

**THE ADDED-VALUE OF MINORITY RIGHTS
PROTECTION FOR MUSLIMS IN WESTERN EUROPE:
MULTICULTURALIST APPROACHES AND
INTERNATIONAL LAW**

A thesis submitted for the degree of Doctor of Philosophy

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August 2013

Abstract

Against the backdrop that multiculturalism has failed in Western Europe, this thesis argues that minority rights standards should be applied to Western European Muslims. Western European States have consistently excluded Muslims from minority rights protection under international law on the basis that they constitute 'new minorities'. However, this thesis asserts that the justifications given by States for the exclusion of Western European Muslims from minority rights protection no longer hold true and have the potential to undermine the object and purpose of the minority rights regime – security and justice. Furthermore, by considering the content of both generally applicable human rights standards and minority rights standards in the light of the situation and specific claims made by Muslim minorities in Western Europe, in relation to the preservation of their identity, this thesis proves that there is an added-value to minority rights protection for these communities. Minority rights standards and multiculturalist policies adopt a similar approach to the accommodation of societal diversity. Thus, given the exclusion of Western European Muslims from the additional protection offered by minority rights standards, this thesis submits that multiculturalist approaches to the accommodation of European Muslims have not failed; insufficient measures have been adopted to ensure their success. If a multiculturalist approach to the accommodation of diversity is to be pursued in Western Europe, States must allow Muslim minorities to benefit from the protection available under minority rights standards.

Keywords:

Cultural Rights, Freedom of Religion, International Human Rights Law, Minority Rights, Multiculturalism, Muslim minorities, 'New Minorities', Religious Minorities.

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Acknowledgements

This thesis would not have been possible without the help and support of more people than it is possible to thank here.

The inspiration for this thesis was gained during my LLM at the Raoul Wallenberg Institute and Lund University. In particular, I would like to acknowledge Professor Gudmundur Alfredsson, Professor Asbjørn Eide and my classmates.

I would like to thank all at Brunel Law School for their support and encouragement during the past five years. In particular, I would like to thank my supervisor, Dr Alexandra Xanthaki, whose patience, support and guidance has allowed me to develop as a researcher and has been greatly appreciated. I would like to express my gratitude to Professor Javaid Rehman for the encouragement and opportunities he has given me, both as his Research Assistant and as a PhD student. I would also like acknowledge Professor Abimbola Olowofoyeku, Dr Mohamed Elewa Badar, Debbie Chay, the late Professor Kaiyan Kaikobad and the other PhD students at Brunel Law School including Rossana Deplano, Meryl Dickinson and Paulette Morris.

Over the past five years, I have also received support from the minority rights community in the UK. In particular, I would like to thank Dr Elizabeth Craig at the University of Sussex, whose advice and comments on my work have been invaluable, and Dr Tawhida Ahmed for her support.

I would like to express gratitude to my friends and family, who have understood and patiently accepted my absence from their lives, in particular, Mum, Dad, Liz and Aaron. Finally, Edward, with whom I have been on this journey for the last five years and without whose love, support and encouragement this would not have been possible.

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Convention on the Rights of the Child 1577 UNTS 3, entered into force 2 September 1990

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Framework Convention for the Protection of National Minorities CETS No 157, entered into force 1 February 1998

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School Standards and Framework Act (SSFA) 1998

Slaughter of Animals Act 1933

Town and Country Planning Act 1990

Welfare of Animals (Slaughter or Killing) Regulations 1995

Table of Abbreviations

AC	Advisory Committee to the Framework Convention for the Protection of National Minorities
CEDAW	Convention on the Elimination of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
Commentary to the UN Declaration on Minorities	The Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECommHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
FCNM	Framework Convention for the Protection of National Minorities
HCNM	OSCE High Commissioner for National Minorities
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
LEA	Local Education Authority

Ljubljana Guidelines	Ljubljana Guidelines on Integration of Diverse Societies
Lund Recommendations	The Lund Recommendations on the Effective Participation of National Minorities in Public Life
OSCE	Organization for Security and Co-operation in Europe
PACE	Parliamentary Assembly of the Council of Europe
PCIJ	Permanent Court of International Justice
The Strasbourg Institutions	European Court of Human Rights and European Commission on Human Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Declaration on Religion or Belief	UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion
UN Declaration on the Rights of Minorities	UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
Venice Commission	European Commission for Democracy Through Law
Warsaw Guidelines	Guidelines to Assist National Minority Participation in the Electoral Process

Chapter 1:

Introduction

1.1. JUSTIFICATION AND RESEARCH QUESTION

Politicians¹ and theorists² have noted a retreat from the pursuit of multiculturalism³ in Western Europe following the terrorist attacks of 9/11. While this may be political rhetoric,⁴ the so-called retreat from multiculturalism has been justified by the claim that multiculturalism has failed.⁵ Specifically, the focus on the accommodation and preservation of minority identity has been singled out for criticism⁶ and blamed for the alleged failure of European Muslims to integrate into wider society.⁷

¹ T Blair, 'Speech on Multiculturalism and Integration' 8 December 2006 <<http://webarchive.nationalarchives.gov.uk/+http://www.number10.gov.uk/Page10563>> accessed 16 May 2011; —, 'Merkel Says German Multicultural Society Has Failed' *BBC News* (17 October 2010) <<http://www.bbc.co.uk/news/world-europe-11559451>> accessed 16 May 2011.

² T Modood, *Multiculturalism - A Civic Idea* (Polity Press 2007) 10-14; W Kymlicka, *Multicultural Odysseys – Navigating the New International Politics of Diversity* (OUP 2007) 122-28; A Mondal, 'Islam and Multiculturalism: Some Thoughts on a Difficult Relationship' Brunel University Research Archive, 6 <<http://bura.brunel.ac.uk/handle/2438/4161>> accessed 16 May 2011; S Vertovec, 'Towards Post-Multiculturalism? Changing Communities, Conditions and Contexts of Diversity' (2010) 61 *International Social Science Journal* 83, 86; W Kymlicka, 'The Rise and Fall of Multiculturalism? New Debates and Accommodation in Diverse Societies' (2010) 61 *International Social Science Journal* 97.

³ Kymlicka has submitted that the retreat from multiculturalism in the West can primarily be observed in relation to immigrants, whereas 'many of the countries that are retreating from immigrant multiculturalism are actually strengthening the institutional recognition of their old minorities'. Kymlicka (2010), above n 2, 103-05.

⁴ *Ibid.*, 104-5.

⁵ Blair, above n 1; BBC news, above n 1; D Cameron, 'PM's Speech at Munich Security Conference' 5 February 2011 <<http://webarchive.nationalarchives.gov.uk/20130109092234/http://number10.gov.uk/news/pms-speech-at-munich-security-conference/>> accessed 21 June 2013.

⁶ B Barry, *Culture and Equality – An Egalitarian Critique of Multiculturalism* (Harvard University Press 2001) 20, 305, 315-22; C Joppke, 'The Retreat of Multiculturalism and the Liberal State: Theory and Policy' (2004) 55 *The British Journal of Sociology* 237, 243; T Phillips, 'After 7/7: Sleepwalking to Segregation' 22 September 2005 <<http://www.humanities.manchester.ac.uk/socialchange/research/social-change/summer-workshops/documents/sleepwalking.pdf>> accessed 9 June 2011.

⁷ Mondal, above n 2, 6; Joppke, above n 6, 250; H Entzinger, 'The Parallel Decline of Multiculturalism and the Welfare State in the Netherlands' in K Banting and W Kymlicka (eds), *Multiculturalism and the Welfare State – Recognition and Redistribution in Contemporary Democracies* (OUP 2006) 183; Vertovec, above n 2, 86.

Furthermore, politicians have linked security concerns to the pursuit of multiculturalist policies^{8,9}.

In contrast, proponents of multiculturalism have noted that multiculturalist policies have not been fully pursued in relation to immigrants and their descendants in Western Europe.¹⁰ Specifically, the UK has tended to focus on the accommodation of racial rather than religious groups.¹¹ Moreover, other Western European States, such as Germany, in which similar claims to the failure of multiculturalism have been made,¹² have only recently adopted such policies in relation to immigrants and their descendants, in particular Muslims.¹³ Thus, although multiculturalism has been blamed for segregation,¹⁴ riots,¹⁵ terrorism¹⁶ and the alleged failure of European Muslims to integrate,¹⁷ European Muslims have historically been excluded from the multiculturalist agenda.

This thesis takes as its starting point that the pursuit of multiculturalist policies requires a legal framework in order to support their realisation. Without a legal framework, policies are likely to be pursued in an inconsistent manner and subject to the prevailing political climate. While at a national level in Europe such a legal framework has not developed consistently, it is asserted that international law and multiculturalist approaches to the accommodation of diversity broadly align and

⁸ The distinction between the terms 'multicultural' and 'multiculturalist' proposed by Hellyer is utilised in this thesis: 'A multicultural country is one where there is more than one culture; a multiculturalist country is one where those cultures are treated in a positive manner'. HA Hellyer, 'Muslims and Multiculturalism in the European Union' (2006) 26 *Journal of Muslim Minority Affairs* 329, 330.

⁹ Cameron, above n 5.

¹⁰ Kymlicka, above n 2, 74-77.

¹¹ T Abbas, 'Muslim Minorities in Britain: Integration, Multiculturalism and Radicalism in the Post-7/7 Period' (2007) 28 *Journal of Intercultural Studies* 287, 288; HA Hellyer, *Muslims of Europe – The 'Other' Europeans* (Edinburgh University Press 2009) 15, 24.

¹² BBC news, above n 1.

¹³ C Joppke, *Immigration and the Nation-State: The United States, Germany and Great Britain* (OUP 1999) 62-5; U Davy, 'Integration of Immigrants in Germany: A Slowly Evolving Concept' (2005) 7 *European Journal of Migration and Law* 123; HRC, 'Fifth Periodic Reports of States Parties – Germany' (4 December 2002) UN doc CCPR/C/DEU/2002/5 paras 373-4.

¹⁴ See, for example, Joppke, above n 6, 250; Phillips, above n 6; Entzinger, above n 7, 183.

¹⁵ T Cantle, 'Community Cohesion: A Report of the Independent Review Team' (The Cantle Report) para 2.1. See also H Ouseley, 'The Bradford District Race Review' 2001 (The Ouseley Report) para 1.1; D Ritchie, 'Oldham Independent Review' (The Ritchie Report) 11 December 2001 para 2.7; T Clarke, 'Burnley Speaks, Who Listens ... ? A Summary of the Burnley Task Force Report on the disturbances in June 2001' (The Clarke Report) December 2001, 7; J Denham, 'Building Cohesive Communities: A Report of the Ministerial Group on Public Order and Community Cohesion' (The Denham Report) (Home Office 2001) paras 2.6, 2.18.

¹⁶ Abbas, above n 11, 288; Vertovec, above n 2, 90.

¹⁷ Barry, above n 6, 77; Mondal, above n 2, 6. See also, Vertovec, above n 2, 86.

pursue similar aims. Indeed, international human rights standards and, in particular, minority rights standards provide a framework for the achievement of multiculturalist policies.¹⁸

Western European States have adopted and promoted minority rights standards that enable the maintenance of minority identity in relation to 'old', 'traditional' or 'autochthonous' minorities, whereas so-called 'new minorities' and religious minorities, including European Muslims, have consistently been excluded from the full scope of protection offered under the minority rights regime.¹⁹ It has further been suggested, both in relation to religious rights²⁰ and more generally,²¹ that minority rights provisions do not extend in scope beyond generally applicable human rights standards.

By considering the claims made by European Muslims to the accommodation of their identity, this thesis contends that there would be an added-value to the application of minority rights standards to European Muslims. However, as minority

¹⁸ D McGoldrick, 'Multiculturalism and its Discontents' (2005) 5 Human Rights Law Review 27, 32-5; A Xanthaki, 'Multiculturalism and International Law: Discussing Universal Standards' (2010) 32 Human Rights Quarterly 21.

¹⁹ F Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* UN Doc. E/CN.4/Sub.2/384/Rev.1 para 205; Commission on Human Rights, 'Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' UN doc E/CN.4/Sub.2/AC.5/2005/2 para 11; HRC, 'Fourth Periodic Reports of States Parties due in 1993 – Germany' (22 February 1996) UN doc CCPR/C/84/Add.5 para 236; Council of Europe, 'List of Declarations Made With Respect to Treaty No. 157 Framework Convention for the Protection of National Minorities' <<http://conventions.coe.int/treaty/Commun/ListeDeclarations.asp?NT=157&CV=1&NA=&PO=99&CN=999&VL=1&CM=9&CL=ENG>> accessed 1 April 2013; A Eide, 'The Rights of "Old" Versus "New" Minorities' (2002/3) 2 European Yearbook of Minority Issues 365; Kymlicka (2007), above n 2, 123-4; K Henrard, 'Minority Specific Rights: A Protection of Religious Minorities Going Beyond the Freedom of Religion?' (2009) 8 European Yearbook of Minority Issues 5, 42; N Ghana, 'Are Religious Minorities Really Minorities?' (2012) 1 Oxford Journal of Law and Religion 57.

²⁰ C Tomuschat, 'Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights' in R Bernhard and others (eds), *Völkerecht als Rechtsordnung, Internationale Gerichtsbarkeit Menschenrecht, Festschrift für Hermann Mosler* (Springer Verlag 1983) 970; H Hannum, *Autonomy, Sovereignty and Self-Determination: The Adjudication of Conflicting Interests* (University of Pennsylvania Press 1996) 69-70; K Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (Martinus Nijhoff 2000) 110, 250; Henrard, above n 19, 42.

²¹ Hannum, above n 20, 69-70; J Packer, 'On the Content of Minority Rights' in J Rääkkä (ed), *Do We Need Minority Rights? Conceptual Issues* (Martinus Nijhoff 1996) 148-49; M Scheinin, 'The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Law' in TS Orlin, A Rosas and M Scheinin (eds), *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach* (Institute for Human Rights, Åbo Akademi University 2000) 220; M Scheinin, 'Minority rights: Additional Rights or Added-Protection?' in M Bergsmo (ed), *Human Rights and Criminal Justice for the Downtrodden – Essays in Honour of Asbjørn Eide* (Martinus Nijhoff 2003).

rights standards have been insufficiently pursued in relation to European Muslims this leads to the conclusion that rather than having failed, multiculturalist policies have not been consistently adopted in relation to European Muslims.

Academic literature in this area has considered multiculturalism in the context of Europe's Muslims,²² the accommodation of European Muslims at a national level,²³ the application of minority rights standards to so-called 'new minorities'²⁴ and the interconnection between international human rights standards and multiculturalist theories.²⁵ Nevertheless, the added-value of the application of minority rights standards to European Muslims has not been considered. Additionally, with the exception of the headscarf debate,²⁶ little research has been carried out into the rights of European Muslims in international law.²⁷

²² Modood, above n 2; Abbas, above n 11; Mondal, above n 2, 2; Hellyer, above n 11.

²³ H Ansari, *Muslims in Britain* (Minority Rights Group International 2002); U Khaliq, 'The Accommodation and Regulation of Islam and Muslim Practices in English Law' (2002) 6 *Ecclesiastical Law Journal* 332; J Nielsen, *Muslims in Western Europe* (3rd edn Edinburgh University Press 2004); T Choudhury, *Muslims in Europe - A Report on 11 EU Cities* (Open Society Institute 2010).

²⁴ Eide, above n 19; RM Letschert, 'Successful Integration While Respecting Diversity; Old Minorities Versus New Minorities' (2007) 18 *Helsinki Monitor* 46; R Medda-Windischer, *Old and New Minorities: Reconciling Diversity and Cohesion – A Human Rights Model for Minority Integration* (Nomos Verlagsgesellschaft 2009).

²⁵ McGoldrick, above n 18; A Xanthaki, 'Multiculturalism and Extremism: International Law Perspectives' in J Rehman and SC Breau (eds), *Religion, Human Rights and International Law - A Critical Examination of Islamic State Practices* (Martinus Nijhoff 2007); E Craig, 'The Framework Convention for the Protection of National Minorities and the Development of a "Generic" Approach to the Protection of Minority Rights in Europe' (2010) 17 *International Journal on Minority and Group Rights* 307; J Ringelheim, 'Minority Rights in a Time of Multiculturalism—The Evolving Scope of the Framework Convention on the Protection of National Minorities' (2010) 10 *Human Rights Law Review* 99; Xanthaki, above n 18.

²⁶ See, for example, D McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing 2006); C Evans, 'The "Islamic Scarf" in the European Court of Human Rights' (2006) 7 *Melbourne Journal of International Law* 52; T Lewis, 'What Not to Wear: Religious Rights, the European Court and the Margin of Appreciation' (2007) 56 *International and Comparative Law Quarterly* 395; A Vakulenko, '"Islamic Headscarves" and the European Convention on Human Rights: An Intersectional Perspective' (2007) 16 *Social Legal Studies* 183; M Evans and P Petkoff, 'A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights' (2008) 36 *Religion, State & Society* 205; MD Evans, 'Freedom of Religion and the European Convention on Human Rights; Approaches, Trends and Tensions' in P Cane, C Evans, and Z Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008); M Borovali, 'Islamic Headscarves and Slippery Slopes' (2009) 30 *Cardozo Law Review* 2593.

²⁷ J Rehman, 'Islam, "War on Terror" and the Future of Muslim Minorities in the United Kingdom: Dilemmas of Multiculturalism' (2007) 29 *Human Rights Quarterly* 831; J Rehman, 'Religion, Minority Rights and Muslims of the United Kingdom' in J Rehman and SC Breau (eds), *Religion, Human Rights and International Law - A Critical Examination of Islamic State Practices* (Martinus Nijhoff 2007); D Kurban, 'Substantive Challenges to the Protection of Religious Freedom under the Framework Convention' in A Verstichel and others (eds), *The Framework Convention for the Protection of National Minorities: a Useful Pan-European Instrument?* (Intersentia 2008); SE Berry, 'Bringing Muslim Minorities within the International Convention

1.2. STRUCTURE

In order to consider whether the extension of minority rights protection to European Muslims would have an added-value as compared to generally applicable human rights standards and, hence, would strengthen the pursuit of multiculturalist policies, this thesis is divided into six substantive chapters. Part A focuses on the protection of minorities in international law. Chapter 2 argues that multiculturalist approaches to diversity to a large extent correspond with international human rights standards and, in particular, minority rights standards. Specifically, both multiculturalist approaches and minority rights standards recognise the importance of the preservation of minority identity, non-discrimination and equality, effective participation and intercultural dialogue as well as pursuing the twin aims of security and justice. International law elaborates a framework of minimum standards within which multiculturalist policies can be pursued. Additionally, multiculturalist theories provide a justification for the approach adopted under international law to the accommodation of diversity.

After considering the correlation between international human rights law and multiculturalist theories, the thesis turns to the question of whether there is a *prima facie* added-value to minority rights protection under international law. Chapter 3 compares the content of generally applicable human rights standards and minority rights standards in relation to the four tenets of minority rights protection, namely the preservation of minority identity, non-discrimination and equality, effective participation and intercultural dialogue. It is argued that minority rights standards provide more comprehensive rights that require additional positive measures to facilitate their achievement and are targeted specifically towards the needs of persons belonging to minorities, as compared to generally applicable human rights standards. Moreover, the Advisory Committee's (AC) elaboration of the scope of the rights contained in the Framework Convention for the Protection of National Minorities²⁸ (FCNM) has the potential to lead to a higher standard of protection than

on the Elimination of All Forms of Racial Discrimination—Square Peg in a Round Hole' (2011) 11 Human Rights Law Review 423.

²⁸ Framework Convention for the Protection of National Minorities CETS No 157, entered into force 1 February 1998.

is possible under generally applicable human rights standards. Furthermore, it is asserted that the four tenets of minority rights protection are intertwined and, therefore, cannot be pursued in isolation.

Part B focuses specifically on European Muslims and their entitlements under international law. Chapter 4 considers the extent to which European Muslims constitute 'minorities' under international law and the nature of their entitlements as 'new', 'religious' and 'ethnic' minorities. While European Muslim communities constitute so-called 'new minorities', it is argued that the suggestion that 'new minorities' have weaker entitlements than 'old minorities' under international law²⁹ is discriminatory and that the justifications for such a distinction in relation to European Muslims no longer hold true. If the aims of justice and security are to be pursued, then the scope of application of the minority rights regime should be determined by its purpose and reflect reality rather than strictly applied and arbitrary definitions. As States have excluded European Muslims from the protection offered under minority rights standards,³⁰ it is suggested that States have insufficiently pursued multiculturalist approaches to the accommodation of diversity. It is also asserted that European Muslim communities constitute ethnic as well as religious minorities and, therefore, can claim rights pertaining to both religious and cultural identity under international law. Thus, the rights applicable to European Muslims should be decided against the elements of their identity that they wish to preserve rather than as a result of an arbitrary classification.

After first establishing the interconnection between international law standards and multiculturalist approaches to the accommodation of diversity; second confirming the added-value of minority rights protection; and taking into account the

²⁹ W Kymlicka, *Multicultural Citizenship - A Liberal Theory of Minority Rights* (OUP 1995) 31, 95-8; Eide, above n 19, 379; Commission on Human Rights, above n 19, para 11; W Kymlicka, 'The Internationalization of Minority Rights' (2008) 6 *International Journal of Constitutional Law* 1, 9.

³⁰ See, for example, HRC, above n 19 paras 242-44; AC, 'Comments of the Government of Denmark on the Opinion of the Advisory Committee on the Implementation of the Framework Convention for the Protection of National Minorities in Denmark' 7 June 2001 GVT/COM/INF/OP/I(2001)005, 3; AC, 'Comments by the Federal Republic of Germany on the Opinion of the Advisory Committee on the Implementation of the Framework Convention for the Protection of National Minorities in the Federal Republic of Germany' 19 July 2002 GVT/COM/INF/OP/I(2002)008, 5; R Hofmann, 'The Framework Convention for the Protection of National Minorities: An Introduction' in M Weller (ed), *The Rights of Minorities, A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP 2005) 16.

exclusion of European Muslims minorities from the protection offered under the minority rights regime, the thesis concludes that multiculturalism has not failed in relation to these minorities but, rather, has not been sufficiently implemented. Turning to the application of this conclusion, the thesis considers in Chapters 5 and 6 whether there is, indeed, an added-value to applying minority rights standards to European Muslim communities.

The primary criticism of multiculturalist approaches has been that too much emphasis has been placed on the maintenance and accommodation of difference.³¹ Hence, Chapters 5 and 6 focus on international human rights standards that enable the preservation of European Muslim minority identity. Key claims made by British Muslims at a national level specifically related to their identity are identified in Chapter 5: *halal* slaughter, the circumcision of boys, the building places of worship, attendance at Friday prayers, the celebration of religious holidays, the right to wear religious attire, accommodation of culture, religion and language in mainstream education, faith schools and *sharia*, as a system of personal law. The extent to which minority rights standards have the potential to facilitate the preservation of European Muslim identity is elaborated by comparing the protection offered under minority rights standards to generally applicable human rights standards, in relation to these claims. It is argued that there is a clear added-value to minority rights protection as compared to generally applicable human rights protection, in relation to the claims made by European Muslims to the preservation of their identity.

In Chapter 6, consideration is given to the extent to which minority rights protection would facilitate the participation of European Muslims in decisions that impact their identity. While there would not be an added-value to minority rights protection for European Muslims in every respect, as they are not sufficiently territorially concentrated, the additional measures suggested by minority rights bodies to ensure minority presence and influence in decision-making processes, including the establishment of consultative mechanisms, led to the conclusion that the application of minority rights standards to European Muslims would facilitate the preservation of their identity.

Chapter 7 concludes by arguing that multiculturalist approaches and international minority rights standards are interrelated and pursue similar aims. Yet,

³¹ See, for example, Barry, above n 6, 77; Phillips above n 6.

the denial of minority rights protection to European Muslims by States leads to the conclusion that, in fact, multiculturalist policies have not been sufficiently pursued in relation to these communities. Whereas it has been suggested that 'new minorities' should have weaker entitlements than 'old minorities', and that freedom of religion and non-discrimination alone are sufficient to accommodate the needs of these communities, this thesis demonstrates that there is a need to apply minority rights standards to European Muslim communities in order to sufficiently protect their identity. Therefore, minority rights standards must be applied to these communities if the joint aims of security and justice are to be achieved. Multiculturalism in Western Europe has not failed, it has been inadequately pursued.

1.3. METHODOLOGY

In order to ascertain whether there is an added-value to minority rights protection for European Muslims, this thesis primarily utilises a doctrinal methodology. However, the research is also informed by sociological perspectives in relation to the nature of European Muslim communities and multiculturalist approaches to the accommodation of diversity in society. The scope of rights established under both minority rights and generally applicable human rights standards is compared, in the light of the claims made primarily by British Muslims to the accommodation of their identity and the political situation of European Muslims. Consequently, an evaluative approach is employed.

In order to identify the scope of international law standards in relation to the accommodation of diversity, a comprehensive literature review has been carried out alongside a detailed evaluation of relevant case law, the interpretation of treaties by international human rights bodies and other international law documents. Key claims made by European Muslims, primarily British Muslims, to accommodation at a national level have been ascertained through the consideration of national case law, legislation, official statistics, the reports of international human rights bodies and academic literature. Similarly the political situation of European Muslims has been determined by reference to official statistics, the reports of international human rights bodies and academic literature. Furthermore, a detailed literature review has been carried out in order to establish the scope and purpose of multiculturalist

theories and the nature of Western European Muslim communities from a sociological perspective.

1.4. LIMITATIONS AND DEFINITIONS

This thesis takes as its starting point that diversity and the promotion and protection of ethnic and religious identity are of inherent value and that they make a positive contribution to society.³² Its scope is limited to the added-value of minority rights standards in relation to the maintenance of Muslim identity in Western Europe as this has been one of the primary criticisms levelled at multiculturalist approaches.³³ Detailed consideration is not given to non-discrimination or equality as these rights indirectly, rather than directly, enable the protection of minority identity. The right to intercultural dialogue and tolerance, which may also indirectly enable the preservation of identity by encouraging the acceptance of diversity in society, also falls outside the scope of this research. Although the premise of this thesis is that the pursuit of multiculturalist policies requires a legal framework in order to support their achievement, this does not imply that a legal framework is in itself sufficient.

The situation and claims made by British Muslims are primarily considered in order to illustrate the claims made by European Muslims to the accommodation of their identity. It is acknowledged that these claims may not be uniform across Western Europe or within Muslim communities in the UK, given their diverse nature. Moreover, this thesis does not purport to identify every manifestation of Islam. The UN Human Rights Committee (HRC) has recognised that minority cultures do not remain static, but rather evolve over time.³⁴ Within this thesis, both

³² Kymlicka (1995), above n 29, 80-106; B Parekh, *Rethinking Multiculturalism - Cultural Diversity and Political Theory* (2nd edn, Palgrave Macmillan 2006) 167-70. See, further, Preamble UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities UN doc A/RES/47/135 (UN Declaration on Minorities); Preamble to the FCNM; article 1 UNESCO Universal Declaration on Cultural Diversity, adopted by the 31st Session of the General Conference of UNESCO in Paris, 2 November 2001; Preamble UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2440 UNTS 311, entered into force 18 March 2007; Preamble UN Declaration on the Rights of Indigenous Peoples UN doc A/RES/61/29 (UNDRIP).

³³ See, for example, Barry, above n 6, 77; Phillips above n 6; Mondal, above n 2, 6; Vertovec, above n 2, 86.

³⁴ *Apirana Mahuika and Others v New Zealand* Communication no 547/1993, UN doc CCPR/C/70/D/547/1993 para 9.4. HRC, 'General Comment No 23' on 'The Rights of Minorities (Art 27)' UN doc CCPR/C/21/Rev.1/Add.5 para 9.

Western European Muslims and British Muslims are referred to, in the plural, as 'communities' and 'minorities'. This signifies that Western European Muslims are heterogeneous in nature and, thus, do not constitute one community but many, within which a variety of opinions, practices and perspectives are represented, informed not only by Islam generally, but a variety of social factors including, but not limited to, sect or school of Islam, ethnic origin, social group, gender, generation and political opinion. This thesis eschews the essentialisation of European Muslim identity.

British Muslims have been selected to illustrate the claims made by Western European Muslims for two reasons. First, the common law system in the UK means that it is possible to identify claims asserted by British Muslims in the public sphere. The pursuit of these claims in the courts ensures that members of Muslim communities place weight upon these manifestations of Islam. Second, the UK has a significant Muslim population³⁵ and has pursued a policy of multiculturalism since the 1960s.³⁶ Therefore, it is useful to consider the extent to which British Muslims have been accommodated within this framework, rather than other Western European States with significant Muslims populations such as France, which has not adopted minority rights standards,³⁷ and Germany, which only recently recognised the need to adopt an integration policy in relation to Muslim communities.³⁸

A number of terms are used throughout this thesis that should be defined for the sake of clarity. As scholars and international organisations have distinguished between the scope of rights available to both groups, minorities originating from immigration in the last century, including Western European Muslims, are referred to as 'new minorities', whereas traditional or autochthonous minorities are referred to as 'old minorities'.³⁹ For the sake of brevity, Western European Muslims communities are referred to as European Muslim minorities or communities. This thesis does not consider the situation of Muslim communities in European States, such as Bulgaria or Greece, where such communities constitute 'old minorities'. A

³⁵ In the 2011 census, 4.8 percent of the English and Welsh population identified as Muslim. Office for National Statistics, 'Religion in England and Wales 2011' <<http://www.ons.gov.uk/ons/rel/census/2011-census/key-statistics-for-local-authorities-in-england-and-wales/rpt-religion.html>> accessed 24 February 2013.

³⁶ Modood, above n 2, 10-14; Abbas, above n 11, 288.

³⁷ HRC, 'Fourth Periodic Report - France' (8 July 2007) UN doc CCPR/C/FRA/4 67-8.

³⁸ Joppke, above n 13, 62-5; Davy, above n 13; HRC, above n 13, paras 373-4.

³⁹ See, for example, Kymlicka (1995), above n 29, 31, 95-8; Eide, above n 19, 379; Commission on Human Rights, above n 19, para 11; Kymlicka (2008), above n 29, 9.

distinction is made between 'multiculturalism' and 'multiculturalist' theories, policies and approaches. 'Multiculturalism' refers to the factual presence of more than one culture in society, while 'multiculturalist' theories, policies, approaches and accommodation pertain to a model of diversity management.⁴⁰

Critics of multiculturalist approaches have argued that the multiculturalist accommodation of minority identity has the potential to perpetuate illiberal practices within these communities and, further, lead to the reification of minority cultures.⁴¹ Illiberal practices that interfere with the human rights of persons belonging to minorities do not find support within international law standards nor multiculturalist theories.⁴² Thus, this thesis focuses on the accommodation of practices that are compatible with human rights standards and does not support the maintenance of illiberal practices within this framework.

Minority rights standards form part of and are intertwined with the international human rights regime. In order to ascertain whether there is an added-value in minority rights protection, it is necessary to draw a distinction between minority rights standards and rights that are applicable to the wider population. Consequently, rights that are only applicable to persons belonging to minorities in international law are referred to as 'minority rights', whilst those rights that are applicable to the entire population are referred to as 'generally applicable human rights'.

1.5. THE LEGAL FRAMEWORK

Minority rights standards form part of the human rights framework. However, this thesis seeks to delineate the standards established under generally applicable human rights standards from minority rights standards in order to ascertain whether there is

⁴⁰ Hellyer, above n 8, 330; Xanthaki, above n 18, 23.

⁴¹ Barry, above n 6, 11, 117, 253-58, 261, 285; S Benhabib, *The Claims of Culture – Equality and Diversity in the Global Era* (Princeton University Press 2002) 83, 86; Joppke, above n 6, 251; Modood, above n 2, 89; Cameron, above n 5.

⁴² Article 4(2) UN Declaration on Minorities; article 46(2) and (3) UNDRIP; article 4 UNESCO Universal Declaration on Cultural Diversity; article 19, 22 and 23 FCNM. HRC, above n 34, para 8; Council of Europe, *Framework Convention for the Protection of National Minorities and Explanatory Report* (February 1995) H(1995)010 para 91; Commission on Human Rights, above n 19, para 57; P Hippold, 'Article 23' in M Weller (ed), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP 2005) 565; Kymlicka (2007), above n 2, 93, 103-4; Hellyer, above n 11, 51; Kymlicka (2010), above n 2, 102-3; Xanthaki, above n 18, 45-7.

an added-value to minority rights protection for European Muslims. Hence, relevant regimes containing both generally applicable human rights standards and explicit minority rights standards will form the basis of this study, namely, the human rights regimes of the United Nations and the Council of Europe. Nonetheless, other regimes will be considered to the extent that they enable the interpretation of standards within these two regimes. For example, the 'complementary roles' of the OSCE High Commissioner for National Minorities (HCNM) and the AC to the FCNM has led to collaboration between the two bodies and contributed to the interpretation of relevant standards.⁴³

1.5.1. The Council of Europe

Within the Council of Europe, the generally applicable human rights regime is easily distinguished from the minority rights regime, as they are governed by different instruments and have different monitoring bodies. The European Convention on Human Rights (ECHR)⁴⁴ predates the FCNM by 45 years and efforts to introduce a minority rights protocol have been unsuccessful. Although the ECHR, inevitably, makes no mention of the FCNM, the European Court of Human Rights (ECtHR) is considered to be slowly evolving its own minority rights jurisprudence⁴⁵ and has referred to and occasionally relied upon comments made by the AC in a limited number of cases with a distinct minority element.⁴⁶

⁴³ E Craig, 'From Security to Justice? The Development of a More Justice-Oriented Approach to the Realisation of European Minority Rights Standards' (2012) 30 *Netherlands Quarterly of Human Rights* 40, 51

⁴⁴ Convention for the Protection of Human Rights and Fundamental Freedoms CETS No 005, entered into force 3 September 1953.

⁴⁵ See generally, G Gilbert, 'The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights' (2002) 23 *Human Rights Quarterly* 736. See also, B Cilevičs, 'The Framework Convention within the Context of the Council of Europe' in Council of Europe, *Filling the Frame: Five Years of Monitoring the Framework Convention for the Protection of National Minorities* (Council of Europe Publishing 2004) 33; J Packer, 'Situating the Framework Convention in a Wider Context: Achievements and Challenges' in Council of Europe, *Filling the Frame: Five Years of Monitoring the Framework Convention for the Protection of National Minorities* (Council of Europe Publishing 2004) 48; J Marko, 'Constitutional Recognition of Ethnic Difference – Towards an Emerging European Minimum Standard?' in A Verstichel and others (eds), *The Framework Convention for the Protection of National Minorities: a Useful Pan-European Instrument?* (Intersentia 2008) 29.

⁴⁶ *DH and Others v the Czech Republic* App no 57325/00 (ECtHR 7 February 2006) paras 26-27; *DH and Others v the Czech Republic* ECHR 2007-IV paras 67-76, 134, 192, 200; *Nachova and Others v Bulgaria* ECHR 2005-VII para 78; *Chapman v United Kingdom* ECHR 2001-I paras 93-98.

The FCNM contains two provisions that address the relationship between the two instruments. Article 19 refers to the 'limitations, restrictions or derogations which are provided for in international legal instruments, in particular the Convention for the Protection of Human Rights and Fundamental Freedoms', establishing that these are the only applicable limitations to the FCNM. Also, article 23 establishes that provisions in the FCNM should 'conform to' corresponding provisions in the ECHR.⁴⁷ Thus, the two regimes cannot be considered to be entirely independent.

There has been some discussion over the significance of these provisions to the work of the AC, in particular in relation to the extent to which the AC should take cognisance of ECtHR jurisprudence when forming its opinions.⁴⁸ Scheinin has asserted that 'minority rights as a sub-category of human rights should be seen as a form of added protection to universal human rights, deemed necessary in order to secure human rights to persons in a minority situation'.⁴⁹ Notably, a number of the provisions in the FCNM appear to correspond with provisions in the ECHR, in particular, freedom of religion.⁵⁰ Yet, Spiliopoulou Åkermark has submitted:

One could say that the relevant provisions in the FCNM and the ECHR are different in content, in aim, in scope, in logic and that there is therefore never a true 'correspondence of provisions' nor a risk of real conflict between the pronouncements of the two organs responsible for the evaluation of their respective implementation.⁵¹

⁴⁷ These two provisions will be considered together, as the permissible limitations to the ECHR appear to have informed the scope of the substantive rights.

⁴⁸ S Spiliopoulou Åkermark, 'The Added Value of the Framework Convention for the Protection of National Minorities (I)' in A Verstichel and others (eds), *The Framework Convention for the Protection of National Minorities: a Useful Pan-European Instrument?* (Intersentia 2008) 83; K Henrard, 'The Added Value of the Framework Convention for the Protection of National Minorities (II) – The Two Pillars of an Adequate System of Minority Protection Revisited' in A Verstichel and others (eds), *The Framework Convention for the Protection of National Minorities: a Useful Pan-European Instrument?* (Intersentia 2008) 97; K Drzewicki, 'Advisability and Feasibility of Establishing a Complaints Mechanism for Minority Rights' (2010) 21 *Security and Human Rights* 93, 102 (FN 20).

⁴⁹ Scheinin (2003), above n 21, 487.

⁵⁰ Article 7 and 8 FCNM cf. Article 9 ECHR.

⁵¹ Spiliopoulou Åkermark, above n 48. 83.

Thus, while minority rights standards form a sub-category of human rights standards the jurisprudence of the ECtHR may not be instructive when interpreting the rights contained in the FCNM. The nature of the rights contained in the respective instruments and the role of their monitoring bodies are particularly pertinent in this respect. Whereas the ECHR provides generally applicable human rights, that are applicable to members of the majority as well as minorities, the rights contained in the FCNM are primarily applicable to 'persons belonging to national minorities'. Nonetheless, article 6 FCNM provides a more general obligation on States, to 'encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory...'. Consequently, article 6 has been utilised by the AC as a catch-all provision⁵² when States have taken a narrow view of the personal scope of application of the Convention,⁵³ and, in particular, have attempted to exclude 'new minorities' from the protection of the FCNM.⁵⁴ Although the AC has taken a wide view of the scope of application of the FCNM, the focus remains the rights of persons belonging to minorities.

While the FCNM constitutes a legally binding instrument, the programmatic nature of the rights contained in the FCNM⁵⁵ has been the subject of criticism.⁵⁶

⁵² AC, 'Second Opinion on Denmark' adopted on 9 December 2004 ACFC/INF/OP/II(2004)005 para 76; R Hofmann, 'The Work of the Advisory Committee under the Framework Convention for the Protection of National Minorities, with Particular Emphasis on the Case of Germany' in M Scheinin and R Toivanen (eds), *Rethinking Non-Discrimination and Minority Rights* (Åbo Akademi University and Deutsches Institut für Menschenrechte 2004) 64; A Verstichel, 'Personal Scope of Application: An Open, Inclusive and Dynamic Approach – The FCNM as a Living Instrument' in A Verstichel and others (eds), *The Framework Convention for the Protection of National Minorities: a Useful Pan-European Instrument?* (Intersentia 2008) 135. For further information, see G Gilbert, 'Article 6' in M Weller (ed), *The Rights of Minorities – A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP 2005) 177-191.

⁵³ AC, 'Report Submitted by Denmark Pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities' received on 6 May 1999 ACFC/SR(1999)009, 11. See also, AC, 'Second Report Submitted by Germany Pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities' received on 13 April 2005 ACFC/SR/II(2005)002 paras 4-9; Ringelheim, above n 25, 116.

⁵⁴ Hofmann, above n 52, 64; R Hofmann, 'The Impact of International Norms on the Protection of National Minorities in Europe: The Added Value and Essential Role of the Framework Convention for the Protection of National Minorities' (5 December 2006) DH-MIN (2006)018 11-12.

⁵⁵ Council of Europe, above n 42, para 11.

⁵⁶ S Troebst, 'From Paper to Practice: The Council of Europe's Framework Convention for the Protection of National Minorities' (1999) 10 Helsinki Monitor 19, 22; G Alfredsson, 'A Frame an Incomplete Painting: Comparison of the Framework Convention for the Protection of National

Although programmatic rights establish 'objectives which the Parties undertake to pursue' they are not 'directly applicable' and 'leave the States concerned a measure of discretion in the implementation of the objectives which they have undertaken to achieve'.⁵⁷ However, Brems has suggested that the approach of monitoring State practice in the context of progressive human rights standards, utilising 'indicators and benchmarks' leads to the maximising of human rights standards as States 'commit themselves to gradually realising these rights, their available resources determining the precise extent of their obligations'.⁵⁸ In the context of the FCNM, Phillips submits that 'it is widely accepted today that some of the "weaknesses" in the language of the Framework Convention are in fact "strengths" as practice has developed and civil society has become engaged'.⁵⁹ Specifically, the programmatic nature of the rights has enabled the AC to take a 'robust' approach to interpretation of standards and, hence, has led to 'an organic growth'.⁶⁰ The AC considers State Reports, Shadow Reports and statistical evidence, in addition to undertaking State visits, in order to objectively ascertain the situation of minorities in the State and to formulate its Opinions on States Reports. Notably, it has been suggested the AC's non-binding Opinions on State Reports have gradually achieved the status of 'soft jurisprudence'.⁶¹

In direct contrast to the FCNM, the standards contained in the ECHR can be considered to be benchmarks. The ECtHR does not monitor the overall implementation of the rights contained in the ECHR but, rather, hears individual cases and takes a violations approach. Consequently, the ECtHR establishes the borderline at which individual rights have been violated, rather than striving to achieve higher standards.⁶² The 'less restrictive alternative' test adopted by the ECtHR when ascertaining the proportionality of limitations on Convention rights has the potential to prevent a minimalist approach to human rights standards being

Minorities with International Standards and Monitoring Procedures' (2000) 7 International Journal on Minority and Group Rights 291, 293.

⁵⁷ Council of Europe, above n 42, para 11.

⁵⁸ E Brems, 'Human Rights: Minimum and Maximum Perspectives' (2009) 9 Human Rights Law Review 349, 354-55.

⁵⁹ A Phillips, 'The 10th Anniversary of the Framework Convention for the Protection of National Minorities' (2008) 1 Europäisches Journal für Minderheitenfragen 181, 183.

⁶⁰ *Ibid.*, 184. See, further, Drzewicki, above n 48, 102.

⁶¹ Hofmann (2006), above n 54, 27.

⁶² Brems, above n 58, 353.

taken,⁶³ nonetheless, this has not been the case in practice.⁶⁴ The ECtHR focuses on individual complaints of rights violations and affords States Parties a margin of appreciation in the event of 'a pressing social need'.⁶⁵ The margin of appreciation has the potential to defer to a majoritarian position⁶⁶ and, thus, to inhibit the protection of the rights of minorities by the ECtHR.⁶⁷

The violations approach adopted under the ECHR also means that the ECtHR can only hear cases when the claimant satisfies the 'victim test'. The ECtHR can hear collective complaints, however, in practice minority representative organisations have not been granted standing.⁶⁸ As a result, instances where measures negatively interfere with the rights of a minority as a whole but do not have a clearly identifiable victim cannot be heard.⁶⁹ Although minority rights standards constitute individual rather than groups rights, it is also recognised that such rights may be 'exercised individually or in community with others'.⁷⁰ Arguably, this inclusion constitutes recognition that the right to enjoy culture may only be effective in practice if exercised in 'community with others'. Notably, Drzewicki has argued that a collective complaints model may be more suitable for upholding the rights of persons belonging to minorities.⁷¹

The ECtHR and the European Commission on Human Rights (the Strasbourg institutions) have also historically expressed an unwillingness to consider statistical

⁶³ *Ibid.*, 359.

⁶⁴ *Ibid.*, 365.

⁶⁵ HC Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff 1996) 192; MD Evans, above n 26, 303.

⁶⁶ G Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 *Oxford Journal of Legal Studies* 705, 729.

⁶⁷ S Wheatley, 'Minorities under the ECHR and the Construction of a "Democratic Society"' [2007] *Public Law* 770, 771; Cilevičs, above n 45, 33; SE Berry, 'A Tale of Two Instruments: Religious Minorities and the Council of Europe's Rights Regime' (2012) 30 *Netherlands Quarterly of Human Rights* 10. See also *Chapman v United Kingdom*, above n 46; *Beard v the United Kingdom* App no 24882/94 (ECtHR 18 January 2001); *DH and Others v the Czech Republic* (2006), above n 46.

⁶⁸ *Noack and Others v Germany* ECHR 2000-VI; *Ouardiri and Ligue des Musulmans de Suisse and Others v Switzerland* App nos 65840/09 and 66274/09 (ECtHR 8 July 2011). See further, Parliamentary Assembly of the Council of Europe (PACE), 'Report on an Additional Protocol to the European Convention on Human Rights on National Minorities' (23 February 2012) Doc 12879 para 64.

⁶⁹ See, for example, *Ouardiri and Ligue des Musulmans de Suisse and Others v Switzerland*, above n 68.

⁷⁰ Article 3(2) FCNM; article 3 UN Declaration on Minorities; article 27 International Covenant on Civil and Political Rights 999 UNTS 171, entered into force 23 March 1976 (ICCPR). See, further, Council of Europe, above n 42, para 37.

⁷¹ Drzewicki, above n 48, 104-05.

evidence of widespread discrimination.⁷² This position has shifted in recent cases,⁷³ yet such evidence must be undisputed and official.⁷⁴ Consequently, while the consideration of statistical evidence would allow the ECtHR to identify practices that discriminate against persons belonging to minorities, the test of 'undisputed official statistics' relies on the existence and availability of such statistics to the applicant.⁷⁵ This has led to differing results under the monitoring processes of the ECHR and FCNM and has the potential to lead to a minimalist interpretation of the rights contained in the ECHR.⁷⁶

The ECHR has been given primacy in article 19 FCNM, regarding permissible limitations to rights, and article 23, establishes that corresponding provisions in the FCNM should 'conform to' the ECHR. However, as the purpose of article 23 has been interpreted as 'prevent[ing] past achievements in this field from being watered down',⁷⁷ it would seem contradictory if article 23 imposed the obligation to follow the ECtHR's interpretation of rights strictly if this would reduce the standard of protection offered under the FCNM. The ECHR and FCNM are different in scope and purpose and the ECtHR and AC fulfil different roles. Thus, whereas it is necessary to consider the scope of the rights within both instruments in order to ascertain the added-value of minority rights protection, this does not involve comparing directly analogous institutions or rights.

1.5.2. The United Nations

A clear delineation between generally applicable human rights and minority rights standards is not possible within the UN human rights regime. Specifically, article 27 of the International Covenant on Civil and Political Rights (ICCPR) provides a minority rights standard within the framework of a generic human rights instrument.

⁷² See for example, *McShane v United Kingdom* App no 43290/98 (ECtHR 28 May 2002) para 135; *DH and Others v the Czech Republic* (2006), above n 46 para 52. Cf. *Manoussakis and Others v Greece* ECHR 1996-IV para 48; *Zarb Adami v Malta* ECHR 2006-VIII para 76.

⁷³ *DH and Others v the Czech Republic* (2007), above n 46, para 188. See also, *Zarb Adami v Malta* above n 72, paras 77-78; *Hoogendijk v the Netherlands* App no 58641/00 (ECtHR 6 January 2005).

⁷⁴ *Hoogendijk v the Netherlands*, above n 73.

⁷⁵ *Ibid.*

⁷⁶ Hofmann (2006), above n 54, 25-26; *DH and Others v the Czech Republic* (2006), above n 46. Cf. *DH and Others v the Czech Republic* (2007), above n 46.

⁷⁷ Hilpold, above n 42, 561.

For the purposes of this thesis, the HRC is primarily considered to constitute the monitoring body of a generally applicable human rights instrument. However, insofar as it monitors the application of article 27 ICCPR, the minority rights provision, the HRC will be considered to be a minority rights monitoring body. This delineation is, nonetheless, somewhat artificial, as the HRC has stressed the interdependent nature of the rights contained in the ICCPR.⁷⁸ Accordingly, article 27 ICCPR has been utilised by the HRC as an interpretive tool for other Covenant rights,⁷⁹ and has been interpreted in the light of other Covenant rights, most notably, article 1, the right to self-determination.⁸⁰

Article 27 ICCPR also constitutes the only binding minority rights standard within the UN system.⁸¹ To establish the content of this right it is necessary to consider its interpretation by the HRC through the authoritative, but not binding, General Comment No 23, Concluding Observations on State Reports and Decisions on individual communications.⁸² The soft law UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN Declaration on Minorities) has also been identified as an authoritative interpretation of article 27 ICCPR.⁸³ Consequently, the elaboration of the rights contained in the UN Declaration on Minorities by UN minority rights bodies —namely, the UN Forum on Minority Issues, the UN Independent Expert on Minority Issues and the former UN Working Group on Minorities— may supplement the interpretation of article 27 ICCPR by the HRC.⁸⁴ Nevertheless, the UN Declaration on Minorities and

⁷⁸ *Diergaardt (late Captain of the Rehoboth Baster Community) and Others v Namibia* Communication no 760/1997, UN doc CCPR/C/69/D/760/1997, Scheinin dissenting opinion.

⁷⁹ *Hopu and Bessert v France* Communication no 549/1993, UN doc CCPR/C/60/D/549/1993/Rev.1 para 10.3. Cf Individual opinion by Committee members David Kretzmer and Thomas Buergenthal, cosigned by Nisuke Ando and Lord Colville para 5.

⁸⁰ *Diergaardt (late Captain of the Rehoboth Baster Community) and Others v Namibia*, above n 78, para 10.3; *Apirana Mahuika and Others v New Zealand*, above n 34, para 9.2; *Gillot and Others v France* Communication no 932/2000, UN doc CCPR/C/75/D/932/2000 paras 13.4 and 13.16.

⁸¹ An analogous right is found in article 30 Convention on the Rights of the Child 1577 UNTS 3, entered into force 2 September 1990 (CRC). However, the scope of application of this right is limited to children by the general scope of the instrument.

⁸² HRC, 'General Comment No 33' on 'The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights' UN doc CCPR/C/GC/33 para 13; S Sun, 'The Understanding and Interpretation of the ICCPR in the Context of China's Possible Ratification' (2007) 6 Chinese Journal of International Law 17, 35.

⁸³ A Xanthaki, *Indigenous Rights and United Nations Standards – Self-Determination, Culture and Land* (CUP 2007) 200. See further, I Brownlie, *Principles of Public International Law* (4th edn, OUP 1990) 699

⁸⁴ See, for example, Commission on Human Rights, above n 19; Human Rights Council, 'Recommendations of the Forum on Minority Issues at its Fifth Session: Implementing the

the interpretation of standards by UN bodies are not legally binding and, therefore, may be less effective than the rights contained within the FCNM.

Other generally applicable human rights instruments within the UN system are also relevant to persons belonging to minorities, in particular, the Convention on the Rights of the Child (CRC), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)⁸⁵ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁸⁶ Treaty bodies have also interpreted these instruments through General Comments, Concluding Observations on State Reports and decisions on individual communications.⁸⁷

The rights contained in the ICCPR, ICERD and the civil and political rights contained in CRC are subject to immediate realisation.⁸⁸ Thus, treaty bodies have focused on establishing the borderline between compliance with human rights obligations and violations.⁸⁹ 'Hence, border control type human rights monitoring does not encourage states to be ambitious in their human rights agendas'.⁹⁰ Similarly to the ECHR, the HRC has established that limitations on rights must be 'strictly interpreted'.⁹¹ However, the HRC has not recognised that States have a margin of appreciation and has interpreted the permissible limitations to rights more narrowly than the Strasbourg institutions.⁹² By stressing that 'the concept of morals should not

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Identifying Positive Practices and Opportunities (27 and 28 November 2012)' (28 December 2012) UN doc A/HRC/22/60.

⁸⁵ International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195, entered into force 4 January 1969 (ICERD).

⁸⁶ International Covenant on Economic, Social and Cultural Rights 993 UNTS 3, entered into force 3 January 1976 (ICESCR).

⁸⁷ The complaints mechanism under the ICESCR came into force on 5 May 2013 but has yet to hear any individual communications. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights UN doc A/63/435.

⁸⁸ Article 2(2) ICCPR; article 2(1) ICERD; Article 4 CRC.

⁸⁹ Brems, above n 58, 351.

⁹⁰ *Ibid.*, 354

⁹¹ HRC, 'General Comment No 22' on 'The Right to Freedom of Thought, Conscience and Religion (Art. 18)' UN doc CCPR/C/21/Rev.1/Add.4, para 8. See also HRC, 'General Comment No 34' on 'Article 19: Freedoms of Opinion and Expression' UN doc CCPR/C/GC/34 para 22.

⁹² See, for example, *Singh Bhinder v Canada* Communication no 208/1986, UN doc CCPR/C/37/D/208/1986 para 6.2; *Singh (Bikramjit) v France* Communication no 1852/2008, UN doc CCPR/C/106/D/1852/2008; *Singh (Ranjit) v France* Communication no 1876/2009, UN doc CCPR/C/102/D/1876/2009 paras 8.3 and 8.4. Cf. *Karaduman v Turkey* (1993) 74 DR 93; *Singh v France* App no 25463/08 (ECtHR 30 June 2009); *Singh v France* App no 27561/08 (ECtHR 30 June 2009).

be drawn exclusively from a single tradition',⁹³ the HRC has recognised that undue weight should not be given to the position of the majority. Therefore, the approach of the HRC may result in a higher standard of protection for persons belonging to minorities, than under the ECHR.

The ICESCR and the economic, social and cultural rights contained in CRC primarily constitute progressive rights.⁹⁴ While the interpretation of these rights in General Comments establishes core obligations, States must commit to progressively achieving the required standards to the extent permitted by available resources.⁹⁵ Thus, their respective monitoring bodies are able to maximise rights by identifying 'best practices' and utilising objective information, including statistical data.⁹⁶ In this way, the practice in relation to economic, social and cultural rights within the UN is comparable to the approach taken by the AC to the FCNM. In contrast, the violations approach utilised in relation to civil and political rights only identifies a bottom line standard. Consequently, the nature of human rights standards, their scope of application and the mandate of their monitoring body have the potential to impact the protection offered to persons belonging to minorities under international law.

⁹³ K Boyle, 'Freedom of Religion in International Law' in J Rehman, and SC Breau (eds), *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices* (Martinus Nijhoff 2007) 43.

⁹⁴ Article 2(1) ICESCR; article 4 CRC.

⁹⁵ ICESCR, 'General Comment No 3' on 'The Nature of States Parties Obligations (Art. 2, para. 1 of the Covenant)' UN doc HRI/GEN/1/Rev.9 (Vol.I) para 10.

⁹⁶ Brems, above n 58, 355.

**PART A:
THE PROTECTION OF MINORITIES IN
INTERNATIONAL LAW**

Chapter 2: Accommodating Diversity in International Law

2.1. INTRODUCTION

While a retreat from political multiculturalism has been perceived in Western Europe,¹ it has been suggested that State obligations under international law, in terms of both content and aims, closely align with the multiculturalist approach to diversity management.² Therefore, if States are to comply with their international obligations, a full retreat from the pursuit of multiculturalist policies is not possible. This chapter argues that international law and multiculturalist theories broadly align in terms of both content and aims. Nonetheless, the content of the rights elaborated in international legal instruments may be insufficient to fully pursue multiculturalist policies. Therefore, international law only provides a framework of *minimum* standards for the pursuit of multiculturalist policies.

First, this chapter will address the extent to which the objectives of the international legal regime align with multiculturalist approaches to diversity management ahead of other forms of diversity management, such as assimilation and integration. Second, the degree to which the content of rights correspond with policies advocated by multiculturalist theorists will be explored, focusing on the four tenets of the minority rights regime: the preservation of minority identity, equality

¹ T Blair, 'Speech on Multiculturalism and Integration' 8 December 2006 <<http://webarchive.nationalarchives.gov.uk/+http://www.number10.gov.uk/Page10563>> accessed 16 May 2011; T Modood, *Multiculturalism - A Civic Idea* (Polity Press 2007) 10-14; W Kymlicka, *Multicultural Odysseys – Navigating the New International Politics of Diversity* (OUP 2007) 122-28; A Mondal, 'Islam and Multiculturalism: Some Thoughts on a Difficult Relationship' Brunel University Research Archive, 6 <<http://bura.brunel.ac.uk/handle/2438/4161>> accessed 16 May 2011; S Vertovec, 'Towards Post-Multiculturalism? Changing Communities, Conditions and Contexts of Diversity' (2010) 61 *International Social Science Journal* 83, 86; W Kymlicka, 'The Rise and Fall of Multiculturalism? New Debates and Accommodation in Diverse Societies' (2010) 61 *International Social Science Journal* 97; —, 'Merkel Says German Multicultural Society Has Failed' *BBC News* (17 October 2010) <<http://www.bbc.co.uk/news/world-europe-11559451>> accessed 16 May 2011.

² A Xanthaki, 'Multiculturalism and International Law: Discussing Universal Standards' (2010) 32 *Human Rights Quarterly* 21, 29. See also, R Medda-Windischer, *Old and New Minorities: Reconciling Diversity and Cohesion – A Human Rights Model for Minority Integration* (Nomos Verlagsgesellschaft 2009); D McGoldrick, 'Multiculturalism and its Discontents' (2005) 5 *Human Rights Law Review* 27, 32-5.

and non-discrimination, effective participation and intercultural dialogue and tolerance.³

2.2. INTERNATIONAL LAW AND ACCOMMODATING DIVERSITY

The neglect of minority specific concerns in the immediate aftermath of the Second World War has been observed in both international law and political philosophy.⁴ Following the perceived failure of the League of Nations minority rights regime, it was generally accepted that human rights standards and the prohibition of discrimination were sufficient to ensure the rights of minorities.⁵ Accordingly, the establishment of a separate regime for the protection of minorities in international law was not thought to be necessary⁶ and a minority rights provision was not included in the Universal Declaration of Human Rights (UDHR)⁷ or the ECHR. Likewise, Murphy has observed 'the near complete disregard of questions of ethnocultural and ethnonational difference by political philosophers in the post-war period'.⁸

In 1966 a minority rights provision, albeit narrowly constructed, was included in the ICCPR.⁹ Following the end of the Cold War, both the UN and Council of Europe adopted detailed instruments to accommodate the needs of minorities and, more recently, within the UN, indigenous peoples.¹⁰ At a similar time, political philosophers began to develop multiculturalist theories in order to provide a justification for the multiculturalist policies adopted by States from the

³ J Ringelheim, 'Minority Rights in a Time of Multiculturalism—The Evolving Scope of the Framework Convention on the Protection of National Minorities' (2010) 10 Human Rights Law Review 99, 118.

⁴ P Thornberry, 'Is There a Phoenix in the Ashes—International Law and Minority Rights' (1980) 15 Texas Journal of International Law 421, 438-39; MD Evans, *Religious Liberty and International Law in Europe* (CUP 1997) 182-83; M Murphy, *Multiculturalism: A Critical Introduction* (Routledge 2012) 36.

⁵ F Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* UN doc E/CN.4/Sub.2/384/Rev.1 para 137; Thornberry, above n 4, 438-39; Evans, above n 4, 182-83; A Eide, 'The Non-Inclusion of Minority Rights: Resolution 217C (III)' in G Alfredsson and A Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff 1999) 708-09.

⁶ *Ibid.*

⁷ GA Res 217A (III) UN doc A/810 at 71 (1948).

⁸ Murphy, above n 4, 36.

⁹ Article 27 ICCPR.

¹⁰ FCNM; UN Declaration on Minorities; UNDRIP.

1970s.¹¹ Consequently, multiculturalist theories, in a similar way to international minority rights standards, developed as a response to the neglect of minority specific concerns following the Second World War.

Three broad approaches to accommodating societal diversity can be identified through State practice and have been recognised in international law: assimilation; integration; and the accommodation of cultural pluralism or multiculturalism.¹² These approaches are not mutually exclusive and overlap can be discerned between policies that pursue assimilation and integration, as well as policies that pursue integration and multiculturalist approaches. However, a common approach to the accommodation of diversity can be discerned between international law and multiculturalist theories.

The assimilationist approach to the challenges of cultural diversity is a one-way process, whereby minorities are expected to abandon their own culture in favour of the majority culture, and the majority are not required to make concessions.¹³ This approach presupposes the cultural homogeneity of the receiving society and denies the value of cultural diversity.¹⁴ The requirement under article 27 ICCPR that persons belonging to ethnic, religious or linguistic minorities 'shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language' indicates that the assimilationist approach to diversity is contrary to international law. While forcible assimilation has been explicitly identified as a violation of the rights of persons belonging to minorities and indigenous peoples,¹⁵ the former UN Working Group on Minorities also identified non-assimilation as one of the primary aims of the minority rights regime: 'Minority protection is based on four

¹¹ W Kymlicka, *Multicultural Citizenship – A Liberal Theory of Minority Rights* (OUP 1995) 127; B Parekh, *Rethinking Multiculturalism - Cultural Diversity and Political Theory* (2nd edn, Palgrave Macmillan 2006) 349; T Modood, *Multiculturalism – A Civic Idea* (Polity Press 2007) 16-19; Murphy, above n 4, 28.

¹² Commission on Human Rights, 'Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' (4 April 2005) UN doc E/CN.4/Sub.2/AC.5/2005/2 paras 20-22, 66; Council of Europe, *Framework Convention for the Protection of National Minorities and Explanatory Report* (February 1995) H(1995)010 para 45-6; Article 8(1) UNDRIP; McGoldrick above n 2, 35.

¹³ Modood, above n 11, 48; Medda-Windischer, above n 2, 19-20.

¹⁴ Parekh, above n 11, 196-7.

¹⁵ Commission on Human Rights, above n 12, para 21; Council of Europe, above n 12, para 45; article 8(1) UNDRIP.

requirements: protection of the existence, non-exclusion, non-discrimination and non-assimilation of the groups concerned'.¹⁶

In relation to 'new minorities', the *travaux préparatoires* of the ICCPR reveal that 'the provisions concerning the rights of minorities, it was understood, should not be applied in such a manner as to encourage the creation of new minorities or to obstruct the process of assimilation'.¹⁷ Yet, Capotorti has stressed that this does not permit the forced assimilation of such communities: 'It is certainly not the function of article 27 to encourage the formation of new minorities; where a minority exists, however, the article is applicable to it, regardless of the date of its formation'.¹⁸ Consequently, under international law, States must not interfere with the ability of persons belonging to minorities or indigenous peoples to preserve their culture and, in particular, force them to assimilate with the majority against their will.

The rejection of assimilation as a method of diversity management in international law finds justification in multiculturalist theories. Multiculturalists have utilised the language of justice in order to reject the imposition of the majority culture upon minorities.¹⁹ Specifically, Raz argues that '*the demand for a forced retraining and adaptation* is liable to undermine people's dignity and self-respect ... It shows that the state, their state, has no respect for their culture, finds it inferior and plots its elimination'.²⁰ As a result of globalisation, Parekh also suggests that in reality, the homogenisation of society is no longer a possibility.²¹ The rejection of assimilation as a mechanism of diversity management has also been mirrored in European State practice.²²

The integrationist approach has been described as a two-way process, within which both the minority and the majority make concessions in order to adapt to an increasingly diverse society.²³ Persons belonging to minorities do not necessarily have to abandon their culture in order to be accepted as equal members of society. Therefore, from a minority rights perspective '[i]ntegration differs from assimilation

¹⁶ Commission on Human Rights, above n 12, para 23.

¹⁷ UN General Assembly (UNGA), 'Annotations on the Text of the Draft International Covenants on Human Rights' UN doc A/2929, Chapter VI para 186.

¹⁸ Capotorti, above n 5, para 205.

¹⁹ Kymlicka, above n 11, 107-130; S Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press 2002) 8.

²⁰ J Raz, 'Multiculturalism' (1998) 11 *Ratio Juris* 193, 200.

²¹ Parekh, above n 11, 171.

²² Kymlicka, above n 11, 78.

²³ Modood, above n 11, 48.

in that while it develops and maintains a common domain where equal treatment and a common rule of law prevail, it also allows for pluralism'.²⁴ Both the AC and the former UN Working Group on Minorities, when interpreting the rights in the FCNM and the UN Declaration on Minorities, respectively, have supported the pursuit of integration policies by States.²⁵ Specifically, the AC has noted, in relation to article 5 FCNM:

Paragraph 2 does not preclude the Parties from taking measures in pursuance of their general integration policy. It thus acknowledges the importance of social cohesion and reflects the desire expressed in the preamble that cultural diversity be a source and a factor, not of division, but of enrichment to each society.²⁶

Kymlicka has, however, only accepted the legitimacy of integration policies in relation to 'new minorities': '[t]he expectation of integration is not unjust, I believe, so long as immigrants had the option to stay in their original culture'.²⁷ The pursuit of differentiated rights has found support in political philosophy and through the development of differentiated regimes in international law.²⁸ Notably, whereas policies to encourage the integration of persons belonging to 'new minorities' find support in international law and multiculturalist theories, policies to encourage the integration of indigenous persons have not found similar support.²⁹

Nonetheless, an approach based purely on the *integration of persons belonging to minorities* may be insufficient to enable the preservation of minority identity. Integration is a two-way process and, in practice, if too much emphasis is placed on the integration of the minority with the majority, there is a danger that integration will become conflated with assimilation. Notably, the mere tolerance of diversity is insufficient within a democratic society to ensure the integration of persons belonging to minorities, as the culture and religion of the majority tend to be

²⁴ Commission on Human Rights, above n 12, para 22.

²⁵ Council of Europe, above n 12, para 46; Commission on Human Rights, above n 12, para 20.

²⁶ Council of Europe, above n 12, para 46.

²⁷ Kymlicka, above n 11, 31, 96.

²⁸ UNDRIP; FCNM; Commission on Human Rights, above n 12, para 11.

²⁹ Article 8(2)(d) UNDRIP; W Kymlicka, 'The Internationalization of Minority Rights' (2008) 6 International Journal of Constitutional Law 1, 3-11.

subsidised by the State and are also reflected in its laws and customs.³⁰ Consequently,

[t]he neutral state does not promote justice; rather it maintains the status quo. Members of minority cultural groups do not have the same opportunities to live and work in their culture and make their own choices to the same degree as the members of majority cultures.³¹

Thus, integration policies should not emphasise the need for members of 'new minorities' to integrate *into* wider society, but instead focus on the *integration of society as a whole*.³² The Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Commentary to the UN Declaration on Minorities) warns that:

While a degree of integration is required in every national society in order to make it possible for the State to respect and ensure human rights to every person within its territory without discrimination, the protection of minorities is intended to ensure that integration does not become unwanted assimilation or undermine the group identity of persons living on the territory of the State.³³

States must ensure that integration policies do not have the undesirable effect of assimilating persons belonging to minorities. The overlap between assimilation and integration leads to the conclusion that, in order to ensure that integration does not become unwanted assimilation, measures should be taken to encourage the preservation of minority identity. Hence, international legal standards establish that

³⁰ Kymlicka, above n 11, 114-5; JT Levy, *The Multiculturalism of Fear* (OUP 2000) 134; Medda-Windischer, above n 2, 19-20; Xanthaki, above n 2, 29; R Race, *Multiculturalism and Education* (Continuum 2011) 20.

³¹ Xanthaki, above n 2, 29.

³² HCNM, 'The Ljubljana Guidelines on Integration of Diverse Societies & Explanatory Note' (November 2012) 3-4.

³³ Commission on Human Rights, above n 12, para 22. See also, Article 8(2)(d) UNDRIP.

States are under a positive obligation not just to tolerate difference but also to nurture it.

Article 27 ICCPR, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the UNESCO Universal Declaration on Cultural Diversity, the UN Declaration on Minorities, the UNDRIP and the FCNM recognise the value of cultural diversity and require that States ensure the preservation, protection and promotion of cultural diversity in society.³⁴ In particular, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions recognises that '[t]he protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples'.³⁵ Donders has also noted that 'human rights and cultural diversity have a mutually interdependent and beneficial relationship'.³⁶ In addition to the explicit recognition of the value of cultural diversity in international legal standards, McGoldrick has suggested that:

Often the multiculturalism aspect of a human rights discourse is subliminal or taken for granted. For example, for the ECtHR, a 'democratic society' for the purposes of the European Convention on Human Rights (ECHR) is characterised by 'pluralism, tolerance and broadmindedness'.³⁷

However, within the UN, the term 'multiculturalism' has primarily been used to refer to cultural diversity in society, rather than multiculturalist policies or theories, as a

³⁴ Article 27 ICCPR; article 5(1) UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions; article 5 UNESCO Universal Declaration on Cultural Diversity; articles 1, 2(1) and 4(1) UN Declaration on Minorities; articles 5, 9, 11(1), 12(1) and 13 UNDRIP; article 5(1) FCNM. See also, article 15(1) ICESCR; article 31 CRC; article 27 Universal Declaration on Human Rights; article 31 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 2220 UNTS 3 adopted 18 December 1990.

³⁵ Article 2(3) UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

³⁶ Y Donders, 'Human Rights and Cultural Diversity: Too Hot to Handle?' (2012) 30 *Netherlands Quarterly of Human Rights* 377, 377.

³⁷ McGoldrick above n 2, 35.

model of diversity management.³⁸ Notably, the mandate of the UN Special Rapporteur on Religion or Belief includes 'to promote an atmosphere of respect and tolerance for religious and cultural diversity, as well as multiculturalism'.³⁹ Yet, the term 'multiculturalism' has not been utilised in international legal instruments nor ascribed a legal definition.

The failure to use the term 'multiculturalism' in international law, may be attributable to the multiple understandings and interpretations of the term within multiculturalist theory itself.⁴⁰ Nonetheless, international standards in relation to cultural diversity can be said to pursue similar aims to multiculturalist policies. Murphy has suggested that multiculturalist policies can be defined as '[a]t the risk of oversimplification, ... *policies* which seek to accommodate the different identities, values and practices of both dominant and non-dominant cultural groups in culturally diverse society'.⁴¹ Although a consistent multiculturalist theory has not been developed,⁴² common ground between the justifications of both minority rights standards and multiculturalist theories can be identified in the aims of security⁴³ and justice.⁴⁴

The dual purpose of minority rights protection was acknowledged by the Permanent Court of International Justice (PCIJ) in the *Minority Schools in Albania* case:

³⁸ Xanthaki, above n 2, 23. See also, Commission on Human Rights, above n 12, para 66; Human Rights Council, 'Report Submitted by Mr Doudou Diène, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance' (12 January 2007) UN doc A/HRC/4/19 para 38; Human Rights Council, 'Report of the Independent Expert on Minority Issues – Mission to Canada' (8 March 2010) UN doc A/HRC/13/23/Add.2 paras 84-5.

³⁹ Human Rights Council. 'Freedom of Religion or Belief: Mandate of the Special Rapporteur on Freedom of Religion or Belief' (23 July 2010) UN doc A/HRC/RES/14/11 para 11.

⁴⁰ S Hall, 'The Multicultural Question' Pavis Papers in Social and Cultural Research No. 4 (Open University 2001) 3 cited in Vertovec, above n 1, 85; Parekh, n 11, 349; Mondal, above n 1, 2.

⁴¹ Murphy, above n 4, 6.

⁴² *Ibid.*, 17.

⁴³ *Minority Schools in Albania* PCIJ Series A./B. Advisory Opinion of April 6 1935, 17; Preamble to the UN Declaration on Minorities; Preamble to the FCNM. See also, Kymlicka, above n 11, 30, 111, 185; A Spiliopoulou Åkermark, *Justifications of Minority Protection in International Law* (Kluwer Law International 1997) 69; Levy, above n 30, 65; C Baldwin, C Chapman and Z Gray, *Minority Rights: The Key to Conflict Prevention* (Minority Rights Group International 2007).

⁴⁴ *Minority Schools in Albania*, above n 43, 17; Preamble to the UN Declaration on Minorities; Preamble to the FCNM. See also, C Taylor, 'The Politics of Recognition' in A Gutmann (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press 1994) 25-73; Kymlicka, above n 11, 107-130; Benhabib, above n 19, 8; P Macklem, 'Minority Rights in International Law' (2008) 6 *International Journal of Constitutional Law* 531; E Craig, 'From Security to Justice? The Development of a More Justice-Oriented Approach to the Realisation of European Minority Rights Standards' (2012) 30 *Netherlands Quarterly of Human Rights* 40.

The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, *the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority*, and satisfying the ensuing special needs.⁴⁵

This has subsequently been reiterated in the preamble to the UN Declaration on Minorities and the FCNM.

Whereas the explicit inclusion of minority rights protection within human rights instruments supports the justice-based approach to minority protection,⁴⁶ the continuing mandate of the HCNM highlights that the unjust treatment of minorities has the potential to result in conflict.⁴⁷ Multiculturalist theorists have likewise recognised the inherent value of the preservation of minority identity in terms of individual well-being, dignity and autonomy.⁴⁸ Yet, the denial of rights to minorities and historical injustice have also been identified as the cause of societal instability and ethnic conflict.⁴⁹ In the same way that multiculturalist theories 'ratifie[-d] and explain[-ed] changes that ... [took] place in the absence of theory' at the national level,⁵⁰ they also provide a justification for the approach pursued under international law to the accommodation of diversity.

The prioritisation of security ahead of justice in the elaboration of minority rights standards in Europe has been subject to criticism on the basis that 'the securitisation of ethnic relations erodes both the democratic space to voice minority

⁴⁵ *Minority Schools in Albania*, above n 43, 17. See also, Spiliopoulou Åkermark, above n 43, 69.

⁴⁶ Craig, above n 44, 56.

⁴⁷ Conference on Security and Co-operation in Europe, *Helsinki Document 1992*, The Challenges of Change, Helsinki Decisions, 8 para 3; Y Alexander, 'Minorities and Terrorism: Some Legal and Strategic Perspectives' in Y Dinstein and M Tabor (eds), *The Protection of Minorities and Human Rights* (Martinus Nijhoff 1992) 341; T Gurr, *People versus States: Minorities at Risk in the New Century* (United States Institute of Peace Press 2000) xiv; Baldwin, Chapman and Gray, above n 43.

⁴⁸ Taylor, above n 44, 25-73; Kymlicka, above n 11, 80-92; Raz, above n 20, 199-201; Benhabib, above n 19, 8; Parekh, above n 11, 167-68; Murphy, above n 4, 14-18.

⁴⁹ Kymlicka, above n 11, 30, 111, 185; Levy, above n 30, 65.

⁵⁰ JA Sigler, *Minority Rights: A Comparative Analysis* (Greenwood 1983) 196.

demands and the likelihood that those demands will be accepted'.⁵¹ However, although the security-based approach may no longer be of relevance to national minorities in Western Europe, it remains pertinent to Arab and Muslim communities.⁵² The aims of security and justice cannot be easily delineated and are both interrelated and interdependent.⁵³ This conclusion has been reiterated by the HCNM's 2012 *Ljubljana Guidelines on Integration of Diverse Societies*: '[p]rotecting and promoting human rights, including minority rights, help States to strengthen the cohesiveness of their societies while respecting diversity, and can thus be considered preconditions for lasting peace, security and stability'.⁵⁴ Accordingly, notwithstanding the fact that minority rights standards are primarily elaborated in human rights instruments, the achievement of these standards remains significant from the perspective of both security and justice.

Despite the failure of the international community to utilise the term 'multiculturalism', the approach taken in international law to the accommodation of diversity clearly favours multiculturalist approaches above the mere tolerance of diversity or assimilationist approach. While the integrationist approach finds support in minority rights instruments, integration measures that require only the tolerance of difference, rather than the preservation of diversity, run the risk of becoming measures of assimilation. Both international law and multiculturalist theories recognise that cultural diversity is of value to society and that the aims of security and justice require that States adopt measures to ensure that persons belonging to minorities are able to preserve their identity.

2.3. MULTICULTURALIST RIGHTS IN INTERNATIONAL LAW?

A degree of convergence has been observed between international law and multiculturalist approaches to accommodating diversity. However, this has not illuminated the policies and content of individual rights that enable the accommodation of cultural diversity in practice. As previously noted significant divergence exists within multiculturalist theories and '[t]he multicultural policies

⁵¹ Kymlicka (2010), above n 1, 106-7.

⁵² *Ibid.*, 106.

⁵³ Craig, above n 44, 51.

⁵⁴ HCNM, above n 32, 12.

appropriate in different countries vary greatly'.⁵⁵ Therefore, it is necessary to initially identify the scope and categories of rights employed within the international legal regime to accommodate diversity. This provides a framework to facilitate the comparison of international law with the approaches advocated by multiculturalist theorists.

The underlying tenets of the minority rights regime have been identified as non-discrimination and equality on the one hand and the preservation and protection of minority identity on the other.⁵⁶ Nonetheless, as noted by the PCIJ in the *Minority Schools in Albania* case, these two tenets of minority protection are not mutually exclusive and, hence, cannot be pursued in isolation:

The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State.

The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.

These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.⁵⁷

The adoption of detailed minority rights standards in the UN Declaration on Minorities and, more significantly, the FCNM, has led to the identification of additional tenets underpinning the minority rights regime. The AC has identified one additional tenet of the regime: '[a]rticles 15 [effective participation], 4 [equality and non-discrimination] and 5 [preservation of minority identity] can be seen as the three corners of a triangle which together form the main foundations of the Framework

⁵⁵ Raz, above n 20, 197.

⁵⁶ K Henrard, *Devising an Adequate System of Minority Protection — Individual Human Rights, Minority Rights and the Right to Self-Determination* (Martinus Nijhoff 2000) 8-11; K Henrard, 'The Protection of Minorities Through the Equality Provisions in the UN Human Rights Treaties: The UN Treaty Bodies' (2007) 14 *International Journal of Minority and Group Rights* 141, 144.

⁵⁷ *Minority Schools in Albania*, above n 43, 17.

Convention'.⁵⁸ In contrast, Ringelheim has suggested that '[e]nshrined in the FCNM are two additional notions, which were absent from the inter-war conception of minority protection, namely intercultural dialogue and democratic participation'.⁵⁹ The right to effective or democratic participation and elements of intercultural dialogue also find elaboration in the UN Declaration on Minorities and, accordingly, may be considered to constitute elements underlying the international minority rights regime.⁶⁰ The four interconnected tenets underpinning minority rights protection in international law, namely, the preservation of minority identity, equality and non-discrimination, effective participation and intercultural dialogue, will be used as the basis of discussion concerning the extent to which the content of international law and multiculturalist theories align.

2.3.1. Preservation of Identity

The preservation of the identity of minorities constitutes a fundamental tenet of minority protection in international law. Generally applicable human rights standards such as freedom of religion, freedom of assembly and association and the right to culture provide a minimum level of protection for persons belonging to minorities.⁶¹ Nonetheless, the FCNM and UN Declaration on Minorities suggest that as minorities are particularly vulnerable to rights violations, additional protection is required in order to ensure that they are able to preserve their cultural, linguistic and religious identities.⁶² Policies which not only tolerate but also recognise and accommodate

⁵⁸ AC, *Commentary on The Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs* adopted on 27 February 2008 ACFC/31DOC(2008)001 para 13.

⁵⁹ Ringelheim, above n 3, 118.

⁶⁰ Articles 2(1), 2(2), 4(2), 4(4), 6 UN Declaration on Minorities; Commission on Human Rights, above n 12, para 67.

⁶¹ Articles 9 and 11 ECHR; articles 18, 21 and 22 ICCPR; article 15(1) ICESCR; article 27 UDHR; the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression and the UNESCO Universal Declaration on Cultural Diversity. McGoldrick above n 2, 35; K Banting and W Kymlicka, 'Introduction – Multiculturalism and the Welfare State: Setting the Context' in K Banting and W Kymlicka (eds), *Multiculturalism and the Welfare State – Recognition and Redistribution in Contemporary Democracies* (OUP 2006) 9-10; Kymlicka (2010), above n 1, 102-3.

⁶² Article 4(1) UN Declaration on Minorities; Article 7 FCNM; Commission on Human Rights, above n 12, para 55.

minority identity have, also, been advocated by multiculturalist theorists as preconditions of multicultural accommodation.⁶³

The HRC has acknowledged that 'culture manifests itself in many forms'. Consequently, in addition to traditional cultural activities, such as education in the language, history and traditions of the minority,⁶⁴ article 27 ICCPR protects the right of persons belonging to minorities to maintain a particular way of life,⁶⁵ which may include the use of land resources or traditional activities such as fishing and hunting.⁶⁶ UNDRIP provides more extensive rights for the protection of indigenous culture including the right to the preservation of indigenous 'archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature'.⁶⁷ Multiculturalist theorists have suggested that a range of measures, varying from exemptions from neutral laws that have the potential to impact minority practices⁶⁸ to the public funding of cultural practices, schools, language and cultural education and minority associations, constitute prerequisites of minority protection.⁶⁹

In order to ensure that these rights are fulfilled, minority rights standards require that States take positive measures.⁷⁰ As the Committee on the Elimination of Racial Discrimination (CERD) has affirmed, such measures are permanent as the minority's identity will always be disadvantaged in comparison to the majority's

⁶³ Kymlicka, above n 11, 30-1; Raz, above n 20, 198; Levy, above n 30, 127-52; Parekh, n 11, 166; Murphy, above n 4, 38-41.

⁶⁴ Articles 2(1), 4(3), 4(4) UN Declaration on Minorities; articles 9(3), 10, 11, 12, 13, 14 FCNM.

⁶⁵ Human Rights Committee (HRC), 'General Comment No 23' on 'The Rights of Minorities (Art 27)' UN doc CCPR/C/21/Rev.1/Add.5, para 7.

⁶⁶ *Ibid.*; *Kitok v Sweden* Communication no 197/1985, UN doc CCPR/C/33/D/197/1985 paras 9.1-9.3; *Länsman (Ilmari) and Others v Finland* Communication no 511/1992, UN doc CCPR/C/52/D/511/1992 paras 9.5-9.8; *Apirana Mahuika and Others v New Zealand* Communication no 547/1993, UN doc CCPR/C/70/D/547/1993 para 9.3; *Länsman (Jouni E.) and Others v Finland* Communication no 671/1995, UN doc CCPR/C/58/D/671/1995 para 10.7; *Howard v Canada* Communication no 879/1999, UN doc CCPR/C/84/D/879/1999 para 12.4.

⁶⁷ Article 11(1) UNDRIP.

⁶⁸ Kymlicka, above n 11, 31; Raz, above n 20, 198; Levy, above n 30, 128-32; Murphy, above n 4, 38-40.

⁶⁹ Kymlicka, above n 11, 31; Parekh, n 11, 166; V Uberoi, 'Do Policies of Multiculturalism Change National Identities?' (2008) 79 *The Political Quarterly* 404, 406, 409; Modood, above n 11, 61; Murphy, above n 4, 36-7, 41.

⁷⁰ HRC, above n 65, paras 6.2, 7; Commission on Human Rights, above n 12, para 33; G Gilbert 'Article 5' in M Weller (ed), *The Rights of Minorities – A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP 2005) 158.

identity.⁷¹ Furthermore, such measures may require the provision of economic resources.⁷² Similarly, multiculturalist theorists have justified the requirement of State funding of minority cultural practices. Specifically, Levy has

argued that the majority culture, simply by being in the majority, has its cultural integrity and heritage protected for free, as it were, while other cultural groups have to create, maintain, and fund institutions ... in order to preserve their cultural integrity to anything like the same degree. Special state measures to ease that burden are assistance rights.⁷³

In contrast, although the soft law UN Declaration on Minorities and UNDRIP have been interpreted to impose financial obligations upon States,⁷⁴ the binding FCNM explicitly excludes 'any financial obligation for the Parties' in relation to private minority educational institutions.⁷⁵ The omission of rights to mother tongue universities and official language status in the FCNM has been the subject of criticism by Kymlicka.⁷⁶ Accordingly, the standards established under the FCNM may not be sufficient from the perspective of multiculturalist theorists to fully support the preservation of minority identity. Nonetheless, by requiring that States take positive measures and provide economic resources in order to enable the preservation of minority identity, minority rights standards extend significantly past mere toleration of diversity and can be argued to provide a framework of minimum standards for the achievement of multiculturalist accommodation.

The scope of application of minority rights standards, in addition to their content, may be insufficient from the perspective of multiculturalist theorists.

⁷¹ CERD, 'General Recommendation No 32' on 'The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination' UN doc CERD/C/GC/32 para 15; Kymlicka, above n 11, 31.

⁷² Commission on Human Rights, above n 12, para 56; article 39 UNDRIP; The International Law Association Committee on the Rights of Indigenous Peoples (ILA), *Interim Report to the 74th ILA Conference in The Hague* (15–20 August 2010) 13, 36-9 <www.ila-hq.org/en/committees/index.cfm/cid/1024> accessed 19 March 2013.

⁷³ Levy, above n 30, 134.

⁷⁴ Article 39 UNDRIP; Commission on Human Rights, above n 12, para 56; ILA, above n 72, 13, 36-9.

⁷⁵ See further, HCNM, 'The Hague Recommendations Regarding the Education Rights of National Minorities and Explanatory Note' (October 1996) 13.

⁷⁶ W Kymlicka, 'Reply and Conclusion' in W Kymlicka and M Opalski (eds), *Can Liberal Pluralism Be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (OUP 2001) 373.

Modood and Parekh have contended that the preservation of minority identity has a collective element and, thus, group rights may be more appropriate than individual rights to achieve this end.⁷⁷ Yet, the international human rights regime only establishes individual rights rather than collective rights, as minorities do not have legal personality.⁷⁸ As minority rights standards accord rights to 'persons belonging to ... minorities', as opposed to minorities as a collective,⁷⁹ they are unable to satisfy this understanding of multiculturalist accommodation.

Yet, Kymlicka argues that group-differentiated rights should not automatically be equated with collective rights, as

many forms of group-differentiated rights are in fact exercised by individuals. Group-differentiated rights can be accorded to the individual members of a group, or to the group as a whole, or to a federal state/province within which the group forms the majority.⁸⁰

This understanding of multiculturalist accommodation is more easily reconciled with the existing international minority rights regime. For example, in *Lubicon Lake Band*, the HRC recognised a group element to article 27 ICCPR and held that '[t]here is ... no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights'.⁸¹ Furthermore, in General Comment No 23, the HRC proposed that:

⁷⁷ Modood, above n 11, 50; Parekh, n 11, 213-19.

⁷⁸ Nowak, above n 5, 639.

⁷⁹ HRC, above n 65, para 1; Council of Europe, above n 12, para 31.

⁸⁰ Kymlicka, above n 11, 45-6.

⁸¹ *Lubicon Lake Band v Canada* Communication no 167/1984, UN doc CCPR/C/38/D/167/1984 para 32.1.

Although the rights protected under article 27 are individual rights, *they depend in turn on the ability of the minority group to maintain its culture, language or religion*. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, *in community with the other members of the group*.⁸²

Likewise, while the provisions contained in the FCNM only refer to the rights 'of persons belonging to national minorities' and, therefore, cannot be interpreted to constitute collective rights under international law, the preamble to the FCNM establishes that the purpose of the Convention is to protect 'the existence of national minorities' and, thus, suggests a collective element to the rights contained in the instrument. Consequently, article 27 ICCPR provides a justiciable right that can be exercised collectively by persons belonging to a minority and minority rights standards aim to protect the existence of minorities and enable the preservation of their collective identity.

Nonetheless, existing minority rights standards under international law are not sufficiently wide in content or scope to satisfy the multifarious policies advocated by some multiculturalist theorists for the protection of minority identity. The most far-reaching obligations in this respect, in relation to State funding for minority education, are located in soft law rather than binding legal instruments. The evolution of the content of minority rights standards has been restricted by the unwillingness of States to accept obligations in this respect and, hence, the minority rights regime should be understood to identify minimum standards. Yet, minority rights standards pursue the same ends as multiculturalist theories – security and justice – and in many respects establish similar rights to those advocated by multiculturalist theorists. Therefore, in effect, minority rights standards establish a framework of *minimum* standards within which the multiculturalist accommodation of minorities may be pursued. Thus, if a State fails to fulfil its international legal obligations in this respect, sufficient steps have not been taken to implement consistent multiculturalist policies.

⁸² HRC, above n 65, para 6.2. [Emphasis added].

2.3.2. Equality and Non-Discrimination

The requirement of equality as a precondition of minority protection was initially established by the PCIJ in the *Minority Schools in Albania* case.⁸³ Although, following the demise of the League of Nations system, it was decided that it was not necessary to recreate the system of minority protection, the prohibition of discrimination against persons on the basis of religion, race, ethnic origin and membership of a national minority remained on the international agenda.⁸⁴ Notably, the ICCPR prohibits discrimination and establishes a separate right to equality.⁸⁵ Subsequent specialised instruments, such as the UN Declaration on Minorities,⁸⁶ UNDRIP,⁸⁷ the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (UN Declaration on Religion or Belief),⁸⁸ the FCNM and Protocol 12 ECHR⁸⁹ have prohibited discrimination based on membership of a particular group.

Contrary to the focus in international human rights law on non-discrimination and equality, multiculturalist theorists have been criticised for emphasising culture and the role of culture in perpetuating disadvantage, at the expense of recognising and combating the true cause of exclusion – socio-economic disadvantage.⁹⁰ While policies to reduce socio-economic disadvantage form part of the multiculturalist agenda,⁹¹ Kymlicka has conceded that '[m]ulticulturalism policies, like all public policies, can have perverse and unintended effects and it is possible that multiculturalism has unintentionally obscured or exacerbated inequalities'.⁹² Therefore, multiculturalist theories have not significantly elaborated upon policies to

⁸³ *Minority Schools in Albania*, above n 43, 17.

⁸⁴ See, for example, article 14 ECHR; article 2 UDHR; ICERD.

⁸⁵ Articles 2(1) and 26 ICCPR.

⁸⁶ Article 3(1) UN Declaration on Minorities

⁸⁷ Article 2 UNDRIP

⁸⁸ UN doc A/36/684.

⁸⁹ CETS 177.

⁹⁰ B Barry, *Culture and Equality – An Egalitarian Critique of Multiculturalism* (Harvard University Press 2001) 308, 322.

⁹¹ Kymlicka, above n 11, 96; Kymlicka (2010), above n 1, 100; Uberoi, above n 69, 406; L Blum, 'Recognition, Value and Equality: A Critique of Charles Taylor's and Nancy Fraser's Accounts of Multiculturalism' (1998) 5 *Constellations* 51, 60.

⁹² Kymlicka (2010), above n 1, 102.

reverse socio-economic disadvantage but instead focused on cultural inequality.⁹³

Raz argues that:

It is crucial to break the link between poverty, under-education and ethnicity. So long as certain ethnic groups are so overwhelmingly over-represented among the poor, ill-educated, unskilled and semiskilled workers the possibilities of cultivating respect for their cultural identity, even the possibility of members of the group being able to have self respect and to feel pride in their cultures are greatly undermined.⁹⁴

Consequently, equality and non-discrimination have not been completely neglected by theorists, who have recognised the importance of socio-economic equality for the preservation of cultural identity.⁹⁵

By establishing a prohibition of discrimination and a right to equality independent of cultural rights, the international legal regime arguably ensures that the cultural disadvantage faced by persons belonging to minorities does not obscure the socio-economic disadvantage faced by the same communities. Ghanea notes that 'the denial of ESCR [Economic, Social and Cultural rights] has a cumulatively negative impact when it is focused on minorities. Here there is not only the immediate impact on the concerned individuals, but also the longer-term impact on the group as a whole'.⁹⁶ Thus, a 'right to participate effectively in ... social, economic and public life' has been established as a minority rights standard.⁹⁷ International law standards, moreover, require that equality be established in both law and fact.⁹⁸ While measures such as affirmative action, preferential hiring and quotas have found support from multiculturalist theorists,⁹⁹ international human rights bodies have

⁹³ See, for example, Parekh, n 11, 239-63.

⁹⁴ Raz, above n 20, 198

⁹⁵ See also, Blum, above n 91, 58-63; Kymlicka, above n 11, 96; Levy, above n 30, 135-7; Uberoi, above n 69, 406; Kymlicka (2010), above n 1, 100; Murphy, above n 4, 41-2.

⁹⁶ N Ghanea, 'Repressing Minorities and Getting Away with It? A Consideration of Economic, Social and Cultural Rights' in N Ghanea and A Xanthaki (eds), *Minorities, Peoples and Self-Determination* (Martinus Nijhoff 2005) 193-94.

⁹⁷ Article 2(2) UN Declaration on Minorities. See also, article 15 FCNM; article 21 UNDRIP.

⁹⁸ *Minority Schools in Albania*, above n 43, 19.

⁹⁹ Levy, above n 30, 135. See also, K Banting, R Johnston, W Kymlicka and S Soroka, 'Do Multiculturalism Policies Erode the Welfare State? Empirical Analysis' in K Banting and W Kymlicka (eds), *Multiculturalism and the Welfare State: Recognition and Redistribution in Contemporary Democracies* (OUP 2006) 58; Kymlicka (2010), above n 1, 101.

additionally provided specific elaboration of the measures required to ensure *de facto* equality.¹⁰⁰ The AC has identified a number of key policies to improve the socio-economic situation of persons belonging to national minorities including: the collection of statistical data; legislation prohibiting discrimination in socio-economic life; access to land, property and residency; and the accessibility and availability of public services and welfare institutions.¹⁰¹ Furthermore, CERD has interpreted the scope of special measures widely to include:

[T]he full span of legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus, as well as plans, policies, programmes and preferential regimes in areas such as employment, housing, education, culture, and participation in public life for disfavoured groups, devised and implemented on the basis of such instruments.¹⁰²

Notably, these special measures are temporary and should only be employed as long as the unequal situation giving rise to the measures prevails.¹⁰³ This is in direct contrast to the measures required in order to enable the preservation of minority identity, which are recognised in both international law and multiculturalist theories to constitute permanent rights.¹⁰⁴

Although international law has focused more on the measures required to reverse socio-economic disadvantage, the means and methods of achieving equality identified under international law broadly align with those identified by multiculturalist theorists. As socio-economic disadvantage has the potential to impact the ability of persons belonging to minorities to maintain their identity,¹⁰⁵ international human rights standards that relate to socio-economic rights may

¹⁰⁰ HRC, 'General Comment No 18' on 'Non-Discrimination' UN doc HRI/GEN/1/Rev.1 (1994) para 10; HRC, above n 65, para 6.2; CERD, 'General Recommendation No 14' on 'Definition of Discrimination' UN doc A/48/18 para 2; CERD, above n 71.

¹⁰¹ AC, above n 58, 14-21.

¹⁰² CERD, above n 71, para 13.

¹⁰³ HRC, above n 100, para 10; HRC, above n 65, paras 6.1-6.2; Committee on the Elimination of Discrimination against Women, 'General Recommendation No 25' on 'Temporary Special Measures' UN doc A/59/38(SUPP) para 20; CERD, above n 71, paras 11 and 16; CESCR, 'General Comment No 20' on 'Non-Discrimination in Economic, Social and Cultural Rights' UN doc E/C.12/GC/20 para 9.

¹⁰⁴ CERD, above n 71, para 15; Kymlicka, above n 11, 31.

¹⁰⁵ Raz, above n 20, 198

indirectly enable the pursuit of multiculturalist policies. Consequently, international human rights standards provide a framework within which multiculturalist policies can be pursued.

2.3.3. Effective Participation

Non-discrimination and the right to preserve a distinct identity have traditionally been considered the bedrocks of minority rights protection. Yet, in relation to the FCNM it has been argued that 'effective participation is clearly another *condition sine qua non*'.¹⁰⁶ Democratic participation is established as a generally applicable human right in article 25 ICCPR and the right to free elections is enshrined in article 1 of Protocol 3 to the ECHR. Additionally, the HRC, UN Declaration on Minorities, UNDRIP and FCNM have explicitly recognised the importance of the *effective* participation of persons belonging to minorities in decision-making processes.¹⁰⁷

Procedural inclusion alone is unlikely to enable persons belonging to minorities to influence decisions concerning their identity, as '[i]n a democracy, the majority/dominant ethno-cultural group will dictate the relevant convention'.¹⁰⁸ Thus, the right to effective participation has been interpreted as serving the dual purpose of providing the necessary conditions for persons belonging to overcome structural inequalities in the political process,¹⁰⁹ and enabling persons belonging to minorities to participate in decisions that have the potential to impact their culture.¹¹⁰ If a minority is able to participate on equal terms with the majority in public life and, in particular, voice the specific concerns of the community, then it is less likely to resort to non-democratic means¹¹¹ and will have increased ownership in and loyalty

¹⁰⁶ R Hofmann, 'The Impact of International Norms on the Protection of National Minorities in Europe: The Added Value and Essential Role of the Framework Convention for the Protection of National Minorities' (5 December 2006) DH-MIN (2006)018, 21; R Hofmann, 'Implementation of the FCNM: Substantive Challenges' in A Verstichel and others (eds), *The Framework Convention for the Protection of National Minorities: a Useful Pan-European Instrument?* (Intersentia 2008) 177-78.

¹⁰⁷ *Apirana Mahuika and Others v New Zealand*, above n 66, paras 9.5-9.6; HRC, above n 65, para 7; articles 2(2) and (3) UN Declaration on Minorities; article 18 UNDRIP; article 15 FCNM.

¹⁰⁸ S Wheatley, *Democracy, Minorities and International Law* (CUP 2005) 160.

¹⁰⁹ Council of Europe, above n 12, para 80; IM Young, *Inclusion and Democracy* (OUP 2000) 34.

¹¹⁰ Hofmann (2006), above n 106, 22; A Verstichel, *Participation, Representation and Identity: The Rights of Persons Belonging to Minorities to Effective Participation in Public Affairs: Content, Justification and Limits* (Intersentia 2009) 253.

¹¹¹ F Palermo and J Woelk, 'No Representation without Recognition: The Right to Political Participation of (National) Minorities' (2003) 25 *European Integration* 225, 240-41; Verstichel,

to the State.¹¹² Accordingly, measures to improve the political participation of minorities underpin the two key aims of the minority rights regime, the preservation of minority identity and non-discrimination and equality, and have been justified on the basis of both justice and security.¹¹³

The participation of minorities in the decision-making process has also been recognised as a prerequisite of multicultural citizenship.¹¹⁴ Levy has submitted that:

Three sets of issues are involved in most arguments for representation, issues easily blurred but important to separate. One is the presence of members of the minority group; one is the chance for members of the minority group to choose representatives; and one is protection of minority group interests.¹¹⁵

As previously noted, the presence of persons belonging to minorities in decision-making bodies may not ensure that minority interests are adequately represented.¹¹⁶ Similarly, ensuring that persons belonging to minorities are able to participate in decisions that concern their identity does not ensure that there is equality of representation in the legislature.

above n 110, 72; A Verstichel, 'Understanding Minority Participation and Representation and the Issue of Citizenship' in M Weller (ed), *Political Participation of Minorities: A Commentary on International Standards and Practice* (OUP 2010) 87; S Wheatley, 'Minorities, Political Participation, and Democratic Governance under the European Convention on Human Rights' in M Weller (ed), *Political Participation of Minorities: A Commentary on International Standards and Practice* (OUP 2010) 195.

¹¹² Commission on Human Rights, 'Towards Effective Political Participation and Representation of Minorities – Working Paper Prepared by Dr Fernand de Varennes' 1 May 1998, UN doc E/CN.4/Sub.2/AC.5/1998/WP.4, 9; Y Ghai, *Public Participation and Minorities* (Minority Rights Group International 2003) 27; Palermo and Woelk, above n 111, 240-41; R Hofmann, 'Political Participation of Minorities' (2006/07) 6 *European Yearbook of Minority Issues* 5, 6; M Weller, 'Minority Consultative Mechanisms: Towards Best Practices' (2007/08) 7 *European Yearbook of Minority Issues* 425, 426; Human Rights Council, 'Background Document by the Independent Expert on Minority Issues, Gay McDougall, on Minorities and Effective Political Participation' (8 October 2009) UN doc A/HRC/FMI/2009/3 para 2; Ringelheim, above n 3, 118.

¹¹³ Ghai, above n 112, 5; Hofmann, above n 112, 6-7; A Verstichel, 'Representation and Identity: The Rights of Persons Belonging to Minorities to Effective Participation in Public Affairs' (2007/08) 7 *European Yearbook of Minority Issues* 449, 454; Kymlicka (2007), above n 1, 239; Medda-Windischer, above n 2, 228; Verstichel (2010), above n 111, 77.

¹¹⁴ Kymlicka, above n 11, 31-3; Levy, above n 30, 150-54; Murphy, above n 4, 31-4.

¹¹⁵ Levy, above n 30, 152.

¹¹⁶ HF Pitkin, *The Concept of Representation* (University of California Press 1967) 89-90; A Phillips, *The Politics of Presence* (OUP 1995) 156-57.

While multiculturalists have suggested the allocation of reserved seats in decision-making bodies and measures to facilitate the inclusiveness of political parties as mechanisms to enable the effective participation of persons belonging to minorities,¹¹⁷ the AC and the former UN Working Group on Minorities have elaborated upon key policies in this area. Specifically, benign gerrymandering,¹¹⁸ exemptions from thresholds,¹¹⁹ reserved seats, quotas and dual voting¹²⁰ have been identified as measures to overcome issues pertaining to inequality in the political process, whereas vetoes, qualified majorities,¹²¹ the decentralisation of the decision-making process¹²² and consultative mechanisms¹²³ have been suggested as measures to increase minority influence on decisions which concern their identity. Thus, the approach advocated by multiculturalist theorists is similar to the approach developed through the interpretation of international standards by minority rights bodies.

Multiculturalist theorists have, nonetheless, additionally argued that measures of self-government or autonomy may be required in order to facilitate the preservation of national minority identity.¹²⁴ Self-government or autonomy may take the form of either territorial autonomy, for example, secession, devolution or federal systems, or cultural autonomy in the form of the transfer of administrative and decision-making powers, in relation to issues of direct concern to the minority's identity.¹²⁵ UNDRIP provides that '[i]ndigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs'.¹²⁶ In contrast, self-government rights have not been expressly provided for persons belonging to minorities. Specifically, the AC and the Commentary to the UN Declaration on Minorities have rejected the suggestion that the FCNM and UN Declaration on Minorities include a right to

¹¹⁷ Kymlicka, above n 11, 31-3; Levy, above n 30, 150.

¹¹⁸ AC, above n 58, para 90. See also, Human Rights Council, above n 112, para 51.

¹¹⁹ AC, above n 58, para 82.

¹²⁰ *Ibid.*, para 72.

¹²¹ *Ibid.*, paras 72, 97-99.

¹²² Commission on Human Rights, above n 12, para 46; Council of Europe, above n 12, para 80.

¹²³ Commission on Human Rights, above n 12, para 48; Council of Europe, above n 12, para 80.

¹²⁴ Kymlicka, above n 11, 27-33; Levy, above n 30, 137-38, 142-48; Murphy, above n 4, 41-45.

¹²⁵ HCNM, 'The Lund Recommendations on the Effective Participation of National Minorities in Public Life and Explanatory Note' (September 1999) paras 17-21; R Hofmann, 'Political Participation of Minorities' (2006/07) 6 *European Yearbook of Minority Issues* 5, 10; S Wheatley, 'Non-Discrimination and Equality in the Rights of Political Participation for Minorities' (2002) 3 *Journal on Ethnopolitics and Minority Issues in Europe* 1, 13.

¹²⁶ Article 4 UNDRIP.

autonomy. The Commentary to the UN Declaration on Minorities clearly states that 'the Declaration does not make it a requirement for States to establish such autonomy'.¹²⁷ Furthermore, the AC to the FCNM has recognised that '[t]he Framework Convention does not provide for the right of persons belonging to national minorities to autonomy, whether territorial or cultural'.¹²⁸

Although an express right to cultural autonomy does not exist under international law, Gilbert has submitted that '[t]he right to autonomy for groups in society is a necessary consequence of the combined effect of the right to self-determination and the rights of persons belonging to minorities to enjoy their own culture'.¹²⁹ The former UN Independent Expert on Minority Issues has also interpreted the right to effective participation to entail 'some degree of group autonomy, which is non-territorial and gives the minority the right to administer and even legislate in certain fields'.¹³⁰ However, while it may be possible to interpret pre-existing minority rights standards to contain a right to cultural autonomy, cultural autonomy itself is insufficient to satisfy the claims identified by multiculturalists, as '[s]elf-government and autonomy claims are about the structure of government and the identity of the governors; recognition/enforcement claims are about the content of the law'.¹³¹

The omission of self-government rights from minority rights instruments has been the source of particular discontent for Kymlicka, who has suggested that, as a result of the omission of this right, minority rights standards are 'founded on a clear integrationist approach'.¹³² Yet, the value of mechanisms of autonomy for minority communities have been recognised in the monitoring activities of the AC and HRC.¹³³ In particular, Hofmann has noted that in relation to article 15 FCNM:

¹²⁷ Commission on Human Rights, above n 12, para 20.

¹²⁸ AC, above n 58, para 133.

¹²⁹ G Gilbert, 'Autonomy and Minority Groups: A Right in International Law?' (2001-2002) 35 *Cornell International Law Journal* 307, 353.

¹³⁰ Human Rights Council, above n 112, para 57. See also, HCNM, 'The Lund Recommendations on the Effective Participation of National Minorities in Public Life' (September 1999) paras 17-18.

¹³¹ Levy categorises 'the recognition of traditional law' as 'recognition/enforcement rights'. Levy, above n 30, 142, 147-48.

¹³² Kymlicka, above n 29, 30. See also, Kymlicka (2007), above n 1, 212-4.

¹³³ AC, 'Opinion on Finland' adopted on 22 September 2000 ACFC/INF/OP/I(2001)002 para 47; AC, 'Opinion on Italy' adopted on 14 September 2001 ACFC/INF/OP/I(2002)007 paras 61, 62; AC, 'Second Opinion on Hungary' adopted on 9 December 2004 ACFC/INF/OP/II(2004)003 para 115; AC, 'Second Opinion on Moldova' adopted on 9 December 2004 ACFC/INF/OP/II(2004)004 para 142; AC, 'Third Opinion on Hungary' adopted on 18 March 2010 ACFC/OP/III(2010)001 paras 142-43, 145; HRC, 'Concluding Observations of the Human

[T]he Advisory Committee underlined the importance of territorial autonomy for preserving and promoting the distinct identity of national minorities, which means that changes to the administrative structures of a country that might have detrimental effects on the situation of national minorities must be avoided.¹³⁴

Thus, the AC has been sympathetic to claims for autonomy, even though a right to autonomy is not recognised in the FCNM. It is unlikely that States will consent to minority rights standards that expressly create a right to self-government, given the implications for sovereignty and the territorial integrity of the State. However, from the perspective of multiculturalist theorists, minority rights standards and their monitoring bodies have not sufficiently recognised a right to minority presence and participation in the institutions of the State, as concrete rights have not been established in relation to self-government and autonomy.

Nonetheless, Craig has suggested that it may be possible for the aims of multiculturalist theories to be achieved through the standards established within the minority rights regime:

There does ... appear to be increasing recognition that effective participation can take many different forms and that justice can be promoted through effective representation that falls short of the special representation and self-government rights advocated by Kymlicka in *Multicultural Citizenship*.¹³⁵

Consequently, despite the dissatisfaction of multiculturalists with the insufficient elaboration of self-government rights in international law, minority rights standards establish minimum standards through which multiculturalist aims can be pursued. In

Rights Committee – Sweden' (24 April 2002) UN doc CCPR/CO/74/SWE para 15; HRC, 'Concluding Observations of the Human Rights Committee – Sweden' (7 May 2009) UN doc CCPR/C/SWE/CO/6 para 20. See also, K Henrard, "'Participation", "Representation" and "Autonomy" in the Lund Recommendations and their Reflections in the Supervision of the FCNM and Several Human Rights Conventions' (2005) 12 *International Journal on Minority and Group Rights* 133, 164-65.

¹³⁴ Hofmann (2006), above n 106, 22. *Footnotes omitted*.

¹³⁵ Craig, above n 44, 63.

particular, the measures elaborated by minority rights bodies to enhance minority representation and influence in decision-making bodies have the potential to enable the achievement of the right to effective participation and *ergo* the realisation of multicultural citizenship.

2.3.4. Intercultural Dialogue and Tolerance

While principles of tolerance and broadmindedness underpin the human rights regime,¹³⁶ the minority rights regime has, since the Cold War, developed the specific notion of intercultural dialogue, tolerance and understanding. The requirement that States 'encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory' is recognised in article 6(1) FCNM. Ringelheim has submitted that this development signals that:

[T]his Convention is not only about enabling minority members to maintain their distinctiveness. It is also geared towards ensuring their inclusion and participation on an equal footing in the society at large, as well as promoting interactions, exchanges and intermingling between people across ethnic, cultural, linguistic and religious lines.¹³⁷

The FCNM, HCNM's Ljubljana Guidelines and the UN Declaration on Minorities establish that education and media are key policy areas in this respect.¹³⁸ In particular, the Commentary to the UN Declaration on Minorities explains that 'intercultural education involves educational policies and practices whereby persons belonging to different cultures, whether in a majority or minority position, learn to interact constructively with each other'.¹³⁹ Thus, social cohesion has been identified

¹³⁶ McGoldrick above n 2, 35; P Wiater, *Intercultural Dialogue in the Framework of European Human Rights Protection* (Council of Europe Publishing 2010) 107-12.

¹³⁷ Ringelheim, above n 3, 118.

¹³⁸ Articles 6(1), 12 FCNM; Council of Europe, above n 12, paras 48-9, 71; article 4(4) UN Declaration on Minorities; Commission on Human Rights, above n 12, paras 65-9; HCNM, above n 32, 21-23, 54-55, 60-61

¹³⁹ Commission on Human Rights, above n 12, para 66.

as the underlying purpose of intercultural dialogue.¹⁴⁰ This concept has also been recognised in UNDRIP, the UNESCO Declaration on Cultural Diversity and the UNESCO Convention on the Promotion and Protection of the Diversity of Cultural Expression.¹⁴¹

Although it has been suggested that multiculturalism has focused too much on difference at the expense of commonality and social cohesion,¹⁴² multiculturalist theorists have also recognised the requirement of intercultural dialogue and tolerance.¹⁴³ Notably, Raz, also stresses the importance of education in this respect:

The young of all cultural groups of significant size should be educated, if their parents so desire, in the culture of their groups. But all of them should also be educated to be familiar with the history and traditions of all the main cultures in the country and an attitude of respect for them should be cultivated.¹⁴⁴

Parekh also considers the importance of intercultural dialogue; however, this is primarily in the context of the criticism and justification of unpopular, including illiberal, minority practices.¹⁴⁵ While multiculturalists have identified intercultural dialogue as underpinning integration, there has been little elaboration of this as a two-way process, whereby the majority must also learn about the culture of the minority for the purpose of developing tolerance and understanding.

¹⁴⁰ Council of Europe, above n 12, para 49; Commission on Human Rights, above n 12, paras 65-9; HCNM, above n 32, 54-55, 60-61.

¹⁴¹ Articles 15(2) and 16(2) UNDRIP; Article 2 UNESCO Declaration on Cultural Diversity; Article 1 UNESCO Convention on the Promotion and Protection of the Diversity of Cultural Expression.

¹⁴² A Wolfe and J Klausen, 'Other Peoples' [2000] Prospect 28, 29; D Miller, *Citizenship and National Identity* (Polity Press 2000) 105-6; Barry, above n 90, 77-81; D Goodhart, 'Too Diverse?' (22 January 2004) Prospect; C Joppke, 'The Retreat of Multiculturalism and the Liberal State: Theory and Policy' (2004) 55 *The British Journal of Sociology* 237, 250-4; H Entzinger, 'The Parallel Decline of Multiculturalism and the Welfare State in the Netherlands' in K Banting and W Kymlicka (eds), *Multiculturalism and the Welfare State – Recognition and Redistribution in Contemporary Democracies* (OUP 2006) 183; M Crepaz, "'If you are my Brother, I May Give you a Dime!'" Public Opinion on Multiculturalism, Trust, and the Welfare State' in K Banting and W Kymlicka (eds), *Multiculturalism and the Welfare State – Recognition and Redistribution in Contemporary Democracies* (OUP 2006) 92-5; Modood, above n 11, 148.

¹⁴³ Raz, above n 20, 198; Parekh, n 11, 196; N Meer and T Modood, 'How Does Interculturalism Contrast with Multiculturalism?' (2012) 33 *Journal of Intercultural Studies* 175, 184-85, 192; G Brahm Levey, 'Interculturalism vs. Multiculturalism: A Distinction without a Difference?' (2012) 33 *Journal of Intercultural Studies* 217, 218-19. Cf. Council of Europe, *White Paper on Intercultural Dialogue: "Living Together As Equals in Dignity"* (Council of Europe 2008) 9.

¹⁴⁴ Raz, above n 20, 198.

¹⁴⁵ Parekh, n 11, 264-94

Furthermore, despite the recognition of the importance of societal cohesion in UNDRIP, less weight is placed on integration than in minority rights instruments. Article 8(d) UNDRIP, for example, stresses that indigenous peoples should not be forced to integrate against their will. Additionally, article 5 establishes:

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, *if they so choose*, in the political, economic, social and cultural life of the State.¹⁴⁶

Intercultural interaction is, thus, not prioritised by the indigenous rights regime, in direct contrast to the minority rights regime.

This approach aligns with the distinction between indigenous peoples and immigrants advocated by Kymlicka, who suggests that whereas it is legitimate for immigrants to be required to integrate, the same demand cannot be made of indigenous peoples who have a legitimate claim, based on justice, to self-government and have historically resisted assimilation.¹⁴⁷ Yet, in contrast to the content of minority rights standards, Kymlicka has stressed that national minorities have similar claims to indigenous peoples and, consequently, should also not be subject to an integrationist approach.¹⁴⁸

In relation to intercultural dialogue and the integration of persons belonging to minorities, international law and multiculturalist theories have broadly aligned. In particular, although both emphasise the importance of integration in relation to minorities, integration is not emphasised as a legitimate policy in relation to indigenous peoples. Nonetheless, the legitimisation of the integration of national minorities by the FCNM is problematic from the perspective of Kymlickan multiculturalist theory.

¹⁴⁶ [Emphasis added].

¹⁴⁷ Kymlicka, above n 11, 79.

¹⁴⁸ Kymlicka, above n 29, 11.

2.4. CONCLUSION

Multiculturalist theorists suggest that the international legal regime does not sufficiently accommodate the identity of national minorities, especially in relation to the public funding of minority education, official language recognition and the requirement of integration. Moreover, a right to self-government and autonomy is insufficiently established under international law to pursue multiculturalist aims. However, multiculturalist theories to a large extent correspond with international human rights standards and, in particular, minority rights standards, in terms of both content and aims. Specifically, multiculturalism and minority rights standards recognise the importance of the preservation of minority identity, non-discrimination and equality, effective participation and intercultural dialogue as well as pursuing the twin aims of security and justice.

Multiculturalism provides a justification for the approach pursued in international law in relation to the accommodation of diversity, whereas the international legal regime provides a broad framework of minimum standards within which multiculturalist policies can be pursued. Therefore, the standards established under international law in respect of the accommodation of diversity must be seen as the minimum standards required, if multiculturalists policies are to be pursued by States. In the event that States have not attained these standards, or have excluded particular minorities from the scope of application of such standards, then they have not fully pursued multiculturalist accommodation.

Chapter 3:

The Added-Value of Minority Rights Protection under International Law

3.1. INTRODUCTION

As considered in the previous chapter, international law and multiculturalist policies pursue the aims of security and justice by securing the four tenets of minority protection, namely, the preservation of minority identity, equality and non-discrimination, effective participation and intercultural dialogue. In particular, both regimes recognise that as the culture and religion of the majority are frequently reflected in both the laws and customs of the State, persons belonging to minorities face additional barriers to maintaining their identity as compared to the majority. Furthermore, persons belonging to minorities are more vulnerable to rights violations.¹ Thus, additional measures may be required in order to ensure that persons belonging to minorities are able to exercise their rights and achieve equality.

Nonetheless, it has been submitted in relation to both religious minorities² and more generally³ that minority rights standards do not have an added-value as compared to generally applicable human rights standards. For example, during the

¹ Article 4(1) UN Declaration on Minorities; Article 7 FCNM; Commission on Human Rights, 'Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' UN doc E/CN.4/Sub.2/AC.5/2005/2 para 55.

² C Tomuschat, 'Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights' in R Bernhard and others (eds), *Völkerecht als Rechtsordnung, Internationale Gerichtsbarkeit Menschenrecht, Festschrift für Hermann Mosler* (Springer Verlag 1983) 970; H Hannum, *Autonomy, Sovereignty and Self-Determination: The Adjudication of Conflicting Interests* (University of Pennsylvania Press 1996) 69-70; K Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (Martinus Nijhoff 2000) 110, 250; K Henrard, 'Minority Specific Rights: A Protection of Religious Minorities Going Beyond the Freedom of Religion?' (2009) 8 *European Yearbook of Minority Issues* 5, 42.

³ Hannum, above n 2, 69-70; J Packer, 'On the Content of Minority Rights' in J Rääkkä (ed), *Do We Need Minority Rights? Conceptual Issues* (Martinus Nijhoff 1996) 148-49; M Scheinin, 'The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Law' in TS Orlin, A Rosas and M Scheinin (eds), *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach* (Institute for Human Rights, Åbo Akademi University 2000) 220; M Scheinin, 'Minority rights: Additional Rights or Added-Protection?' in M Bergsmo (ed), *Human Rights and Criminal Justice for the Downtrodden – Essays in Honour of Asbjørn Eide* (Martinus Nijhoff 2003).

drafting of the UDHR 'Mrs Roosevelt, the Chairman of the CHR, was fundamentally opposed to the concept of minority rights, believing that "the best solution of the problem of minorities was to encourage respect for human rights"'.⁴ Therefore, it has been claimed that the protection of minorities would be better served by non-discrimination and the application of generally applicable human rights norms than by the maintenance of a separate minority rights regime.⁵

This chapter argues that there is a *prima facie* added-value to minority rights protection, as compared to generally applicable human rights standards. Moreover, although it has been argued that multiculturalism has focused too much on the preservation of minority identity at the expense of socio-economic equality and intercultural dialogue,⁶ it is asserted that the four tenets of minority rights protection are interrelated and mutually dependent and, hence, the preservation of minority identity cannot be pursued without the realisation of the other tenets of the minority rights regime.

Using the four tenets of minority rights protection as a framework, this chapter will compare the scope of protection offered under generally applicable human rights standards and minority rights standards. Thus, the extent to which there is an added-value to minority rights protection will be considered in relation to the right to preserve minority identity, equality and non-discrimination, effective participation and intercultural dialogue. Notably, in relation to the right to preserve minority identity, rights pertaining to the preservation of minority culture and religion will be elaborated. Moreover, the extent to which the tenets of minority rights protection contribute to the preservation of minority identity will be considered.

⁴ MD Evans, *Religious Liberty and International Law in Europe* (CUP 1997) 182-183.

⁵ F Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* UN doc E/CN.4/Sub.2/384/Rev.1 para 137; P Thornberry, 'Is There a Phoenix in the Ashes—International Law and Minority Rights' (1980) 15 *Texas Journal of International Law* 421, 438-39; *ibid.*, 182-183; A Eide, 'The Non-Inclusion of Minority Rights: Resolution 217C (III)' in G Alfredsson and A Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff 1999) 708-09.

⁶ B Barry, *Culture and Equality – An Egalitarian Critique of Multiculturalism* (Harvard University Press 2001) 77-81; D Goodhart, 'Too Diverse?' (22 January 2004) Prospect; C Joppke, 'The Retreat of Multiculturalism and the Liberal State: Theory and Policy' (2004) 55 *The British Journal of Sociology* 237, 250-4.

3.2. PRESERVATION OF MINORITY IDENTITY

The right to preserve minority identity is established in article 27 ICCPR, article 2(1) UN Declaration on Minorities and article 5 FCNM. Article 27 ICCPR establishes:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Nonetheless, the rights of religious minorities have been neglected under minority rights standards and their supervisory mechanisms.⁷ Furthermore, generally applicable human rights instruments also contain provisions that directly relate to the preservation of minority identity, namely, the right to culture⁸ and freedom of religion.⁹ Thus, it is necessary to consider the scope and content of these rights, in order to ascertain whether there is an added-value to minority rights protection.

3.2.1. The Right to Culture and a Distinct Way of Life

The culture, in particular the language and religion, of the majority tends to have a privileged role within the State, primarily for historical reasons.¹⁰ Therefore, persons belonging to minorities may require assistance to maintain their distinct identity. A right to culture is found in both minority rights instruments and generally applicable human rights instruments. Notably, generally applicable human rights standards, article 15(1) ICESCR and article 27 UDHR elaborate a general right to culture. Furthermore, although not strictly human rights instruments, the UNESCO

⁷ See generally, Henrard (2009), above n 2, 42; N Ghana, 'Are Religious Minorities Really Minorities?' (2012) 1 Oxford Journal of Law and Religion 57.

⁸ Article 15(1)(a) ICESCR; article 27 UDHR.

⁹ Article 18 ICCPR; article 9 ECHR.

¹⁰ W Kymlicka, *Multicultural Citizenship – A Liberal Theory of Minority Rights* (OUP 1995) 111-15; R Medda-Windischer, *Old and New Minorities: Reconciling Diversity and Cohesion – A Human Rights Model for Minority Integration* (Nomos Verlagsgesellschaft 2009) 19-20; A Xanthaki, 'Multiculturalism and International Law: Discussing Universal Standards' (2010) 32 Human Rights Quarterly 21, 29.

Convention on the Protection and Promotion of the Diversity of Cultural Expression and the UNESCO Universal Declaration on Cultural Diversity also recognise the value of cultural diversity.¹¹

In contrast, within the minority rights regime, article 27 ICCPR and article 2(1) UN Declaration on Minorities recognise the right of persons belonging to minorities 'to enjoy their own culture'. Article 1(1) UN Declaration on Minorities also recognises the right to cultural identity. Although Donders notes that 'cultural identity' constitutes 'an "umbrella" concept or principle under which members of minorities have specific rights',¹² the right to cultural identity does not appear to differ significantly from article 2(1) UN Declaration on Minorities.¹³ Within the Council of Europe, article 5 FCNM places an obligation upon States Parties to facilitate the preservation of minority cultural identity and, additionally, the AC has considered cultural rights under article 6 FCNM.¹⁴

The achievement of the right to culture is dependent upon the ability of persons belonging to minorities to exercise their rights to freedom of association, freedom of expression, freedom of religion and political participation.¹⁵ While these rights constitute universal human rights standards, their specific relevance to persons belonging to minorities has been highlighted by their reiteration in articles 7-9 and 15 FCNM. Article 4(1) UN Declaration on Minorities similarly establishes that 'States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively their human rights and fundamental freedoms without any discrimination and in full equality before the law'.¹⁶

¹¹ D McGoldrick, 'Culture, Cultures, and Cultural Rights' in M Baderin and R McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (OUP 2007) 471.

¹² YM Donders, *Towards a Right to Cultural Identity?* (Intersentia 2002) 201.

¹³ Commission on Human Rights, above n 1, paras 28-9 cf para 33.

¹⁴ AC, 'Opinion on Austria' adopted on 16 May 2002 ACFC/INF/OP/I(2002)009 para 29; AC, 'Opinion on Germany' adopted on 1 March 2002 ACFC/INF/OP/I(2002)008 para 36; AC, 'Opinion on Norway' adopted on 12 September 2002 ACFC/INF/OP/I(2003)003 para 35; AC, 'Opinion on Portugal' adopted on 6 October 2006 ACFC/OP/I(2006)002 para 46; AC, 'Second Opinion on Bulgaria' adopted on 18 March 2010 FCNM/II(2012)001 para 101; AC, 'Third Opinion on Norway' adopted on 30 June 2011 ACFC/OP/III(2011)007 para 75; AC, 'Third Opinion on Spain' adopted on 22 March 2012 ACFC/OP/III(2012)003 para 83.

¹⁵ CESCR, 'Cultural Rights and Universality of Human Rights - Background Paper submitted by Mr Patrick Thornberry' (9 May 2008) UN doc E/C.12/40/15, 5.

¹⁶ See, further, Council of Europe, *Framework Convention for the Protection of National Minorities and Explanatory Report* (February 1995) H(1995)010 para 51; Commission on Human Rights, above n 1, para 55.

As these rights are elaborated in the ICCPR, the HRC may be better placed, than the CESCR, to elaborate upon the content of the right of persons belonging to minorities to preserve their culture. The HRC has acknowledged the interrelated nature of the rights contained in the ICCPR¹⁷ and has utilised article 27 ICCPR as interpretive guidance, when considering the scope of other Covenant rights.¹⁸ Nonetheless, even though these rights constitute prerequisites for the achievement of the right to culture, they are insufficient by themselves to guarantee this right, as positive measures may also be required.

3.2.1.1. *The Scope of 'Culture'*

Despite the presence of a 'right to culture' in the ICESCR and UDHR, it has been submitted that the drafters of these instruments did not intend to refer to 'culture' in the way that is now understood but instead intended to establish a right to access 'high culture'.¹⁹ Furthermore, article 27 UDHR establishes that '[e]veryone has the right freely to participate in the cultural life of the community'. Stamatopoulou has suggested that the use of the term '*the* community' in article 27 UDHR gives 'out a signal of limitation to this freedom and an assumption of a homogenous rather than multicultural society'.²⁰ Hence, these provisions may be of limited use for persons belonging to minorities as a mechanism to enable the preservation of their identity. In spite of this, Adalsteinsson and Thórhallson have suggested:

¹⁷ *Diergaardt (late Captain of the Rehoboth Baster Community) and Others v Namibia* Communication no 760/1997, UN doc CCPR/C/69/D/760/1997, Scheinin dissenting opinion.

¹⁸ *Hopu and Bessert v France* Communication no 549/1993, UN doc CCPR/C/60/D/549/1993/Rev.1 para 10.3. Cf Individual opinion by Committee members David Kretzmer and Thomas Buergenthal, cosigned by Nisuke Ando and Lord Colville para 5.

¹⁹ R O'Keefe, 'The "Right to Take Part in Cultural Life" Under Article 15 of the ICESCR' (1998) 47 ICLQ 904, 912-13, 916-17; Donders, above n 12, 29, 142, 150; CESCR, 'Cultural Life in the Context of Human Rights - Background Paper submitted by Ms Yvonne Donders' (9 May 2008) UN doc E/C.12/40/13, 3.

²⁰ E Stamatopoulou, 'Monitoring Cultural Human Rights: The Claims of Culture on Human Rights and the Response of Cultural Rights' (2012) 34 Human Rights Quarterly 1170, 1174.

It was clearly not the intention of the drafters of article 27 that it should provide protection for minorities in particular ... However, like other human rights instruments, the UDHR has to be interpreted in the light of present day circumstances. Access to high culture is not a pressing social problem today. In contrast, the right of minorities to profess their own culture is one of the most difficult problems on an international level at the turn of the century.²¹

This view gains support from the gradual move by the CESCR towards considering the rights of minorities under article 15(1)(a). Irrespective of the original intention of the drafters of the ICESCR, in General Comment No 21, the CESCR interpreted article 15(1)(a) ICESCR to establish that 'minorities have the right to their cultural diversity, traditions, customs, religion, forms of education, languages, communication media ... and other manifestations of their cultural identity and membership'.²²

This interpretation largely conforms with the content of minority rights instruments, which also establish religious rights,²³ linguistic rights,²⁴ educational rights,²⁵ and the right to establish and access minority media.²⁶ Nonetheless, these rights are explicitly established in minority rights instruments. In comparison, article 15 ICESCR does not expressly contain these rights but rather has been interpreted to do so by the CESCR. With the exception of freedom of religion²⁷ and educational rights, the identified rights necessary for the preservation of minority cultural

²¹ R Adalsteinsson and P Thórhallson, 'Article 27' in G Alfredsson and A Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff 1999) 580.

²² CESCR, 'General Comment No 21' on 'Right of Everyone to Take Part in Cultural Life (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)' UN doc E/C.12/GC/21 para 32.

²³ Article 7-8 FCNM; articles 2(1), 2(2) and 4(2) UN Declaration on Minorities.

²⁴ Articles 9-11 FCNM; article 4(3) UN Declaration on Minorities.

²⁵ Articles 12-14 FCNM; articles 4(3) and 4(4) UN Declaration on Minorities.

²⁶ Articles 9(2), (3), (4) FCNM; Human Rights Council, 'Recommendations of the Forum on Minority Issues at its Fifth Session: Implementing the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Identifying Positive Practices and Opportunities (27 and 28 November 2012)' (28 December 2012) UN doc A/HRC/22/60 para 47.

²⁷ Article 18 UDHR; article 9 ECHR; article 18 ICCPR;.

identity have not been explicitly elaborated in generally applicable human rights instruments.²⁸

The UNESCO Convention against Discrimination in Education and article 29(c) CRC explicitly provide educational rights pertaining to the right to culture. In contrast, articles 4(3) and 4(4) UN Declaration on Minorities and articles 12, 13 and 14 FCNM provide for education in the language, culture, history and traditions of the minority, as well as the right to establish and maintain separate educational institutions. The content of these rights has been elaborated in the AC's *Commentary on Education under the Framework Convention for the Protection of National Minorities*²⁹ as well as the HCNM's *Hague Recommendations Regarding the Education Rights of National Minorities*.³⁰ Specifically, the programmatic nature of the rights contained in the FCNM has enabled the AC to elaborate the content of educational rights.

Minority rights instruments also contain additional rights, as compared to the ICESCR, that contribute to the maintenance of minority identity including the right to effective participation in cultural, social and economic life and public affairs³¹ and the right to maintain cross-border contacts.³² As noted by Donders, '[i]t appears that the more specific the provisions, the more criteria are incorporated, while general values such as cultural identity lack such criteria'.³³ Thus, as a result of the establishment of specific rights in minority rights instruments, in addition to a general right to culture, minority rights standards establish more robust rights than generally applicable human rights standards and provide a clearer understanding of the measures required to preserve minority cultural identity.

Furthermore, culture under article 27 ICCPR has been interpreted widely by the HRC to include 'a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional

²⁸ UNESCO Convention against Discrimination in Education 429 UNTS 93, entered into force 22 May 1962; article 29(c) UN Convention on the Rights of the Child 1577 UNTS 3, entered into force 2 September 1990.

²⁹ AC, *Commentary on Education under the Framework Convention for the Protection of National Minorities* adopted on 2 March 2006 ACFC/25DOC(2006)002.

³⁰ HCNM, 'The Hague Recommendations Regarding the Education Rights of National Minorities and Explanatory Note' (October 1996).

³¹ Article 15 FCNM; articles 2(2) and 2(3) UN Declaration on Minorities.

³² Article 17 FCNM; article 2(5) UN Declaration on Minorities.

³³ Donders, above n 12, 201.

activities as fishing or hunting and the right to live in reserves protected by law'.³⁴ While the HRC monitors the generally applicable ICCPR, as noted in Chapter 1, it also monitors the minority-specific article 27. In this respect, it can also be considered to be a minority rights monitoring body. The ECtHR has also interpreted article 8 ECHR, the right to respect for private and family life, to afford a degree of protection to the way of life of persons belonging to minorities.³⁵ However, in comparison to the HRC,³⁶ the ECtHR's jurisprudence in this regard has been limited and the wide margin of appreciation afforded to State parties has led article 8 ECHR to prove largely ineffective at protecting the right of persons belonging to minorities to maintain their way of life.³⁷

Although the definition of culture adopted under minority rights instruments incorporates the traditional way of life of persons belonging to minorities, this does not lead to the conclusion that in order to be protected minority cultures must remain rooted in the past. Article 5(1) FCNM provides that '[t]he Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage'. The use of the term 'develop' suggests that minority culture should not be considered a static concept, an interpretation that has been affirmed under article 27 ICCPR and the UN Declaration on Minorities.³⁸

³⁴ HRC, 'General Comment No 23' on 'The Rights of Minorities (Art 27)' UN doc CCPR/C/21/Rev.1/Add.5 para 7.

³⁵ *G and E v Norway* (1983) 35 DR 30, 35; *Buckley v United Kingdom* ECHR 1996-IV para 71; *Chapman v United Kingdom* ECHR 2001-I para 96; *Noack and Others v Germany* ECHR 2000-VI.

³⁶ *Lovelace v Canada* Communication no 24/1977, UN doc CCPR/C/13/D/24/1977; *Länsman (Ilmari) and Others v Finland* Communication no 511/1992, UN doc CCPR/C/52/D/511/1992; *Apirana Mahuika and Others v New Zealand* Communication no 547/1993, UN doc CCPR/C/70/D/547/1993; *Länsman (Jouni E.) and Others v Finland* Communication no 671/1995, UN doc CCPR/C/58/D/671/1995; *Ángela Poma Poma v Peru* Communication no 1457/2006, UN doc CCPR/C/95/D/1457/2006.

³⁷ *G and E v Norway*, above n 35, 35; *Buckley v United Kingdom*, above n 35, paras 80, 84; *Chapman v United Kingdom*, above n 35, paras 98, 114-15; *Noack and Others v Germany*, above n 35. Cf. *Connors v United Kingdom* App no 66746/01 (ECtHR 27 May 2004) paras 86, 89, 94-95. See further, S Holt, 'Family, Private Life, and Cultural Rights' in M Weller (ed), *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (OUP 2007) 252.

³⁸ *Länsman (Ilmari) and Others v Finland*, above n 36, para 9.3; *Apirana Mahuika and Others v New Zealand*, above n 36, para 9.4; Commission on Human Rights, above n 1, para 29; G Gilbert, 'Article 5' in M Weller (ed), *The Rights of Minorities – A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP 2005) 157-58.

Furthermore, article 5 FCNM acknowledges that 'religion, language, traditions and cultural heritage' may combine to form the identity of persons belonging to minorities. It is not always possible to delineate the elements of minority identities and, in particular, an intersection may exist between religious and cultural identity.³⁹ The Commentary to the UN Declaration on Minorities suggests that persons belonging to religious minorities may only be able to claim rights that 'relate to the profession and practice of their religion' as opposed to persons belonging to ethnic minorities who have more extensive claims in relation to the right to culture.⁴⁰ However, the Commentary to the UN Declaration on Minorities has also noted that 'ethnicity is generally defined by a broad conception of culture, including a way of life'.⁴¹ Consequently, the Commentary to the UN Declaration on Minorities also recognises that 'in some cases religion and ethnicity coincide'.⁴² Thus, a wide interpretation of the concept of 'culture' has been adopted under minority rights standards that acknowledges the interconnected and changing nature of the elements of a minority's cultural identity.

Minority rights standards constitute individual rather than group rights. However, it has been acknowledged that such rights may be 'exercised individually or in community with others'.⁴³ Arguably, this inclusion represents recognition of the fact that the right to enjoy culture may only be effective in practice if exercised in 'community with others'. It is often the assertion of minority identity as a group that leads to discrimination or persecution against persons belonging to minorities.⁴⁴ Similarly, in General Comment No 21, the CESCR has stressed that 'article 15, paragraph 1 (a) of the Covenant also includes the right of minorities and of persons belonging to minorities to take part in the cultural life of society, and also to conserve, promote and develop their own culture'.⁴⁵ This interpretation, by recognising the rights of both 'minorities and of persons belonging to minorities',

³⁹ SE Berry, 'Bringing Muslims Minorities within the International Convention on the Elimination of All Forms of Racial Discrimination—Square Peg in a Round Hole?' (2011) 11 Human Rights Law Review 423, 439-447; Ghanea, above n 7, 62.

⁴⁰ Commission on Human Rights, above n 1, para 6.

⁴¹ *Ibid.*, para 6.

⁴² *Ibid.*, para 43.

⁴³ Article 3(2) FCNM; article 3 UN Declaration on Minorities; article 27 ICCPR. See, further, Council of Europe, above n 16, para 37.

⁴⁴ Commission on Human Rights, above n 1, para 53. See also H-J Heinze, 'Article 3' in M Weller (ed), *The Rights of Minorities – A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP 2005) 133-34.

⁴⁵ CESCR, above n 22, para 32.

indicates that the broader right to culture may include a group element.⁴⁶ Consequently, despite not constituting a minority rights standard, the interpretation of article 15(1)(a) ICESCR to incorporate a collective element by the CESCR is *prima facie* similar to the HRC's interpretation of article 27 ICCPR. The interpretation of article 15(1)(a) ICESCR by the CESCR to comprise an element of minority protection may indicate the recognition of the interrelated and interdependent nature of human rights standards.⁴⁷

3.2.1.2. *The Right to Culture: A Positive Right?*

Positive measures have been justified on the grounds that the culture of the majority tends to have a privileged role within the State and, hence, such measures are required to ensure that persons belonging to minorities are able to preserve their identity to the same extent as the majority.⁴⁸ Despite the negative wording of article 27 ICCPR, the HRC has interpreted this right to require that States take positive measures to ensure its achievement.⁴⁹ Likewise, article 4(2) UN Declaration on Minorities requires that States 'take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs'. Thus, it is necessary to consider whether the elaboration of positive measures to facilitate the preservation of minority cultural identity constitutes an added-value of minority rights protection as compared to generally applicable human rights protection.

General Comment No 23 of the HRC does not elaborate upon the content of the positive measures to be undertaken by States in order to *fulfil* their minority rights commitments.⁵⁰ However, given the interrelationship between the UN Declaration on Minorities and article 27 ICCPR, it is possible to draw from the guidance contained in the Commentary to the UN Declaration on Minorities. For example, '[t]he Declaration on Minorities makes it clear that these rights often require action, including protective measures and encouragement of conditions for

⁴⁶ See also, O'Keefe, above n 19, 917; CESCR, above n 15, 8-10; Stamatopoulou, above n 20, 1182.

⁴⁷ UNGA, 'Vienna Declaration and Programme of Action' UN doc A/CONF.157/24 (Part I), ch III, s I, para 5.

⁴⁸ Commission on Human Rights, above n 1, para 56.

⁴⁹ HRC, above n 34, para 6.1.

⁵⁰ *Ibid.*, paras 6.1, 6.2 and 7.

the promotion of their identity (art. 1) and specified, active measures by the State (art. 4).⁵¹ Such positive measures may include the provision of economic resources.⁵²

While the FCNM contains programmatic rights, the obligation in article 5(1) 'to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture' has been interpreted to establish 'a positive obligation to involve minority groups in the process of determining what the State has to do to promote the necessary conditions for those groups to flourish and an ultimate obligation to provide finance for such initiatives'.⁵³ This approach has been affirmed by the supervisory practice of the AC.⁵⁴

Similarly to minority rights standards, article 15(1)(a) ICESCR has also been interpreted to impose positive obligations upon States to ensure the preservation and promotion of minority identity.⁵⁵ For example, General Comment No 21 of the CESCR recognises that:

In order for this right to be ensured, it requires from the State party both abstention (i.e., non-interference with the exercise of cultural practices and with access to cultural goods and services) and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods).⁵⁶

This interpretation of right to culture *prima facie* aligns with minority rights standards. Nonetheless, Donders has suggested, that '[w]hile Article 15 and other instruments may help protect the cultural identity of everyone, Article 27 in its broad sense could be important for the protection of the cultural identity of (individuals of)

⁵¹ Commission on Human Rights, above n 1, para 33, see also, para 29.

⁵² *Ibid.*, para 56.

⁵³ Gilbert, above n 38, 158.

⁵⁴ See, for example, 'Opinion on Austria' above n 14, paras 24-7; AC, 'Opinion on Italy' adopted on 14 September 2001 ACFC/INF/OP/I(2002)007 para 30; 'Opinion on Norway' above n 14, paras 29-31, 34; AC, 'Opinion on Sweden' adopted on 25 August 2002 ACFC/INF/OP/I(2003)006 paras 29; AC, 'Second Opinion on Austria' adopted on 8 June 2007 ACFC/OP/II(2007)005 paras 63, 70; AC, 'Second Opinion on Norway' adopted on 5 October 2006 ACFC/OP/II(2006)006 paras 69-70; AC, 'Third Opinion on Austria' adopted on 28 June 2011 ACFC/OP/III(2011)005 paras 48-9.

⁵⁵ Article 15(2) ICESCR; CESCR, above n 22, paras 6 and 52. See also, O'Keefe, above n 19, 918; Donders, above n 12, 158-59.

⁵⁶ CESCR, above n 22, paras 6.

specific communities'.⁵⁷ The consideration of article 15(1)(a) ICESCR by the CESCR is a relatively recent development, as it had previously been neglected in favour of economic and social rights.⁵⁸ As a result, the CESCR's work in this area has been described 'as good but limited'.⁵⁹ Specifically, the CESCR has not, of yet, developed a body of jurisprudence in relation to the ICESCR and, therefore, its elaboration of article 15(1)(a) ICESCR has been limited to General Comment No 21 and its Concluding Observations on State Reports. This is in direct contrast to the HRC, which has established a body of jurisprudence under article 27 ICCPR, and the detailed consideration given to the rights contained in the FCNM by the AC during the State reporting procedure.

The progressive nature of the rights contained in the ICESCR may, however, lead to the establishment of a more robust right to culture under the ICESCR than the ICCPR, in the long term.⁶⁰ Article 27 ICCPR constitutes an immediate right and, thus, the HRC identifies the point at which a violation of a right has occurred, rather than encouraging States to strive to achieve higher standards.⁶¹ In contrast, Brems has suggested that through the monitoring practice of the CESCR and 'the use of indicators and benchmarks',⁶² rights may be maximised in order 'to avoid the bottom line tendency of the violations approach'.⁶³ Similarly to the ICESCR, the FCNM contains programmatic rights.⁶⁴ The AC has, through the State reporting process, taken an investigative approach and utilised information from a variety of sources in order to ascertain the extent to which States have implemented the rights contained in the FCNM.⁶⁵ This has led to 'an organic growth following Opinions of the Advisory Committee and Resolutions of the Committee of Ministers'.⁶⁶

⁵⁷ Donders, above n 12, 190.

⁵⁸ CESCR, above n 19, 5; Stamatopoulou, above n 20, 1172, 1180.

⁵⁹ Stamatopoulou, above n 20, 1180.

⁶⁰ Article 2(1) ICESCR.

⁶¹ E Brems, 'Human Rights: Minimum and Maximum Perspectives' (2009) 9 Human Rights Law Review 349, 353.

⁶² *Ibid.*, 356.

⁶³ *Ibid.*, 358.

⁶⁴ Council of Europe, above n 16, para 11.

⁶⁵ A Phillips, *The Framework Convention for the Protection of National Minorities: A Policy Analysis* (Minority Rights Group International 2002) 6; A Phillips, 'The 10th Anniversary of the Framework Convention for the Protection of National Minorities' (2008) 1 *Europäisches Journal für Minderheitenfragen* 181, 181-182.

⁶⁶ Phillips (2008), above n 65, 184. See, further, K Drzewicki, 'Advisability and Feasibility of Establishing a Complaints Mechanism for Minority Rights' (2010) 21 *Security and Human Rights* 93, 102.

Consequently, the nature of the rights contained in the ICESCR and FCNM may enable their monitoring bodies to elaborate upon the positive measures required to ensure the achievement of the right to culture, to a degree that would not be possible under the violations approach adopted under the ICCPR.

3.2.1.3. Preliminary Conclusions

The right to culture has been understood in a similar manner in both generally applicable human rights and minority rights instruments. In particular, monitoring bodies have interpreted 'culture' widely to include a variety of practices, acknowledged the importance of positive measures to facilitate the achievement of this right and have recognised its collective element. The ICESCR is subject to progressive implementation, which may lead to the establishment of higher standards, over time, than it is possible to achieve utilising a violations approach under the minority-specific article 27 ICCPR. However, the consideration of the right to culture by the CDESCR is a relatively recent development and, thus far has only received limited attention. Furthermore, the interpretation of article 15(1)(a) ICESCR in an analogous manner to article 27 ICCPR may suggest recognition of the interrelated and interdependent nature of human rights standards. In comparison to the ICESCR, the programmatic nature of the rights contained in the FCNM has allowed the AC to significantly develop the content of this right, through the State reporting process and its thematic commentaries.

The ICCPR contains a number of rights that constitute prerequisites for the achievement of the right to culture, including freedom of expression, freedom of association and freedom of assembly. In contrast, these rights fall outside the remit of the CDESCR. The interconnected nature of the rights contained in the ICCPR, permits the HRC to interpret these rights in a manner that contributes to the achievement of the minority-specific article 27 ICCPR. The importance of these rights for the preservation of minority identity has also been reiterated in minority rights instruments. Accordingly, minority rights standards may provide a more holistic understanding of the requirements of the maintenance of minority identity, than can be found in the right to culture alone.

Furthermore, minority rights standards, in particular the FCNM and the UN Declaration on Minorities, are targeted at the needs of persons belonging to minorities, in direct contrast to article 15 ICESCR. These instruments provide specific rights, which enable the achievement of the broader right to culture, including religious rights, linguistic rights, educational rights, effective participation in cultural, social and economic life and public affairs and the right to maintain cross-border contacts. These specific minority rights standards have, in turn, been subject to detailed elaboration by monitoring bodies, most notably, the right to education. In comparison, these elements have only received cursory attention in the context of article 15(1)(a) ICESCR. Therefore, it appears that the specific, detailed and targeted nature of minority rights standards constitutes the added-value of minority rights protection.

3.2.2. Religious Rights

Within generally applicable human rights standards, article 18 of the ICCPR and the UDHR, article 9 of the ECHR and article 1 of the UN Declaration on Religion or Belief contain a stand-alone right to freedom of religion:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.⁶⁷

Although the UN Declaration on Minorities does not contain a stand-alone right to freedom of religion, the importance of religious rights for the preservation of minority identity is affirmed by the inclusion of 'the right ... to profess and practise their own religion' in article 2(1) of the UN Declaration on Minorities as well as article 27 ICCPR. In contrast, article 8 FCNM establishes a specific right to manifest

⁶⁷ Article 18(1) ICCPR; article 1(1) UN Declaration on Religion or Belief. See also, article 9 ECHR.

religion 'and to establish religious institutions, organisations and associations', in addition to article 7 FCNM, which reiterates the right to freedom of religion.

Although the right to manifest religion constitutes a universal human right, its repetition in article 8 FCNM affirms the particular relevance of freedom of religion to persons belonging to religious minorities.⁶⁸ Specifically, Machnyikova suggests that the inclusion of article 8 in the FCNM, when a general right to freedom of religion is provided in article 7 'highlights the essential role that the profession of religion plays in preserving a minority group's identity and existence'.⁶⁹ Notably, the AC has also considered freedom of religion in relation to 'new minorities' under article 6 FCNM.⁷⁰

Nonetheless, freedom of religion under the ECHR and ICCPR has been more readily utilised than minority rights standards by both persons belonging to religious minorities and supervisory mechanisms.⁷¹ This has led Xanthaki to suggest:

Because the right to culture is not as well established as the right to religion in international law, this blurring of the terms religion and culture enables the better consolidation of some claims by using the right to religion as their legal basis.⁷²

However, in direct contrast, Evans has asserted that:

⁶⁸ Council of Europe, above n 16, para 51.

⁶⁹ Z Machnyikova, 'Article 8' in M Weller (ed), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP 2005) 259-260.

⁷⁰ AC, 'Second Opinion on Denmark' adopted on 09 December 2004 ACFC/INF/OP/II(2004)005 paras 88, 93, 101; AC, 'Second Opinion on Slovenia' adopted on 26 May 2005 ACFC/INF/OP/II(2005)005 para 98; AC, 'Second Opinion on Sweden' adopted on 8 November 2007 ACFC/OP/II(2007)006 para 78; AC, 'Third Opinion on Denmark' adopted on 31 March 2011 ACFC/OP/III(2011)002 para 56.

⁷¹ Evans, above n 4, 182; N Ghanea, 'Religious or Minority? Examining the Realisation of International Standards in Relation to Religious Minorities in the Middle East' (2008) 36 *Religion, State & Society* 303, 309; Henrard (2009), above n 2, 42; Ghanea, above n 7, 61.

⁷² Xanthaki, above n 10, 28.

[H]uman rights law is developing in a fashion that is likely to hinder rather than assist the realization of the goals of tolerance and religious pluralism. There are two reasons for this. First, the entire human rights approach to religious liberty is increasingly geared toward a form of 'neutrality' that is inimical to religious liberty. Second, that approach tends to bear more harshly on some religious traditions than others, undermining the very values that it is said to reflect.⁷³

It is, thus, necessary, in relation to religious rights, to consider whether there is an added-value to minority rights protection, as compared to freedom of religion under generally applicable human rights instruments.

3.2.2.1. The Scope of Religious Rights

The right to freedom of religion, established in article 9 ECHR, article 18 ICCPR and article 1(1) UN Declaration on Religion or Belief, protects both the internal and external dimensions of religion. From the perspective of the preservation of minority identity, the right 'to manifest his religion or belief in worship, observance, practice and teaching' is particularly pertinent.⁷⁴ The explicit protection of the manifestation of religion 'either individually or in community with others'⁷⁵ is significant from a minority perspective as it recognises the collective element of the right. Notably, the use of 'either' does not suggest that the State has a choice whether to permit 'freedom to manifest religion' to be exercised in community with others. For example, in *X v United Kingdom* the ECommHR stressed:

⁷³ M Evans, 'Human Rights and the Freedom of Religion' in M Ipgrave (ed), *Justice & Rights – Christian and Muslim Perspectives* (Georgetown University Press 2009) 109.

⁷⁴ Article 18(1) ICCPR; article 1 UN Declaration on Religion or Belief. The same elements are also found, in a different order, in article 9(1) ECHR and article 18 Universal Declaration of Human Rights.

⁷⁵ Article 18(1) ICCPR; article 1 UN Declaration on Religion or Belief; article 9(1) ECHR, article 18 UDHR.

[T]he right to manifest one's religion 'in community with others' has always been regarded as an essential part of freedom of religion and finds that the two alternatives 'either alone or in community with others' in Article 9(1) cannot be considered as mutually exclusive, or as leaving a choice to the authorities, but only as recognising that religion may be practised in either form.⁷⁶

Nonetheless, Evans has submitted that freedom of religion and belief

does not adequately address all facets of religious life, particularly, its 'collective' dimensions, that is, the abilities of believers to engage with each other, and its 'group' dimensions, which concerns the manner in which the communities of believers are protected as an entity in its own right.⁷⁷

Similarly to freedom of religion and belief, article 27 ICCPR establishes that 'persons belonging to such minorities shall not be denied the right, in community with the other members of their group ... to profess and practise their own religion'. Ghana has submitted that '[i]t is the collective dimensions recognised by Article 27, in association with Article 18 of the ICCPR, that together offer a promising overlap for religious minorities discriminated on the grounds of religion or belief'.⁷⁸ Nonetheless, 'religious minorities would—self-evidently—gain a broader scope of protection of their group rights through the minority rights regime'.⁷⁹

In relation to freedom of religion in generally applicable human rights instruments, Nowak has reflected, that 'the specific emphasis of *freedom* in these rights reveals that they are primarily of a defensive nature'.⁸⁰ Consequently, as a result of its negative formulation, freedom of religion within generally applicable

⁷⁶ *Ahmad v United Kingdom* (1981) 22 DR 27.

⁷⁷ MD Evans, 'Believing in Communities, European Style' in N Ghana (ed), *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Martinus Nijhoff 2003) 134.

⁷⁸ N Ghana, 'The 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: Some Observations' in N Ghana (ed), *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Martinus Nijhoff 2003) 26.

⁷⁹ Ghana, above n 7, 62.

⁸⁰ M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) 411.

human rights instruments does not require that States take positive measures to ensure that persons belonging to religious minorities are able to preserve their religion 'individually or in community with others'.⁸¹

In contrast to freedom of religion, article 27 ICCPR, articles 2(1) and 4(2) UN Declaration on Minorities and article 5 FCNM require that States take positive measures to ensure that persons belonging to minorities are able to preserve their identity.⁸² Gilbert has observed that 'Article 5 [FCNM] is the explicit recognition that the guarantee of freedom of religion for individuals requires necessary conditions to be put in place by the State'.⁸³ The HRC has also stressed 'that these rights [article 27] must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant'.⁸⁴ Therefore, it can be concluded that the rights conferred by article 27 ICCPR are wider in scope than those conferred by article 18 and are a prerequisite for religious minorities to maintain their identity.

Although a right to freedom of religion has been established under a number of generally applicable human rights and minority rights instruments, the interpretation of the right to manifest religion has not developed in a consistent manner. The scope of article 18 ICCPR has been considered infrequently by the HRC under its individual complaints procedure,⁸⁵ which has resulted in a 'paucity of interpretive material'.⁸⁶ Accordingly, General Comment No 22 of the HRC on the right to freedom of thought, conscience and religion⁸⁷ despite only providing a 'conservative list' of manifestations,⁸⁸ has been described as 'the only available authoritative interpretation of article 18'.⁸⁹

However, within the UN system, both the UN *Study of Discrimination in the Matter of Religious Rights and Practice* (the Krishnaswami report) and article 6 of

⁸¹ Ghanea, above n 7, 64-5.

⁸² HRC, above n 34, para 6.2; Council of Europe, above n 16, para 43; Commission on Human Rights, above n 1, paras 29, 33, 56.

⁸³ Gilbert, above n 38, 163.

⁸⁴ HRC, above n 34, para. 9.

⁸⁵ N Lerner, *Religion, Secular Belief and Human Rights: 25 Years after the 1981 Declaration* (Martinus Nijhoff 2006) 27.

⁸⁶ Evans, above n 4, 208.

⁸⁷ HRC, 'General Comment No 22' on 'The Right to Freedom of Thought, Conscience and Religion (Art. 18)' UN doc CCPR/C/21/Rev.1/Add.4 para 4.

⁸⁸ PM Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP 2005) 220.

⁸⁹ K Boyle, 'Freedom of Religion in International Law' in J Rehman SC Breau (eds), *Religion, Human Rights and International Law: a Critical Examination of Islamic State Practices* (Martinus Nijhoff 2007) 40.

the UN Declaration on Religion or Belief have also expanded upon the content of manifestation of religion.⁹⁰ Notably, the Krishnaswami report observes that the terms 'teaching, practice, worship and observance' were intended to incorporate every conceivable manifestation of a religion.⁹¹ Whereas, the elaboration of protected manifestations of religion in article 6 of the UN Declaration on Religion or Belief is not as comprehensive as the Krishnaswami report, it does elaborate minimum standards⁹² that have been acknowledged to be 'the widest scope given to this freedom in a UN *instrument*'.⁹³

The only authoritative interpretation of article 9 ECHR can be found through the jurisprudence of the European Commission on Human Rights (ECommHR) and the ECtHR. As a result, often only instances when a manifestation of religion is not protected under article 9 ECHR find expression in the case law of the Strasbourg institutions, forming a negative rather than positive list. Furthermore, Taylor warns that:

[T]he educational context of the European cases concerning the wearing of Muslim headscarves has been integral to the reasoning of those decisions without giving sufficient emphasis to the practice as an obvious and straightforward manifestation. Individual decisions are not only few in number but often emerge from a particular background which limits the recognition given to certain practices.⁹⁴

Given that the decisions of the Strasbourg institutions are specific to the circumstances of the case,⁹⁵ these cases should be used with caution to identify protected manifestations of religion.

While freedom of religion, under both article 18 ICCPR and article 9 ECHR, constitutes a minimum standard, articles 7 and 8 FCNM are subject to progressive realisation. The FCNM was initially criticised for the programmatic nature of its

⁹⁰ A Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, UN doc E/CN.4/Sub.2/200/Rev.1, 17; N Lerner, 'The Nature and Minimum Standards of Freedom of Religion or Belief' [2000] *Brigham Young University Law Review* 905, 920.

⁹¹ Krishnaswami, above n 90, 17.

⁹² Ghanea, above n 78, 22.

⁹³ *Ibid.*, 23.

⁹⁴ Taylor, above n 88, 290.

⁹⁵ Article 46(1) ECHR.

rights.⁹⁶ However, arguably this has been one of its strengths as the AC has been able to flesh out the content of rights through the State reporting process beyond the minimum standards contained in the ECHR and ICCPR. In this respect, Alidadi and Foblets submit that:

[U]nder a violations-focused approach more restrictions will be allowed on individual's beliefs and practices and room for religious diversity will be much more limited than under an approach where States aim for good practices and commit to 'gradually realising these rights, their available resources determining the precise extent of their obligations'.⁹⁷

Consequently, the programmatic nature of the religious rights contained in the FCNM may lead to a higher standard of protection for persons belonging to religious minorities, than the violations-focused approach adopted under generally applicable human rights instruments.

Although the AC did not initially consider article 7 and 8 in great detail,⁹⁸ the AC has increasingly considered the content of these rights in its Opinions on the Second and Third rounds of State Reports.⁹⁹ Furthermore, the AC has elaborated upon the content of the right to manifest religion under article 6 FCNM. Notably, under the FCNM, protected manifestations of religion include: the registration of religious organisations and associations;¹⁰⁰ the restitution of religious property;¹⁰¹

⁹⁶ G Alfredsson, 'A Frame an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures' (2000) 7 *International Journal on Minority and Group Rights* 291, 293.

⁹⁷ K Alidadi and M-C, Foblets, 'Framing Multicultural Challenges in Freedom of Religion Terms: Limitations of Minimal Human Rights for Managing Religious Diversity in Europe' (2012) 30 *Netherlands Quarterly of Human Rights* 388, 395.

⁹⁸ R Hofmann, 'The Work of the Advisory Committee under the Framework Convention for the Protection of National minorities, with Particular Emphasis on the Case of Germany' in M Scheinin and R Toivanen, (eds), *Rethinking Non-Discrimination and Minority Rights* (Institute for Human Rights Åbo Akademi University and Deutsches Institut für Menschenrechte 2004) 76.

⁹⁹ SE Berry, 'A Tale of Two Instruments: Religious Minorities and the Council of Europe's Rights Regime' (2012) 30 *Netherlands Quarterly of Human Rights* 10, 19.

¹⁰⁰ See, for example, AC, 'Opinion on Azerbaijan' adopted on 22 May 2003 ACFC/INF/OP/I(2004)001 paras 46-7; AC, 'Opinion on the Russian Federation' adopted on 13 September 2002 ACFC/INF/OP/I(2003)005 paras 72-3; AC, 'Second Opinion on the Russian Federation' adopted on 11 May 2006 ACFC/OP/II(2006)004 paras 170, 172; AC, 'Third Opinion on Moldova' adopted on 26 June 2009 ACFC/OP/III(2009)003 paras 102-4.

¹⁰¹ See, for example, AC, 'Opinion on Albania' adopted on 12 September 2002 ACFC/INF/OP/I(2003)004 para 43; AC, 'Opinion on Georgia' adopted on 19 March 2009 ACFC/OP/I(2009)001 paras 93, 96-7; AC, 'Second Opinion on Albania' adopted on 29 May 2008

religious education;¹⁰² planning permission for places of worship¹⁰³ and cemeteries;¹⁰⁴ religious dietary rules,¹⁰⁵ circumcision;¹⁰⁶ observation of religious holidays;¹⁰⁷ and the wearing of religious attire.¹⁰⁸ In contrast to the FCNM, the scope of 'religion' and the rights of religious minorities have not been the focus of detailed attention under article 27 ICCPR or the UN Declaration on Minorities.¹⁰⁹

Significantly, in relation to religious education, higher standards have been established under the FCNM than under generally applicable human rights standards. Generally applicable human rights standards establish 'the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions'.¹¹⁰ Thus, parents may ensure the transmission of minority identity to their children through education. Nonetheless, these standards are recognised to constitute negative rather than positive rights. As noted by Temperman:

Under international human rights law, the state is under no obligation to help establish or support religious educational schools. The right to freedom of religion or belief and the right to education, taken in conjunction with one another, do not constitute a duty on the part of the state to provide religious education.¹¹¹

ACFC/OP/II(2008)003 paras 123-24; AC, 'Second Opinion on Croatia' adopted on 1 October 2004 ACFC/INF/OP/II(2004)002 para 102; 'Second Opinion on the Russian Federation' above n 100, paras 171, 174.

¹⁰² See, for example, 'Opinion on Georgia' above n 101, paras 98-9; 'Opinion on Norway' above n 14, para 40; 'Second Opinion on Norway' above n 54, para 96; AC, 'Second Opinion on the United Kingdom' adopted on 6 June 2007 ACFC/OP/II(2007)003 paras 155-56; AC, 'Third Opinion on Cyprus' adopted on 19 March 2010 ACFC/OP/III(2010)002 paras 122-23.

¹⁰³ See, for example, 'Opinion on Georgia' above n 101, para 93; AC, 'Opinion on Slovenia' adopted on 12 September 2002 ACFC/INF/OP/I(2005)002 para 46; 'Second Opinion on Denmark' above n 70, paras 88, 93; AC, 'Second Opinion on Spain' adopted on 22 February 2007 ACFC/OP/II(2007)001 para 110.

¹⁰⁴ AC, 'Opinion on Montenegro' adopted on 28 February 2008 ACFC/OP/I(2008)001 para 66; AC, 'Second Opinion on Finland' adopted on 2 March 2006 ACFC/OP/II(2006)003 para 90; AC, 'Second Opinion on Moldova' adopted on 9 December 2004 ACFC/INF/OP/II(2004)004 para 84.

¹⁰⁵ AC, 'Second Opinion on Serbia' adopted on 19 March 2009 ACFC/OP/II(2009)001 para 146.

¹⁰⁶ 'Opinion on Sweden' above n 54, para 40; 'Second Opinion on Finland' above n 104, paras 93-4; 'Second Opinion on Sweden' above n 70, paras 82-3.

¹⁰⁷ AC, 'Second Opinion on Poland' adopted on 20 March 2009 ACFC/OP/II(2009)002 paras 108-12.

¹⁰⁸ 'Second Opinion on the United Kingdom' above n 102, paras 158, 161.

¹⁰⁹ See generally, Henrard (2009), above n 2. See also, Ghanea, above n 7, 65-74.

¹¹⁰ Article 18(4) ICCPR; article 13(3) ICESCR; article 2 Protocol 1 ECHR.

¹¹¹ J Temperman, 'State Neutrality in Public School Education: An Analysis of the Interplay Between the Neutrality Principle, the Right to Adequate Education, Children's Right to Freedom

Instead, these provisions acknowledge the rights of persons belonging to minorities to establish their own private educational institutions, without placing an obligation upon States to fund such institutions,¹¹² unless the denial of funding would be discriminatory.¹¹³

Minority rights standards in relation to education appear to have a similar negative formulation to generally applicable human rights standards.¹¹⁴ Yet, the interpretation of these rights by the AC implies a positive State obligation to guarantee these rights, in particular, when limitations lead to discriminatory treatment¹¹⁵ or, significantly, inhibit the ability of persons belonging to minorities to maintain their distinct identity.¹¹⁶ Indeed, the AC has explicitly encouraged States to take a proactive approach and to fund minority education.¹¹⁷ In relation to Sweden, for example, the AC found the authorities' decision to cease funding Jewish schools 'highly regrettable'.¹¹⁸

Through the reporting process, the AC has been able to maximise the scope of the education rights contained in the FCNM. Similarly, the Commentary of the UN Working Group on Minorities has suggested that in relation to the maintenance of minority identity, '[i]n the same way as the State provides funding for the development of the culture and language of the majority, it shall provide resources for similar activities of the minority'.¹¹⁹ Accordingly, minority rights standards have been interpreted to impose positive obligations upon States to ensure that persons

of Religion or Belief, Parental Liberties, and the Position of Teachers' (2010) 32 Human Rights Quarterly 865, 883.

¹¹² Article 13(3) ICESCR; CESCR, 'General Comment No 13' in 'The Right to Education (Article 13 of the Covenants)' UN doc E/C.12/1999/10 para 29; MA Martín Estébanez, 'The United Nations International Covenant on Economic, Social and Cultural Rights' in K Henrard and R Dunbar (eds), *Synergies in Minority Protection - European and International Law Perspectives* (CUP 2008) 235; F Coomans, 'UNESCO's Convention Against Discrimination in Education' in K Henrard and R Dunbar (eds), *Synergies in Minority Protection - European and International Law Perspectives* (CUP 2008) 305; K Henrard, 'Education and Multiculturalism: the Contribution of Minority Rights?' (2000) 7 International Journal on Minority and Group Rights 393, 403.

¹¹³ *Waldman v Canada* Communication no 694/1996, UN doc CCPR/C/67/D/694/1996 para 10.6.

¹¹⁴ Article 13 FCNM; CSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* para 32; 'The Hague Recommendations and Explanatory Note', above n 30, 13.

¹¹⁵ AC, above n 29, 9-10.

¹¹⁶ See, for example, 'Opinion on Austria' above n 14, paras 26, 94; AC, 'Opinion on Cyprus' adopted on 6 April 2001 ACFC/INF/OP/I(2002)004 para 29; AC, above n 29, 9-10.

¹¹⁷ AC, above n 29, 22-3, 26-7.

¹¹⁸ 'Second Opinion on Sweden' above n 70, paras 142.

¹¹⁹ Commission on Human Rights, above n 1, para 56.

belonging to minorities are able to access publicly funded education that meets their religious needs to the same extent as persons belonging to the majority and other minorities.

While little attention has been paid to the rights of religious minorities under minority rights standards, the added-value to minority rights protection in relation to religious rights is the recognition that these rights may impose positive obligations upon States. In contrast, freedom of religion, under article 9 ECHR and article 18 ICCPR, constitute negative rights. Furthermore, the AC's interpretation of the content of rights relevant to religious minorities, as evidenced in relation to minority education, may lead to higher standards being established under the FCNM, than generally applicable human rights instruments.

3.2.2.2. *Permissible Limitations and Religious Rights*

The right to manifest religion is not absolute. Article 18(3) ICCPR, article 9(2) ECHR and article 1(3) UN Declaration on Religion or Belief recognise that this right may be subject to limitations on the grounds of 'public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'. Article 18 ICCPR and article 9 ECHR *prima facie* provide similar limitations to the right to manifest religion. Specifically, the HRC has observed 'that paragraph 3 of article 18 is to be strictly interpreted',¹²⁰ whereas the ECtHR has established the principle that 'exemptions to a Convention right must be narrowly construed',¹²¹ thus outlining the principle of 'priority to rights'.¹²² Limitations on the right to manifest religion under both article 18 ICCPR and article 9 ECHR must be proportionate to the aim pursued.¹²³ Nonetheless, the ECtHR has permitted States a margin of appreciation when considering the proportionality of limitations on the right to manifest religion. This appears to have led to a divergence in the practice of the ECtHR and the HRC.

¹²⁰ HRC, above n 87, para 8.

¹²¹ C Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001) 137.

¹²² S Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP 2006) 203-13.

¹²³ HRC, above n 87, para 8; DJ Harris and others (eds), *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (2nd edn OUP 2009) 13; Taylor, above n 88, 11.

In relation to article 9, the Strasbourg institutions initially construed the margin of appreciation extremely narrowly, as 'freedom of religion, including religious tolerance and pluralism, represents one of the most foundational rights in European democracy'.¹²⁴ The Strasbourg institutions have also recognised that 'a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position'.¹²⁵ The ECtHR has, however, increasingly employed article 9(2) and, as a result, the margin of appreciation has become progressively more significant.¹²⁶ As the State primarily represents the majority perspective, the use of the margin of appreciation in cases concerning freedom of religion has the potential to lead to the restriction of the rights of persons belonging to minorities.¹²⁷ Malcolm Evans, in particular, has criticised the Strasbourg institutions' use of the margin of appreciation in article 9 cases:

[I]t has become increasingly apparent that this is no longer understood to mean so much as respect by others *for* religion but respect *by* religions for others. The result is that religious manifestation is seen as permissible only to the extent that this is compatible with the underpinnings of the ECHR system, these being democracy and human rights. The court today seems to identify democracy and human rights with tolerance and pluralism, and is apt to construe any forms of religious manifestation which do not manifest those virtues as posing a threat to its core values.¹²⁸

Furthermore, Carolyn Evans has noted the ECtHR's 'general reluctance to acknowledge the value and religious importance of many religious practices outside of Christianity'.¹²⁹

¹²⁴ Y Arai-Takahashi, *The Margin of Appreciation and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 100. See also, *Kokkinakis v Greece* (1993) Series A no 260-A para 31.

¹²⁵ *Young, James and Webster v United Kingdom* (1981) Series A no 44 para 63.

¹²⁶ See generally, G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007); MD Evans, 'Freedom of Religion and the European Convention on Human Rights; Approaches, Trends and Tensions' in P Cane, C Evans, and Z Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008).

¹²⁷ See, generally, Berry, above n 99.

¹²⁸ Evans, above n 126, 303.

¹²⁹ C Evans, 'The "Islamic Scarf" in the European Court of Human Rights' (2006) 7 *Melbourne Journal of International Law* 52, 56.

In comparison, the fact that experts drawn from any one religious or cultural background do not dominate the UN may have led to a wider understanding of the scope of the right to manifest religion.¹³⁰ The Krishnaswami report elaborated the envisaged circumstances in which religious manifestation should be subject to limitations, '[i]nto this category fall such practices as the sacrifice of human beings, self-immolation, mutilation of the self or others, and reduction into slavery or prostitution, if carried out in the service of, or under the pretext of promoting, a religion or belief',¹³¹ polygamy,¹³² 'rebellion or subversion'¹³³ and acts contrary to peace and security.¹³⁴ This suggests that manifestations of religion can only be limited within the UN system when the practice in question is extreme and clearly violates human rights standards. The HRC has also established that 'the concept of morals should not be drawn exclusively from a single tradition'.¹³⁵ In contrast to the HRC, by allowing States a wide margin of appreciation the ECtHR may permit 'the moralistic preferences of the majority'¹³⁶ to be prioritised over the rights religious minorities. Arguably, this differing interpretation of the permissible limitations to freedom of religion has led to a divergence in the decisions of the HRC and the ECtHR in cases concerning religious attire.¹³⁷

In comparison to the right to freedom of religion elaborated in generally applicable human right instruments, article 27 ICCPR does not contain an express limitation clause. Thus, Nowak has suggested that given the *lex specialis* nature of article 27 ICCPR, the limitation clauses found in articles 18, 19, 20, 21 ICCPR 'are ... applicable to the majority but not to the minorities protected by Art. 27. This privileged status corresponds to the purpose of a specific provision for protecting

¹³⁰ Boyle, above n 89, 43.

¹³¹ Krishnaswami, above n 90, 29.

¹³² *Ibid.*, 30.

¹³³ *Ibid.*, 29.

¹³⁴ *Ibid.*, 30.

¹³⁵ Boyle, above n 89, 43.

¹³⁶ G Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 Oxford Journal of Legal Studies 705, 729.

¹³⁷ *Singh (Bikramjit) v France* Communication no 1852/2008, UN doc CCPR/C/106/D/18552/2008 para 8.7; *Singh (Ranjit) v France* Communication no 1876/2009, UN doc CCPR/C/102/D/1876/2009 paras 8.3 and 8.4 Cf. *Karaduman v Turkey* (1993) 74 DR 93; *Aktas v France* App no 43563/08 (ECtHR 30 June 2009); *Bayrak v France* App no 14308/08 (ECtHR 30 June 2009); *Gamaleddyn v France* App no 18527/08 (ECtHR 30 June 2009); *Ghazal v France* App no 29134/08 (ECtHR 30 June 2009); *Singh v France* App no 25463/08 (ECtHR 30 June 2009); *Singh v France* App no 27561/08 (ECtHR 30 June 2009).

minorities'.¹³⁸ This view is consistent with the HRC's view that article 27 'should not be confused with other personal rights conferred on one and all under the Covenant'.¹³⁹

Yet, the UN Declaration on Minorities does establish under article 4(2) that States should:

[C]reate favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, *except where specific practices are in violation of national law and contrary to international standards*.¹⁴⁰

This provision has been interpreted to imply that States have a margin of appreciation when determining 'which practices it wants to prohibit, taking into account the particular conditions prevailing in that country. As long as the prohibitions are based on reasonable and objective grounds, they must be respected'.¹⁴¹ However, this clause allows the States to limit their positive obligation to 'create favourable conditions' rather than the negative 'freedom to manifest religion'. Consequently, it is the positive aspect of this right, which does not exist under generally applicable human rights standards, that is subject to restriction. Accordingly, UN minority rights standards in relation to religion are wider in scope and subject to fewer restrictions than the generally applicable right to freedom of religion.

Although the FCNM does not contain limitation clauses, article 19 permits States to limit the rights in the Convention in accordance with 'international legal instruments, in particular the Convention for the Protection of Human Rights and Fundamental Freedoms'. While the ECHR has primacy under article 19, the reference to other 'international legal instruments' leads to the conclusion that the scope of limitations permitted under the ICCPR must also be considered.¹⁴² If the

¹³⁸ Nowak, above n 80, 667.

¹³⁹ HRC, above n 34, para 9.

¹⁴⁰ [Emphasis added].

¹⁴¹ Commission on Human Rights, above n 1, para 58.

¹⁴² L Hannikainen, 'Article 19' in M Weller (ed), *The Rights of Minorities – A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP 2005) 520, 528.

HRC were to interpret permissible limitations to Covenant rights more restrictively than the ECtHR, this would result in a higher standard of protection under the ICCPR than the ECHR.

Additionally, article 23 FCNM establishes that the rights in the FCNM 'in so far as they are the subject of a corresponding provision in the Convention for the Protection of Human Rights and Fundamental Freedoms or in the Protocols thereto, shall be understood so as to conform to the latter provisions'. However, despite the *prima facie* similarity between articles 7 and 8 FCNM and article 9 ECHR, these rights do not necessarily correspond with one another.¹⁴³ Not only do minority rights standards establish positive obligations, in comparison to the negative freedom of religion established in the ECHR, the programmatic nature of the rights contained in the FCNM, their targeted nature and the differing mandates of the respective monitoring bodies has led Spiliopoulou Åkermark to observe that can never be 'a true "correspondence of provisions"'.¹⁴⁴ Thus, the adoption of an identical interpretation of articles 7 and 8 FCNM to that adopted by the Strasbourg institutions, in relation to article 9 ECHR, may be inappropriate given the differing scope and purpose of these rights.

As the purpose of article 23 has been interpreted as 'prevent[ing] past achievements in this field from being watered down',¹⁴⁵ it would also seem contradictory for article 23 to impose an obligation to follow the ECtHR's interpretation of rights strictly, if this were to impose a lower standard than that established under the ICCPR. A similar argument can be made in relation to the application of the limitation clauses contained in the ECHR to the provisions of the FCNM. Consequently, there is potential for religious rights to be interpreted more liberally under the FCNM, than the ECHR.

¹⁴³ Article 19 FCNM.

¹⁴⁴ S Spiliopoulou Åkermark, 'The Added Value of the Framework Convention for the Protection of National Minorities (I)' in A Verstichel and others (eds), *The Framework Convention for the Protection of National Minorities: a Useful Pan-European Instrument?* (Intersentia 2008) 83.

¹⁴⁵ P Hilpold, 'Article 23' in M Weller (ed), *The Rights of Minorities – A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP 2005) 561.

3.2.2.3. *Preliminary Conclusions*

The content of the right to manifest religion has not been subject to significant elaboration under minority rights standards. In contrast, the content of the generally applicable human right to freedom of religion has been elaborated in the UN Declaration on Religion or Belief, the Krishnaswami Report and General Comment No 18 of the HRC. Despite the fact the Strasbourg institutions have developed considerable jurisprudence under article 9 ECHR, this is of limited use as their decisions only apply to the specific case being considered. Thus, Taylor has counselled that '[t]he use of different sources to identify accepted forms of manifestation of religion or belief is therefore important to help to avoid such distortions, particularly in European case law'.¹⁴⁶

Minority rights standards relating to religion may strengthen the protection afforded under international law to religious minorities, as they require that States take positive measures to ensure their achievement, in comparison to freedom of religion, which constitutes a negative right. The progressive elaboration of the rights contained in the FCNM, through the State reporting process, also has the potential to extend the scope of religious rights further than is possible within the violations-approach utilised in relation to the ECHR and ICCPR, as has been noted in relation to the right to religious education. Additionally, although limitations on minority rights standards are permitted, these do not appear to be as wide as those permitted under article 9 ECHR and article 18 ICCPR. Notably, it has been suggested that as the rights contained in article 7 and 8 FCNM are not directly comparable to article 9 ECHR, they should not be subject to the same limitations. Accordingly, there is a potential added-value to minority rights protection for religious minorities.

3.2.3. *Preliminary Conclusions*

The right of persons belonging to minorities to maintain their identity is expressly provided in article 27 ICCPR, article 2(1) UN Declaration on Minorities and article 5 FCNM. A number of generally applicable human rights standards also contribute to the achievement of this tenet of minority rights protection. The rights to freedom

¹⁴⁶ Taylor, above n 88, 290.

of expression, freedom of association and freedom of assembly constitute prerequisites for the preservation of minority identity. Furthermore, significant overlap exists between generally applicable human rights standards, namely, the right to culture and freedom of religion, and the content of these minority rights provisions.

Nonetheless, an added-value to minority rights protection can still be discerned. Whereas the right to culture under the ICESCR has been interpreted in a similar manner to minority rights provisions in terms of both content and scope, minority rights standards not only provide a general right to culture but also specific, targeted rights including linguistic, religious and education rights. These targeted rights have been elaborated by minority rights monitoring bodies and, therefore, establish far more robust standards than has been possible through the liberal interpretation of article 15(1)(a) ICESCR by the CESCR.

Freedom of religion under generally applicable human rights instruments constitutes a negative right. Thus, whilst the rights of religious minorities have not been the focus of attention under minority rights standards, the requirement that States take positive measures to ensure the achievement of the preservation of minority identity, leads to the conclusion that there is a potential added-value to minority rights protection for religious minorities. The limitations permitted to minority rights standards are also not as wide in scope as those permitted in relation to the right to manifest religion under the ECHR and ICCPR.

There is a clear added-value to minority rights protection in relation to both the right to culture and religious rights. In particular, the programmatic nature of the rights contained in the FCNM has allowed the AC to flesh out the content of minority rights standards. However, while the rights considered contribute to the preservation of minority identity, they may be insufficient to facilitate the achievement of this right if the other elements of minority protection are not fulfilled. Minority rights standards are intertwined and mutually dependent. Consequently, it is also necessary to consider the extent to which the remaining three tenets of minority rights protection would impact the realisation of the preservation of minority identity.

3.3. EQUALITY AND NON-DISCRIMINATION

Both minority rights instruments and generally applicable human rights instruments contain rights that serve the purpose of preventing discrimination against persons belonging to minorities including accessory non-discrimination provisions,¹⁴⁷ autonomous provisions that prohibit discrimination on specific grounds,¹⁴⁸ and a right to equality.¹⁴⁹ As it has been suggested that the prohibition of discrimination and the protection of human rights are sufficient to ensure the protection of persons belonging to minorities,¹⁵⁰ it is necessary to consider whether there is an added-value to the protection offered under minority rights instruments. Furthermore, the extent to which equality and non-discrimination have the potential to facilitate the preservation of minority identity will be elaborated.

3.3.1. Prohibited Grounds of Discrimination

Article 2(2) ICESCR and article 2(1) ICCPR prohibit discrimination in the application of Covenant rights on the grounds of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. As the enumerated grounds contained in these provisions are not exhaustive,¹⁵¹ the addition of 'association with a national minority' to article 14 and Protocol 12 ECHR has arguably not added significantly to the protection of national minorities. Additionally, this ground of discrimination has generally been avoided by the Strasbourg institutions, which have chosen to decide cases on the grounds of 'race' or 'religion' in preference to 'association with a national minority'.¹⁵²

¹⁴⁷ Article 14 ECHR; article 2(2) ICESCR; article 2(1) ICCPR.

¹⁴⁸ ICERD; UN Declaration on Religion or Belief; Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms - Prohibition of Discrimination CETS No 177, entered into force 1 April 2005; articles 4(1) and 6(2) FCNM; article 3 UN Declaration on Minorities.

¹⁴⁹ Article 26 ICCPR; article 4 FCNM; article 4(1) UN Declaration on Minorities.

¹⁵⁰ Evans, above n 4, 182-83.

¹⁵¹ Y Klerk, 'Working Paper on Article 2(2) and Article 3 of the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 250, 256; S Davidson, 'Equality and Non-Discrimination' in A Conte, S Davidson and R Burchill (eds), *Defining Civil and Political Rights – The Jurisprudence of the United Nations Human Rights Committee* (Ashgate 2004) 162 Nowak, above n 80, 47.

¹⁵² *DH and others v Czech Republic* App no 57325/00 (ECtHR, 7 February 2006) paras 32, 45, 48, 52. See also, K Henrard, *Equal Rights versus Special Protection – Minority Protection and the*

Specialised regimes prohibit discrimination on the grounds of race,¹⁵³ religion¹⁵⁴ and minority identity.¹⁵⁵ While the ICERD and FCNM are binding instruments and have monitoring bodies, the non-binding UN Declaration on Religion or Belief and UN Declaration on Minorities do not have enforcement mechanisms.¹⁵⁶ Nonetheless, the UN Special Rapporteur on Freedom of Religion or Belief and the UN Independent Expert on Minority Issues are mandated to monitor the implementation of the UN Declaration on Religion or Belief and the UN Declaration on Minorities, respectively.¹⁵⁷ Still, the existence of a complaints mechanism significantly enhances the effectiveness of ICERD. Consequently, despite assertions that the UN Declaration on Religion or Belief is 'declarative of existing law'¹⁵⁸ and part of customary international law,¹⁵⁹ and that the UN Declaration on Minorities is an authoritative interpretation of the binding article 27 ICCPR,¹⁶⁰ persons belonging to minorities will find it difficult to assert these rights and, hence, are more likely to rely on the binding non-discrimination provisions found in generally applicable human rights instruments.

The definition of 'racial discrimination' employed in ICERD is established in article 1(1) as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin ...'. Felice has commented that "[n]ational or ethnic origin" denotes linguistic, cultural, and historical roots. Thus,

Prohibition of Discrimination (European Communities 2007) 37; Harris and others above n 123, 602-603.

¹⁵³ ICERD.

¹⁵⁴ UN Declaration on Religion or Belief.

¹⁵⁵ Articles 4 and 6(2) FCNM; article 3 UN Declaration on Minorities.

¹⁵⁶ Evans, above n 4, 247.

¹⁵⁷ Commission on Human Rights, 'Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' (21 April 2005) UN doc E/CN.4/RES/2005/79 para 6(a); Human Rights Council, 'Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' (14 December 2007) UN doc A/HRC/RES/6/37 para 17(c); Human Rights Council, 'Freedom of Religion or Belief: Mandate of the Special Rapporteur on Freedom of Religion or Belief' (23 July 2010) UN doc A/HRC/RES/14/11 para 15; Human Rights Council, 'Mandate of the Independent Expert on Minority Issues' (8 April 2011) UN doc A/HRC/RES/16/6 para 9(a).

¹⁵⁸ B Dickson, 'The United Nations and Freedom of Religion' (1995) 44 ICLQ 327, 345; Lerner, above n 90, 931.

¹⁵⁹ DH Davis, 'The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' [2002] Brigham Young University Law Review 217, 230.

¹⁶⁰ A Xanthaki, *Indigenous Rights and United Nations Standards – Self-Determination, Culture and Land* (CUP 2007) 200; I Brownlie, *Principles of Public International Law* (4th edn, OUP 1990) 699.

this broad concept of race clearly is not limited to objective, mainly physical elements, but also includes subjective and social components'.¹⁶¹ As the ground of 'race' has been interpreted in a similarly broad manner by human rights bodies, so as to include 'national or ethnic origin',¹⁶² ICERD may provide additional protection for persons belonging to national or ethnic minorities.

The Strasbourg Institutions have identified both race and religion as particularly serious forms of discrimination. For example, in *Hoffmann v Austria*, the ECtHR noted that 'a distinction based essentially on a difference in religion alone is not acceptable'.¹⁶³ Furthermore, the ECtHR has recognised discrimination on the grounds of race as 'a particularly invidious kind of discrimination ... [that], in view of its perilous consequences, requires from the authorities special vigilance and vigorous reaction'.¹⁶⁴ Therefore, 'very weighty reasons' must be given to justify such distinctions.¹⁶⁵

Nonetheless, within the jurisprudence of the Strasbourg institutions and the HRC, article 14 and Protocol 12 ECHR and articles 2(1) and 26 ICCPR have been utilised infrequently. In particular, violations of articles 2(1) and 26 ICCPR have only been found in a small number of cases and rarely on the ground of religion.¹⁶⁶ As a result, the weak protection offered by the UN Declaration on Religion or Belief is not significantly enhanced by the ICCPR.

¹⁶¹ WF Felice, 'The UN Committee on the Elimination of All Forms of Racial Discrimination: Race, and Economic and Social Human Rights' (2002) 24 Human Rights Quarterly 205, 205,

¹⁶² HRC, 'General Comment No 18' on 'Non-discrimination' UN doc HRI/GEN/1/Rev.1 (1994) para 6; *Abdulaziz, Cabales and Balkandali v United Kingdom* (1983) Series A no 94, 54; *Nachova and Others v Bulgaria* App nos 43577/98, 43579/98 (ECtHR, 26 February 2004) para 155; *Nachova and Others v Bulgaria* ECHR 2005-VII para 144; *Moldovan and Others v Romania (no 2)* App nos 41138/98, 64320/01 (ECtHR, 12 July 2005) para 149; *Timishev v Russia* ECHR 2005-XII para 55.

¹⁶³ *Hoffmann v Austria* (1993) Series A no 255-C para 36.

¹⁶⁴ *DH and Others v Czech Republic* ECHR 2007-IV para 176.

¹⁶⁵ P van Dijk and others (eds), *Theory and Practice of the European Court of Human Rights* (4th edn Intersentia 2006) 1046; *ibid.*, para 196.

¹⁶⁶ W Vandenhoe, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia 2005) 114, 123. See, for example, *Aumeeruddy-Cziffra and 19 other Mauritanian Women v Mauritius* Communication no 35/1978, UN doc CCPR/C/OP/1 at 67 (1984); *Waldman v Canada*, above n 113, para 10.6; *Toonen v Australia* Communication no 488/1992, UN doc CCPR/C/50/D/488/1992; *Ignatane v Latvia* Communication no 884/1999, UN doc CCPR/C/72/D/884/1999; *Mundy Busyo, Osthudi Wongodi, Sibu Matubuka and Others v Democratic Republic of the Congo* Communication no 933/2000, UN doc CCPR/C/78/D/933/2000; *Alegre v Peru* Communication no 1126/2002, UN doc CCPR/C/85/D/1126/2002; *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka* Communication no 1249/2004, UN doc CCPR/C/85/D/1249/2004 para 7.4; *Vojnović v Croatia* Communication no 1510/2006, UN doc CCPR/C/95/D/1510/2006.

UN treaty bodies have recognised that vulnerable groups may be subject to more than one form of discrimination, simultaneously.¹⁶⁷ Multiple (or double) discrimination occurs when an individual is subject to discrimination on two or more of the prohibited grounds of discrimination. Specifically, CERD has submitted that:

The 'grounds' of discrimination are extended in practice by the notion of 'intersectionality' whereby the Committee addresses situations of double or multiple discrimination - such as discrimination on grounds of gender or religion – when discrimination on such a ground appears to exist in combination with a ground or grounds listed in Article 1 of the Convention.¹⁶⁸

Consequently, persons belonging to minorities who suffer from both racial discrimination, as a result of their ethnic origin, and religious discrimination, are able to benefit from the protection offered by ICERD, provided that an intersection exists between these identities.¹⁶⁹ Notably, the former UN Special Rapporteur on Religion or Belief, Abdelfattah Amor, has suggested:

[P]ositive criminal legislation should be enacted, not only imposing severe penalties on single forms of discrimination, but above all defining a new offence, that of aggravated racial and religious discrimination, which should carry a specific penalty, and naturally one that is heavier than that imposed for single forms of discrimination, whether religious or racial.¹⁷⁰

¹⁶⁷ See, for example, UN Committee on the Elimination of Discrimination against Women, 'General Recommendation No 26' on 'Women Migrant Workers' UN doc CEDAW/C/2009/WP.1/R para 13; CERD, 'General Recommendation No 32' on 'The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination' UN doc CERD/C/GC/32 para 7; HRC, 'General Comment No 28' on 'Equality Between Men and Women' UN doc CCPR/C/21/Rev.1/Add.10 para 30.

¹⁶⁸ CERD, above n 167, para 7.

¹⁶⁹ See further, Berry, above n 39, 441, 444-47. See also, European Union Agency for Fundamental Rights (FRA), 'Data in Focus Report 2 – Muslims' in *European Union Minorities and Discrimination Survey 2009*, 5 <fra.europa.eu/fraWebsite/research/publications/publications_per_year/2009/pub_dif2_en.htm> accessed 18 January 2013.

¹⁷⁰ UNGA, 'Interim Report by the Special Rapporteur of the Commission on Human Rights on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' (8 September 2000) UN doc A/55/280 para 115.

Thus, States should treat instances of double or multiple discrimination more seriously than discrimination on one of the prohibited grounds.

3.3.2. The Scope of Equality and Non-Discrimination Provisions

3.3.2.1. *Non-Discrimination*

Article 2(2) ICESCR, article 2(1) ICCPR and article 14 ECHR constitute accessory or parasitic provisions insofar as a violation of these rights can only be found in conjunction with a different convention right.¹⁷¹ A breach of a substantive right is not required provided that the discrimination suffered falls within the ambit of a substantive provision.¹⁷² Notably, the Strasbourg institutions have tended not to consider the application of article 14 in cases where a violation of a substantive right has already been found.¹⁷³

Autonomous discrimination provisions are primarily found in specialised regimes, including minority rights instruments.¹⁷⁴ Specifically, ICERD provides a general prohibition on racial discrimination, which may be utilised by ethnic and national minorities. Nonetheless, Protocol No 12 to the ECHR provides a general prohibition on discrimination including on the grounds of race, religion or association with a national minority. However, a number of Western European States, including Denmark, France, Germany and the UK, have not ratified or acceded to Protocol No 12 and, therefore, the instrument is of limited relevance to

¹⁷¹ *Abdulaziz, Cabales and Balkandali v United Kingdom*, above n 162, para 71; *Inze v Austria* (1987) Series A no 126, 17 para 36; *Botta v Italy* ECHR 1998-I para 39; HRC, above n 162, para 1; CESCR, 'General Comment No 20' on 'Non-discrimination in Economic, Social and Cultural Rights' (art.2, para. 2, of the International Covenant on Economic, Social and Cultural Rights' UN doc E/C.12/GC/20 para 7.

¹⁷² *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v Belgium* (1968) Series A no 6 para 9; *Thlimmenos v Greece* ECHR 2000-IV para 40; *Cha'are Shalom Ve Tsedek v France* ECHR 2000-VII para 86. See also, M Craven, *The International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development* (Clarendon Press 1998) 193; Nowak, above n 80, 36.

¹⁷³ *Airey v Ireland* (1979) Series A no 32 para 30. See also K 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 Council of Europe' (25 October 2006) DH-MIN(2006)020, 9. Cf. *Dudgeon v United Kingdom* (1981) Series A no 45 para 67; *Chassagnou and Others v France* ECHR 1999-III para 89; *Aziz v Cyprus* ECHR 2004-V para 35.

¹⁷⁴ ICERD; UN Declaration on Religion or Belief; article 6(2) FCNM; article 3 UN Declaration on Minorities.

European Muslims. Moreover, the ECtHR has only found a violation of Protocol No 12 in one instance,¹⁷⁵ and utilised a comparable interpretation of discrimination to that adopted under article 14 ECHR.¹⁷⁶ Wintemute has, thus, suggested that 'Protocol No. 12 probably increases the material scope of Art. 14 ... by less than has been supposed'.¹⁷⁷

Minority rights instruments establish autonomous prohibitions on discrimination, in contrast to the ECHR, ICCPR and ICESCR. Article 3(1) UN Declaration on Minorities establishes the right of '[p]ersons belonging to minorities' to 'exercise their rights ... without any discrimination', whereas article 4(1) FCNM establishes that 'any discrimination based on belonging to a national minority shall be prohibited'. Although article 3(1) UN Declaration on Minorities refers to non-discrimination in the exercise of rights, it is not an accessory provision, as it does not require that discrimination be established in relation to the rights contained in the UN Declaration on Minorities itself. Accordingly, the prohibition on discrimination contained in minority rights instruments is wider in scope than the non-discrimination provisions found in the ECHR, ICCPR and ICESCR.

The interpretation of the FCNM, a minority specific instrument, by the AC also seems to go further than generally applicable provisions. In monitoring the implementation of the prohibition of discrimination, the AC has focused on the adequacy of measures taken in national law to prevent discrimination,¹⁷⁸ the monitoring of discrimination¹⁷⁹ and the socio-economic situation of persons belonging to national minorities.¹⁸⁰ In particular, the AC has urged 'the authorities to

¹⁷⁵ *Sejdić and Finci v Bosnia and Herzegovina* ECHR 2009 paras 55-56; Henrard, above n 173, 9.

¹⁷⁶ *Sejdić and Finci v Bosnia and Herzegovina*, above n 175, para 55.

¹⁷⁷ R Wintemute, 'Filling the Article 14 "Gap": Government Ratification and Judicial Control of Protocol No.12 ECHR: Part 2' [2004] *European Human Rights Law Review* 484, 490.

¹⁷⁸ See, for example, AC, 'Opinion on Denmark' adopted on 22 September 2000 ACFC/INF/OP/I(2001)005 para 25; AC, 'Opinion on the Netherlands' adopted on 25 June 2009 ACFC/OP/I(2009)002 paras 28-29; AC, 'Opinion on the United Kingdom' adopted on 30 November 2001 ACFC/INF/OP/I(2002)006 paras 20-22; 'Second Opinion on the United Kingdom' above n 102, paras 58-60.

¹⁷⁹ See, for example, 'Opinion on Germany' above n 14, para 24; AC, 'Opinion on Spain' adopted on 27 November 2003 ACFC/INF/OP/I(2004)004 para 39; AC, 'Second Opinion on Germany' adopted on 1 March 2006 ACFC/OP/II(2006)001 para 33; AC, 'Second Opinion on Portugal' adopted on 5 November 2009 ACFC/OP/II(2009)003 para 46; 'Second Opinion on Spain' above n 103, para 65.

¹⁸⁰ See, for example, 'Opinion on Austria' above n 14, para 23; AC, 'Opinion on Ireland' adopted on 22 May 2003 ACFC/INF/OP/I(2004)003 paras 34-40; 'Opinion on Sweden' above n 54, para 26; AC, 'Second Opinion on Austria' above n 54, para 54; 'Third Opinion on Austria' above n 54, para 42.

pay particular attention to persons most at risk of discrimination so as to enable them to be fully informed about their rights and the remedies available'.¹⁸¹

Consequently, the non-parasitic nature of non-discrimination provisions in minority rights instruments and the detailed elaboration of the requirements of this right by the AC leads to the conclusion that there is an added-value to minority rights protection, as compared to the non-discrimination provisions contained in the ECHR, ICCPR and ICESCR. In comparison, as ICERD provides a general prohibition on racial discrimination, persons belonging to purely religious or linguistic minorities cannot benefit from the protection of this instrument.

3.3.2.2. *Equality and Special Measures*

Article 4(1) UN Declaration on Minorities and article 4 FCNM also recognise the right of persons belonging to minorities to equality before the law. Similarly, article 26 ICCPR establishes a right to both equality before the law and equal protection of the law¹⁸² on the same grounds as article 2(1). 'Equality and nondiscrimination may be seen as affirmative and negative statements of the same principle'.¹⁸³ However, as noted by Judge Tanaka in the *South West Africa* case:

[T]he principle of equality before the law does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equally and unequally what are unequal. ... To treat unequal matters differently according to their inequality is not only permitted but required.¹⁸⁴

Article 1(4) ICERD, thus, explicitly recognises the value of special measures:

¹⁸¹ 'Third Opinion on Denmark' above n 70, para 40

¹⁸² Article 26 ICCPR.

¹⁸³ BG Ramcharan, 'Equality and Nondiscrimination' in L Henkin (ed), *International Bill of Rights – Covenant on Civil and Political Rights* (Columbia University Press 1981) 252.

¹⁸⁴ *South West Africa (Liberia and Ethiopia v South Africa)* (Second Phase, Judgment) [1966] ICJ Rep 6. Dissenting Opinion of Judge Tanaka, 305-6.

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination.

Both the AC and the UN Working Group on Minorities have recognised that it may be necessary for States to adopt special measures in order to ensure *de facto* in addition to *de jure* equality.¹⁸⁵ This view is shared with the HRC,¹⁸⁶ Strasbourg institutions,¹⁸⁷ CERD,¹⁸⁸ and CESCR.¹⁸⁹ Notably, while ICERD explicitly recognises the obligation upon States to guarantee equality before the law,¹⁹⁰ the UN Declaration on Religion or Belief does not contain a comparable provision. Nonetheless, the UN Special Rapporteur on Freedom of Religion or Belief has recognised the value of special measures.¹⁹¹ For example, the former UN Special Rapporteur on Religion or Belief has suggested that 'in-depth studies and analyses on the socio-economic situation of particular religious communities are vital for States to take adequate measures'.¹⁹²

CERD has interpreted the scope of special measures widely to include:

¹⁸⁵ Commission on Human Rights, above n 1, para 55; Council of Europe, above n 16, para 39. See also, article 6(2) FCNM.

¹⁸⁶ HRC, above n 162, paras 8, 10, 13; *Jacobs v Belgium* Communication no 943/2000, UN doc CCPR/C/81/D/943/2000 paras 9.3-9.5.

¹⁸⁷ *DH and Others v Czech Republic*, above n 164, para 175. See also, *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v Belgium*, above n 172, para 10; *Thlimmenos v Greece*, above n 172, para 44; *Stec and Others v United Kingdom* ECHR 2006-VI para 51

¹⁸⁸ Article 1(4) ICERD; CERD, above n 167, paras 11, 13; CERD, 'General Recommendation No 14' on 'Definition of Discrimination' (22 March 1993) UN doc A/48/18 para 2.

¹⁸⁹ CESCR, above n 171, paras 8-9. See also, Henrard, above n 152, 46.

¹⁹⁰ Article 5 ICERD.

¹⁹¹ Human Rights Council, 'Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development – Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir' (6 January 2009) UN doc A/HRC/10/8 para 36.

¹⁹² *Ibid.*, para 38-9.

[T]he full span of legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus, as well as plans, policies, programmes and preferential regimes in areas such as employment, housing, education, culture, and participation in public life for disfavoured groups, devised and implemented on the basis of such instruments.¹⁹³

Consequently, there does not appear to be an added-value to minority rights protection in respect of the measures identified in order to facilitate *de facto* equality. However, special measures are temporary and should only be employed as long as the unequal situation, giving rise to the measures, prevails.¹⁹⁴ This is in direct contrast to the measures required in order to enable the preservation of minority identity, which have been recognised in both international law and multiculturalist theories to constitute permanent rights.¹⁹⁵

Notably, it has been acknowledged that the adoption of special measures does not constitute discrimination, provided that their adoption serves a legitimate purpose and is proportionate to the aims pursued.¹⁹⁶ Not every distinction based on the enumerated grounds is prohibited. Specifically, the jurisprudence of the HRC highlights that 'distinctions are prohibited as discriminatory only when they are not supported by *reasonable and objective criteria*'.¹⁹⁷

¹⁹³ CERD, above n 167, para 13.

¹⁹⁴ HRC, above n 162, para 10; HRC, above n 34, paras 6.1-6.2; Committee on the Elimination of Discrimination against Women, 'General Recommendation No 25' on 'Temporary Special Measures' UN doc A/59/38(SUPP) para 20; CERD, above n 167, paras 11 and 16; CESCR, above n 171, para 9.

¹⁹⁵ CERD, above n 167, para 15; Kymlicka, above n 10, 31.

¹⁹⁶ Article 1(4) ICERD; articles 4(2)-(3), 6(2) FCNM; articles 4(1) and 8(3) UN Declaration on Minorities; Commission on Human Rights, above n 1, para 55; Council of Europe, above n 16, paras 39, 41; CERD, above n 167, para 16; HRC, above n 162, para 10.

¹⁹⁷ See, for example, *Broeks v the Netherlands* Communication no 172/1984, UN doc CCPR/C/OP/2 at 196 para 13; *Zwaan-de Vries v the Netherlands* Communication no 182/1984 UN doc CCPR/C/OP/2 at 209 para 13; *Sprenger v the Netherlands* Communication no 395/1990, UN doc CCPR/C/44/D/395/1990 paras 7.2 and 7.4; *Oulajin and Kaiss v the Netherlands* Communication nos 406/1990 and 426/1990, UN doc CCPR/C/46/D/406/1990 and 426/1990 para 7.3. See also, *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v Belgium*, above n 172, para 10; *Abdulaziz, Cabales and Balkandali v United Kingdom*, above n 162, para 72; *Rasmussen v Denmark* Series A no 87 para 38.

3.3.2.3. Differing Forms of Discrimination

UN treaty bodies and the ECtHR have accepted that discrimination may be either direct or *indirect*.¹⁹⁸ While *direct* discrimination occurs when measures are explicitly intended to differentiate between groups on an enumerated ground, *indirect* discrimination on the other hand, 'concerns measures that without differentiating explicitly on a certain ground (are likely to) have a disproportionate impact on a group defined according to that ground, without objective justification'.¹⁹⁹ A discriminatory intent is not required in order for a violation of non-discrimination and equality provisions to be found, provided that such an effect is proven.²⁰⁰ Notably, the former UN Special Rapporteur on Religion or Belief, Asma Jahangir, has warned:

Since indirect discrimination may also exist without intention from the perpetrator, it may be more difficult to detect and prove than direct discrimination. However, once indirect discrimination has been identified, States should adopt appropriate measures in order to remedy the situation as soon as possible.²⁰¹

In the context of minority rights protection, the AC has recognised that seemingly neutral measures may indirectly discriminate against persons belonging to national minorities²⁰² and impact the ability of persons belonging to minorities to exercise

¹⁹⁸ CERD, above n 167, para 7; *Derksen v the Netherlands* Communication no 976/2001, UN doc CCPR/C/80/D/976/2001 para 9.3; *Althammer and Others v Austria* Communication no 998/2001, UN doc CCPR/C/78/D/998/2001 para 10.2; CESCR, above n 171, para 10; *DH and Others v Czech Republic*, above n 164, para 184.

¹⁹⁹ K Henrard, 'The Protection of Minorities Through the Equality Provisions in the UN Human Rights Treaties: The UN Treaty Bodies; (2007) 14 International Journal of Minority and Group Rights 141, 150.

²⁰⁰ Article 1(1) ICERD; CERD, above n 167, para 7; *DH and Others v Czech Republic*, above n 164, para 184 cf *DH and Others v Czech Republic*, above n 152, paras 48, 52-53.

²⁰¹ Human Rights Council, above n 191, paras 38-9.

²⁰² See, for example, 'Opinion on Georgia' above n 101, para 49; AC, 'Opinion on the Implementation of the Framework Convention for the Protection of National Minorities in Kosovo' adopted on 25 November 2005 ACFC/OP/I(2005)004 para 35; 'Second Opinion on the United Kingdom' above n 102, para 53.

their rights under the FCNM.²⁰³ For example, in relation to Switzerland the AC expressed concern

about the indirect discrimination which Travellers continue to suffer, in particular in the fields of land-use planning, the regulation of constructions and the regulation of commerce. That discrimination stems from the application of legal provisions which, although they do not lay down discriminatory distinctions, simply fail to take account of the specific characteristics of the Travellers' culture and way of life.²⁰⁴

Thus, under both generally applicable human rights and minority rights standards, States must ensure that neutral measures do not indirectly discriminate against persons belonging to minorities.

International bodies have also stressed that States have an obligation to prevent both public and private acts of discrimination.²⁰⁵ *Public* discrimination occurs when the State, organs of the State or other entities performing a public function discriminate against a group,²⁰⁶ whereas *private* discrimination occurs outside the realm of the State.²⁰⁷ Specifically, the Commentary to the UN Declaration on Minorities reveals that the State is under an obligation to 'ensure that individuals and organizations of the larger society do not interfere or discriminate'.²⁰⁸ Furthermore, article 2(1) UN Declaration on Religion or Belief explicitly prohibits both public and private discrimination: '[n]o one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or other beliefs'.²⁰⁹ Under both the UN Declaration on Religion or Belief and the FCNM violence against members of religious minorities and attacks against places of

²⁰³ See, for example, AC, *Commentary on The Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs*, adopted on 27 February 2008 ACFC/31DOC(2008)001 para 76.

²⁰⁴ AC, 'Opinion on Switzerland' adopted on 20 February 2003 ACFC/INF/OP/I(2003)007 para 28.

²⁰⁵ CESCR, above n 171, para 11; HRC, 'General Comment No 31' on 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' UN doc CCPR/C/21/Rev.1/Add.13 para 8; CERD, above n 167, para 9.

²⁰⁶ N Lerner, *Group Rights and Discrimination* (2nd edn Martinus Nijhoff 2003) 54.

²⁰⁷ Vandenhoe, above n 166, 36.

²⁰⁸ Commission on Human Rights, above n 1, para 34.

²⁰⁹ See also, Human Rights Council, above n 191, para 35.

worship have been recognised as acts of private discrimination which the State has an obligation to prevent.²¹⁰

Article 20(2) ICCPR prohibits 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. Thus, under the ICCPR, States are required to prevent both *public* and *private* actors from advocating hatred that may have a particularly pernicious impact on persons belonging to minorities.²¹¹ As noted by Ghanea '[t]he occurrence of such advocacy of hate serves as a warning to the state concerned of its overarching role in obliterating such discrimination through multifaceted interventions at numerous levels'.²¹² Hence, the prohibition of advocacy of hatred is necessary to guarantee other rights contained in the ICCPR, including article 2(1), the prohibition on discrimination, and article 26, equality before the law.²¹³

While article 20(2) ICCPR provides some protection from private discrimination, this must meet the threshold of constituting 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. Consequently, this provision 'does not require States parties to prohibit advocacy of hatred in private that instigates non-violent acts of racial or religious discrimination'.²¹⁴ In contrast, under ICERD, the UN Declaration on Minorities and the FCNM, States are required to take measures to protect groups against hate speech more generally, rather than just hate speech which incites discrimination, hostility or violence.²¹⁵ In particular, 'CERD also draws into its general discourse on Article 4 cases where racial groups are subject to targeting, stigmatization, stereotyping or

²¹⁰ *Ibid.*, paras 34-5. See, for example, 'Opinion on Georgia' above n 101, para 93; AC, 'Third Opinion on Lichtenstein' adopted on 26 June 2009 ACFC/OP/III(2009)001 para 33; AC, 'Third Opinion on Sweden' adopted on 23 May 2012 ACFC/OP/III(2012)004 paras 66, 69.

²¹¹ HRC, 'General Comment No 11' on 'Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (Art. 20)' UN doc HRI/GEN/1/Rev.9 (Vol.I) para 2; N Ghanea, 'Minorities and Hatred: Protections and Implications' (2010) 17 *International Journal on Minority and Group Rights* 423, 432-35, 446.

²¹² N Ghanea, 'Expression and Hate Speech in the ICCPR: Compatible or Clashing' (2010) 5 *Religion and Human Rights* 171, 177.

²¹³ *Ibid.*, 188-89.

²¹⁴ Nowak, above n 80, 475. See also N Ghanea, 'The Concept of Racist Hate Speech and its Evolution Over Time' (28 August 2012) 3-4 <<http://www2.ohchr.org/english/bodies/cerd/docs/discussion/TD28082012/NazilaGhanea.pdf>> accessed 19 April 2012.

²¹⁵ Article 6 FCNM; article 4 ICERD: Council of Europe, above n 16, para 50; CERD, 'General Recommendation No 29' on 'Article 1(1) Regarding Descent' UN doc HRI/GEN/1/Rev.9 (Vol.II) para 18; Commission on Human Rights, above n 1, para 32.

racial profiling'.²¹⁶ Although article 4 ICERD is limited to 'racial groups', Thornberry has submitted that:

Cases can arise whether the hate speech discourse is careful to avoid direct racial or ethnic insult, and may have 'switched' its language from the racial/ethnic to the religious in relation to the same targeted community. The Committee is, it is submitted, eminently capable of addressing such re-phrasing of hate speech from within its present interpretative resources.²¹⁷

Thus, in the case of an intersection between racial and religious identity, it may be possible for religious hate speech to fall within the scope of ICERD.

Article 6 FCNM applies to 'all persons' rather than being restricted to 'national minorities' and requires that States 'take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity'. Accordingly, the AC has required that measures be taken to prevent racial, religious and linguistic hate speech.²¹⁸ Thus, although the prohibition of hate speech under both ICERD and the FCNM is similar in content, the prohibition of hate speech under the FCNM appears to have a wider scope as it is not reliant on an intersection between racial and religious identity.

The interpretation of the prohibition on hate speech by the AC and CERD has revealed that States are required to take measures to ensure the investigation of complaints and the prosecution of those private individuals responsible.²¹⁹ The AC

²¹⁶ P Thornberry, 'Forms of Hate Speech and the Convention on the Elimination of all Forms of Racial Discrimination (ICERD)' (2010) 5 *Religion and Human Rights* 97, 108.

²¹⁷ *Ibid.*, 104.

²¹⁸ AC, 'Second Opinion on Bosnia and Herzegovina' adopted on 9 October 2008 ACFC/OP/II(2008)005 paras 134, 136, 146; AC, 'Second Opinion on Kosovo' adopted on 5 November 2009 ACFC/OP/II(2009)004 para 131; 'Second Opinion on the Russian Federation' above n 100, para 152; 'Second Opinion on the United Kingdom' above n 102, paras 127-28, 131; 'Third Opinion on Sweden' above n 210, para 69.

²¹⁹ See, for example, *Gelle v Denmark* Communication no 34/2004, UN doc CERD/C/68/D/34/2004 paras 7.6 and 8; *TBB-Turkish Union in Berlin/Brandenburg v Germany* (Communication no 48/2010, UN doc CERD/C/82/D/48/2010 paras 12.3, 12.8-12.9; 'Opinion on the Netherlands' above n 178, para 43; 'Second Opinion on Bosnia and Herzegovina' above n 218, para 146; AC, 'Third Opinion on Estonia' adopted on 1 April 2011 ACFC/OP/III(2011)004 para 80; 'Third Opinion on Spain' above n 14, para 89; *Ghanea*, above n 214, 4-5.

has, further, encouraged States to ensure that legislation is effective²²⁰ and that law enforcement officials and members of the judiciary receive adequate training to implement such legislation in practice.²²¹ The importance of combatting new forms of hate speech, in particular hate speech on the internet, has also been recognised by the AC.²²² Therefore, the role of the AC, providing detailed consideration of the effectiveness of measures adopted by States parties to the FCNM, has enabled the scope of the prohibition on hate speech to be developed in accordance with emerging issues.

3.3.3. The Relevance of Non-Discrimination for the Preservation of Minority Identity

As mentioned above, the interpretation of article 4 FCNM by the AC has primarily focused on the adequacy of formal guarantees against discrimination²²³ and socio-economic discrimination.²²⁴ Thus, this provision has provided a narrow scope of protection from discrimination for persons belonging to national minorities. Nonetheless, the PCIJ in the *Minority Schools in Albania* case acknowledged the interrelationship between two tenets of minority rights protection, namely, non-discrimination and equality and the preservation of minority identity:

²²⁰ See, for example, 'Opinion on Montenegro' above n 104, para 52; 'Second Opinion on Poland' above n 107, para 94; AC, 'Second Opinion on Serbia' above n 105, para 114; 'Third Opinion on Spain' above n 14, paras 90, 93.

²²¹ See, for example, AC, 'Opinion on Finland' adopted on 22 September 2000 ACFC/INF/OP/I(2001)002 para 27; 'Opinion on the Netherlands' above n 178, para 44; 'Second Opinion on the United Kingdom' above n 102, para 132; 'Third Opinion on Denmark' above n 70, para 58; 'Third Opinion on Estonia' above n 219, para 82.

²²² 'Third Opinion on Estonia' above n 219, para 79; AC, 'Third Opinion on Finland' adopted on 14 October 2010 ACFC/OP/III(2010)007 para 91; 'Third Opinion on Spain' above n 14, paras 85-6; 'Third Opinion on Sweden' above n 210, para 63.

²²³ See, for example, 'Opinion on Denmark' above n 178, para 25; 'Opinion on the Netherlands' above n 178, paras 28-29; 'Opinion on the United Kingdom' above n 178, paras 20-22; 'Second Opinion on the United Kingdom' above n 102, paras 58-60.

²²⁴ See, for example, 'Opinion on Austria' above n 14, para 23; 'Opinion on Ireland' above n 180, paras 34-40; 'Opinion on Sweden' above n 54, para 26; 'Second Opinion on Austria' above n 54, para 54; 'Third Opinion on Austria' above n 54, para 42.

These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.²²⁵

The AC has also acknowledged the potential for discrimination to impact the preservation of minority identity²²⁶ and, specifically, in relation to Azerbaijan, noted that:

[P]ersons belonging to the numerically smaller national minority groups living in Azerbaijan, such as the Kryz, the Khynalygs or the Udins, are facing increasing difficulties to preserve their distinct identity, culture and language. This is *due inter alia* to socio-economic difficulties and internal migrations.²²⁷

Indeed, the potential for discriminatory measures to impact the preservation of minority identity has been increasingly recognised by the AC under article 6, which has a wider scope of application than article 4.²²⁸ However, this has been limited to specific issues, such as language rights²²⁹ and the building of places of worship.²³⁰

²²⁵ *Minority Schools in Albania* PCIJ Series A./B. Advisory Opinion of April 6 1935, 17.

²²⁶ See, for example, 'Opinion on Ireland' above n 180, para 35; 'Opinion on Portugal' above n 14, para 32; 'Opinion on Switzerland' above n 204, para 28; 'Opinion on the United Kingdom' above n 178, para 35; 'Second Opinion on the United Kingdom' above n 102, para 75.

²²⁷ AC, 'Second Opinion on Azerbaijan' adopted on 9 November 2007 ACFC/OP/II(2007)007 para 41.

²²⁸ See, for example, AC, 'Second Opinion Armenia' adopted on 12 May 2006 ACFC/OP/II(2006)005 para 61; 'Second Opinion on Bosnia and Herzegovina' above n 218, para 124; 'Second Opinion on Bulgaria' above n 14, para 102; AC, 'Second Opinion on Denmark' above n 70, paras 88, 93, 101; 'Second Opinion on Slovenia' above n 70, paras 98, 104; AC, 'Second Opinion on Switzerland' adopted on 29 February 2008 ACFC/OP/II(2008)002 paras 87, 89; 'Third Opinion on Norway' above n 14, paras 68, 72, 74-76.

²²⁹ See, for example, 'Opinion on the Netherlands' above n 178, para 57; 'Second Opinion on Slovenia' above n 70, paras 106, 108; 'Second Opinion on Spain' above n 103, paras 85, 88; 'Third Opinion on Austria' above n 54, paras 50-52; 'Third Opinion on Finland' above n 222, para 70; AC, 'Third Opinion on Slovenia' adopted on 31 March 2011 ACFC/OP/III(2011)003 paras 80-81.

²³⁰ 'Second Opinion on Denmark' above n 70, paras 88, 93, 101; 'Second Opinion on Slovenia' above n 70, para 98; 'Second Opinion on Sweden' above n 70, para 78; 'Third Opinion on Denmark' above n 70, para 56.

Similarly, when elucidating the purpose of article 3(1) UN Declaration on Minorities, the UN Working Group on Minorities observed that:

This principle is important, because Governments or persons belonging to majorities are often tolerant of persons of other national or ethnic origins until such time as the latter assert their own identity, language and traditions. It is often only when they assert their rights as persons belonging to a group that discrimination or persecution starts. Article 3.1 makes it clear that they shall not be subjected to discrimination for manifesting their group identity.²³¹

Provisions relating to equality and non-discrimination primarily serve the purpose of reversing disadvantage faced by persons belonging to minorities, rather than facilitating the maintenance of minority identity.²³² Thus, CERD has distinguished between special measures to reverse discrimination, which must be discontinued once equality has been achieved²³³ and measures to enable the preservation of minority identity, which constitute permanent rights:

Special measures should not be confused with specific rights pertaining to certain categories of person or community, such as, for example the rights of persons belonging to minorities to enjoy their own culture, profess and practise their own religion and use their own language ... Such rights are permanent rights, recognised as such in human rights instruments, including those adopted in the context of the United Nations and its agencies.²³⁴

Yet, by protecting the right of persons belonging to minorities to practice their religion and promote their culture on equal terms with the majority, equality and non-discrimination may also enable the maintenance of minority identity as has been observed by the PCIJ, UN Working Group on Minorities and the AC. Discriminatory

²³¹ Commission on Human Rights, above n 1, para 53.

²³² Henrard, above n 3, 8-11.

²³³ CERD, above n 167, para 27.

²³⁴ *Ibid.*, para 15.

measures may *indirectly* impact the ability of a minority to preserve their identity, whereas the assertion of minority identity may lead to discrimination against persons belonging to minorities by the majority. Accordingly, these two elements of minority protection are intertwined.

3.3.4. Preliminary Conclusions

The accessory nature of the non-discrimination provisions contained in the ECHR, ICCPR and ICESCR leads to the conclusion that non-discrimination provisions in minority rights instruments are *prima facie* wider in scope than those found in generally applicable human rights instruments. Although article 26 ICCPR establishes a stand-alone right to equality, this has rarely been utilised by the HRC, especially in cases concerning religion and, therefore, provides limited protection to persons belonging to minorities. Similarly, while Protocol 12 to the ECHR is not parasitic, its low ratification rate has hindered its effectiveness and the ECtHR has yet to establish a body of jurisprudence in this respect. The AC, in contrast, has considered the scope of articles 4 and 6 FCNM in its Opinions on State Reports and, hence, has established a clearer interpretation of the prohibition of discrimination against persons belonging to national minorities than has been possible under the ECHR. Thus, as a result of the parasitic nature of the prohibition of discrimination in ICCPR, ICESCR and ECHR, coupled with the limited elaboration of Protocol 12 to the ECHR and article 26 ICCPR, there is an added-value to minority rights protection.

Of the specialised regimes, ICERD prohibits all forms of racial discrimination and, as a consequence of the body of jurisprudence and detailed interpretation of rights developed by CERD, establishes some of the clearest standards in this respect, especially in relation to the obligations of States to prevent hate speech. Nevertheless, as ICERD's scope of application is limited to racial discrimination, religious minorities cannot benefit from its provisions unless an intersection exists between their racial and religious identity. The Commentary to the UN Declaration on Minorities and the Opinions of the AC to the FCNM reveal a similarly wide understanding of the measures required by States to prevent

discrimination, without the same limitation regarding scope of application. Hence, an added-value to minority rights protection can be discerned.

The non-binding nature of the UN Declaration on Religion or Belief and lack of enforcement mechanism significantly weakens its effectiveness. The same criticism can be made of the UN Declaration on Minorities, however, its connection with the binding article 27 ICCPR and its detailed elaboration by UN bodies²³⁵ has arguably ensured that it has remained on the international agenda to a much larger extent than the UN Declaration on Religion or Belief.

The strongest prohibition on discrimination is found in the generally applicable human rights instrument ICERD. Yet, its limited scope of application means that there remains an added-value to minority rights protection for those minorities that do not primarily identify as members of an ethnic group. Equality and the prohibition of discrimination and the preservation of minority identity have been recognised as intertwined tenets of the minority rights regime. Without non-discrimination and equality, the ability of persons belonging to minorities to maintain their identity is significantly hindered. Consequently, the achievement of equality is likely to *indirectly* contribute to the preservation of minority identity.

3.4. EFFECTIVE PARTICIPATION

The ICCPR and ECHR contain political rights *stricto sensu*: article 1 Protocol 3 ECHR and article 25 ICCPR establish the right to participate in public affairs to varying degrees. In contrast, article 15 FCNM establishes that '[t]he Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them'; whereas the soft law UN Declaration on Minorities and the politically binding Lund Recommendations on the Effective Participation of

²³⁵ Commission on Human Rights, above n 1; Human Rights Council, 'Background Document by the Independent Expert on Minority Issues, Gay McDougall, on Minorities and Effective Political Participation' (8 October 2009) UN doc A/HRC/FMI/2009/3; Human Rights Council, 'Report of the Independent Expert on Minority Issues, Gay McDougall' (7 January 2010) UN doc A/HRC/13/23; Human Rights Council, 'Recommendations of the Second Session of the Forum on Minority Issues on Minorities and Effective Political Participation (12 and 13 November 2009)' (2 February 2010) UN doc A/HRC/13/25; Human Rights Council, above n 26; Human Rights Council, 'Report of the Independent Expert on Minority Issues, Rita Izsák' (31 December 2012) UN doc A/HRC/22/49.

National Minorities in Public Life (Lund Recommendations) recognise the right of persons belonging to minorities to *effective* participation in decisions of particular relevance to the community,²³⁶ and in the public life of the State more generally.²³⁷ The emphasis on *effective* participation has also been reaffirmed by the HRC in relation to article 27 ICCPR.²³⁸

3.4.1. The Scope of Political Rights

Both article 1 Protocol 3 ECHR and article 25 ICCPR establish the right to vote and stand for election in similar terms, however, article 1 Protocol 3 ECHR is expressly limited to elections to the legislature.²³⁹ The Strasbourg institutions have, notably, increasingly interpreted 'legislature' widely, to include elections to the European Parliament and Regional Councils provided that have been vested with law-making powers.²⁴⁰ In comparison, article 25 ICCPR constitutes *prima facie* a much broader right²⁴¹ and reaffirms the commitment to non-discrimination,²⁴² establishes the right 'to take part in the conduct of public affairs, directly or through freely chosen representatives'²⁴³ and to 'have access... to public service'.²⁴⁴ ICERD also establishes that minorities should not be disadvantaged on the basis of ethnic origin in their

²³⁶ Article 2(3) UN Declaration on Minorities; HCNM, 'The Lund Recommendations on the Effective Participation of National Minorities in Public Life' (September 1999) para 1; Commission on Human Rights, above n 1, para 38; HCNM, 'The Lund Recommendations on the Effective Participation of National Minorities in Public Life and Explanatory Note' (September 1999) 16-17 para 1.

²³⁷ Article 2(2) UN Declaration on Minorities; 'The Lund Recommendations', above n 236, para 1; Commission on Human Rights, above n 1, paras 35, 38; 'The Lund Recommendations and Explanatory Note', above n 236, 16-17 para 1.

²³⁸ HRC, above n 34, para 7.

²³⁹ *Booth-Clibborn and Others v United Kingdom* (1985) 43 DR 26; *Habsburg-Lothringen v Austria* (1990) 64 DR 210; *Baskauskaitė v Lithuania* App no 41090/98 (Commission Decision, 21 October 1998); *Cherepkov v Russia* ECHR 2000-I; *Boškoski v Former Yugoslav Republic of Macedonia* ECHR 2004-VI; *Guliyev v Azerbaijan* App no 35584/02 (ECtHR 27 May 2004).

²⁴⁰ *Mathieu-Mohin and Clerfayt v Belgium* (1987) Series A no 113 para 53; *Matthews v United Kingdom* ECHR 1999-I paras 39-44; *Vito Sante Santoro v Italy* ECHR 2004-VI paras 50-53. Cf. *Booth-Clibborn and Others v United Kingdom*, above n 239, 248.

²⁴¹ Cf. GH Fox, 'The Right to Political Participation in International Law' (1992) 17 *Yale Journal of International Law* 539, 560; AA Melansek, 'Universal and European Standards of Political Participation of Minorities' in M Weller (ed), *Political Participation of Minorities – A Commentary on International Standards and Practice* (OUP 2010) 348.

²⁴² Article 25 ICCPR. If discrimination in the exercise of political rights is to be found under the ECHR then a violation of article 1 Protocol 3 in conjunction with article 14 must be found, or Protocol 12 to ECHR on the 'Prohibition of Discrimination'.

²⁴³ Article 25(a) ICCPR.

²⁴⁴ Article 25(c) ICCPR.

exercise of political rights, in particular in relation to participation in public affairs.²⁴⁵

Neither article 25 ICCPR nor article 1 Protocol 3 ECHR explicitly mention democracy nor prescribe a particular political system. Yet, as both the ECHR and ICCPR constitute living instruments²⁴⁶ their monitoring bodies have subsequently drawn the connection between democracy and the political rights elaborated in these instruments.²⁴⁷ The Strasbourg institutions and the HRC have also consistently reiterated a number of key principles necessary to ensure that elections reflect the will of the people.²⁴⁸

In particular, the Western liberal concept of democracy has enabled the Strasbourg institutions to interpret article 11, freedom of association, in the light of article 1 Protocol 3 ECHR to require the establishment of multiparty democracy.²⁴⁹ Although it has been claimed that 'it is far from settled that either the ICCPR or customary international law requires elections to take place in a multiparty setting',²⁵⁰ the HRC has stressed the importance of opposition for effective democracy.²⁵¹ In particular, in *Bwalya v Zambia* 'the Committee observe[d] that restrictions on political activity outside the only recognized political party amount[ed] to an unreasonable restriction of the right to participate in the conduct of public affairs'.²⁵² Therefore, the right to form political parties has been secured under both article 11 ECHR and article 22 ICCPR. Additionally, universal suffrage, free

²⁴⁵ Article 5(c) ICERD.

²⁴⁶ *Tyrer v United Kingdom* (1978) Series A no 26; *Judge v Canada* Communication no 829/1998, UN doc CCPR/C/78/D/829/1998 para 10.3. Article 31(3)(b) Vienna Convention on the Law of Treaties (VCLT) 1155 UNTS 331, entered into force 27 January 1980 allows 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' to be taken into account.

²⁴⁷ HRC, 'General Comment No 25' on 'The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Article 25)' UN doc CCPR/C/21/Rev.1/Add.7 para 1; *United Communist Party of Turkey and Others v Turkey* ECHR 1998-I, para 45. See also, S Wheatley, 'Minorities, Political Participation, and Democratic Governance under the European Convention on Human Rights' in M Weller (ed), *Political Participation of Minorities: A Commentary on International Standards and Practice* (OUP 2010) 180.

²⁴⁸ *X v United Kingdom* (1976) 7 DR 95, 96-7; HRC, above n 247, para 9.

²⁴⁹ *United Communist Party of Turkey and Others v Turkey* above n 247, para 25; *Socialist Party and Others v Turkey* ECHR 1998-III para 29; *Refah Partisi (The Welfare Party) and Others v Turkey* ECHR 2003-II paras 87-89.

²⁵⁰ J Vidmar, 'Multiparty Democracy: International and European Human Rights Law Perspectives' (2010) 23 *Leiden Journal of International Law* 209, 240. Cf. Nowak, above n 80, 584.

²⁵¹ *Chiiko Bwalya v Zambia* Communication no 314/1988, UN doc CCPR/C/48/D/314/1988 para 6.6; *Womah Mukong v Cameroon* Communication no 458/1991, UN doc CCPR/C/51/D/458/1991 para 9.7.

²⁵² *Chiiko Bwalya v Zambia* above n 251, para 6.6.

and periodic elections, equality of votes and representative democracy have been recognised as requirements of the political rights contained in generally applicable human rights instruments.²⁵³ The HRC and Strasbourg institutions have also affirmed the connection between democracy, political participation and freedom of assembly,²⁵⁴ association²⁵⁵ and expression.²⁵⁶

Notably, the political rights contained in generally applicable human rights instruments establish the right to participation, without an explicit recognition that such participation should be *effective*. Nevertheless, the ECtHR has consistently reiterated in its jurisprudence that Convention rights 'are not theoretical or illusory, but practical and *effective*'.²⁵⁷ Similarly, in relation to article 25 ICCPR, the HRC has stressed that it 'may be necessary to ensure that citizens have an *effective* opportunity to enjoy what it protects'.²⁵⁸ As a result, the omission of the term 'effective' from article 25 ICCPR and article 1 Protocol 3 ECHR does not necessarily lead to the conclusion that States do not need to ensure that these rights are *effective* in practice.

In contrast to generally applicable human rights, minority rights standards presuppose the existence of democratic State structures.²⁵⁹ Hence, minority rights standards focus on the effective participation of persons belonging to minorities within democratic State structures, rather than the more general requirements of democracy. The UN Declaration on Minorities establishes two separate rights in this regard: article 2(2) recognises that '[p]ersons belonging to minorities to have the right to participate effectively in ... public life', whereas article 2(3) recognises that

²⁵³ *X v the Netherlands* (1974) 1 DR 87, 89; *X v United Kingdom* above n 248, 96; *Lindsay v UK* (1979) 15 DR 247; *Moureaux and Others v Belgium* (1983) 33 DR 115 para 61; *Mátyus v Slovakia* Communication no 923/2000, UN doc CCPR/C/75/D/923/2000 para 9.2; HRC, above n 247, paras 9, 19, 21-22.

²⁵⁴ Article 11 ECHR; Article 21 ICCPR

²⁵⁵ Article 11 ECHR; Article 22 ICCPR

²⁵⁶ Article 10 ECHR; Article 19 ICCPR; *Chiiko Bwalya v Zambia* above n 251, para 6.6; HRC, above n 247, paras 12 and 25; *Gauthier v Canada* Communication no 633/1995, UN doc CCPR/C/65/D/633/1995 para 13.4. *Lingens v Austria* (1986) Series A no 103 para 41; *United Communist Party of Turkey and Others v Turkey* above n 247, paras 25, 43, 45; *Socialist Party and Others v Turkey* above n 249, paras 29, 41; *Refah Partisi (The Welfare Party) and Others v Turkey* above n 249, paras 87-89; *Ouranio Toxo and Others v Greece* ECHR 2005-X paras 34-36; *United Macedonian Organisation Ilinden – PIRIN and Others v Bulgaria* App no 59489/00 (ECtHR 20 October 2005) para 56; *Ždanoka v Latvia* ECHR 2006-IV para 115.

²⁵⁷ *Ouranio Toxo and Others v Greece* above n 256, para 37. [Emphasis added]. See also, *Artico v Italy* (1980) Series A no 37, 15-16 para 33; *United Communist Party of Turkey and Others v Turkey* above n 247, para 33.

²⁵⁸ HRC, above n 247, para 1. [Emphasis added].

²⁵⁹ AC, above n 203, para 1; 'The Lund Recommendations', above n 236, para 1; Commission on Human Rights, above n 1, para 42.

'[p]ersons belonging to minorities have the right to participate effectively in decisions ... concerning the minority to which they belong or the regions in which they live'. The AC has supported a similar interpretation of the right to effective participation under article 15 FCNM and stressed 'that the involvement of representatives of national minorities in decision-making should encompass a wide range of areas, including those not exclusively dealing with minority issues'.²⁶⁰

Nonetheless, as acknowledged in the Commentary to the UN Declaration on Minorities:

The number of persons belonging to minorities is by definition too small for them to determine the outcome of decisions in majoritarian democracy. They must as a minimum have the right to have their opinions heard and fully taken into account before decisions which concern them are adopted.²⁶¹

Consequently, both the AC and the UN Working Group on Minorities have stressed that in order to give effect to the right to effective participation, States must adopt measures to 'create the conditions necessary for the effective participation of persons belonging to national minorities'.²⁶² While 'effective participation requires representation in legislative, administrative and advisory bodies and more generally in public life',²⁶³ the adoption of additional measures including consultative and advisory mechanisms,²⁶⁴ decentralised or local forms of government²⁶⁵ and proportional electoral systems²⁶⁶ have also been recommended. Similarly, the Lund Recommendations elaborate standards in order to implement the right to effective participation,²⁶⁷ observing that '[e]xperience in Europe and elsewhere has shown

²⁶⁰ 'Second Opinion on Sweden' above n 70, para 172; AC, above n 203, para 17.

²⁶¹ Commission on Human Rights, above n 1, para 42.

²⁶² Council of Europe, above n 16, para 80; Commission on Human Rights, above n 1, para 42-8.

²⁶³ Commission on Human Rights, above n 1, para 44.

²⁶⁴ Council of Europe, above n 16, para 80; Commission on Human Rights, above n 1, para 48.

²⁶⁵ Council of Europe, above n 16, para 80; Commission on Human Rights, above n 1, para 46.

²⁶⁶ Commission on Human Rights, above n 1, 2 para 45.

²⁶⁷ H-J Heintze, 'Minority Issues in Western Europe and the OSCE High Commissioner on National Minorities' (2000) 7 *International Journal on Minority and Group Rights* 381, 383.

that, in order to promote such participation, governments often need to establish specific arrangements for national minorities'.²⁶⁸

Although both minority rights and generally applicable human rights instruments establish that participation must be *effective*, generally applicable human rights instruments have focused on the preconditions of democracy and equality, whereas minority rights instruments have recognised that democratic structures may be insufficient to enable the effective participation of persons belonging to minorities in the decision-making process. Therefore, the added-value of minority rights standards in this respect is the recognition that the guarantee of equal participation is insufficient if persons belonging to minorities are to be able to *effectively* exercise their political rights and the requirement that additional measures be adopted in order to ensure the achievement of this right.

3.4.2. A Right to Consultation/Influence?

The equal participation of persons belonging to minorities in political institutions does not *per se* ensure that persons belonging to minorities are able to influence the outcome of the decision-making process, as they can still be outvoted by the majority in such institutions.²⁶⁹ Hence, it is necessary to consider whether political rights require that persons belonging to minorities merely be consulted on matters of concern or be able to influence the outcome of decision-making processes.

In *Young, James and Webster v United Kingdom* the ECtHR asserted that 'democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position'.²⁷⁰ Yet, neither article 1 Protocol 3 ECHR nor the ECtHR have provided detailed elaboration of the measures required to ensure that persons belonging to a minority are able to effectively participate in democratic decision-making processes. Additionally, the ECtHR has established the

²⁶⁸ 'The Lund Recommendations', above n 236, 1.

²⁶⁹ 'Second Opinion on Azerbaijan' above n 227, para 154; AC, 'Second Opinion on the Czech Republic' adopted on 24 February 2005 ACFC/INF/OP/II(2005)002 para 172; F Palermo, 'At the Heart of Participation and of its Dilemmas – Minorities in the Executive Structures' in M Weller (ed), *Political Participation of Minorities: A Commentary on International Standards and Practice* (OUP 2010) 437.

²⁷⁰ *Young, James and Webster v United Kingdom*, above n 125, para 63. See also, *Chassagnou and Others v France*, above n 173, para 112; *Gorzelik and Others v Poland* ECHR 2004-I para 90.

principle that the ECHR does not extend special protection to minorities²⁷¹ and, in particular, did not initially recognise the right of minorities to be consulted on matters of concern.²⁷²

However, the jurisprudence of the ECtHR has more recently established a requirement that interested parties must be allowed to participate in the decision-making process.²⁷³ In *Hatton and Others v United Kingdom*, decided under article 8 ECHR the right to respect for private and family life, the ECtHR stressed the need to consider 'the extent to which the views of individuals (including the applicants) were taken into account throughout the decision-making procedure, and the procedural safeguards available'.²⁷⁴ O'Connell has suggested that in this case 'the Court has indicated that it will not accept just a façade of consultation'.²⁷⁵ Thus, similarly to minority rights standards, the ECtHR has established that the consultation process must be effective.

The ECtHR's decision in *Noack v Germany* can be interpreted to establish that persons belonging to minorities must not be excluded from the decision-making process when decisions directly affect their identity.²⁷⁶ Yet, it does not require that persons belonging to minorities be able to influence the outcome of the decision-making process. Specifically, the ECtHR did not require that the perspective of persons belonging to the Sorbian minority be given any additional weight to those of other interested parties. The measures opposed by the Sorbian minority directly interfered with their way of life and, hence, had a more serious effect on their interests than the other interested parties.²⁷⁷ Consequently, the requirement of

²⁷¹ *G and E v Norway* above n 35, 35; *Noack and Others v Germany*, above n 35. However in recent cases, the ECtHR has recognised that they may be evidence of an emerging European consensus in relation to the special needs of minorities: *Chapman v United Kingdom*, above n 35, para 93-94, 98; *DH and Others v Czech Republic*, above n 164, para 181; *Gorzelik and Others v Poland* above n 270, para 68.

²⁷² *National Union of Belgian Police v Belgium* (1975) Series A no 19, concurring opinion of Judge Zekia; *G and E v Norway*, above n 35, 36.

²⁷³ *Noack and Others v Germany*, above n 35; *Hatton and Others v United Kingdom* ECHR 2003-VIII para 99. See also, *Buckley v United Kingdom*, above n 35, para 76; *Chapman v United Kingdom*, above n 35, para 92.

²⁷⁴ *Hatton and Others v United Kingdom* above n 273, para 104.

²⁷⁵ R O'Connell, 'Towards a Stronger Concept of Democracy in the Strasbourg Convention' [2006] European Human Rights Law Review 281, 293. See also, Wheatley, above n 247, 214.

²⁷⁶ G Gilbert, 'The Contribution of the European Court of Human Rights to the Promotion of the Effective Participation of National Minorities: Groping in the Dark for Something that May Not Be There' (2009) 16 International Journal of Minority and Group Rights 611, 616. See also, *Grande Oriente D'Italia di Palazzo Giustiniani v Italy* ECHR 2001-VIII para 30.

²⁷⁷ *Noack and Others v Germany*, above n 35.

consultation of interested parties does not necessarily ensure that 'democracy does not simply mean that the views of a majority must always prevail'.²⁷⁸ Even though a right to consultation for interested parties may exist under the ECHR, this does not require that persons belonging to minorities be able to influence the outcome of the decision-making process.

Both CERD and the HRC have welcomed the adoption of consultative mechanisms under generally applicable human rights standards.²⁷⁹ However, the establishment of such mechanisms does not constitute a requirement of article 25 ICCPR nor article 5(c) ICERD. Notably, article 25 ICCPR has an unusual formulation, insofar as it prescribes the right 'to take part in the conduct of public affairs, *directly or through freely chosen representatives*'.²⁸⁰ While direct participation in the political process has been interpreted by the HRC to include consultation,²⁸¹ the use of 'or' in the provision indicates that although States have the discretion to utilise specific forms of direct political participation, they are not necessarily required to do so.²⁸² In the event that a consultative body is established citizens must have access to it on a non-discriminatory basis.²⁸³ Still, this understanding of the right to be consulted does not establish an obligation for States parties to consult minorities or for the outcome of such consultations to influence the outcome of the decision-making process.

Furthermore, in *Marshall v Canada* the HRC held:

[A]rticle 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of article 25(a).²⁸⁴

²⁷⁸ *Young, James and Webster v United Kingdom*, above n 125, para 63.

²⁷⁹ HRC, above n 247, para 6; CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination – Belgium' (21 May 2002) UN doc CERD/C/60/CO/2 para 9; CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination – Germany' (22 September 2008) UN doc CERD/C/DEU/CO/18 para 13.

²⁸⁰ Article 25(a) ICCPR. [Emphasis added].

²⁸¹ HRC, above n 247, para 6.

²⁸² Nowak, above n 80, 571.

²⁸³ HRC, above n 247, para 6.

²⁸⁴ *Marshall v Canada* Communication no 205/1986, UN doc CCPR/C/43/D/205/1986 paras 5.4-5.5.

Therefore, even though States may choose to consult particular groups on issues of specific interest to them, article 25(a) ICCPR cannot be interpreted to require the consultation of every interested party. In particular, the HRC indicated that the exclusion of numerically small minorities from consultation procedures would not constitute discrimination or an unreasonable restriction on the rights contained in article 25(a) ICCPR.²⁸⁵ As such, the interpretation of the right to 'direct participation' under article 25(a) by the HRC does not provide an explicit right for persons belonging to minorities to be consulted on matters of concern to their identity.

Nonetheless, in *Hopu and Bessert v France*, decided under articles 17 and 23 ICCPR, the HRC suggested that the State must consider the interests of minorities and that a failure to do so may give rise to a violation of the ICCPR.²⁸⁶ As noted in the individual opinion in this case, the HRC's decision was significantly influenced by the interrelated nature of the rights contained in the ICCPR and, in particular, article 27 ICCPR: 'The reference by the Committee to the authors' history, culture and life, is revealing. For it shows that the values that are being protected are not the family, or privacy, but cultural values'.²⁸⁷ In its Concluding Observations on New Zealand in 2010, the HRC also stressed the importance of the effective consultation of all Māori groups, and, specifically, that 'the public consultation period should be sufficiently long so as to enable *all Māori groups* to have their views heard'.²⁸⁸ Thus, in more recent cases, the HRC has appeared to change its approach to require that all minorities, regardless of size, be consulted on matters of concern. Nonetheless, while the ECtHR and the HRC have recognised the value of the consultation of interested parties including persons belonging to minorities, neither body has required that persons belonging to minorities be able to influence the outcome of the decision-making process under generally applicable human rights standards.

Turning to minority right standards, the HRC's approach under article 27 ICCPR has evidenced a similar shift to that in *Hopu and Bessert v France*. Initially, the HRC did not require that the concerns of minorities be taken into account during

²⁸⁵ *Ibid.*, para 6.

²⁸⁶ *Hopu and Bessert v France*, above n 18, para 10.3. S Wheatley, *Democracy, Minorities and International Law* (CUP 2005) 152-53.

²⁸⁷ *Hopu and Bessert v France*, above n 18, Individual opinion by Committee members David Kretzmer and Thomas Buergenthal, cosigned by Nisuke Ando and Lord Colville para 5.

²⁸⁸ HRC, 'Concluding Observations of the Human Rights Committee – New Zealand' (7 April 2010) UN doc CCPR/C/NZL/CO/5 para 19. [Emphasis added].

the decision-making process under article 27 ICCPR.²⁸⁹ However, in the more recent case of *Ángela Poma Poma v Peru*, the HRC stressed that 'that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community'.²⁹⁰ Therefore, although the HRC did not initially establish a robust right to participation in the decision-making process under either generally applicable human rights or minority rights standards, this approach appears to have changed and the HRC has required that persons belonging to minorities be able to effectively participate in decisions concerning their identity. This change in approach by the HRC may be understood as a reaffirmation of the interrelated nature of Covenant rights, as demonstrated in *Hopu and Bessert v France*. The requirement of effective participation under article 25 ICCPR is not divorced from article 27, the minority rights provision.

Similarly to generally applicable human rights standards, the right of persons belonging to minorities to *effectively* participate in public affairs under minority rights standards has been understood to encompass the involvement and consultation of minority representatives in decision-making processes in relation to issues of specific concern.²⁹¹ The AC has consistently recognised the importance of the consultation of minorities under article 6, in addition to article 15 FCNM.²⁹² However, in order for minority participation to be *effective*, the AC has suggested that States should ensure that minorities have 'a substantial influence on decisions which are taken and that there is, as far as possible, a shared ownership of the decisions taken'.²⁹³ Likewise, the Commentary to the UN Declaration on Minorities has suggested that persons belonging to minorities 'must as a minimum have the right to have their opinions heard and fully taken into account before decisions

²⁸⁹ *Länsman (Jouni E.) and Others v Finland*, above n 36, paras 7.8, 10.5. See further, M Weller, 'Effective Participation of Minorities in Public Life' in M Weller (ed), *Universal Minority Rights – A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (OUP 2007) 510; A Verstichel, *Participation, Representation and Identity: The Rights of Persons Belonging to Minorities to Effective Participation in Public Affairs: Content, Justification and Limits* (Intersentia 2009) 172.

²⁹⁰ *Ángela Poma Poma v Peru*, above n 36, para 7.6

²⁹¹ AC, above n 203, para 16; HRC, above n 34, para 7; *Apirana Mahuika and Others v New Zealand*, above n 36, para 9.5; Commission on Human Rights, above n 1, paras 38, 42.

²⁹² See, for example, 'Opinion on Switzerland' above n 204, para 42; 'Second Opinion on Denmark' above n 70, paras 86, 91; 'Third Opinion on Austria' above n 54 paras 70, 72; 'Third Opinion on Denmark' above n 70, para 59.

²⁹³ AC, above n 203, para 19.

which concern them are adopted',²⁹⁴ a view which has subsequently been reiterated by the UN Independent Expert on Minority Issues.²⁹⁵

Specifically, the AC has encouraged the Dutch authorities to ensure that the work of the National Ethnic Minority Consultative Committee 'is duly taken into consideration in governmental decision-making'.²⁹⁶ Moreover, the AC has recognised that in some instances an obligation to negotiate may exist, extending past the obligation to consult.²⁹⁷ In order to increase the legitimacy of the decision-making process, the AC has emphasised that in the event that the recommendations of minority consultative bodies are not followed by the authorities, it is good practice that reasons be given. For example, '[t]he Advisory Committee is therefore of the opinion that the Romanian Government should ensure that the Council of National Minorities is consulted more regularly, and given reasons whenever the authorities do not accept its views'.²⁹⁸ Additionally, the AC has suggested that in relation to issues *exclusively* of concern to the minority, their perspective may be afforded priority.²⁹⁹

Consequently, in direct contrast to generally applicable human rights standards, the mere consultation of minorities is insufficient to satisfy the requirements of article 15 FCNM and article 2(3) UN Declaration on Minorities. Persons belonging to minorities must be given the opportunity to influence the outcome of the decision-making process, and in some instances, their opinion should be afforded priority.

The right to self-determination, contained in article 1 ICCPR and ICESCR, establishes the most far-reaching right in relation to participation in public affairs. As noted by Wheatley, '[f]or a number of ethno-cultural groups, the desire for political self-government forms part of the collective identity of the group'.³⁰⁰ However, article 1 is only applicable to 'peoples' and, although related to the concept of

²⁹⁴ Commission on Human Rights, above n 1, para 42.

²⁹⁵ Human Rights Council, 'Background Document' above n 235, para 26.

²⁹⁶ 'Opinion on the Netherlands' above n 178, para 41.

²⁹⁷ 'Second Opinion on Finland' above n 104, para 156; 'Third Opinion on Finland' above n 222, paras 158, 162.

²⁹⁸ AC, 'Opinion on Romania' adopted on 6 April 2001 ACFC/INF/OP/I(2002)001 para 66. Wheatley, above n 286, 159-60.

²⁹⁹ AC, above n 203, para 98.

³⁰⁰ Wheatley, above n 286, 64.

'minority' under international law, it is widely accepted that persons belonging to minorities do not have a right to self-government or territorial autonomy.³⁰¹

Nonetheless, the HRC appears to have adopted an expansive interpretation of article 1 ICCPR when utilising it as an interpretive tool. Notably, the HRC has suggested that the rights contained in the ICCPR, in particular articles 25, the right to political participation, 26, the right to equality before the law, and 27, the rights of persons belonging to minorities, may be interpreted in the light of article 1.³⁰² Similarly, CERD has recognised that the internal dimension of self-determination is connected to the exercise of political rights,³⁰³ and, in particular, has noted the connection between the right to internal self-determination and article 27 ICCPR:

Governments should consider, within their respective constitutional frameworks, vesting persons belonging to ethnic or linguistic groups comprised of their citizens, where appropriate, with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups.³⁰⁴

This interpretation of self-determination implies that a right to cultural autonomy for persons belonging to minorities may exist under international law in specific circumstances. Gilbert and Verstichel have also submitted that the realisation of article 27 ICCPR, interpreted in the light of article 1, may require the establishment of mechanisms of autonomy for persons belonging to minorities, in particular, mechanisms of cultural autonomy.³⁰⁵ Gilbert has made a similar suggestion in relation to articles 1 and 2(3) UN Declaration on Minorities.³⁰⁶ This interpretation

³⁰¹ HRC, above n 34, para 3.1; Commission on Human Rights, above n 1, para 20; AC, above n 203, para 133.

³⁰² *Diergaardt (late Captain of the Rehoboth Baster Community) and Others v Namibia*, above n 78, para 10.3 and Scheinin dissenting opinion; *Apirana Mahuika and Others v New Zealand*, above n 36, para 9.2; *Gillot and Others v France* Communication No 932/2000, UN doc CCPR/C/75/D/932/2000 paras. 13.4 and 13.16.

³⁰³ CERD, 'General Comment No 21' on 'the Right to Self-Determination' (27 May 2008) UN doc HRI/GEN/1/Rev.9 (Vol. II) para 4.

³⁰⁴ *Ibid.*, para 5.

³⁰⁵ G Gilbert, 'Autonomy and Minority Groups: A Right in International Law?' (2001-2002) 35 *Cornell International Law Journal* 307, 342; A Verstichel, 'Recent Developments in the UN Human Rights Committee's Approach to Minorities, with a Focus on Effective Participation' (2005) 12 *International Journal on Minority and Group Rights* 25, 36.

³⁰⁶ Gilbert, above n 305, 319.

has found support from the former UN Independent Expert on Minority Issues, who interpreted the right to effective participation to entail 'some degree of group autonomy, which is non- territorial and gives the minority the right to administer and even legislate in certain fields, such as education, cultural affairs...'.³⁰⁷ Furthermore, the AC has frequently noted the contribution of mechanisms of cultural autonomy to ensuring that persons belonging to national minorities are able to preserve their distinct identity and participate in decisions of concern to the community, under article 15 FCNM.³⁰⁸

The establishment of mechanisms of cultural autonomy would not only allow persons belonging to minorities to influence decisions directly concerning their identity, but to take such decisions. Consequently, while an independent right to cultural autonomy does not exist under international law, the requirement of cultural autonomy may be a corollary of pre-existing standards, including articles 1, 25 and 27 ICCPR, articles 1 and 2(3) UN Declaration on Minorities and articles 5 and 15 FCNM. In particular, the establishment mechanisms of cultural autonomy may be necessary if the effective participation of persons belonging to minorities in decisions concerning their identity cannot be secured through other means. Notably, this interpretation is dependent upon the presence of both political rights and a minority rights provision in the same instrument and the recognition of the interdependent nature of human rights standards.

Although the ECHR has increasingly recognised the importance of the consultation of interested parties, this has not required that persons belonging to minorities be able to influence the outcome of decision-making processes. In comparison, minority rights standards establish that persons belonging to minorities must be able to both participate in and influence the decision-making process. The interrelated nature of the rights contained in the ICCPR has allowed the HRC to interpret the content of generally applicable human rights standards in the light of article 27 ICCPR to establish a requirement of effective consultation of persons belonging to minorities. In the event that the effective participation of persons

³⁰⁷ Human Rights Council, 'Background Document' above n 235, para 57.

³⁰⁸ AC, above n 203, para 135; AC, 'Opinion on Moldova' adopted on 1 March 2002 ACFC/INF/OP/I(2003)002 para 92; AC, 'Second Opinion on Romania' adopted on 24 November 2005 ACFC/OP/II(2005)007 para 185; AC, 'Third Opinion on Germany' adopted on 27 May 2010 ACFC/OP/III(2010)003 para 182.

belonging to minorities in decisions concerning their identity cannot be secured through other means, it may be possible to infer a requirement of cultural autonomy under the ICCPR, UN Declaration on Minorities and FCNM. Hence, if the right of persons belonging to minorities to *effectively* participate in the decision-making process is to be guaranteed, there is a clear added-value to minority rights protection.

3.4.3. The Relevance of Effective Participation for the Preservation of Minority Identity

Having established the added-value to minority rights protection in relation to the effective participation in the decision-making process, it is necessary to consider the extent to which effective participation has the potential to facilitate the preservation of minority identity. Verstichel has suggested that while the right to participate in decisions regarding issues of direct relevance to the minority's identity constitutes minority rights *sensu stricto*, participation more generally in public affairs 'belongs to the first pillar of minority protection (the non-discrimination approach)'.³⁰⁹ Accordingly, participation in decisions that directly impact their interests may enable persons belonging to a minority to maintain their distinct identity; in contrast, participation in decisions that are of broader societal concern enables a minority to take part in public affairs on equal terms with the majority and, therefore, encourages integration. Nonetheless, as previously considered, measures to facilitate non-discrimination and equality may also contribute to the preservation of minority identity.

Notably, the scope of the right to participate in decisions affecting persons belonging to minorities has been considered in the context of article 27 ICCPR, the UN Declaration on Minorities and the FCNM. In General Comment No 23, the HRC determined that the right of minorities to be consulted under article 27 ICCPR is limited to matters pertaining to minority culture.³¹⁰ In comparison, the UN Declaration on Minorities has acknowledged that minority interests extend past purely cultural issues³¹¹ and article 2(3) UN Declaration on Minorities has been interpreted to include the participation of minorities in decisions concerning

³⁰⁹ Verstichel, above n 289, 253.

³¹⁰ HRC, above n 34, para 7; *Apirana Mahuika and Others v New Zealand*, above n 36, para 9.5.

³¹¹ Article 2(3) UN Declaration on Minorities.

'education, culture and religion'.³¹² Thus, although it has been argued that the UN Declaration on Minorities constitutes an authoritative interpretation of article 27 ICCPR,³¹³ in relation to *effective* participation, the content of the UN Declaration on Minorities exceeds the HRC's interpretation of article 27 ICCPR. This has led both Henrard and Verstichel to propose that the HRC's interpretation of article 27 ICCPR can be extended, by analogy, to other minority identity concerns.³¹⁴

The AC has advocated an even more expansive understanding of minority concerns, under article 15 FCNM. Specifically, the AC has stressed in its Opinions on State Reports that participation should not be limited to issues traditionally considered to fall within the remit of minority concerns such as culture, religion and education.³¹⁵ For example in its Opinion on the Moldovan State Report, the AC considered 'the areas in which national minorities are consulted, as defined in Article 22 of the 2001 National Minorities Act, to be too restrictive, since they are confined to the cultural and educational spheres'.³¹⁶ Hence, the AC has noted the importance of consulting minorities in relation to issues that indirectly impact their ability to preserve their identity, such as planning matters,³¹⁷ the distribution of finances³¹⁸ and the decentralisation of government.³¹⁹

Consequently, the effective participation of persons belonging to minorities in the public life of the State has been recognised as both a means to encourage the integration of minorities into the public life of the State and to enable the minority to preserve and protect their distinct identity.³²⁰ Whereas the HRC has adopted a narrow understanding of the scope of minority concerns, the Commentary to the UN

³¹² Commission on Human Rights, above n 1, para 39.

³¹³ Xanthaki, above n 160, 200. See further, Brownlie, above n 160, 699; SE Berry, 'Integrating Refugees: The Case for a Minority Rights Based Approach' (2012) 24 International Journal of Refugee Law 1, 23.

³¹⁴ Henrard (2000), above n 2, 161; Verstichel, above n 289, 169.

³¹⁵ See, for example, 'Opinion on Moldova' above n 308, para 88; 'Second Opinion on Switzerland' above n 228, para 183; 'Third Opinion on Estonia' above n 219, paras 167, 169; AC, 'Third Opinion on Italy' adopted on 15 October 2010 ACFC/OP/III(2010)008 para 239. See also, 'The Lund Recommendations', above n 236, para 12.

³¹⁶ 'Opinion on Moldova' above n 308, para 88.

³¹⁷ 'Second Opinion on Sweden' above n 70, para 167; 'Second Opinion on Switzerland' above n 228, para 183.

³¹⁸ 'Second Opinion on Spain' above n 103, paras 147-148.

³¹⁹ 'Second Opinion on Kosovo' above n 218, para 234.

³²⁰ R Hofmann, 'Political Participation of Minorities' (2006/07) 6 European Yearbook of Minority Issues 5, 17. See also, K Drzewicki, 'OSCE Lund Recommendations in the Practice of the High Commissioner on National Minorities' in M Weller (ed), *Political Participation of Minorities: A Commentary on International Standards and Practice* (OUP 2010) 278.

Declaration and, in particular, the AC have stressed that persons belonging to minorities must be able to participate in a wide range of decisions if the right to preserve minority identity is to be secured.

3.4.4. Preliminary Conclusions

Both minority rights and generally applicable human rights standards establish the right to participate in the decision-making process. Yet, minority rights standards acknowledge that equality is not necessarily sufficient to ensure that the participation of minorities is effective. Thus, while generally applicable human rights standards have concentrated on the right to participate in democratic processes, minority rights standards have recognised that States may need to adopt additional measures if persons belonging to minorities are to be able to exercise their right to *effective* participation. Therefore, an added-value to minority rights protection in respect of the right to effective participation in decision-making processes can be discerned.

Despite the recognition that generally applicable human rights standards incorporate a right to consultation, these standards are not as robust as those established under minority rights instruments. In particular, the jurisprudence of the ECtHR has only recently evolved to recognise a right to consultation for interested parties. However, the right to consultation does not suggest a right for persons belonging to minorities to influence the outcome of the decision-making process. Furthermore, under article 25 ICCPR, the HRC did not initially require the consultation of every interested party. Although the HRC has determined that mere consultation is insufficient to enable persons belonging to minorities to effectively participate in decision-making processes, this may be attributed to the recognition of the interrelated nature of the rights contained in the ICCPR, in particular articles 25 and 27. Thus, the presence of a minority rights provision in the ICCPR has influenced the HRC's interpretation of generally applicable human rights standards.

In contrast, minority rights standards have been interpreted to establish a requirement that persons belonging to minorities are not only consulted in relation to issues of specific concern to the community but are also able to influence the outcome of the decision-making process. As a result, '[c]onsultation should not be a

mere window dressing exercise in the sense that the opinions of the minorities should not *a priori* be disregarded'.³²¹

By facilitating participation and influence over decisions that impact the concerns of the minority, broadly conceived, the right to effective participation *directly* enables persons belonging to minorities to maintain their identity. Without this right, minority interests are likely to be relegated in favour of majority interests. Moreover, minority rights standards, including article 27 ICCPR interpreted in the light of articles 1 and 25 ICCPR, may also require the establishment of mechanisms of cultural autonomy if the right to effective participation cannot be secured through other means. Consequently, there is an added-value to minority rights protection.

3.5. INTERCULTURAL DIALOGUE AND TOLERANCE

Under article 6(1) FCNM, States are required to 'encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory'. By encouraging interactions between different communities, the right to intercultural dialogue and tolerance aims to facilitate societal cohesion and integration.³²² Consequently, following its inclusion in the FCNM, the concept of intercultural dialogue and tolerance has been acknowledged as a tenet of minority rights protection.³²³

In comparison to minority rights instruments, generally applicable human rights standards do not explicitly mention 'intercultural dialogue'. However,

³²¹ K Henrard, "'Participation', 'Representation' and 'Autonomy' in the Lund Recommendations and their Reflections in the Supervision of the FCNM and Several Human Rights Conventions' (2005) 12 *International Journal on Minority and Group Rights* 133, 140.

³²² Council of Europe, above n 16, para 49; G Gilbert, 'Article 6' in M Weller (ed), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP 2005) 182-86; Council of Europe, *White Paper on Intercultural Dialogue: "Living Together As Equals in Dignity"* (Council of Europe 2008) 17; HCNM, 'The Ljubljana Guidelines on Integration of Diverse Societies & Explanatory Note' (November 2012) 14-5.

³²³ J Ringelheim, 'Minority Rights in a Time of Multiculturalism—The Evolving Scope of the Framework Convention on the Protection of National Minorities' (2010) 10 *Human Rights Law Review* 99, 118.

[t]he General Assembly has repeatedly encouraged activities aimed at promoting interreligious and intercultural dialogue in order to enhance social stability, respect for diversity and mutual respect in diverse communities and to create, at the global, regional, national and local levels, an environment conducive to peace and mutual understanding (see resolutions 64/81 and 65/138).³²⁴

Generally applicable human rights standards including non-discrimination and equality, freedom of thought, conscience and religion, freedom of expression and freedom of association and assembly have been identified as prerequisites for the achievement of intercultural dialogue.³²⁵ Specifically, the UN Special Rapporteur on Religion or Belief has noted, in accordance with the obligations of States to respect, protect and fulfil human rights obligations, that '[t]he promotion of societal tolerance can be understood as falling within the field of the duty to "fulfil" in relation to the right to freedom of religion'.³²⁶ Furthermore, within the UN human rights system, the ICERD and CRC establish that education should promote 'understanding' and 'tolerance'.³²⁷ Additionally, although not strictly human rights instruments, the UNESCO Declaration on Cultural Diversity and the UNESCO Convention on the Promotion and Protection of the Diversity of Cultural Expression recognise the value of dialogue between cultures and the requirements of intercultural education have been elaborated in UNESCO's *Guidelines on Intercultural Education*.³²⁸

The Council of Europe's *White Paper on Intercultural Dialogue* identifies a number of key policy areas including: democratic governance of cultural diversity; democratic citizenship and participation; learning and teaching intercultural

³²⁴ UNGA, 'Interim Report of the Special Rapporteur on Freedom of Religion or Belief' (18 July 2011) UN doc A/66/156 para 38.

³²⁵ Council of Europe, above n 322, 26-8; P Wiater, *Intercultural Dialogue in the Framework of European Rights Protection* (Council of Europe 2010); F Shaheed and others, 'Human Rights are Essential Tools for an Effective Intercultural Dialogue' (21 May 2010) <http://www.ohchr.org/Documents/Issues/CulturalRights/Statement_cultural_diversity21052010.doc> accessed 9 April 2013; UNGA, above n 324, para 24.

³²⁶ UNGA, above n 324, Footnote 15.

³²⁷ Article 7 ICERD; article 29(1) CRC.

³²⁸ Article 7 UNESCO Declaration on Cultural Diversity; Article 1 UNESCO Convention on the Promotion and Protection of the Diversity of Cultural Expression. See further, UNESCO, *UNESCO Guidelines on Intercultural Education* (UNESCO 2006); UNESCO, *A New Cultural Policy Agenda for Development and Mutual Understanding – Key Arguments for a Strong Commitment to Cultural Diversity and Intercultural Dialogue* (UNESCO 2011).

competences; spaces for intercultural dialogue; and intercultural dialogue in international relations.³²⁹ In contrast, article 6(1) FCNM singles out 'the fields of education, culture and the media' as underpinning tolerance and intercultural dialogue.³³⁰ Furthermore, article 4(4) UN Declaration on Minorities and article 12(1) FCNM reiterate the role of education in creating the necessary conditions of intercultural dialogue and tolerance.

As noted by Gilbert '[w]hile a state can try to prevent intolerance and prejudice, promoting intercultural dialogue is a much more ephemeral obligation'.³³¹ The Council of Europe's *White Paper on Intercultural Dialogue* has suggested that intercultural dialogue 'requires the freedom and ability to express oneself, as well as the willingness and capacity to listen to the views of others'.³³² Thus, as recommended in the *Ljubljana Guidelines on Integration of Diverse Societies* (Ljubljana Guidelines), 'it is preferable to use positive incentives to ensure compliance rather than punitive measures'.³³³ Consequently, the role of the media and education are of particular importance if the right to intercultural dialogue is to be secured.

As the scope of the right to effective participation and the right to culture has been considered above, this will not be the focus of attention. Instead, this section will focus on the role of education and the media in securing the right to intercultural dialogue and tolerance. Nonetheless, it is worth observing that in the context of the creation of spaces for intercultural dialogue, the Council of Europe and the UN Special Rapporteur on Religion or Belief have stressed the role of cultural activities, museums and heritage sites in addition to common public spaces, kindergartens, schools, youth clubs and youth activities, the media and sport.³³⁴ In particular, common or shared cultural activities have the potential to eliminate barriers between

³²⁹ Council of Europe, above n 322, 25-36. See also, 'The Ljubljana Guidelines & Explanatory Note', above n 322, 38-64.

³³⁰ See, also, 'The Ljubljana Guidelines & Explanatory Note', above n 322, paras 11, 44, 48.

³³¹ Gilbert, above n 322, 184.

³³² Council of Europe, above n 322, 17.

³³³ 'The Ljubljana Guidelines & Explanatory Note', above n 322, para 11.

³³⁴ Commission on Human Rights, 'Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief – Report submitted by Mr. Angelo Vidal d'Almeida Ribero, Special Rapporteur appointed in accordance with resolution 1986/20 of the Commission on Human Rights' UN doc E/CN.4/1987/3 para 108; Council of Europe, above n 322, 32-4; UNGA, above n 324, paras 18, 42, 45.

persons belonging to minorities and the majority.³³⁵ In comparison, intolerance in politics³³⁶ and sport³³⁷ have been explicitly recognised by the AC as undermining intercultural dialogue.

3.5.1. Intercultural Education

Whereas article 6(1) FCNM explicitly establishes a right to 'intercultural dialogue', article 4(4) UN Declaration on Minorities and article 12(1) FCNM establish a right to 'intercultural education'.³³⁸ Specifically, article 4(4) UN Declaration establishes that:

States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.

Ringelheim has, in this context, suggested that:

Valuing minority cultures in education, reflecting their contribution to the history of the country, and thus enabling the majority to become better acquainted with it, may contribute in an important respect to fostering the notion that minorities are fully part of the society.³³⁹

Hence, the UN Forum on Minorities Issues has stressed that '[i]ntercultural education approaches that are minority-sensitive should be adopted, with particular attention paid to reflecting the diversity within society and the contribution of minorities to

³³⁵ Council of Europe, above n 16, para 49.

³³⁶ See, for example, 'Opinion on Austria' above n 14, para 33; 'Opinion on the Netherlands' above n 178, para 37; 'Second Opinion on Austria' above n 54, paras 85, 87; 'Second Opinion on Denmark' above n 70, para 77; 'Second Opinion on Switzerland' above n 228, para 91; 'Third Opinion on Spain' above n 14, para 81.

³³⁷ AC, 'Third Opinion on the United Kingdom' adopted on 30 June 2011 ACFC/OP/III(2011)006 para 105.

³³⁸ Commission on Human Rights, above n 1, 67; Council of Europe, above n 16, para 71.

³³⁹ Ringelheim, above n 323, 121.

society and to countering negative stereotypes and myths'.³⁴⁰ The portrayal of minority cultures, languages and religions in textbooks and the curriculum in order to counter negative stereotypes³⁴¹ and teacher training in relation to anti-discrimination and intercultural education³⁴² have been identified as key elements of this right. In order to achieve this, representatives of minorities should be consulted in relation to the content of textbooks and the design of the curriculum.³⁴³ Notably, by recognising the value of minority cultures in education, such measures have the potential to enhance majority receptiveness to societal diversity, whilst the provision of education in the minority culture will facilitate the preservation of minority identities.

Education is not limited to schools and the AC has also stressed the importance of the education of law enforcement officials, the judiciary, the media and the armed forces in relation to the culture and history of the minority.³⁴⁴ The State

should continue in particular to support structures designed to make information about national minorities available over the long-term. Projects aimed at raising awareness on specific issues of relevance to national minorities, promoting understanding of national minorities and increasing inter-ethnic tolerance should also be supported.³⁴⁵

Nonetheless, intercultural education within article 4(4) UN Declaration on Minorities and article 12(1) FCNM is not limited to the majority being educated about the

³⁴⁰ Human Rights Council, above n 26, para 43.

³⁴¹ See, for example, Council of Europe, above n 16, para 71; AC, 'Opinion on Bulgaria' 27 May 2004 ACFC/OP/I(2006)001 paras 85-6; Commission on Human Rights, above n 1, para 67; Human Rights Council, above n 26, paras 43, 45.

³⁴² See, for example, Human Rights Council, above n 26, para 45; 'Opinion on Bulgaria' above n 341, para 86; 'Opinion on Ireland' above n 180, para 83; 'Second Opinion on Bulgaria' above n 14, para 159; 'Third Opinion on Finland' above n 222, para 126; 'Third Opinion on the United Kingdom' above n 337, paras 169, 177.

³⁴³ See, for example, 'Opinion on the Implementation of the Framework Convention for the Protection of National Minorities in Kosovo' above n 202, para 88; 'Opinion on Montenegro' above n 104, para 77, 79; AC, 'Second Opinion on Cyprus' adopted on 7 June 2007 ACFC/OP/II(2007)004 paras 122-23; 'Second Opinion on Portugal' above n 179, para 95.

³⁴⁴ See, for example, 'Opinion on Albania' above n 101, para 40; 'Opinion on the United Kingdom' above n 178, para 55; AC, 'Second Opinion on "the former Yugoslav Republic of Macedonia"' adopted on 23 February 2007 ACFC/OP/II(2007)002 para 88; 'Second Opinion on Norway' above n 54, para 90; 'Third Opinion on Denmark' above n 70, para 58.

³⁴⁵ 'Third Opinion on Sweden' above n 210, para 67.

minority. Integration, as has been established in Chapter 2, is a 'two-way process' and, consequently, persons belonging to minorities must learn the language and about the culture of the majority. Without such education, myths about the majority are likely to circulate and prejudices arise amongst the minority.³⁴⁶ By reducing ignorance of other cultures, languages and religions, intercultural dialogue has the potential to prevent stereotyping and intolerance, whilst also 'counteract[ing] tendencies towards fundamentalist or closed religious or ethnic groups'.³⁴⁷ Thus, the AC has stressed the importance of interaction between the majority and minority in the school environment,³⁴⁸ the role of bilingual education³⁴⁹ and the adoption of measures to reduce hostility and bullying in order to ensure such interaction.³⁵⁰

Measures to ensure the proficiency of persons belonging to minorities in the official language of the State have been recognised as essential if persons belonging to minorities are to gain employment and participate in the cultural, economic, political and social life of the State.³⁵¹ Specifically, the UN Independent Expert on Minorities, Rita Izsák has noted that persons belonging to minorities,

may, for example, face barriers in gaining access to labour markets on the basis of their language skills or in establishing business enterprises. In terms of social life, minorities may be restricted in their interactions outside their own communities and consequently in their possibility to engage fully in the social and cultural life of the nation.³⁵²

³⁴⁶ A Eide, 'Minorities in a Decentralized Environment' Background paper (All Human Rights for All International Conference on Human Rights, Yalta, Ukraine, 2-4 September 1998) 13.

³⁴⁷ Commission on Human Rights, above n 1, paras 65-8; Council of Europe, above n 16, para 71; See also, 'The Ljubljana Guidelines & Explanatory Note', above n 322, para 44.

³⁴⁸ See, for example, AC, 'Opinion on "the former Yugoslav Republic of Macedonia"' adopted on 27 May 2004 ACFC/INF/OP/I(2005)001 para 74; 'Opinion on Slovenia' above n 103, para 60; 'Opinion on the Netherlands' above n 178, para 56; 'Second Opinion on "the former Yugoslav Republic of Macedonia"' above n 344, para 142.

³⁴⁹ See, for example, 'Opinion on Austria' above n 14, para 54; 'Opinion on "the former Yugoslav Republic of Macedonia"' above n 348, para 74; 'Opinion on Slovenia' above n 103, para 60; 'Second Opinion on Austria' above n 54, para 133.

³⁵⁰ 'Opinion on Bulgaria' above n 341, para 85; 'Third Opinion on the United Kingdom' above n 337, para 106.

³⁵¹ Human Rights Council, 'Report of the Independent Expert on Minority Issues' (2012) above n 235, paras 23 and 66.

³⁵² *Ibid.*, para 23.

Therefore, intercultural dialogue has the potential to improve the socio-economic situation of persons belonging to minorities and contributes to the achievement of equality and non-discrimination. Accordingly the intertwined nature of the tenets of minority rights protection is further evidenced.

Although the ECHR establishes a right to education, in contrast to minority rights standards, there is not a right to intercultural education. Yet, in its case law the ECtHR has noted that '[p]luralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals which are justified in order to maintain and promote the ideals and values of a democratic society'.³⁵³ However, the ECtHR's decisions in cases concerning headscarves, as will be considered in Chapter 5, have indicated that the requirements of pluralism and dialogue, in the educational context, may be subordinated to other concerns underpinning the ECHR such as gender equality, through the margin of appreciation.³⁵⁴

The elimination of religious symbols in public institutions has the potential to undermine intercultural dialogue and tolerance. Notably, Taylor has warned that '[i]f teachers, particularly of minority religions, are prohibited from wearing religious dress, the message is likely to be a powerful one of intolerance towards the religion concerned'.³⁵⁵ Accordingly, the requirement of dialogue established by the ECtHR is less robust than that established under minority rights standards. Furthermore, as has been noted by the AC, the negative discourse surrounding the headscarf in Europe has the potential to inhibit the manifestation of minority religions.³⁵⁶ Consequently, intolerance of minority identity may interfere with the right of persons belonging to minorities to preserve their identity.

Within the UN human rights system, the ICERD and CRC establish a requirement of intercultural education.³⁵⁷ Specifically, article 29 CRC establishes that:

³⁵³ *Şahin v Turkey* ECHR 2005-XI para 108; *Dogru v France* App no 27058/05 (ECtHR 4 December 2008) para 62; *Aktas v France* App no 43563/08 (ECtHR 30 June 2009).

³⁵⁴ *Ibid.*, *Dahlab v Switzerland* ECHR 2001-V; *Köse and 93 Others v Turkey* ECHR 2006-II. See, further, Berry, above n 99, 32-33.

³⁵⁵ Taylor, above n 88, 255.

³⁵⁶ AC, 'Third Opinion on the Russian Federation' adopted on 24 November 2011 ACFC/OP/III(2011)010 para 151; 'Third Opinion on Spain' above n 14, para 75.

³⁵⁷ Article 7 ICERD; article 29(1) CRC.

1. States Parties agree that the education of the child shall be directed to:

...

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.

Furthermore, the UN Special Rapporteur on Religion or Belief has noted that 'education should be aimed at inculcating, from early childhood, a spirit of tolerance and respect for the spiritual values of others'.³⁵⁸ General Comment No 1 of the Committee on the Rights of the Child has stressed the need to revise 'textbooks and other teaching materials and technologies, as well as school policies' and provide pre-service and in-service teacher-training to achieve the aims of article 29(1) CRC.³⁵⁹ Similarly, the UN Special Rapporteur on Religion or Belief has emphasised that 'States have an obligation to make use of the manifold options inherent in the school system by providing appropriate teaching material, offering interreligious training for teachers and facilitating encounters among pupils'.³⁶⁰ Hence, within the UN system, the right to intercultural education is expressly recognised in binding instruments. Furthermore, the Committee on the Rights of the Child and the UN Special Rapporteur on Religion or Belief have interpreted obligations in this respect in a similar manner to the UN Independent Expert on Minority Issues and the former UN Working Group on Minorities.

Nonetheless, both ICERD and CRC have a limited scope of application. While ICERD has the benefit of providing a binding obligation in relation to intercultural education, this is only 'with a view to combating prejudices which lead to racial discrimination'. Accordingly, article 7 ICERD is insufficient to ensure intercultural dialogue and tolerance in relation to religious and linguistic minorities. Additionally, CRC only establishes a requirement of intercultural education for children. In contrast, minority rights standards recognise the importance of intercultural education for society as a whole. In particular, only minority rights

³⁵⁸ Commission on Human Rights, above n 334, para 106.

³⁵⁹ UN Committee on the Rights of the Child, 'General Comment No 1' on 'Article 29 (1): The Aims of Education' UN doc CRC/GC/2001/1 para 18.

³⁶⁰ UNGA, above n 324, para 44.

standards expressly recognise that intercultural education is a two-way process and that persons belonging to minorities should receive education in the culture and language of the majority, in order to facilitate integration. The Special Rapporteur on Religion or Belief has primarily, although not exclusively, focused on inter-religious communication rather than the broader 'intercultural dialogue'. Thus, the narrower scope of application of the right to intercultural education contained in ICERD and CRC and the limited mandate of the UN Special Rapporteur on Religion or Belief leads to the conclusion that there is still an added-value to minority rights protection.

3.5.2. The Media and Intercultural Dialogue

The media serves the dual purpose of educating the majority about the minority whilst creating space for intercultural dialogue to take place.³⁶¹ In addition to article 6 FCNM, article 9 FCNM explicitly protects the freedom of expression of persons belonging to national minorities, including through access to the media. Article 9(4) requires that '[i]n the framework of their legal systems, the Parties shall adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities and in order to promote tolerance and permit cultural pluralism'. The provision has been interpreted by the AC as serving 'the dual aim of facilitating access to the media for persons belonging to national minorities and promoting tolerance and cultural pluralism'.³⁶²

In contrast, the UN Declaration on Minorities does not explicitly mention the role of the media in facilitating intercultural dialogue. However, the UN Forum on Minority Issues has noted that:

Information on minority rights and minority communities should also be targeted at society at large by means of, for example, media campaigns on minority rights, equality and non-discrimination and resource materials on the Declaration and the history, culture, traditions and contributions to society of minority groups present in the State.³⁶³

³⁶¹ Council of Europe, above n 322, 29-34.

³⁶² Council of Europe, above n 16, para 62.

³⁶³ Human Rights Council, above n 26, para 20.

Furthermore, the broader right to 'participate effectively in cultural, religious, social, economic and public life'³⁶⁴ has been interpreted as a requirement 'for persons belonging to minorities to promote their interests and values and to create an integrated but pluralist society based on tolerance and dialogue'.³⁶⁵

Media hostility towards minority concerns has the potential to lead to distrust of both the majority and the media,³⁶⁶ and inhibit minority political participation.³⁶⁷ Consequently, in accordance with the Ljubljana Guidelines, States are required to encourage the media to promote tolerance and intercultural dialogue.³⁶⁸ The AC has also emphasised that:

It is essential that the public is adequately informed, both by mainstream and minority media, about political issues relevant to persons belonging to national minorities. Hence it is important to ensure adequate participation of persons belonging to national minorities in various media-related bodies, such as supervisory boards and independent regulatory bodies, public service broadcast committees and auditors' councils.³⁶⁹

Specifically, the AC has suggested that the measures envisaged by articles 6 and 9 FCNM involve funding for minority media, programmes dealing with minority issues or intercultural dialogue in the mainstream media and minority access to the mainstream media.³⁷⁰ The AC has welcomed media initiatives in respect of multicultural education and combatting xenophobia³⁷¹ and the reporting of minority

³⁶⁴ Article 2(2) UN Declaration on Minorities.

³⁶⁵ Commission on Human Rights, above n 1, para 35.

³⁶⁶ Verstichel, above n 289, 61.

³⁶⁷ Human Rights Council, 'Background Document' above n 235, para 30.

³⁶⁸ 'The Ljubljana Guidelines & Explanatory Note', above n 322, para 11.

³⁶⁹ AC, above n 203, 8.

³⁷⁰ Council of Europe, above n 16, para 62; 'Second Opinion on the United Kingdom' above n 102, para 113; 'Third Opinion on Denmark' above n 70, para 64.

³⁷¹ See, for example, AC, 'Opinion on the Czech Republic' adopted on 6 April 2001 ACFC/INF/OP/I(2002)002 para 37; 'Opinion on Portugal' above n 14, para 44; 'Second Opinion on Norway' above n 54, para 79.

issues in an impartial and unbiased manner.³⁷² In comparison, the AC has been particularly critical of reporting in the media that is xenophobic and has the potential to incite hostility³⁷³ and hate crimes.³⁷⁴ In particular, the AC has criticised the reporting of the minority background of those suspected of criminal activities.³⁷⁵ For example, in relation to Italy, the AC noted 'in reporting criminal facts, some newspapers mention the ethnic origin of the alleged perpetrators, especially when those belong to the Roma community, thus reinforcing the prevalent clichés'.³⁷⁶

The measures recommended by the AC in order to secure the right to intercultural dialogue and tolerance in the media would not only allow the communication of minority concerns but also, additionally, have the potential to promote majority receptiveness to such concerns. Consequently, intercultural dialogue and tolerance in the media may facilitate the preservation of minority identity. Specifically, the AC has noted that 'the media not only has a major role in encouraging a spirit of tolerance and intercultural dialogue, but it also holds one of the essential keys for the preservation and promotion of the culture of persons belonging to different ethnic and religious groups'.³⁷⁷

In contrast to minority rights standards, generally applicable human rights instruments do not explicitly require that the media encourage intercultural dialogue. However, the mandate of the UN Special Rapporteur on Religion or Belief '*[c]alls upon the Special Rapporteur to work with the mass-media organizations to promote an atmosphere of respect and tolerance for religious and cultural diversity, as well as multiculturalism*'.³⁷⁸ Notably, a consultation organised by the UN Special Rapporteur on Religion or Belief revealed 'the importance of skills training, including with

³⁷² 'Opinion on the Czech Republic' above n 371, para 37; AC, 'Opinion on Serbia and Montenegro' adopted on 27 November 2003 ACFC/INF/OP/I(2004)002 para 61; 'Second Opinion on Croatia' above n 101, para 84.

³⁷³ See, for example, 'Opinion on Austria' above n 14, para 32; 'Opinion on Spain' above n 179, para 50; 'Second Opinion on Denmark' above n 70, paras 79, 96-7; 'Second Opinion on Norway' above n 54, paras 82-3; 'Second Opinion on the United Kingdom' above n 102, paras 112, 115.

³⁷⁴ See, for example, 'Opinion on Georgia' above n 101, para 81; 'Opinion on Serbia and Montenegro' above n 372, para 61; 'Second Opinion on Bulgaria' above n 14, paras 121-22.

³⁷⁵ See, for example, 'Opinion on Germany' above n 14, para 34; 'Opinion on Italy', above n 54, para 37; 'Opinion on Portugal' above n 14, para 47; 'Second Opinion on Austria' above n 54, para 89; 'Second Opinion on Germany' above n 179, paras 82-4, 87.

³⁷⁶ 'Opinion on Italy', above n 54, para 37.

³⁷⁷ 'Second Opinion on Denmark' above n 70, para 99.

³⁷⁸ Human Rights Council. 'Freedom of Religion or Belief: Mandate of the Special Rapporteur on Freedom of Religion or Belief' (23 July 2010) UN doc A/HRC/RES/14/11 para 11.

respect to investigative reporting' in order to facilitate the promotion of tolerance by the media.³⁷⁹

Media pluralism has been established as a requirement of article 19 ICCPR and article 10 ECHR.³⁸⁰ In particular, in General Comment No 34 the HRC recognised that '[a]s a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media'.³⁸¹ Moreover, the recognition by the ECtHR in *Informationsverein Lentia and Others v Austria* that the State is the 'ultimate guarantor' of pluralism,³⁸² implies that the State must take positive measures to facilitate the achievement of media pluralism.³⁸³ Through access to and participation in the media, persons belonging to minorities may be able to challenge prejudice and educate the majority about their culture.³⁸⁴

Nonetheless, freedom of expression does not require that States take measures to ensure that the media proactively encourages tolerance and intercultural dialogue. As a result, while these generally applicable human rights standards create the necessary conditions for intercultural dialogue to take place, they are insufficient by themselves to ensure that this right is realised. Although the UN Special Rapporteur on Religion or Belief has been mandated to 'promote an atmosphere of respect and tolerance for religious and cultural diversity', this has only been the subject of limited attention.³⁸⁵ In comparison, the AC has clearly established the measures required in relation to the media to ensure intercultural dialogue and tolerance. This approach has found support in the UN Declaration on Minorities and

³⁷⁹ UNGA, above n 324, para 20.

³⁸⁰ *Informationsverein Lentia and Others v Austria* (1993) Series A no 276 para 38; HRC, 'General Comment No 34' on 'Article 19: Freedoms of Opinion and Expression' UN doc CCPR/C/GC/34 paras 14, 40.

³⁸¹ HRC, above n 380, para 14.

³⁸² *Informationsverein Lentia and Others v Austria*, above n 380, para 38.

³⁸³ T McGonagle, *Minorities, Freedom of Expression and of the Media: Dynamics and Dilemmas* (Intersentia 2011) 454.

³⁸⁴ *Ibid.*, 387.

³⁸⁵ Commission on Human Rights, above n 334, para 108; UNGA, 'Interim Report of the Special Rapporteur of the Commission on Human Rights on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' (31 July 2001) UN doc A/56/253 paras 122-130; Commission on Human Rights, 'Civil and Political Rights, including the Question of Religious Intolerance – Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir' (9 January 2006) UN doc E/CN.4/2006/5 paras 19 and 62; UNGA, above n 324.

the Ljubljana Guidelines. Consequently, an added-value to minority rights protection can be discerned.

3.5.3. Preliminary Conclusions

The broader right to intercultural dialogue is only explicitly elaborated in the FCNM. Yet, the rights contained in a wide spectrum of human rights instruments have the potential to facilitate and encourage intercultural dialogue and tolerance. Within the UN system, the requirement of intercultural education is clearly established within the binding CRC and ICERD. However, both the CRC and ICERD have a limited scope of application, which has the potential to restrict the scope of intercultural education, as compared to minority rights instruments. Additionally, only the FCNM and UN Declaration on Minorities expressly recognise that intercultural education is a two-way process. The elaboration of the measures required to ensure that intercultural education is effective, by the AC, UN Forum on Minorities Issues and in the Commentary to the UN Declaration on Minorities, leads to the conclusion that there is an added-value to minority rights protection.

The explicit recognition in the FCNM of the role of the media in fomenting intercultural dialogue and the elaboration of the measures required in order to facilitate intercultural dialogue and tolerance, constitutes a clear added-value to minority rights protection. Although the UN Declaration on Minorities does not explicitly recognise this right, the UN Forum on Minorities has suggested that it may constitute a prerequisite for the achievement of other minority rights standards. In contrast, generally applicable human rights instruments do not expressly establish a right to intercultural dialogue and tolerance in relation to the media.

Freedom of expression has been interpreted by the HRC and ECtHR to require that States take measures to ensure that the media reflects societal diversity. Yet, this does not lead to the conclusion that the media must take measures to foment intercultural dialogue and tolerance. The UN Special Rapporteur on Religion or Belief, in accordance with his mandate, has begun to consider the role of the media in facilitating inter-religious and intercultural dialogue. However, the AC and the Ljubljana Guidelines have elaborated upon the role of the media in this respect, in far more detail. Consequently, there is an added-value to minority rights protection

insofar as it provides explicit standards in relation to intercultural dialogue and tolerance, the content of which has been elaborated by supervisory bodies.

The requirement of intercultural dialogue and tolerance in education and the media has the potential to improve majority receptiveness to societal diversity and to claims to multicultural accommodation made by persons belonging to minorities. A tolerant society ensures that persons belonging to minorities are able to visibly manifest their cultural and religious identity, without fear of repercussion. Moreover, pluralism in the media both affirms the societal membership of persons belonging to minorities and provides a forum for the communication and preservation of minority culture. Thus, intercultural dialogue and tolerance has the potential to impact the ability of persons belonging to minorities to preserve their identity both directly, by providing access to resources, and indirectly, by ensuring that the majority is receptive to minority concerns and amenable to pluralism and diversity.

3.6. CONCLUSION: THE ADDED-VALUE OF MINORITY RIGHTS PROTECTION?

It has been suggested that minority rights standards do not extend past generally applicable human rights standards. However, this chapter has revealed a *prima facie* added-value to minority rights protection. Minority rights standards are based on the premise that persons belonging to minorities are more susceptible to rights violations than members of the majority and require additional support in order to maintain their identity. Accordingly, minority rights standards are more focused on the needs of persons belonging to minorities, establish more detailed standards and require positive measures to ensure their achievement, as compared to generally applicable human rights standards. In particular, the interpretation and elaboration of the measures needed in order to ensure the achievement of minority rights standards by monitoring bodies constitutes an added-value of minority rights protection.

In relation to the preservation of minority identity, minority rights standards significantly overlap with the generally applicable human rights standards of freedom of religion and the right to culture. Notably, the group element of the exercise these rights has been acknowledged either within the standards themselves or by their monitoring bodies. Although article 15(1)(a) ICESCR establishes a right to culture, it has only been through the CESCR's recent elaboration of this right in

General Comment No 21 that minority cultural practices have been recognised as benefiting from its protection. In comparison, minority rights instruments explicitly provide targeted rights to ensure the preservation of minority cultural practices including educational, linguistic and religious rights, which have, in turn, been elaborated by the AC and in the Commentary to the UN Declaration on Minorities.

Likewise, while the supervisory mechanisms of article 15(1)(a) ICESCR and minority rights standards have submitted that States have positive obligations to ensure these rights, only minority rights bodies —the AC and the former UN Working Group on Minorities— have provided significant elaboration on the content of such positive measures. In particular, the programmatic nature of the rights contained in the FCNM has allowed the AC to elaborate the content of rights pertaining to minority identity through the State reporting procedure. Hence, in relation to the preservation of minority culture, there appears to be an added-value to minority rights protection.

The religious rights contained in minority instruments require positive measures to be taken in order to ensure their achievement, whereas freedom of religion, contained in generally applicable human rights instruments, constitutes a negative right. Nevertheless, the rights of religious minorities have not received much attention under minority rights instruments and, consequently, minority rights bodies have not significantly elaborated the content of these rights. In contrast, the Strasbourg institutions have developed a significant body of jurisprudence in relation to freedom of religion. However, it appears that the limitations permitted to freedom of religion under the ECHR are wider than the limitations permitted to religious rights under minority rights standards. Thus, there also appears to be an added-value to minority rights protection in respect of the preservation of the identity of religious minorities.

Non-discrimination and equality provisions are found in both generally applicable human rights and minority rights instruments and have been interpreted in a similar manner to require that States adopt special measures to ensure their achievement and to include a prohibition on *public* and *private* discrimination as well as *direct* and *indirect* discrimination. Nonetheless, the majority of non-discrimination provisions in generally applicable human rights instruments are parasitic and, therefore, can only be exercised in conjunction with another

Convention right. While article 26 ICCPR and Protocol 12 ECHR are not parasitic, they have rarely been utilised by the HRC and ECtHR respectively. In comparison, minority rights instruments provide a general prohibition on discrimination. Similarly, ICERD provides general protection from 'racial discrimination', which incorporates national or ethnic origin. The binding nature of this instrument and the existence of a complaints mechanism lead to the conclusion that ICERD provides more extensive protection for persons belonging to national or ethnic minorities than minority rights protection. Yet, this protection is not extended to persons belonging to purely religious or linguistic minorities. Accordingly, an added-value to minority rights protection can still be discerned.

Political rights are found in both minority rights and generally applicable human rights instruments. Whereas political rights in generally applicable human rights instruments focus on the requirements of democratic participation, minority rights standards require that such participation is effective. In particular, minority rights bodies —the AC, HCNM, the UN Independent Expert on Minority Issues and the former UN Working Group on Minorities— have suggested that persons belonging to minorities should not only be consulted on matters of concern to their community but must also be able to influence the outcome of the decision-making process. This is in direct contrast to the ECtHR that has only recently recognised that interested parties have a right to be consulted and has not acknowledged that persons belonging to minorities may require additional protection. Moreover, in the event that measures to ensure the effective participation of persons belonging to minorities are insufficient to facilitate the preservation of their identity, a right to cultural autonomy may be inferred.

A broad right to intercultural dialogue and tolerance is only explicitly provided in article 6(1) FCNM. However, the role of education in facilitating intercultural dialogue has been explicitly reaffirmed in article 12(1) FCNM, article 4(4) UN Declaration on Minorities, article 29(1) CRC and article 7 ICERD. Although the generally applicable human rights standards contained in ICERD and CRC provide a binding right to intercultural education, the limited scope of application of these instruments leads to the conclusion that there is an added-value to minority rights protection. Minority rights bodies —the AC, the former UN

Working Group on Minorities and HCNM— have also provided detailed guidance regarding the measures required in order to realise this right in practice.

The role of the media in facilitating intercultural dialogue has been acknowledged in articles 6(1) and 9 FCNM and by the UN Forum on Minority Issues. In contrast, generally applicable human rights standards do not explicitly recognise this right and primarily protection in this regard can be derived under freedom of expression. Although supervisory mechanisms have recognised the role of the media in promoting pluralism under freedom of expression, this right has not been interpreted to require that the media take active measures to promote intercultural dialogue and tolerance, in direct contrast to article 6(1) and 9 FCNM. However, the UN Special Rapporteur on Freedom of Religion or Belief has increasingly considered the role of the media in promoting inter-religious and intercultural dialogue, in accordance with his mandate. Yet, the AC to the FCNM has, through the State reporting process, provided a far more extensive elaboration of the requirements of this right.

While the rights contained in generally applicable human rights instruments including freedom of expression contribute to the achievement of intercultural tolerance and dialogue, the explicit recognition of this right and the measures advocated by minority rights bodies for the achievement of this right constitute the added-value of minority rights protection.

Although the adoption of measures to enable the preservation of the culture and religion of persons belonging to minorities clearly contribute to the maintenance of minority identity, these measures are unlikely to be sufficient to guarantee the exercise of this right unless the other tenets of minority rights protection are respected. The effective participation of persons belonging to minorities in decisions that affect them prevents the majority from having undue influence over minority concerns. Hence, this right also directly enables the preservation of minority identity.

In comparison, measures to prevent discrimination and encourage intercultural dialogue may result in the increased acceptance of diversity within society. This in turn may *indirectly* impact the ability of persons belonging to minorities to maintain their distinct identity. As acknowledged by the *PCIJ* and the AC, the tenets of minority rights protection are intertwined. The socio-economic disadvantage of persons belonging to minorities has the potential to hinder the

preservation of their identity. Furthermore, fear of intolerance from the majority may prevent persons belonging to minorities from visibly manifesting their minority identity. Intercultural education may also increase majority receptiveness to claims made by the minority to the accommodation of their identity.

As identified in chapter 2, international law and multiculturalist policies align in terms of both content and aims. Additionally, international law provides a framework of minimum standards for the achievement of multiculturalist policies. However, there is a clear added-value to minority rights protection as compared to generally applicable human rights protection. It is, therefore, minority rights standards that provide the basis of the framework of minimum standards for the pursuit of multiculturalist policies. This leads to the conclusion that in order to pursue multiculturalist policies, minority rights standards must be applied to persons belonging to minorities. Furthermore, given the intertwined nature of the four tenets of minority rights protection, the preservation of minority identity is dependent upon the achievement of the other three tenets. If multiculturalist policies focus too much on identity concerns to the detriment of equality and societal cohesion, this would appear to be counterproductive.

PART B:
THE PROTECTION OF EUROPEAN MUSLIMS IN
INTERNATIONAL LAW

Chapter 4:

The Status of Europe's Muslims under International Law

4.1. INTRODUCTION

This thesis has established that multiculturalist theories and international law broadly align in terms of both content and aims, particularly as both pursue the aims of justice and security. Furthermore, there is a *prima facie* added-value to minority rights protection as compared to generally applicable human rights standards. Hence, minority rights standards provide a framework of minimum standards for the pursuit of multiculturalist policies. However, in the absence of a universally accepted definition of 'minority' under international law,¹ both academic discussion and State practice have distinguished between the rights of 'new minorities' and 'old minorities'.²

Eide has noted that:

¹ P Thornberry, *International Law and the Rights of Minorities* (OUP 1992) 164; MN Shaw, 'The Definition of Minorities in International Law' in Y Dinstein and M Tabory (eds), *The Protection of Minorities and Human Rights* (Martinus Nijhoff 1992); J Packer, 'Problems in Defining Minorities' in D Fottrell and B Bowring (eds), *Minority and Group Rights in the New Millennium* (Martinus Nijhoff 1999); A Verstichel, 'Personal Scope of Application: An Open, Inclusive and Dynamic Approach – The FCNM as a Living Instrument' in A Verstichel and others (eds), *The Framework Convention for the Protection of National Minorities: a Useful Pan-European Instrument?* (Intersentia 2008).

² G Pentassuglia, *Minorities in International Law – An Introductory Study* (Council of Europe Publishing 2002) 59-67. See also, for example, HRC, 'Fourth Periodic Reports of States parties due in 1993 – Germany' (22 February 1996) UN doc CCPR/C/84/Add.5 paras 242-44; AC, 'Comments of the Government of Denmark on the Opinion of the Advisory Committee on the Implementation of the Framework Convention for the Protection of National Minorities in Denmark' 7 June 2001 GVT/COM/INF/OP/I(2001)005, 3; AC, 'Comments by the Federal Republic of Germany on the Opinion of the Advisory Committee on the Implementation of the Framework Convention for the Protection of National Minorities in the Federal Republic of Germany' 19 July 2002 GVT/COM/INF/OP/I(2002)008, 5.

Old minorities are composed of persons who lived, or whose ancestors lived, in the country or a part of it before the state became independent or before the boundaries were drawn in the way they are now. New minorities are composed of persons who have come in after the state became independent.³

Packer has, similarly suggested, that "[n]ew" in this sense typically refers to "immigrants", either themselves or their descendants'.⁴ On this basis, States have attempted to limit their obligations under minority rights standards by excluding 'new minorities' from their scope of application.⁵ For example, Denmark has explicitly stated that '[t]he Danish Government thus holds the view that immigrants and refugees cannot be considered to be covered by the notion of national minority'.⁶

Additionally, while the Commentary to the UN Declaration on Minorities does not support the exclusion of 'new minorities' from minority rights protection, it does note that 'in the application of the Declaration the "old" minorities have stronger entitlements than the "new"'.⁷ The Commentary to the UN Declaration on Minorities also indicates that persons belonging to religious minorities may only be able to claim rights pertaining to 'the profession and practice of their religion', as compared to persons belonging to ethnic minorities who 'would have more extensive rights relating to the preservation and development of other aspects of their culture'.⁸ Consequently, if European Muslims are not excluded from minority rights protection, their rights may be limited as a result of their status as 'new minorities' or classification as religious minorities.

This chapter asserts that in the absence of an accepted definition of 'minority' under international law, the rules of treaty interpretation should be employed. The exclusion of European Muslims from minority rights protection and the adoption of

³ A Eide, 'The Rights of "Old" Versus "New" Minorities' (2002/3) 2 *European Yearbook of Minority Issues* 365, 365.

⁴ Packer, above n 1, 263.

⁵ R Hofmann, 'The Framework Convention for the Protection of National Minorities: An Introduction' in M Weller (ed), *The Rights of Minorities, A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP 2005) 16.

⁶ 'Comments of the Government of Denmark' above n 30, 3.

⁷ Commission on Human Rights, 'Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' UN doc E/CN.4/Sub.2/AC.5/2005/2 para 11.

⁸ *Ibid.*, para 6.

differentiated rights on the basis that they constitute 'new minorities' is based upon arbitrary criteria and overlooks 'the object and purpose'⁹ of minority rights protection: security and justice. Furthermore, given the intersection between the ethnic and religious identities of the majority of European Muslim minorities, persons belonging to these minorities should be able to claim the protection offered by minority rights standards pertaining to ethnic as well as religious identity.

First, this chapter considers the interpretation of the term 'minority' under international law, focusing upon the justifications for the exclusion of 'new minorities' from minority rights protection and the object and purpose of minority rights protection. Second, the suggestion that 'old minorities' have different entitlements to 'new minorities' is similarly examined. Third, this chapter establishes the nature of European Muslim identity in order to ascertain whether European Muslim minorities are able to claim rights pertaining to ethnic or cultural identity in addition to religious identity.

4.2. ARE EUROPE'S MUSLIMS 'MINORITIES'?

The PCIJ held in the *Greco-Bulgarian Communities* case that 'the existence of communities is a question of fact; it is not a question of law'.¹⁰ While the need for the adoption of an authoritative legal definition of the term 'minority' has been questioned by academics,¹¹ it has also been suggested that the failure to adopt a clear definition may allow States to evade their obligations under international law.¹² Therefore, even though 'the existence of communities is a question of fact', such communities must be recognised by States if their claims to the protection offered by minority rights standards are to be realised. In the case of 'new minorities' the importance of a definition becomes apparent, as States have attempted to exclude

⁹ Article 31(1) VCLT.

¹⁰ *Greco-Bulgarian Communities* Case PCIJ Series B No 17 Advisory Opinion of July 31 1930, 22.

¹¹ A Spiliopoulou Åkermark, *Justifications of Minority Protection in International Law* (Kluwer Law International 1997) 86; RM Letschert, *The Impact of Minority Rights Mechanisms* (TMC Asser Press 2005) 28.

¹² JA Sigler, *Minority Rights – A Comparative Analysis* (Greenwood Press 1983) 3; Spiliopoulou Åkermark, above n 10, 87; Packer, above n 1, 225; Pentassuglia, above n 30, 56.

such groups from minority rights protection under both the UN and Council of Europe systems.¹³

Although Muslim communities have been present in Western Europe since the Middle Ages,¹⁴ widespread migration took place following the Second World War.¹⁵ The term 'new minorities' has been widely understood to comprise immigrants and their descendants.¹⁶ As the majority of post-Second World War immigrants in Europe were Muslims,¹⁷ by excluding 'new minorities' from the scope of minority rights protection, Western European States have, in fact, primarily excluded Muslims from minority rights protection. Such a restriction has been justified on the grounds that immigrants were initially expected to assimilate into their receiving State¹⁸ or to return to their State of origin.¹⁹

The scope of application of minority rights standards differs between the UN and Council of Europe systems. Under the UN system, persons belonging to ethnic, linguistic or religious minorities find protection under article 27 ICCPR:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

¹³ HRC, above n 30, para 236; HRC, 'Fourth Periodic Reports of States Parties due in 1998 – Denmark' (22 February 1999) UN doc CCPR/C/DNK/99/4 para 241; Council of Europe, 'List of Declarations Made With Respect to Treaty No. 157 Framework Convention for the Protection of National Minorities' <<http://conventions.coe.int/treaty/Commun/ListeDeclarations.asp?NT=157&CV=1&NA=&PO=999&CN=999&VL=1&CM=9&CL=ENG>> accessed 1 April 2013; AC, 'Report Submitted by Denmark Pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities' received on 6 May 1999 ACFC/SR(1999)009, 11; AC, 'Second Report Submitted by Germany Pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities' received on 13 April 2005 ACFC/SR/II(2005)002 paras 4-9.

¹⁴ M Anwar, 'Muslims in Western States: The British Experience and the Way Forward' (2008) 28 *Journal of Muslim Minority Affairs* 125, 125-56; HA Hellyer, *Muslims of Europe – The 'Other' Europeans* (Edinburgh University Press 2009) 145.

¹⁵ J Nielsen, *Muslims in Western Europe* (3rd edn Edinburgh University Press 2004); Anwar, above n 14, 125-56; Hellyer, above n 14, 149.

¹⁶ Packer, above n 1, 263; Eide, above n 3, 365.

¹⁷ T Modood, *Multiculturalism – A Civic Idea* (Polity Press 2007) 4.

¹⁸ UNGA, 'Annotations on the Text of the Draft International Covenants on Human Rights' UN doc A/2929, Chapter VI para 186; HRC, above n 30, para 242.

¹⁹ See, for example, U Davy, 'Integration of Immigrants in Germany: A Slowly Evolving Concept' (2005) 7 *European Journal of Migration and Law* 123, 126.

The UN Declaration on Minorities adds 'national minorities' to this list. In order to elaborate the content of article 27 ICCPR, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities commissioned the authoritative Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*. This report has to date provided the most widely accepted definition of ethnic, religious or linguistic minorities:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.²⁰

This definition aligns with the text of article 27 ICCPR and does not indicate that 'new minorities' are automatically excluded from its scope of application. Thus, European Muslims are not *per se* excluded from minority rights protection under the UN system.

The FCNM, in contrast, applies only to persons belonging to 'national minorities'. In similar language to article 27 ICCPR, article 5(1) FCNM establishes:

The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.

The term 'national minority' has roots in the League of Nations minority rights system. Shaw has noted that '[i]t would have been preferable if the term had disappeared altogether, not least because of the chronic uncertainty as to what exactly is meant by "national" but this has not happened. Partly one suspects, this is

²⁰ F Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* UN Doc. E/CN.4/Sub.2/384/Rev.1 para 568.

because of historical usage'.²¹ Historically the term 'national minority' has been understood to imply a connection to a kin-State, 'a larger nation already constituted in a state or in a federated entity within a federal state'.²² However, a common understanding of the term did not evolve amongst States.²³

The Commentary to the UN Declaration on Minorities reveals '[t]hat addition [of national minority] does not extend the overall scope of application beyond the groups already covered by article 27'.²⁴ As a result, the term 'national minority' has been interpreted to have a narrower scope than the terms 'ethnic, religious or linguistic minority' utilised in article 27 ICCPR. Yet, Gilbert has proposed on the basis of the provisions of the FCNM itself, that it is possible to interpret 'national minority' in a similar manner to the UN minority rights standards:

The characteristics of a national minority are set out in Article 5.1 of the Framework Convention, which lists 'the essential elements of their identity' as 'their religion, language, traditions and cultural heritage.' A minority group need only be distinctive for any one of those reasons.²⁵

Consequently, it is possible for 'national minority' to be interpreted broadly to include religious minorities. If the identified characteristics of a 'national minority' are taken at face value, then European Muslims are not *per se* excluded from the scope of application of the FCNM.

Nonetheless, requirements of numerical inferiority, non-dominance, the will to maintain their distinct identity,²⁶ citizenship²⁷ and 'longstanding, firm and lasting

²¹ Shaw, above n 1, 22.

²² F Benoît-Rohmer, *The Minority Question in Europe – Texts and Commentary* (Council of Europe Publishing 1996) 15.

²³ *Ibid*; TH Malloy, *National Minority Rights in Europe* (OUP 2005) 21.

²⁴ Commission on Human Rights, above n 7, para 6.

²⁵ G Gilbert, 'The Council of Europe and Minority Rights' (1996) 18 *Human Rights Quarterly* 160, 177; H Klebes, 'The Council of Europe's Framework Convention for the Protection of National Minorities – Introduction' (1995) 16 *Human Rights Law Journal* 92, 93; HJ Heintze, 'Article 1' in M Weller (ed), *The Rights of Minorities, A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP 2005) 84.

²⁶ Capotorti, above n 20, para 568; J Deschênes, *Proposal concerning the Definition of the Term 'Minority'* UN doc E/CN.4/Sub.2/1985/31 para 181; R Medda-Windischer, 'New Minorities, Old Instruments? A Common but Differentiated System of Minority Protection' (2011) 13 *International Community Law Review* 361, 361-62.

²⁷ Capotorti, above n 20, para 568; Council of Europe, above n 13.

ties with' the State²⁸ have been suggested as preconditions of minority rights protection under both the UN and Council of Europe systems. In the case of European Muslims the requirements of numerical inferiority, non-dominance are clearly satisfied, whereas the will to maintain their distinct identity appears to have been satisfied, implicitly,²⁹ by the continued practice of Islam over time. Hence, it is necessary to consider the extent to which the proposed requirements of citizenship and longstanding, firm and lasting ties impact the ability of European Muslims to exercise minority rights. On the basis of the object and purpose of minority rights standards, the extent to which these proposed limitations on the scope of 'minority' under international law are justifiable will be examined.

4.2.1. Citizenship

Citizenship as a prerequisite for recognition as a minority has been suggested under both the UN system and the FCNM.³⁰ Such a requirement is not contained in the text of minority rights provisions. However, as States have been afforded a wide margin of appreciation under the FCNM to interpret the scope of application of the instrument,³¹ 'national minority' has been interpreted by States to impose the requirement of citizenship.³² Specifically, under the FCNM, Austria, Estonia, Germany, Latvia, Poland and the former Yugoslav Republic of Macedonia have issued declarations to this effect.³³ For example, the Austrian declaration states

²⁸ Capotorti, above n 20, para 202; Declaration contained in the instrument of ratification, deposited on 6 January 1997, Council of Europe, above n 13.

²⁹ Medda-Windischer, above n 26, 361-62.

³⁰ Capotorti, above n 20, para 568; Thornberry, above n 1, 171-72; Council of Europe, above n 13.

³¹ Council of Europe, Framework Convention for the Protection of National Minorities and Explanatory Report February 1995, H(1995)010 para 12.

³² Benoît-Rohmer, above n 22, 14-5; P Thornberry, 'The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations and an Update' in A Philips and A Rosas (eds), *Universal Minority Rights* (Turku/Åbo Akademi University Institute for Human Rights and Minority Rights Group International 1995) 30.

³³ Council of Europe, above n 13.

... the term "national minorities" within the meaning of the Framework Convention for the Protection of National Minorities is understood to designate those groups which come within the scope of application of the Law on Ethnic Groups ... and which live and traditionally have had their home in parts of the territory of the Republic of Austria and *which are composed of Austrian citizens* with non-German mother tongues and with their own ethnic cultures.³⁴

The impact of a requirement of citizenship on the ability of European Muslims to claim the protection of minority rights standards varies according to their State of residence. As the majority of British Muslims from the Indian sub-continent had gained British citizenship by the mid-1970s,³⁵ a citizenship requirement would not restrict the application of minority rights standards to these communities. In contrast, other European States –most notably Germany– have systematically denied Muslim immigrants citizenship and argued that citizenship constitutes a prerequisite of minority rights protection under international law.³⁶ Nonetheless, Muslims in Germany constitute permanent residents.

Packer submits that 'there are varying degrees of being "inside" or "outside" the polity. Migrant labour, refugees, tourists, etc., are all in one way or another *inside* the polity, while at the same time partly outside it';³⁷ thus, 'the fuzzy reality of varying degrees of relations between non-citizens and the polity/State strongly imply that most minority rights may be extended to non-citizens who are substantially within the polity'.³⁸ Additionally, it has been recognised that States may use a requirement of citizenship in order to limit their obligations under minority rights protection. Notably, the Russian Federation has objected to the requirement of citizenship on the basis that:

³⁴ Council of Europe, above n 13.

³⁵ Nielsen, above n 15, 51-2.

³⁶ AC, 'Opinion on Germany' adopted on 1 March 2002 ACFC/INF/OP/I(2002)008 para 17; AC, 'Second Opinion on Germany' adopted on 1 March 2006 ACFC/OP/II(2006)001 para 13; Declaration contained in a letter from the Permanent Representative of Germany, dated 11 May 1995, handed to the Secretary General at the time of signature, on 11 May 1995 and renewed in the instrument of ratification, deposited on 10 September 1997, Council of Europe, above n 13; CERD, 'Concluding Observation of the Committee on the Elimination of Racial Discrimination – Germany' (22 September 2008) UN doc CERD/C/DEU/CO/18 para 19; T Choudhury, *Muslims in Europe - A Report on 11 EU Cities* (Open Society Institute, London 2010) 187-88.

³⁷ Packer, above n 1, 266.

³⁸ *Ibid.*, 267.

[A]ttempts to exclude from the scope of the Framework Convention the persons who permanently reside in the territory of States Parties to the Framework Convention and previously had a citizenship but have been arbitrarily deprived of it, contradict the purpose of the Framework Convention for the Protection of National Minorities.³⁹

It would appear arbitrary to exclude European Muslims, who have permanent residency, from the scope of application of minority rights protection, when they contribute to the State in which they are resident and are 'substantially within the polity'.

Both the HRC and the AC have rejected the imposition of a strict requirement of citizenship by States, in particular in relation to non-political rights.⁴⁰ In 1994 the HRC interpreted article 27 ICCPR in the authoritative General Comment No 23. Specifically, the HRC explicitly stated that, 'the individuals designed to be protected need not be citizens of the State party';⁴¹ whereas the AC has warned that 'a citizenship requirement in a general provision dealing with the scope of application of minority rights is not appropriate as these rights are human rights and not rights of citizens'.⁴² Thus, although a number of States have argued that citizenship constitutes a prerequisite for minority rights protection, this interpretation is not supported by the text of minority rights standards and has not been accepted as a legitimate restriction by monitoring bodies, in practice.

³⁹ Council of Europe, above n 13.

⁴⁰ HRC, 'General Comment No 23' on 'The Rights of Minorities (Art 27)' UN doc CCPR/C/21/Rev.1/Add.5 paras 5.1-5.2; Commission on Human Rights, above n 7, paras 9-10; Commission on Human Rights, 'Specific Groups and Individuals: Minorities – Report of the Independent Expert on Minority Issues, Gay McDougall' (6 January 2006) UN doc E/CN.4/2006/74 para 25. See, for example, AC, 'Opinion on Austria' adopted on 16 May 2002 ACFC/INF/OP/I(2002)009 para 20; 'Opinion on Germany' above n 36, paras 17-8; AC, 'Opinion on Switzerland' adopted on 20 February 2003 ACFC/INF/OP/I(2003)007 para 24.

⁴¹ HRC, above n 40, para 5.1.

⁴² AC, 'Third Opinion on "the former Yugoslav Republic of Macedonia"' adopted on 30 March 2011 ACFC/OP/III(2011)001 para 35.

4.2.2. Longstanding, Firm and Lasting Ties

While citizenship has not been accepted as a requirement of minority rights protection, 'longstanding, firm and lasting ties with' the State have also been suggested as a precondition of minority rights protection.⁴³ Such a requirement may be utilised by States for the purpose of limiting the application of minority rights standards to traditionally recognised minorities, to the exclusion of 'new minorities'.⁴⁴ Notably, 'longstanding, firm and lasting ties' has been suggested to impose the requirement of presence in the State for over 100 years⁴⁵ or at least three generations.⁴⁶ Given that the majority of European Muslims residing in Western Europe constitute so-called 'new minorities', such a requirement has the potential to limit the application of minority rights standards to these communities.

The *travaux préparatoires* to the ICCPR reveal that 'the provisions concerning the rights of minorities, it was understood, should not be applied in such a manner as to encourage the creation of new minorities or to obstruct the process of assimilation'.⁴⁷ Although the *travaux préparatoires* indicate support for the restriction of minority rights protection to 'traditional minorities', this understanding of the scope of application of article 27 ICCPR stems from 1955. As has been noted in Chapter 2, assimilation has subsequently been rejected as a method of diversity management and, notably, in 1979 Capotorti submitted:

[I]t is also inadmissible that a distinction be made between 'old' and 'new' minorities. It is certainly not the function of article 27 to encourage the formation of new minorities; where a minority exists, however, the article is applicable to it, regardless of the date of its formation.⁴⁸

⁴³ Council of Europe, above n 13. See also, Thornberry, above n 1, 171; G Alfredsson, 'Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law' in N Ghana and A Xanthaki (eds), *Minorities, Peoples and Self-Determination* (Martinus Nijhoff 2005) 167.

⁴⁴ HRC, above n 30, paras 242-44; HRC, above n 13, para 241. See, also, the Declarations of Denmark, Germany, Netherlands, Slovenia, Sweden and the former Yugoslav Republic of Macedonia: Council of Europe, above n 13; 'Report Submitted by Denmark' above n 13, 11; 'Second Report Submitted by Germany' above n 13, paras 4-9.

⁴⁵ Alfredsson, above n 43, 167.

⁴⁶ M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) 647; Verstichel, above n 1, 148.

⁴⁷ UNGA, above n 18, para 186.

⁴⁸ Capotorti, above n 20, para 205.

As human rights conventions constitute 'living instruments',⁴⁹ the interpretation of article 27 ICCPR should reflect social reality, as opposed to the narrow scope of application foreseen at the time of adoption. Therefore, while it was initially anticipated that immigrants would return home or assimilate into their receiving State, as this has not happened in practice, article 27 ICCPR should be interpreted accordingly. Nowak has suggested:

With the *rapid increase of migration* in times of globalisation, it would be somehow anachronistic to stick to traditional notions with respect to the definition of minorities, such as the "three generations rule", in order to exclude so-called "new minorities" from rights which are granted to members of "old minorities".⁵⁰

Hence, it is the existence of minorities that should determine whether minority rights are applicable rather than the requirement of 'longstanding, firm and lasting ties with' the State. This approach has been adopted in the Commentary to the UN Declaration on Minorities,⁵¹ UN Independent Expert on Minority Issues⁵² and, most notably, by the HRC in General Comment No 23: 'Just as they need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights'.⁵³

State practice in Western Europe has largely supported this approach in relation to immigrants.⁵⁴ Notably, despite initially opposing a wide definition of the

⁴⁹ *Tyrer v United Kingdom* (1978) Series A no 26; *Judge v Canada* Communication no 829/1998, UN doc CCPR/C/78/D/829/1998 para 10.3. Article 31(3)(b) VCLT allows 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' to be taken into account.

⁵⁰ Nowak, above n 46, 647.

⁵¹ Commission on Human Rights, above n 7, paras 10-11.

⁵² Commission on Human Rights, above n 40, para 25.

⁵³ HRC, above n 40, para 5.2.

⁵⁴ HRC, 'Third Periodic Report – Netherlands' (25 August 2000) UN doc CCPR/C/NET/99/3 paras 198-200; HRC, 'Fourth Periodic Report – Belgium' (16 May 2003) UN doc CCPR/C/BEL/2003/4, Article 27 para.1.2; HRC, 'Fifth Periodic Report – Finland' (24 July 2003) UN doc CCPR/C/FIN/2003/5 paras 417-421; HRC, 'Fifth Periodic Report – Norway' (3 December 2004) UN doc CCPR/C/NOR/2004/5 paras 267-270; HRC, 'Fourth Periodic Report – Austria' (20 November 2006) UN doc CCPR/C/AUT/4 paras 472-477; HRC, 'Sixth Periodic

term 'minority',⁵⁵ Germany has reported on 'new minorities' under article 27 ICCPR and expressed regret 'that the impression has been created that the rights under Article 27 of the Covenant in Germany are granted only to specific minorities...374. Germany is making considerable efforts to improve the lives of immigrants in Germany'.⁵⁶

In contrast, given the narrower understanding of the term 'national minority' as compared to 'ethnic, religious or linguistic minorities', States –notably Estonia and Switzerland– have expressly restricted the scope of application of the FCNM to persons belonging to minorities that satisfy the requirements of 'longstanding, firm and lasting ties', whereas other States, including Denmark, Germany, the Netherlands and Sweden, have limited the scope of application of the FCNM to specific minorities which satisfy these criteria.⁵⁷ Notably, while Germany has been willing to accept an inclusive interpretation of the scope of application of article 27 ICCPR, it has objected to the AC adopting a similar interpretation under the FCNM:

Since ... Germany clearly has, on the one hand, laid down an abstract definition of the term "national minorities" for legal applications in Germany and, on the other, has - without any objections being raised by the Contracting States - designated the groups to whom this definition applies, there is no need for the Advisory Committee to comment on ethnic groups that fail to meet at least one of the above-mentioned criteria. This goes for the "migrants" and "immigrants" referred to in various parts of the Opinion, for "non-citizens" in general as well as for the "group of Poles".⁵⁸

The adoption of the term 'national minority', which has traditionally been interpreted to have a narrow scope, potentially indicates a will on the part of State parties to limit the scope of application of the FCNM. Furthermore, as the FCNM was only

Report – United Kingdom of Great Britain and Northern Ireland' (18 May 2007) UN doc CCPR/C/GBR/6 para 765.

⁵⁵ HRC, above n 30, para 236.

⁵⁶ HRC, 'Fifth Periodic Report – Germany' (4 December 2002) UN doc CCPR/C/DEU/2002/5 paras 373-4.

⁵⁷ Council of Europe, above n 13.

⁵⁸ 'Comments by the Federal Republic of Germany' above n 30, 5.

adopted in 1998, arguably the situation has not sufficiently changed in this time to justify a wider interpretation being taken on the basis of the 'living' nature of the FCNM. Nonetheless, had States wished to restrict the scope of application of the FCNM, it would have been possible to adopt a definition, rather than leaving the scope of application to States' discretion and the interpretation of the AC.

The AC has consistently emphasised 'that the implementation of the FCNM should not be a source of arbitrary or unjustified distinctions' and has encouraged States to adopt a liberal interpretation of the term 'national minority'.⁵⁹ Arguably, the restriction of the definition of 'national minority' on the basis of a time criterion is arbitrary and not informed by the existence of a minority. Additionally, a number of States have adopted an inclusive definition of national minority during the reporting process.⁶⁰ For example, in its first State Report to the AC, Lithuania reported that 'Lithuanian legislation does not contain any definition of the concept of a national minority or a group of persons recognised to be a national minority. In Lithuania there are no linguistic or ethnic groups which are not considered national minorities'.⁶¹

Thornberry and Estébanez point to 'statements that all ethnic groups in the country can be regarded as national minorities and willingness to accept that the emergence of new national minorities may be the consequence of social developments' as evidence of the adoption of a 'liberal approach' to the scope of application of FCNM.⁶² Consequently, while no uniform conception of 'national

⁵⁹ Hofmann, above n 5, 16. See, for example, AC, 'Opinion on Denmark' adopted on 22 September 2000 ACFC/INF/OP/I(2001)005 paras 14-15; AC, 'Opinion on Finland' adopted on 22 September 2000 ACFC/INF/OP/I(2001)002 paras 12-13; 'Opinion on Germany' above n 36, paras 14-15; AC, 'Opinion on Sweden' adopted on 25 August 2002 ACFC/INF/OP/I(2003)006 paras 14-16.

⁶⁰ See, for example, AC, 'Report Submitted by Estonia Pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities' 22 December 1999 ACFC/SR(1999)016, 13, 16; AC, 'Report Submitted by Ireland pursuant to Article 25, paragraph 2 of the Framework Convention for the Protection of National Minorities' 13 November 2001 ACFC/SR(2001)006, 5; AC, 'Report Submitted by the Slovak Republic Pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities' 4 May 1999 ACFC/SR(1999)008, 13; AC, 'Report Submitted by the United Kingdom Pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities' 26 July 1999 ACFC/SR/(1999)013' paras 45-6; AC, 'Second Report Submitted by Finland pursuant to Article 25, paragraph 2 of the Framework Convention for the Protection of National Minorities' 10 December 2004 ACFC/SR/II(2004) 012 E.

⁶¹ AC, 'Report Submitted by Lithuania Pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities' 31 October 2001 ACFC/SR(2001)007, 20.

⁶² P Thornberry and MA Martin Estébanez, *Minority Rights in Europe: A Review of the Work and Standards of the Council of Europe* (Council of Europe Publishing 2004) 95.

minority' exists under international law, 'new minorities' have not been automatically excluded from the scope of application of the FCNM.

Moreover, the AC has utilised article 6, which refers to 'all persons living on [the State's] territory', rather than 'persons belonging to a national minority', as a catch-all provision⁶³ when States have taken a narrow view of the scope of application of the Convention.⁶⁴ A gradually evolving wide interpretation of the term 'national minority' can also be observed in the work of the OSCE HCNM.⁶⁵

In accordance, with article 31(3) Vienna Convention on the Law of Treaties (VCLT) '[t]here shall be taken into account, together with the context: ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation...'. Although the liberal approach of the AC to the interpretation of 'national minority' has received support from a number of States and the HCNM, there is insufficient consensus to establish 'subsequent practice' for the purposes of the VCLT as States have been granted a margin of appreciation to interpret the scope of application of the FCNM.⁶⁶ Nonetheless, a wide interpretation of 'national minority' would not be contrary to the VCLT and it would be possible for a wide definition of 'national minority' to evolve over time, through consistent State practice.

It is not possible to permanently exclude 'new minorities' from the protection of minority rights standards by establishing a requirement of 'longstanding, firm and lasting' ties to the State. As Alfredsson notes, '[a]t some point ... the newcomers become minorities'.⁶⁷ The HRC, UN Commentary to the UN Declaration on Minorities and the AC have all indicated that an inclusive interpretation of the scope of application of minority rights protection is preferable. Given that European Muslims have become citizens or permanent residents of the States in which they

⁶³ AC, 'Second Opinion on Denmark' adopted on 09 December 2004 ACFC/INF/OP/II(2004)005 para 76; Verstichel, above n 1, 135. For further information, see G Gilbert, 'Article 6' in M Weller (ed), *The Rights of Minorities, A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP 2005) 177-191.

⁶⁴ 'Report Submitted by Denmark' above n 13, 11; 'Second Report submitted by Germany' above n 13, paras 4-9; J Ringelheim, 'Minority Rights in a Time of Multiculturalism – The Evolving Scope of the Framework Convention on the Protection of National Minorities' (2010) 10 Human Rights Law Review 99, 116.

⁶⁵ Verstichel, above n 1, 141; HCNM, 'The Ljubljana Guidelines on Integration of Diverse Societies & Explanatory Note' (November 2012) 4.

⁶⁶ Council of Europe, above n 31, para 12.

⁶⁷ Alfredsson, above n 43, 167.

originally migrated to, the argument that they do not have 'longstanding, firm and lasting ties with' the State will at some point, if not already, become redundant.

4.2.3. The Object and Purpose of Minority Rights Protection

In accordance with article 31(1) VCLT, '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.⁶⁸ European Muslims have not been excluded from minority rights protection by the text of minority rights standards but by the interpretation of these rights by States. Therefore, as a consistent definition of the term 'national minority' and 'ethnic, religious and linguistic minorities' has not evolved under international law or State practice, in accordance with article 31(1) VCLT the object and purpose of minority rights standards should inform their scope of application.

As established in article 31(2) VCLT, '[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, *including its preamble* and annexes...'.⁶⁹ The preambles to both the UN Declaration on Minorities and the FCNM recognise that the preservation of minority identity is demanded by human rights standards and democratic values. Specifically, the Preamble to the FCNM recognises:

[T]hat a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity.

⁶⁸ U Linderfalk, *On the Interpretation of Treaties: The Modern Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 7, states 'the provisions of VCLT articles 31-33 are binding only for parties to the convention ... Parallel to the rules of interpretation laid down in articles 31-33, customary law also contains a set of rules to be used for this purpose. These rules of international custom are identical to the rules laid down in the Vienna Convention – nowadays, a fact on which not only states, but also authors, as well as international courts and tribunals seem to be in agreement'(footnotes omitted). Therefore, article 31(1) is applicable to ICCPR. See also, *LaGrand (Germany v United States of America)* (Judgment) [2001] ICJ Rep 466, 501-502 paras 99, 101; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, para 160.

⁶⁹ [Emphasis added].

Thus, as considered in Chapter 2, minority rights standards pursue the objective of justice.

As Muslims primarily constitute citizens or permanent residents of the States in which they live and contribute to the broader polity, the omission of European Muslims from the scope of application of minority rights standards does not appear to be founded in justice. Notably, these communities have maintained their identity, constitute religious and potentially ethnic minorities and satisfy the requirements of numerical inferiority, non-dominance and the will to maintain distinct their distinct identity. Hence, their exclusion from minority rights protection is based on the arbitrary criterion of time imposed by some States, which is not found within minority rights standards themselves and has not found support from the monitoring bodies of minority rights standards. In order to achieve the aim of justice, the application of minority rights standards should be based on the existence of the minority within the polity rather than an arbitrary criterion.

Additionally, the preamble to the UN Declaration on Minorities has recognised that 'the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live'; whereas the preamble to the FCNM states: 'the upheavals of European history have shown that the protection of national minorities is essential to stability, democratic security and peace in this continent'. Consequently, the preambles to the UN Declaration on Minorities and the FCNM identify peace and security as objectives underpinning the minority rights regime. Notably, however, this interpretation of the preamble to the FCNM has been disputed by the Danish government, which has asserted on the basis of the rules of treaty interpretation 'that the Convention is aimed at minorities created by the upheavals of European history'.⁷⁰ By delimiting the scope of application of the FCNM, this interpretation could be used to exclude European Muslims from the scope of protection of the FCNM. However, the wording of the preamble to the FCNM appears to indicate that 'the upheavals of European history' have demonstrated the need for minority rights protection, rather than establishing the scope of application of the instrument. Thus, contrary to the assertion of the Danish government, the phrase 'the upheavals of European history' reveals the objectives of

⁷⁰ 'Comments of the Government of Denmark' above n 30, 2.

the FCNM – peace and security – rather than excluding 'new minorities' including European Muslims from its scope of application.⁷¹

The exclusion of European Muslims from minority rights protection also has the potential to undermine the aim of security, pursued by minority rights standards. In particular, Gilbert has warned that 'a state that persistently fails to recognize the rights of its minorities will sow the seeds of disloyalty'.⁷² In the context of the security dimension, Kymlicka has noted:

Today, this is a non-issue throughout the established western democracies with respect to historic national minorities and indigenous peoples, although it remains an issue with respect to certain immigrant groups, particularly Arab and Muslim groups after 9/11.⁷³

Similarly, the HCNM has noted:

In the light of what we have already seen in many places in Europe and after discussions with many Western European governments, in my opinion we will face a serious social threat if we do not quickly implement measures in order to integrate all groups in our society, not least the new.⁷⁴

Therefore, whereas the aim of security pursued by the FCNM may no longer of relevance to 'national minorities' in Western Europe, as traditionally understood, the recognition of the rights of European Muslims 'is essential to stability, democratic security and peace in this continent'.⁷⁵ Consequently, the exclusion of European Muslims from the scope of application of minority rights standards may undermine the objectives of peace and security.

⁷¹ *Ibid.*, 2-3.

⁷² Gilbert, above n 25, 167.

⁷³ W Kymlicka, 'The Rise and Fall of Multiculturalism? New Debates and Accommodation in Diverse Societies' (2010) 61 *International Social Science Journal* 97, 106.

⁷⁴ HCNM, 'De Nye Minoritetene i Europa - Hvordan Ruste oss til dette Møtet?' (Maihaugenkonferansen, Lillehammer 8 May 2008) 5. Author's own translation.

⁷⁵ Preamble FCNM.

As European Muslims are permanent residents or citizens of the Western European States in which they reside, their exclusion from minority rights protection on the basis of the arbitrary criteria of citizenship or 'longstanding, firm and lasting ties' to the State has the potential to be counterproductive. Specifically, if States wait for these criteria to be met, the denial of minority rights to European Muslims is likely to have bred dissatisfaction, at which point it will be harder to achieve the aims of security and justice.

4.2.4. Preliminary Conclusions

The narrow interpretation of the scope of application of minority rights standards by States has led to a distinction between 'old minorities' and 'new minorities'. Yet, the justifications for such a distinction no longer hold true in relation to European Muslims, who have not assimilated or returned to their State of origin. Citizenship has not been recognised by monitoring bodies as a prerequisite of minority rights protection. Furthermore, given that European Muslims are citizens or permanent residents in Western European States it is a matter of time before they satisfy the criteria of 'longstanding, firm and lasting ties' to the State. By arbitrarily denying European Muslims the protection afforded by minority rights standards in the meantime, States are in danger of undermining the aims of the minority rights regime; to ensure justice and security. Thus, under international law, European Muslims can claim the protection of minority rights standards.

4.3. DIFFERENTIATED RIGHTS FOR 'NEW MINORITIES' AS COMPARED TO 'OLD MINORITIES'?

While the exclusion of 'new minorities' from minority rights protection has not been accepted by monitoring bodies, it has been suggested that persons belonging to 'new minorities' may have weaker entitlements than persons belonging to 'old minorities'.⁷⁶ Specifically, Eide has submitted that:

⁷⁶ Commission on Human Rights, above n 7, para 11; Eide, above n 3, 379. See also, W Kymlicka, *Multicultural Citizenship - A Liberal Theory of Minority Rights* (OUP 1995) 31, 95-8; W Kymlicka, 'The Internationalization of Minority Rights' (2008) 6 *International Journal of Constitutional Law* 1, 9.

Members of all minorities, whether new or old, are entitled to the basic freedom from discrimination and the other fundamental freedoms. However, those parts of positive measures which constitute significant burdens on the state can more reasonably be reserved for old or traditional minorities.⁷⁷

Kymlicka has also justified a distinction between 'old minorities' and 'new minorities' on the basis that '[i]n deciding to uproot themselves, immigrants voluntarily relinquish some of the rights that go along with their original national membership'.⁷⁸ Nonetheless, Kymlicka's distinction is arguably only relevant to the first generation of immigrants, rather than the descendants of immigrants who did not make the decision to 'relinquish some of the rights that go along with their original national membership'.

Packer has submitted that a distinction between the rights of 'new minorities' and 'old minorities' has the potential to be discriminatory, as '[t]he immigrant of decades past will almost certainly have contributed to the polity in moral and material terms far greater than the young non-immigrant, so to deny the immigrant certain rights seems all the more unfair'.⁷⁹ Thus, although a distinction may be justified between temporary migrant workers and 'old minorities', based on contribution to the polity, such a distinction is not justified between the descendants of immigrants who have permanent residence or the citizenship of the State in which they reside.

As European Muslims have been present in Western Europe for decades and constitute permanent residents or citizens, the distinction between 'old minorities' and 'new minorities' on the basis of the burden on the State appears unjustified. Costly minority rights standards have been justified on the grounds that '[i]n the same way as the State provides funding for the development of the culture and language of the majority, it shall provide resources for similar activities of the

⁷⁷ Eide, above n 3, 379; J Packer, 'Situating the Framework Convention in a Wider Context: Achievements and Challenges' in Council of Europe (ed), *Filling the Frame: Five years of Monitoring the Framework Convention for the Protection of National Minorities* (Council of Europe Publishing 2004) 45.

⁷⁸ Kymlicka (1995), above n 76, 96.

⁷⁹ Packer, above n 1, 264.

minority'.⁸⁰ Consequently, as long as European Muslims pay tax in Western Europe on the same basis as 'old minorities' and the majority, the limitation of the rights of European Muslims on the basis of cost, is arguably arbitrary and discriminatory.⁸¹

The FCNM *prima facie* has a narrower scope of application than UN minority rights standards. Yet, Kymlicka has submitted that the rights contained in the FCNM are of a generic nature.⁸² Hence, while he has distinguished between the rights of 'old minorities' and 'new minorities', Kymlicka has argued, in relation to the FCNM, that 'there is no obvious reason why they shouldn't apply to non-territorial groups like the Roma, or indeed to immigrant groups as well. Surely generic minority rights should be protected generically?'⁸³ Similarly, Hofmann, the former Chairperson of the AC, has proposed that the generic standards contained in the FCNM may be applicable to 'new minorities':

As regards the issue of the potential applicability of the Framework Convention also to persons belonging to 'new' minorities, the Advisory Committee consistently notes that some of the provisions of the Framework Convention ... would obviously be applicable only to 'old' minorities. In contrast, it is clear that Article 6 applies to 'all persons living on the territory' of a given State Party and, thus, also to persons belonging to 'new' minorities. Furthermore, it seems indeed to be possible also to argue that other provisions, such as Articles 3, 5, 7 and 8 could, at least in certain circumstances, be also applicable to persons belonging to 'new' minorities.⁸⁴

⁸⁰ Commission on Human Rights, above n 7, para 56.

⁸¹ K Henrard 'Education and Multiculturalism: the Contribution of Minority Rights?' (2000) 7 International Journal on Minority and Group Rights 393, 404-05.

⁸² W Kymlicka, *Multicultural Odysseys – Navigating the New International Politics of Diversity* (OUP 2007) 219. See also, E Craig, 'The Framework Convention for the Protection of National Minorities and the Development of a "Generic" Approach to the Protection of Minority Rights in Europe' (2010) 17 International Journal on Minority and Group Rights 307.

⁸³ Kymlicka, above n 82, 217.

⁸⁴ R Hofmann, 'The Work of the Advisory Committee under the Framework Convention for the Protection of National Minorities, with Particular Emphasis on the Case of Germany' in M Scheinin, and R Toivanen (eds), *Rethinking Non-Discrimination and Minority Rights*, Institute for Human Rights (Åbo Akademi University and Deutsches Institut für Menschenrechte 2004) 64; Packer, above n 77, 45; R Hofmann, 'The Impact of International Norms on the Protection of National Minorities in Europe: The Added Value and Essential Role of the Framework Convention for the Protection of National Minorities' (5 December 2006) DH-MIN (2006)018, 11-12.

In some cases the AC has suggested that States apply the rights contained in the FCNM on an 'article-by-article basis' to different minorities.⁸⁵ This approach has been criticised for 'creating first and second-class national minorities'.⁸⁶ However, it has enabled the AC to encourage States to reconsider their position on the scope of application of the FCNM and to expand the scope of protection available to persons belonging to 'new minorities'.⁸⁷

Although the distinction between 'old minorities' and 'new minorities' on the basis of the burden on the State appears to be discriminatory, a distinction based on the needs of persons belonging to minorities would not be. 'New minorities' do not necessarily have identical needs to 'old minorities'. An 'article-by-article' approach may allow the extension of relevant rights to 'new minorities'.

A number of the more costly provisions contained in the FCNM are limited within the text of the FCNM to areas inhabited 'traditionally' or by 'substantial numbers' of persons belonging to a national minority.⁸⁸ Additionally, the provision of language education in article 14(2) FCNM is subject to 'sufficient demand'. The Explanatory Report to the FCNM reveals that '[t]he term "inhabited ... traditionally" does not refer to historical minorities, but only to those *still living* in the same geographical area'.⁸⁹ Notably, European Muslims have been present for several decades and in many instances have settled in similar regions.⁹⁰ Nonetheless, while European Muslims are 'still living in the same geographical area' it is unclear what is meant by 'traditional ties'. This may imply the requirement of the continued presence of persons belonging to the minority in the area for three generations or 100 years and, thereby, exclude European Muslims from the scope of the right, for at least the immediate future. Statements excluding persons belonging to 'new minorities' from the scope of application of the FCNM cannot be justified on the grounds that their

⁸⁵ See, for example, 'Second Opinion on Germany' above n 36, para 10. Hofmann (2006), above n 84, 15; R Hofmann, 'Implementation of the FCNM: Substantive Challenges' A Verstichel and others (eds), *The Framework Convention for the Protection of National Minorities: a Useful Pan-European Instrument?* (Intersentia 2008) 168.

⁸⁶ AC, 'Comments of the Government of Germany on the Second Opinion of the Advisory Committee on the Implementation of the Framework Convention for the Protection of National Minorities in Germany' 20 July 2006 GVT/COM/INF/OP/I(2002)008, 6.

⁸⁷ Verstichel, above n 1, 156.

⁸⁸ Articles 10(2), 11(3), 14(2) FCNM.

⁸⁹ Council of Europe, above n 31, para 66.

⁹⁰ I Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States – Dynamic Legal Pluralisms in England, Turkey and Pakistan* (Ashgate 2005) 56.

inclusion would place an unreasonable burden on the State, as the terms of the convention itself have restricted the scope of application of the most costly rights.

The distinction between the rights of persons belonging to 'old minorities' and 'new minorities' has the potential to create 'first- and second-class citizens'.⁹¹ While a distinction may be justifiable between newcomers who have not contributed to the State and other minorities, the distinction between 'old minorities' and 'new minorities' has the potential to be discriminatory, given the wide definition of 'new minorities', which includes immigrants *and their descendants*.⁹² Instead, it would appear preferable for any distinction between the rights of 'old minorities' and European Muslims to be based on the terms of minority rights instruments and the needs of the communities in question rather than the burden on the State.

4.4. DIFFERENTIATED RIGHTS FOR RELIGIOUS MINORITIES?

As previously established, Europe's Muslim minorities can claim the protection of minority rights instruments, despite constituting 'new minorities'. However, Ghanea has suggested that '[r]eligious minorities have always been assumed to be part and parcel of the minorities' regime normatively, but have, in fact, rarely been protected by it'.⁹³ Notably, the UK has adopted a liberal interpretation of the scope of application of the FCNM. Still, this interpretation has excluded British Muslims, as the definition adopted 'is based on the definition of racial group as set out in the Race Relations Act 1976 which defines a racial group as "a group of persons defined by colour, race, nationality (including citizenship) or ethnic or national origins"'.⁹⁴

Due to the neglect of religious minorities within the minority rights regime, rights pertaining purely to religious identity may not have a significant added-value for European Muslims as compared to generally applicable human rights standards.⁹⁵ Specifically, the Commentary to the UN Declaration on Minorities submits:

⁹¹ Packer, above n 1, 264. See also, 'Comments of the Government of Germany' above n 86, 6.

⁹² Packer, above n 1, 263.

⁹³ N Ghanea, 'Are Religious Minorities Really Minorities' (2012) 1 Oxford Journal of Law and Religion 57, 59-60.

⁹⁴ 'Report Submitted by the United Kingdom' above n 60, para 2.

⁹⁵ K Henrard, 'Minority Specific Rights: A Protection of Religious Minorities Going Beyond the Freedom of Religion?' (2009) 8 European Yearbook of Minority Issues 5, 42.

Persons belonging to groups defined solely as religious minorities might be held to have only those special minority rights which relate to the profession and practice of their religion. Persons belonging to groups solely defined as linguistic minorities might similarly be held to have only those special minority rights which are related to education and use of their language. Persons who belong to groups defined as ethnic would have more extensive rights relating to the preservation and development of other aspects of their culture also, since ethnicity is generally defined by a broad conception of culture, including a way of life.⁹⁶

The suggestion that the rights of persons belonging to religious minorities are restricted may reflect concerns over the implications of such protection for State neutrality. In particular, the recognition of religious laws may need to be balanced with the human rights of others.⁹⁷ Nonetheless, it is clearly established that minority rights standards cannot be used to justify interference with the human rights of individuals.⁹⁸

Furthermore, the Capotorti report indicates that such a clear distinction between the rights of persons belonging to religious minorities and the rights of persons belonging to ethnic minorities was not initially foreseen. Specifically, the report considers 'the right of ethnic, religious and linguistic minorities to have their own culture',⁹⁹ and, hence, indicates that rights pertaining to culture may also be applicable to religious and linguistic minorities. The Commentary to the UN Declaration on Minorities has notably acknowledged that 'in some cases religion and ethnicity coincide'.¹⁰⁰ Thus, the rights applicable to persons belonging to minorities should be decided against the elements of the identity that they wish to preserve rather than as a result of their classification. Gilbert, likewise, has contended that:

⁹⁶ Commission on Human Rights, above n 7, para 6.

⁹⁷ N Ghana, 'Are Religious Minorities Really Minorities' (2012) 1 Oxford Journal of Law and Religion 57, 78.

⁹⁸ Articles 4(2) and 8(2) UN Declaration on Minorities; article 20 FCNM.

⁹⁹ Capotorti, above n 20, paras 218-225.

¹⁰⁰ *Ibid.*, para 43.

Classification, in the end, is irrelevant. Minorities often straddle these classes and need guarantees about linguistic rights, religious freedom, and the protection of their culture. To categorise them adds nothing to the fact that they are a minority and that minority rights should attach in general. The adjectives go to the areas of protection and guarantees, rather than to the definition of those accorded that protection and those guarantees.¹⁰¹

The danger of classifying minorities has been noted by the AC, in relation to 'the designation of the Roma and Aromanians / Vlachs as linguistic minorities rather than national minorities' in Albania: 'some members of these communities are not satisfied with this term "linguistic minority" as it does not reflect the essential elements of their identity that go beyond a purely linguistic connotation'.¹⁰² In practice States have attempted to limit the scope of rights applicable to persons belonging to a particular minority by arbitrarily classifying them on the basis of their religious or linguistic characteristics, rather than by reference to all of the elements of their minority identity.¹⁰³

Thus, the classification of minorities runs the risk of restricting the scope of protection available persons belonging to minorities. As European Muslim minorities constitute most obviously religious minorities, the restriction of their rights to religious rights appears logical. However, as a result of the intersection between the ethnic and religious identities of European Muslim communities, such a restriction may not be desirable.

Minority religious identity may be indistinguishable or overlap with minority ethnic identity.¹⁰⁴ In the context of Europe, Hellyer maintains that 'many minority faith communities are also minority ethnic ones'.¹⁰⁵ Specifically, Ghanea suggests that:

¹⁰¹ Gilbert, above n 25, 169.

¹⁰² AC, 'Opinion on Albania' adopted on 12 September 2002 ACFC/INF/OP/I(2003)004 para 20.

¹⁰³ *Ibid.*; AC, 'Second Opinion on Albania' adopted on 29 May 2008 ACFC/OP/II(2008)003 paras 37-40; AC, 'Third Opinion on Albania' adopted on 23 November 2011 ACFC/OP/III(2011)009 para 36.

¹⁰⁴ Commission on Human Rights, above n 7, para 43.

¹⁰⁵ Hellyer, above n 14, 29.

While professing and practicing their own religion would appear to be the most appropriate of the enjoyments accruing to religious minorities, some religious communities may worship in a language differing from the majority community. Furthermore, the term 'culture' may be the most apt description for their literature, symbols, cumulative manifestation and practice of relevant rites, customs, observance – for example holidays, dietary codes, fasting, pilgrimage, worship and a separate calendar – again especially when these differ from those of wider society.¹⁰⁶

This overlap between culture and religion is particularly prominent in relation to Islam. Islam has been described as a way of life, due to the requirement that adherents follow the prescripts of the religion in all elements of their life from worship to dietary codes to financial transactions.¹⁰⁷ As a result Islam does not conform with the Western European notion of religion as being confined to the private sphere.¹⁰⁸ Islam may be more akin to culture than the narrow European understanding of religion and, consequently, religious rights may be insufficient to protect the rights of European Muslims.¹⁰⁹ Additionally, from the perspective of European Muslim communities, religion is, arguably, intertwined with the cultural identity of communities originating from immigration.¹¹⁰ Claims made by European Muslims to the maintenance of identity, in particular, in relation to the right to wear

¹⁰⁶ N Ghanaea, 'Religious or Minority? Examining the Realisation of International Standards in Relation to Religious Minorities in the Middle East' (2008) 36 *Religion, State & Society* 303, 310. See also, JA Lindgren Alves, 'Race and Religion in the United Nations Committee on the Elimination of Racial Discrimination' (2007-2008) 42 *University of San Francisco Law Review* 941, 951; Ghanaea, above n 93, 62.

¹⁰⁷ S Ferrari, 'Islam in Europe: An Introduction to Legal Problems and Perspectives' in R Aluffi B-P and G Zincone (eds), *The Legal Treatment of Islamic Minorities in Europe* (Peeters 2004) 2; PG Danchin, 'Islam in the Secular *Nomos* of the European Court of Human Rights' (2010-2011) 32 *Michigan Journal of International Law* 663, 678.

¹⁰⁸ MD Evans, 'Freedom of Religion and the European Convention on Human Rights: approaches, trends and tensions' in P Cane, C Evans and Z Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008) 305; M Evans, and P Petkoff, 'A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights' (2008) 36 *Religion, State & Society* 205; Danchin, above n 107, 689.

¹⁰⁹ See generally, Danchin, above n 107; SE Berry, 'A Tale of Two Instruments: Religious Minorities and the Council of Europe's Rights Regime' (2012) 30 *Netherlands Quarterly of Human Rights* 10.

¹¹⁰ SE Berry, 'Bringing Muslims Minorities within the International Convention on the Elimination of All Forms of Racial Discrimination—Square Peg in a Round Hole?' (2011) 11 *Human Rights Law Review* 423, 439-447.

a specific form of religious attire or access to linguistic education, may be rooted in both religion and culture.

The Commentary to the UN Declaration on Minorities has noted the connection between culture and the ethnic identity of persons belonging to minorities: 'ethnicity is generally defined by a broad conception of culture, including a way of life'.¹¹¹ Just as cultural practices cannot be clearly delineated from religious practices, ethnic identity cannot be clearly delineated from religious identity; 'in some cases religion and ethnicity coincide'.¹¹² Similarly, CERD has recognised the intersection between religion and race and, specifically, between religious and ethnic identity:

The 'grounds' of discrimination are extended in practice by the notion of 'intersectionality' whereby the Committee addresses situations of double or multiple discrimination - such as discrimination on grounds of gender or religion – when discrimination on such a ground appears to exist in combination with a ground or grounds listed in Article 1 of the Convention.¹¹³

This has led CERD, a body with a mandate restricted to racial discrimination, to explicitly express concern 'about reports of a considerable increase in reported cases of widespread harassment of people of Arab and Muslim backgrounds since 11 September 2001'.¹¹⁴ Nonetheless, in relation to Muslims in Western Europe, CERD has argued that no specific ethnic groups are targeted by discrimination against Muslims, evidenced in part due to the heterogeneous nature of their ethnic origin.¹¹⁵ By taking this approach, CERD does not consider whether Islam forms a significant element of the ethnic identity of Europe's Muslim minorities.¹¹⁶

¹¹¹ Commission on Human Rights, above n 7, para 6.

¹¹² *Ibid.*, para 43.

¹¹³ CERD, 'General Recommendation No 32' on 'The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination' UN doc CERD/C/GC/32 para 7.

¹¹⁴ CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination – Denmark' (21 May 2002) UN doc CERD/C/60/CO/5 para 16.

¹¹⁵ *PSN v Denmark* Communication no 36/2006, UN doc CERD/C/71/D/36/2006 para 6.2; *AWRAP v Denmark* Communication no 37/2006, UN doc CERD/C/71/D/37/2006 paras 6.2-6.3.

¹¹⁶ Berry, above n 110.

The AC to the FCNM, a body with a mandate restricted to the rights of national minorities, has also considered the rights of European Muslims. However, in contrast to CERD, the AC has relied on the link between the religious and ethnic identity of European Muslims: '[A]s most Muslims in the United Kingdom are also members of minority ethnic communities, they are in practice already largely covered by the Framework Convention'.¹¹⁷ Thus, the AC has recognised the intersection between the ethnic and religious identities of European Muslims and has not distinguished between the rights available to religious minorities as compared to ethnic minorities.

The overlap between culture – a defining component of ethnicity – and religion is particularly prominent in relation to Islam. While it is claimed that the younger generation of Muslims in the West are moving towards practicing of a pure form of Islam, unpolluted by cultural practices, this is coupled with the claim that their parents 'practice Islam in ways blurred with culture and thus imperfect'.¹¹⁸ Accordingly, for many the practice of Islam, at least for the older generations, is merged with their culture and, thereby, ethnic origin. In relation to the British Pakistani community, Modood, Beishon and Virdee assert that:

Islam is at the very least a badge of (symbolic) solidarity; hence those claiming to be Pakistanis or that being Pakistani is important to them have to engage with some aspect or other of Islam, to explain how one's conduct, ethnicity and social philosophy stand in relation to it.¹¹⁹

Furthermore, Meer submits simply 'although one may imagine a Muslim identity in different ways, when one is born into a Muslim family, one becomes a Muslim'.¹²⁰ Accordingly, when one is born into an ethnic minority, of which Islam is a defining

¹¹⁷ AC, 'Second Opinion on the United Kingdom' adopted on 6 June 2007 ACFC/OP/II(2007)003 para 34. See also, AC, 'Second Opinion on the United Kingdom' adopted on 6 June 2007 ACFC/OP/II(2007)003 para 253; AC, 'Third Opinion on the United Kingdom' adopted on 30 June 2011 ACFC/OP/III(2011)006 paras 189, 192.

¹¹⁸ G Schmidt, 'Islamic Identity Formation among Young Muslims: The Case of Denmark, Sweden and the United States' (2004) 24 *Journal of Muslim Affairs* 31, 37-38; L Peek, 'Becoming Muslim: The Development of a Religious Identity' (2005) 66 *Sociology of Religion* 215, 229.

¹¹⁹ T Modood, S Beishon and S Virdee, *Changing Ethnic Identities* (Policy Studies Institute 1994) 62. See also, M Chon and DE Artz, 'Walking While Muslim' (2004-2005) 68 *Law and Contemporary Problems* 215, 221.

¹²⁰ N Meer, 'The Politics of Voluntary and Involuntary Identities: Are Muslims in Britain an Ethnic, Racial or Religious Minority?' (2008) 42 *Patterns of Prejudice* 61, 67.

element, one becomes a Muslim. The majority of Muslims in Western Europe are born into Muslim families – of which Islam is likely to be associated with their ethnic origin. The rate of conversion in Western European States is still relatively low, despite the claim that the number of Muslims is rapidly growing.¹²¹ The importance of Islam to ethnic identity is also highlighted by its continuing importance to non-practicing Muslims; 'even those young Asians who do not practise their religion nevertheless recognise that religion as part of their distinctive heritage and ethnic identity'.¹²²

However, a primary argument against identifying Muslims along ethnic lines is based on the self-identification of Muslims themselves. It is increasingly claimed that the younger adherents of Islam in Western Europe subscribe to the view that they form part of the *ummah*,¹²³ membership of which takes precedence over ethnic and national identities.¹²⁴ As a consequence of this, it is claimed that 'Islam as a minority religion in Europe is losing the connection with specific states, and that the new reality for Islam involves new possibilities for practicing the religion, new forms of activities and new expressions'.¹²⁵ This essentially colour and culture-blind approach to Islam also encompasses converts, who do not typically belong to an ethnic group associated with Islam. The AC has, accordingly, noted that representatives of British Muslim communities

underline that many of them identify primarily as members of the Muslim community rather than affiliating with a particular ethnic group or background, such as Pakistani, Bangladeshi or Somali and, as such, would like to have their distinct identity and culture as Muslims protected under the Framework Convention, in line with the principle of self-identification.¹²⁶

¹²¹ H Ansari, *Muslims in Britain* (Minority Rights Group International 2002) 7; T Gudrun Jensen, 'To Be "Danish", Becoming "Muslim": Contestations of National Identity?' (2008) 34 *Journal of Ethnic and Migration Studies* 389, 392.

¹²² Modood, Beishon and Virdee, above n 119, 59.

¹²³ The global Muslim community.

¹²⁴ Ansari, above n 121, 14.

¹²⁵ K Sinclair, 'Islam in Britain and Denmark: Deterritorialized Identity and Reterritorialized Agendas' (2008) 28 *Journal of Muslim Minority Affairs* 45, 50.

¹²⁶ 'Third Opinion on the United Kingdom' above n 117, para 33 [sic].

Within international law, self-identification as a member of a minority is vital, and people cannot be forced to belong to a minority against their will.¹²⁷ As a result, the younger generations cannot be forced to belong to an ethnic group that they do not wish to belong to. Still, the precedence given to Islam by the younger generation may simply represent the reordering of their different, competing identities based on their specific situation. Meer notes a shift in identities: 'One outcome among young people of Pakistani origin is a process whereby identification with Pakistan – or a region of Pakistan – becomes less significant while "Muslim", as an identity, becomes more prominent'.¹²⁸ Furthermore, Parekh asserts that '[n]ew communities remain strongly identified with family and cultural and religious traditions of origin. But these are also being integrated into evolving self-conceptions'.¹²⁹ In fact, the emergence of 'Muslim' as the primary identity of particular groups of immigrants may simply represent the evolution of their identity as they become more detached from their parents' or grandparents' country of origin and focus on non-national elements of their ethnic identity. Minority identities do not remain static; they evolve overtime.

Another explanation for this shift in Muslim minority identity may be that identities become more important when they are perceived to be under threat.¹³⁰ Chon and Arzt suggest that:

Religion is not 'immutable' in the way we understand skin colour to be. Religious affiliation or identity is always a matter of choice. Yet, especially through the war on terror, Islam is acquiring characteristics of immutability, innateness, inevitable inheritability and, importantly, inferiority. In other words, religious difference is being 'radicalized'.¹³¹

¹²⁷ Article 3(1) FCNM; article 3(2) UN Declaration on Minorities.

¹²⁸ Meer, above n 120, 66.

¹²⁹ B Parekh, *The Future of Multi-Ethnic Britain – The Parekh Report* (Profile Books 2000) 36.

¹³⁰ Modood, Beishon and Virdee, above n 119, 105; A Eide, 'Minority Protection and World Order: Towards a Framework for Law and Policy' in A Philips and A Rosas (eds), *Universal Minority Rights* (Åbo Akademi University Institute for Human Rights and Minority Rights Group International 1995) 90.

¹³¹ Chon and Artz, above n 119, 228.

Following the terrorist attacks of 9/11 and 7/7, there has been an increasing anti-Muslim discourse and a rise in violence against Muslims.¹³² Even the ECtHR has expressed the view that Islam is not compatible with Western democracy and women's rights.¹³³ Therefore, it is unsurprising that the religious elements of ethnic identities are starting to take precedence over cultural and national elements.

The research of Modood, Beishon and Virdee highlights that we should be careful not to read too much into this shift from ethnic identity to religious identity:

For our respondents Islam did not have this anti-ethnicism, they did not reject ethnicity but gave Islam as central place in their ethnic identity. Several people responded to the identity question by stating they were Muslims before mentioning they were Pakistanis or Bangladeshis, and nearly everybody when asked what being Pakistani or Bangladeshi meant to them, mentioned being Muslim almost straight away.¹³⁴

The reordering of elements of the identity of European Muslim minorities does not alter the fact that their minority identity is influenced by both ethnic and religious factors. There remains a clear connection between the ethnic identity and religion of European Muslim minorities. Hence, it may not possible to derive where an ethnic practice ends and a religious one begins. The nature of Islam, as a way of life, means that rights pertaining to culture may be pertinent to persons belonging to European Muslim minorities. Moreover, whereas Muslims do not constitute a homogenous ethnic group and an identity based purely on religion, the *ummah*, overcomes this, a clear connection still remains between being a Muslim and specific ethnic identities, with the exception of converts.

Thus, the classification of European Muslim minorities as purely religious minorities overlooks the intersection between their ethnic and religious identities in the majority of cases. The rights of persons belonging to minorities should be based on the elements of their identity that they wish to preserve rather than the arbitrary

¹³² Ansari, above n 121, 4-5; G Schmidt, 'Denmark' in G Larsson (ed), *Islam in the Nordic and Baltic Countries* (Islamic Studies Series, Routledge 2009) 43-4.

¹³³ *Refah Partisi (The Welfare Party) and Others v Turkey* ECHR 2003-II para 123; *Şahin v Turkey* ECHR 2005-XI; *Dahlab v Switzerland* 2001-V.

¹³⁴ Modood, Beishon and Virdee, above n 119, 62.

classification of the minority. European Muslims should be able to claim minority rights protection in relation to both their religious and ethnic identities.

4.5. CONCLUSION

It has been suggested that 'new minorities' are excluded from minority rights protection under international law and have weaker entitlements than 'old minorities'. As the majority of European Muslim minorities originated from post-Second World War immigration, any distinction between the rights of 'old minorities' and 'new minorities' will restrict the rights of European Muslims.

However, the monitoring bodies of minority rights standards have not supported a restrictive interpretation of the term 'minority' under international law. In particular, the monitoring bodies of minority rights standards have not accepted that citizenship constitutes a prerequisite of minority rights protection. Furthermore, the requirement of 'longstanding, firm and lasting ties' establishes an arbitrary time criterion that at some point will become redundant, as European Muslims constitute citizens and permanent residents of the States in which they reside.

This chapter has argued that in the absence of a common understanding of the definition of 'minority' under international law, the rules of treaty interpretation should be employed. In particular, the scope of application of minority rights protection should be informed by their object and purpose, specifically the aims of security and justice. As a result of the permanent presence of Muslims in Western Europe, their exclusion from minority rights protection has the potential to undermine the object and purpose of these standards.

Similarly, it is argued that any distinction between the entitlements of 'old minorities' and 'European Muslims' under minority rights standards should be informed by the needs of the communities. As European Muslims contribute to European societies in both social and material terms, any distinction based on burden on the State has the potential to be discriminatory. In contrast, a distinction between the entitlements of permanent minorities and temporary migrant workers may be justifiable on the basis of cost. The rights contained in article 27 ICCPR, UN Declaration on Minorities and the FCNM are, therefore, applicable to European Muslims.

Furthermore, it has been suggested that the rights of persons belonging to religious minorities are restricted to those directly pertaining to religious identity and are narrower than the rights of ethnic minorities. Nonetheless, this distinction is not based on the text of minority rights instruments. Moreover, it is not always possible to delineate cultural practices from religious practices. The ethnic identity of persons belonging to minorities may influence or be intertwined with their religious identity. This is specifically the case for the majority of European Muslims, as Islam forms a defining characteristic of their ethnic identity and informs both cultural and religious practices. Given the nature of Islam as a way of life and the intersection between the ethnic and religious identities of the majority of European Muslims, it is proposed that the rights of these communities should not be restricted to religious rights. Rights pertaining to cultural and linguistic identity are also relevant to European Muslims.

Minority rights standards establish a framework of minimum standards for the pursuit of multiculturalist policies. Thus, in order to pursue multiculturalist policies, minority rights standards must be applied to persons belonging to minorities. However, a restrictive approach has been adopted in relation to the application of minority rights standards to European Muslims. Notably, States and academics have suggested that 'new minorities' including European Muslims are excluded from the scope of application of minority rights standards or have limited entitlements. Yet, this restrictive interpretation of minority rights standards is not supported by the text of the rights nor their object and purpose. In order for multiculturalist policies to be pursued, minority rights standards should be applied to persons belonging to European Muslim minorities on the basis of their needs and the object and purpose these rights. As there is no good reason for the exclusion of European Muslims from the scope of application of minority rights standards, or the application of restricted rights to these communities, this chapter asserts that European Muslims can claim minority rights standards as persons belonging to both religious and ethnic minorities.

Chapter 5:

The Added-Value of Minority Rights Protection for the Preservation of European Muslim Identity

5.1. INTRODUCTION

It has been established that the exclusion of European Muslims from minority rights protection and the limitation of their entitlements, on the basis that they constitute 'new minorities' and 'religious minorities', has the potential to undermine the object and purpose of minority rights protection. European Muslims have not been excluded from minority rights protection by the text of minority rights standards but, rather, by their interpretation by States. Accordingly, it has been argued that the minority rights standards contained in article 27 ICCPR, the UN Declaration on Minorities and the FCNM are applicable to European Muslims.

As minority rights provide a framework of minimum standards for the achievement of multiculturalist policies, the exclusion of European Muslims from minority rights protection by States *prima facie* leads to the conclusion that multiculturalist policies have not been sufficiently pursued in relation to these communities. However, although it has been established that minority rights have a *prima facie* added-value as compared to generally applicable human rights standards, academics have suggested that there may not be an added-value in respect of the specific claims made by 'new minorities' or 'religious minorities'.¹ Therefore, it is necessary to consider the claims made by European Muslims in order to establish whether there is an added-value to minority rights protection for these communities in practice.

¹ C Tomuschat, 'Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights' in R Bernhard and others (eds), *Völkerecht als Rechtsordnung, Internationale Gerichtsbarkeit Menschenrecht, Festschrift für Hermann Mosler* (Springer Verlag 1983) 970; H Hannum, *Autonomy, Sovereignty and Self-Determination: The Adjudication of Conflicting Interests* (University of Pennsylvania Press 1996) 69-70; W Kymlicka, *Multicultural Citizenship – A Liberal Theory of Minority Rights* (OUP 1995) 96-7; K Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (Martinus Nijhoff 2000) 110, 250; G Pentassuglia, *Minorities in International Law – An Introductory Study* (Council of Europe Publishing 2002) 71-2, 247-48; K Henrard, 'Minority Specific Rights: A Protection of Religious Minorities Going Beyond the Freedom of Religion?' (2009) 8 European Yearbook of Minority Issues 5, 42.

As the primary criticism of multiculturalism is that too much emphasis has been placed on the maintenance and accommodation of difference, at the expense of commonality and equality,² this chapter will focus on the extent to which there is an added-value to minority rights protection under international law in respect of claims made by European Muslims to the preservation of their identity. Notably, the majority of European Muslims can assert claims pertaining to their ethnic as well as religious identity.

This chapter argues that European Muslims can derive additional protection from minority rights standards pertaining to the preservation of minority identity. Thus, the application of minority rights standards to European Muslims is necessary, if multiculturalist accommodation is to be realised. While this chapter focuses on claims relating to identity, as noted in Chapter 3, international standards relating to non-discrimination and equality and intercultural dialogue may still indirectly influence the ability of persons belonging to minorities to maintain their identity. Hence, rights pertaining to non-discrimination and equality and intercultural dialogue will also be considered when relevant.

European Muslims have made consistent and wide-ranging claims for the accommodation of their religious and cultural practices.³ These claims have ranged from the relatively uncontroversial, such as the right to access places of worship,⁴ to claims that are perceived to be incompatible with Western values, such as child or forced marriage.⁵ As claims that violate the human rights of individuals do not find support within minority rights standards,⁶ only claims that are *prima facie*

² See, for example B Barry, *Culture and Equality – An Egalitarian Critique of Multiculturalism* (Harvard University Press 2001) 77; T Phillips, 'After 7/7: Sleepwalking to Segregation' 22 September 2005 <<http://www.humanities.manchester.ac.uk/socialchange/research/social-change/summer-workshops/documents/sleepwalking.pdf>> accessed 9 June 2011.

³ See generally, S Ferrari and A Bradney (eds), *Islam and European Legal Systems* (Ashgate 2000); R Aluffi B –P and G Zincone (eds), *The Legal Treatment of Islamic Minorities in Europe* (Peeters Press 2004); J Nielsen, *Muslims in Western Europe* (3rd edn, Edinburgh University Press 2004); HA Hellyer, *Muslims of Europe - The 'Other' Europeans* (Edinburgh University Press 2009).

⁴ See generally, S Allievi, *Conflicts over Mosques in Europe: Policy Issues and Trends – NEF Initiative on Religion and Democracy in Europe* (Network of European Foundations, Alliance Publishing Trust 2009); TH Green, 'The Resistance to Minarets in Europe' (2011) 52 *Journal of Church and States* 619.

⁵ *Khan v United Kingdom* (1986) 48 DR 253.

⁶ Article 22 and 23 FCNM; Council of Europe, *Framework Convention for the Protection of National Minorities and Explanatory Report* (February 1995) H(1995)010 paras 90-91; article 4(2) and 8(2) UN Declaration on Minorities; Commission on Human Rights, 'Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons

compatible with human rights standards will be considered. The diverse nature of European Muslim communities means that the claims identified may not find support from all European Muslims.

The basis of this chapter will be claims that touch on European Muslim identity and have been made in the public sphere, primarily, by British Muslims: *halal* slaughter, the circumcision of boys, the building places of worship, attendance at Friday prayers, the celebration of religious holidays, the right to wear religious attire, accommodation of culture, religion and language in mainstream education, faith schools and *sharia*, as a system of personal law. These claims have been identified on the basis that they have been made in a public forum, primarily in contentious legal proceedings or consultations with international monitoring bodies. They will be used in order compare the level of support available for the preservation of European Muslim identity under minority rights standards and generally applicable human rights standards. This, in turn, will determine whether an added-value to minority rights protection exists for European Muslims.

5.2. HALAL SLAUGHTER

The requirement that animals be slaughtered in accordance with the precepts of Islam is recognised as a key element of the faith.⁷ Khaliq notes that '[t]he practice of ritual slaughter, which for Muslims is obligatory, entails the slicing of the carotid arteries and both jugular veins but not the spinal cord across the underside of the neck, with a very sharp knife by rapid, uninterrupted action while reciting a prayer'.⁸ A significant proportion of British Muslims also believe that animals must not be stunned prior to slaughter, if meat is to be *halal*.⁹

Belonging to National or Ethnic, Religious and Linguistic Minorities' (4 April 2005) UN doc E/CN.4/Sub.2/AC.5/2005/2 paras 57 and 81.

⁷ U Khaliq, 'The Accommodation and Regulation of Islam and Muslim Practices in English Law' (2002) 6 Ecclesiastical Law Journal 332, 335.

⁸ Khaliq, above n 7, 335.

⁹ Due to divergence in beliefs amongst the British Muslim community, not all British Muslims oppose the stunning of animals prior to slaughter. S Knights, *Freedom of Religion, Minorities and the Law* (OUP 2007) 192; *ibid.*, 335; S McLoughlin and T Abbas, 'United Kingdom' in JS Nielsen and others (eds), *Yearbook of Muslims in Europe* (Brill 2011) 556. *Malins v Cole & Attard* [1986] CLY 89.

Despite consistent opposition from animal welfare groups,¹⁰ an exemption from the requirement to stun animals prior to slaughter has been available for religious groups in the UK since 1933¹¹ and *halal* meat has been widely available in the UK since the 1960s.¹² Consequently, it has not been necessary for British Muslims to make general claims in respect of the availability of religiously compliant food. The need to provide *halal* food for those held in British prisons has also been officially recognised.¹³ Nonetheless, British Muslims have claimed that the provision of *halal* food in public institutions in the UK, in particular prisons, is inadequate.¹⁴ Specifically, Ansari notes '[I]ack of provision of *halal* food in prisons has been an issue reported on many occasions in the *British Muslim Monthly Survey*'.¹⁵

International monitoring bodies have recognised that the observance of dietary regulations finds protection under the freedom of religion provisions of the ICCPR, ECHR and the FCNM.¹⁶ However, the right to access religiously compliant food may be subject to limitation under generally applicable human rights standards. In the case of *Cha'are Shalom Ve Tsedek v France*, the ECtHR held that restrictions on licencing that prevented the ultra-orthodox Jewish community from slaughtering animals in accordance with their religious convictions were permissible, provided that adherents were able to access such meat elsewhere.¹⁷ Accordingly, the ECtHR has interpreted article 9 ECHR to encompass the right to access religiously

¹⁰ H Ansari, 'The Legal Status of Muslims in the UK' in R Aluffi B –P and G Zincone (eds), *The Legal Treatment of Islamic Minorities in Europe* (Peeters Press 2004) 267-68; Nielsen, above n 3, 55; Khaliq, above n 7, 336; A Mondal, 'Islam and Multiculturalism: Some Thoughts on a Difficult Relationship' Brunel University Research Archive, 8 <<http://bura.brunel.ac.uk/handle/2438/4161>> accessed 16 May 2011.

¹¹ Slaughter of Animals Act 1933 s 6; Welfare of Animals (Slaughter or Killing) Regulations 1995 Reg 22 and Schedule 12. Knights, above n 9, 192; Ansari, above n 10, 267.

¹² Ansari, above n 10, 267.

¹³ *Religion Manual* PSO 4550 of 30 October 2000 as amended para 1.43.

¹⁴ Ansari, above n 10, 67; H Ansari, *Muslims in Britain* (Minority Rights Group 2002) 17, 25, 29; Knights, above n 9, 203. Cf. *X v United Kingdom* (1976) 5 DR 8; *D and ES v United Kingdom* (1990) 65 DR 245; S Vertovec, 'Islamophobia and Muslim Recognition in Britain' in Y Yazbeck Haddad (ed), *Muslims in the West – From Sojourners to Citizens* (OUP 2002) 28.

¹⁵ Ansari (2002), above n 14, 25.

¹⁶ HRC, 'General Comment No 22' on 'The Right to Freedom of Thought, Conscience and Religion (Art. 18)' UN doc CCPR/C/21/Rev.1/Add.4 para 4; *Cha'are Shalom Ve Tsedek v France* ECHR 2000-VII para 80; AC, 'Second Opinion on Serbia' adopted on 19 March 2009 ACFC/OP/II(2009)001 para 146.

¹⁷ *Cha'are Shalom Ve Tsedek v France*, above n 16, paras 80, 83.

compliant food rather than to slaughter animals in accordance with religious requirements.¹⁸

Furthermore, as the generally applicable human rights right of freedom of religion constitutes a negative right¹⁹ it does not impose an explicit positive duty upon States to accommodate religious dietary requirements in State institutions. In the context of the UN, the Krishnaswami report acknowledged that public authorities may not be able to accommodate the religious dietary requirements of 'members of a mixed group — as for example in schools, hospitals, prisons or the armed forces — unless the number of people observing a particular religion is sufficiently large'.²⁰ Nonetheless, Krishnaswami clarified:

Where the Government controls the means of production and distribution, it should place the objects necessary for observing dietary practices prescribed by particular religions or beliefs, or the means of producing them, at the disposal of members of those religions or beliefs.²¹

Likewise, General Comment No 22 of the HRC recognises that under article 18(3) ICCPR, '[p]ersons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint'.²²

A similar approach was taken by the ECtHR, in the context of the provision of religiously compliant food in prisons.²³ While the ECtHR was willing to consider whether the refusal of such meals was justifiable on the basis of cost,²⁴ in *Jakóbski v Poland* the Court found 'that the authorities failed to strike a fair balance between the

¹⁸ MD Evans, 'Believing in Communities, European Style' in N Ghanea (ed), *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Martinus Nijhoff 2003) 139.

¹⁹ M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) 411.

²⁰ A Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, UN doc E/CN.4/Sub.2/200/Rev.1, 36

²¹ Rule 8(2) *ibid.*, 64.

²² HRC, above n 16, para 8.

²³ *Jakóbski v Poland* App no 18429/06 (ECtHR 7 December 2010). Cf. *X v United Kingdom* above n 14; *D and ES v United Kingdom* above n 14.

²⁴ *Jakóbski v Poland*, above n 23, paras 48-51.

interests of the prison authorities and those of the applicant, namely the right to manifest his religion through observance of the rules of the Buddhist religion'.²⁵

Consequently, under generally applicable human rights standards, States are not required to accommodate the dietary requirements of European Muslims in public institutions, provided that alternative sources of food are available. Yet, if alternative sources of food are not readily available, such as when individuals are deprived of their liberty, then the State is under an obligation to provide religiously compliant food. Hence, this right primarily constitutes an obligation upon governments to not interfere with the ability of European Muslims to access religiously compliant food.

The CESCR in the context of article 15 has also recognised 'that culture, for the purpose of implementing article 15 (1) (a), encompasses, inter alia ... food'.²⁶ However, as the CESCR has not given further consideration to the scope of this element of the right to cultural life, it is not possible to ascertain whether it would enhance the protection of European Muslim identity available under generally applicable human rights standards.

Similarly to the ECtHR, the AC to the FCNM has suggested that States are required to ensure access to religiously compliant food in State institutions when alternative sources of food are likely to be restricted. Specifically, under article 8 FCNM, the AC noted that 'difficulties are still reported with regard to respecting religious diversity, in particular with regard to the lack of respect for religious dietary rules in the army'.²⁷ The AC has not considered access to religiously compliant food in other contexts. Thus, while the FCNM requires that States take positive measures to facilitate the achievement of minority rights standards,²⁸ the full

²⁵ *Ibid.*, para 54.

²⁶ CESCR, 'General Comment No 21' on 'Right of Everyone to Take Part in Cultural Life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)' UN doc E/C.12/GC/21, para 13.

²⁷ 'Second Opinion on Serbia' above n 16, para 146.

²⁸ See, for example, AC, 'Opinion on Austria' adopted on 16 May 2002 ACFC/INF/OP/I(2002)009 paras 24-7; AC, 'Opinion on Italy' adopted on 14 September 2001 ACFC/INF/OP/I(2002)007 para 30; AC, 'Opinion on Norway' adopted on 12 September 2002 ACFC/INF/OP/I(2003)003 paras 29-31, 34; AC, 'Opinion on Sweden' adopted on 25 August 2002 ACFC/INF/OP/I(2003)006 paras 29; AC, 'Second Opinion on Austria' adopted on 8 June 2007 ACFC/OP/II(2007)005 paras 63, 70; AC, 'Second Opinion on Norway' adopted on 5 October 2006 ACFC/OP/II(2006)006 paras 69-70; AC, 'Third Opinion on Austria' adopted on 28 June 2011 ACFC/OP/III(2011)005 paras 48-9.

extent of the obligation upon States to provide religiously compliant food has not been elaborated by the AC.

'Dietary codes' that differ from those of the majority may be considered to constitute cultural practices as well as religious practices.²⁹ Therefore, it is possible for a right to access to *halal* meat to find protection under article 4(2) UN Declaration on Minorities as both 'religious practices' and 'traditions and customs' or under article 27 ICCPR as part of a distinct 'way of life'.³⁰ Contrary to the AC, which has recognised that access to religiously compliant food finds protection under the FCNM, access to religiously compliant food has not been explicitly considered in the context of article 27 ICCPR or the UN Declaration on Minorities. Were the HRC to recognise a right to access religiously compliant food under article 27 ICCPR, in addition to article 18 ICCPR, this may have the added-value of imposing positive obligations upon States to ensure that European Muslims are able to widely access religiously compliant food.

Freedom of religion, under generally applicable human rights standards, primarily imposes the negative requirement for States not to deny access to religiously compliant food. Minority rights standards and article 15 ICESCR may additionally place positive obligations upon States to ensure this right and as a result may require the provision of *halal* food in States institutions such as schools. However, as the positive obligations of States in relation to the right to access religiously or culturally compliant food have not been elaborated in the context of minority rights standards, it is not possible to confirm whether there would be an added-value to minority rights standards in practice.

Notably, in relation to the specific claims made by British Muslims there does not appear to be an added-value to minority rights protection. As the UK has largely accommodated the needs of the British Muslim community in relation to ritual slaughter, the claims of the community have focused on the alleged failure to provide adequate access to religiously compliant food in State prisons. If this is the

²⁹ N Ghana, 'Are Religious Minorities Really Minorities?' (2012) 1 Oxford Journal of Law and Religion 57, 62.

³⁰ Commission on Human Rights, above n 6, paras 6, 56; UN Human Rights Committee, 'General Comment No 23' on 'The Rights of Minorities (Art 27)' UN doc CCPR/C/21/Rev.1/Add.5 para 3.2.

case, then the failure to provide religiously complaint food in State prisons violates not only article 8 FCNM but also article 18 ICCPR and article 9 ECHR.

5.3. CIRCUMCISION

Religious communities in the UK, including Muslims, are able to circumcise boys in accordance with their religious beliefs. The legality of this practice has largely gone unquestioned³¹ and the courts have considered the legality of male circumcision only in the instance that one parent has withheld consent.³² While the right to circumcise boys has, thus, not been the subject of claims by British Muslims, the legality of male circumcision has been the topic of debate in Western Europe following a German Court decision that was thought to have the potential to prohibit religious circumcision.³³ The potential ban on religious circumcision became a source of concern for German Muslims and Ali Demir, the Chairman of the Religious Community of Islam in Germany, observed the potential for the ruling to be 'adversarial to the cause of integration and discriminatory against all the parties concerned'.³⁴ Measures that restrict the religious circumcision of boys have also been considered in Finland and Sweden.³⁵ Consequently, the extent to which this practice is protected under international law merits consideration.

Circumcision as a manifestation of religion has not been widely considered within the UN or under the ECHR. Still, observance and practice of religion have been interpreted by the HRC to 'include not only ceremonial acts but also such customs as ... participation in rituals associated with certain stages of life'.³⁶

³¹ PW Edge, 'Male Circumcision After the Human Rights Act 1998' (2000) 5 *Journal of Civil Liberties* 320, 323.

³² *Re. J (A Child)* [1999] EWCA Civ 3022 (25 November 1999); *S (Children)* [2004] EWCA Civ 1257 (30 July 2004).

³³ Notably the German Parliament subsequently passed legislation, explicitly legalising male religious circumcision provided that certain conditions are met. A Günzel, 'Nationalization of Religious Parental Education? The German Circumcision Case' (2013) 2 *Oxford Journal of Law and Religion* 206.

³⁴ K Connolly, 'Circumcision Ruling Condemned by Germany's Muslim and Jewish Leaders' *The Guardian* (27 June 2012) <<http://www.theguardian.com/world/2012/jun/27/circumcision-ruling-germany-muslim-jewish>> accessed 5 August 2013.

³⁵ 'Opinion on Sweden' above n 54, para 40; AC, 'Second Opinion on Finland' adopted on 2 March 2006 ACFC/OP/II(2006)003 para 93-4; AC, 'Second Opinion on Sweden' adopted on 8 November 2007 ACFC/OP/II(2007)006 para 83; AC, 'Third Opinion on Finland' adopted on 14 October 2010 ACFC/OP/III(2010)007 para 97.

³⁶ HRC, above n 16, para 4. See also, CESCR, above n 26, para 13.

Furthermore, in relation to Bulgaria, 'that parents arranging for male children to be traditionally circumcised are subjected to gaol sentences' has been raised as a potential breach of article 6(h) UN Declaration on Religion or Belief.³⁷ This implies that circumcision constitutes a protected manifestation within the UN and, specifically, under the UN Declaration on Religion or Belief. In contrast, the ECtHR has noted 'that the rites and rituals of many religions may harm believers' well-being, such as, for example circumcision practised on Jewish or Muslim male babies'.³⁸ Although this comment is *obiter dictum*, it may reveal that limitations of this right would be permissible in accordance with article 9(2) ECHR, even though circumcision constitutes a legitimate manifestation of religion.

The AC to the FCNM has considered the right of religious minorities to circumcise boys in the context of the adoption of laws limiting the practice in Finland and Sweden.³⁹ Similarly to the ECtHR, the AC noted the legitimate aim of such laws 'as they have been introduced in the interest of the health of children, and that they appear proportionate in relation to this aim'.⁴⁰ Nonetheless, the AC also encouraged both sides to reach a pragmatic solution in order to ensure that the regulation of circumcision did not interfere with religious traditions.⁴¹ Specifically, in relation to a proposed ban on circumcision in Finland, the AC encouraged:

³⁷ Commission on Human Rights, 'Implementation of the Declaration on the Elimination of All forms of Intolerance and of Discrimination Based on Religion or Belief, Report Submitted by Mr Angelo Vidal d'Almeida Ribeiro, Special Rapporteur appointed in accordance with resolution 1986/20 of the Commission on Human Rights' (6 January 1988) UN doc E/CN.4/1988/45, 4. See also, Commission on Human Rights, 'Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief – Report submitted by Mr. Angelo Vidal d'Almeida Ribero, Special Rapporteur appointed in accordance with resolution 1986/20 of the Commission on Human Rights' (24 December 1986) UN doc E/CN.4/1987/35 para 57.

³⁸ *Case of Jehovah's Witnesses of Moscow and Others v Russia* App no 302/02 (ECtHR 10 June 2010) para 144.

³⁹ 'Opinion on Sweden' above n 54, para 40; 'Second Opinion on Finland' above n 35, para 93-4; 'Second Opinion on Sweden' above n 35, para 83; 'Third Opinion on Finland' above n 35, para 97.

⁴⁰ 'Opinion on Sweden' above n 54, para 40. See also, 'Second Opinion on Finland' above n 35, para 93.

⁴¹ 'Opinion on Sweden' above n 54, para 40; 'Second Opinion on Finland' above n 35, para 94; 'Second Opinion on Sweden' above n 35, para 83; 'Third Opinion on Finland' above n 35, para 97.

[T]he authorities, together with minorities and others concerned, to continue to search for pragmatic solutions to this issue, taking the health of children fully into account, while ensuring that the outcome does not unduly inconvenience the practice of religious traditions at issue.⁴²

The permissibility of religious circumcision has not been considered in sufficient detail under generally applicable human rights standards to definitively ascertain whether there is an added-value to minority rights protection. It appears that in contrast to the approach in the UK, the religious circumcision of boys may be restricted under both the ECHR and FCNM in specific circumstances. However, as the AC has required that States engage with minority representatives, in order to reach an acceptable solution that does not unnecessarily restrict the religious practices of the minority, there may be an added-value to minority rights protection.

5.4. PLANNING PERMISSION FOR MOSQUES

[R]eligious buildings are a symbolic presence in and of themselves and their distinctive architecture and adornment, as well as the activities which take place in and around them, again take on a symbolic meaning which is at once both 'conceptual' and 'tangible'.⁴³

British Muslims claims to the accommodation of their identity in relation to applications to construct and expand mosques, increase mosque opening hours and to broadcast the *azan* have frequently received significant opposition.⁴⁴ It is estimated that there are currently between 850 and 1,500 mosques in the UK.⁴⁵

⁴² 'Second Opinion on Finland' above n 35, para 94.

⁴³ MD Evans, *Manual on the Wearing of Religious Symbols in Public Areas* (Council of Europe Publishing 2009) 61.

⁴⁴ *Sheffield CC v Abdulqader* [2004] PAD 69 para 2.3; *North-East Lincolnshire Council v The Islamic Association of South Humberside* [1998] 13 PAD 769 para 4.2; *Islamic Education Society v Blackburn and Darwin Borough Council*, Application 10/04/0629 PAD 31 August 2005 DCS No. 100038903, reported in 'Sound System for Prayer Calling Rejected at Mosque' (2006) *Journal of Planning & Environmental Law* 298, 302; Green, above n 4, 633; S Naylor and JR Ryan, 'The Mosque in the Suburbs: Negotiating Religion and Ethnicity in South London' (2002) 3 *Social and Cultural Geography* 39, 51-5; R Gale, 'Planning Law and Mosque Development: The Politics of Religion and Residence in Birmingham' in P Shah (ed), *Law and Ethnic Plurality – Socio-Legal Perspectives* (Martinus Nijhoff 2007) 129-37.

⁴⁵ Allievi, above n 4, 23.

Under national law, permission is required not only for the building of new mosques,⁴⁶ approval is also required for their design,⁴⁷ and for the change in usage of existing buildings to become mosques.⁴⁸ Khaliq has stressed:

The mosque has historically been central to the creation of a Muslim identity. The coming together for prayer on as many of the five times per day as is possible and especially on a Friday, has been vital in creating a sense of community and unity throughout Islamic history.⁴⁹

Thus, in *Sheffield CC v Abdulqader* the restrictions placed on the use of a room in a community centre for prayer were appealed on the basis that 'no alternative premises are available and the property enables citizens the right to practise their religion'.⁵⁰ Similarly in *Ouardiri and Ligue des Musulmans de Suisse and Others v Switzerland* the applicants asserted the connection between the building of minarets and the practice of Islam: '*Les requérantes considèrent que le minaret est intimement lié à la religion musulmane. En conséquence, elles estiment que son interdiction constitue une restriction de la pratique religieuse frappant l'ensemble des musulmans*'.⁵¹

The establishment of places of worship has been recognised as a manifestation of religion under the ECHR, ICCPR and FCNM.⁵² Under both generally applicable human rights instruments and minority rights instruments planning permission for places of worship should not be denied on a discriminatory

⁴⁶ Town and Country Planning Act 1990 s 1.

⁴⁷ *Ibid.*, s 62(5)(a)

⁴⁸ Department for Communities and Local Government, 'Circular 03/2005 – Changes of Use of Buildings and Land—the Town and Country Planning (Use Classes) Order 1987' (21 March 2005).

⁴⁹ Khaliq, above n 7, 337.

⁵⁰ *Sheffield CC v Abdulqader*, above n 44 para 2.4.

⁵¹ *Ouardiri and Ligue des Musulmans de Suisse and Others v Switzerland* App nos 65840/09 and 66274/09 (ECtHR 8 July 2011).

⁵² *Johannische Kirche and Peters v Germany* ECHR 2001-VIII; *Vergos v Greece* App no 65501/01 (ECtHR 24 June 2004) para 32; *ISKCON and 8 Others v United Kingdom* App no 20490/92 (Commission Decision 8 March 1994); HRC, above n 16, para 4. See, for example, AC, 'Opinion on Georgia' adopted on 19 March 2009 ACFC/OP/I(2009)001 para 93; AC, 'Opinion on Slovenia' adopted on 12 September 2002 ACFC/INF/OP/I(2005)002 para 46; AC, 'Second Opinion on the Russian Federation' adopted on 11 May 2006 ACFC/OP/II(2006)004 para 173; AC, 'Second Opinion on Spain' adopted on 22 February 2007 ACFC/OP/II(2007)001 para 110. See also, article 6(1) UN Declaration on Religion or Belief.

basis.⁵³ Notably, in General Comment No 22, the HRC noted that '[t]he concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship'.⁵⁴ Similarly, article 6(a) UN Declaration on Religion or Belief establishes that the right to freedom of religion or belief includes, '[t]o worship or assemble in connexion with a religion or belief, and *to establish and maintain places for these purposes*'. Additionally, the UN Special Rapporteur on Religion or Belief has insisted:

[T]hat places of worship are an essential element of the manifestation of the right to freedom of religion or belief to the extent that the great majority of religious communities or communities of belief need the existence of a place of worship where their members can manifest their faith.⁵⁵

In particular, the Annual Reports of the UN Special Rapporteur on Religion or Belief reveal that the 'prohibition of the opening of new places of worship or assembly' and the 'refusal to grant permits to build new places of worship or assembly' constitute violations of the UN Declaration on Religion or Belief.⁵⁶

The former UN Working Group on Minorities also suggested that the protection of the existence of minorities and the promotion of minority identity 'requires respect for and protection of their religious and cultural heritage, essential to their group identity, including buildings and sites such as libraries, churches, mosques, temples and synagogues'.⁵⁷ Thus, the significance of places of worship for the preservation of religious minority identity have been recognised by the HRC, the UN Special Rapporteur on Religion or Belief and the former UN Working Group on

⁵³ Article 9 in conjunction with article 14 ECHR; Protocol No 12 ECHR; article 18 in conjunction with article 2(1) and article 26 ICCPR; UN Declaration on Religion or Belief; articles 4(1) and 6(2) FCNM; article 3 UN Declaration on Minorities.

⁵⁴ HRC, above n 16, para 4.

⁵⁵ Commission on Human Rights, 'Civil and Political Rights, including the Question of Religious Intolerance – Report submitted by Asma Jahangir, Special Rapporteur on Freedom of Religion or Belief' (20 February 2004) UN doc E/CN.4/2005/61 para 50. See also, UNGA, 'Interim Report by the Special Rapporteur of the Commission on Human Rights on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' (8 September 2000) UN doc A/55/280/Add.1 para 160.

⁵⁶ MD Evans, *Religious Liberty and International Law in Europe* (CUP 1997) 253.

⁵⁷ Commission on Human Rights, above n 6, para 24.

Minorities. However, the right to build places of worship has received only limited attention in the UN. In contrast, the Strasbourg institutions and the AC have considered the denial of this right in more detail and will be the focus of more detailed consideration.

5.4.1. Places of Worship and the ECHR

A number of cases have been brought under article 9 ECHR in relation to the right to build places of worship, varying from the ability of a religious community to gain authorisation for the change in usage of a pre-existing property⁵⁸ to planning permission to construct purpose built places of worship and cemeteries.⁵⁹ In all cases, the Strasbourg institutions accepted that the refusal to grant such authorisation or planning permission constituted an interference with the right of the applicants to manifest their religion.⁶⁰ In particular, in *Vergos v Greece*:

*La Cour note que le refus de la mairie de Petres de « délimiter l'espace » pour l'érection de la maison de prière du requérant s'analyse en une ingérence dans l'exercice de son droit à la « liberté de manifester sa religion (...) par le culte (...) et l'accomplissement des rites ».*⁶¹

Accordingly, the Strasbourg institutions have decided whether the cases disclosed violations of article 9 ECHR on the basis of whether the interference with the applicants' freedom of religion was justifiable under article 9(2), the limitations clause.

As the Strasbourg institutions are not permitted to review administrative decisions, they have considered cases involving planning permission to fall outside their mandate,⁶² and have allowed States a wide margin of appreciation. Consequently, in three cases brought under article 9 ECHR concerning planning

⁵⁸ *ISKCON and 8 Others v United Kingdom* above n 52; *Manoussakis and Others v Greece* ECHR 1996-IV.

⁵⁹ *Johannische Kirche and Peters v Germany* above n 52; *Vergos v Greece* above n 52.

⁶⁰ *Ibid*; *ISKCON and 8 Others v United Kingdom* above n 52; *Manoussakis and Others v Greece* above n 58.

⁶¹ *Vergos v Greece* above n 52, para 32.

⁶² *Sporrong and Lönnroth v Sweden* (1981) Series A no 52 para 69; *Chater v United Kingdom* (1987) 52 DR 250.

permission for places of worship the Strasbourg institutions did not consider the proportionality of the interference with the applicants' rights.⁶³ Planning matters were considered to be prescribed by law and to pursue a legitimate policy aim. However, aside from the identification of the aim under article 9(2) ECHR, very little attention was paid to how the restriction on the applicants' rights would pursue such an aim and whether the restriction was 'necessary in a democratic society'. In particular, in *ISKCON and 8 Others v United Kingdom*, the State did not need to prove the necessity of the measures to protect 'the rights and freedoms of others' or whether they were proportionate to the aims pursued, as article 9 ECHR cannot 'be used to circumvent existing planning legislation, provided that in the proceedings under that legislation, adequate weight is given to freedom of religion'.⁶⁴

The wide margin of appreciation permitted to States in planning matters has the potential to prevent the ECtHR from considering whether a pattern of discrimination against a religious community exists in planning decisions. While in *Manoussakis and Others v Greece* the ECtHR noted the pattern of discrimination against Jehovah's Witnesses in planning matters in Greece,⁶⁵ the case turned on the disproportionate nature of the criminal prosecution and conviction of the applicant for using the room as a place of worship rather than the discrimination suffered by the community.⁶⁶

In contrast, in *Vergos v Greece*, the State's submissions hinted at a discriminatory undercurrent in the planning decision, justifying the lack of 'social need' for a 'True Orthodox Christian' place of worship on the grounds that a suitable place of worship existed in the neighbouring town; the land was not suitable for such a building; and *the building of a place of worship could exacerbate the religious feelings of other Christians and lead to disorder*.⁶⁷ Nevertheless, the ECtHR did not consider this final point further and deferred to the wide margin of appreciation of the State in planning matters.⁶⁸ Therefore, it would seem that a violation was found in *Manoussakis and Others v Greece* because the interference complained of struck

⁶³ *Johannische Kirche and Peters v Germany* above n 52; *Vergos v Greece* above n 52, para 32; *ISKCON and 8 Others v United Kingdom* above n 52.

⁶⁴ *ISKCON and 8 Others v United Kingdom* above n 52.

⁶⁵ *Manoussakis and Others v Greece* above n 58, para 48.

⁶⁶ *Manoussakis and Others v Greece* above n 58, paras 51-3.

⁶⁷ *Vergos v Greece* above n 52, para 14.

⁶⁸ *Vergos v Greece* above n 52, paras 40-41.

at the heart of the right, as it not only prevented the applicant from establishing a place of worship but also resulted in his criminal conviction.

The wide margin of appreciation given to States in planning matters has the potential to prevent the ECtHR from considering whether a pattern of discrimination exists in planning decisions.⁶⁹ Were the Strasbourg institutions to review the proportionality of planning decisions, rather than deferring to the alleged 'pressing social need', it would be possible to identify instances of systematic discrimination, in cases not concerning serious violations of other Convention rights.⁷⁰ The acceptance of statistical evidence by the ECtHR would also facilitate the identification of such discrimination.

5.4.2. Places of Worship and the FCNM

In contrast to the Strasbourg institutions, the AC in its Opinions on State Reports has focused on discriminatory obstacles to planning permission for places of worship, under articles 6 and 8 FCNM.⁷¹ Notably, when reviewing the situation in Georgia, the AC observed under article 8 FCNM:

The obstacles impeding their efforts to acquire, build or apply for the restitution of places of worship are another serious concern to the persons belonging to minorities. The Armenians, for instance, report reluctance, or even refusal, by certain local authorities to grant permission for the building of new churches, as well as tensions generated by these procedures. They also mention attempts by the Georgian Orthodox Church to appropriate property belonging to the Armenian churches, as well as acts of provocation and defamatory language against them. The Azeris report particular difficulties in their efforts to build and maintain mosques, as well

⁶⁹ *Manoussakis and Others v Greece* above n 58, paras 48, 51-3; *Vergos v Greece* above n 52, paras 40-41.

⁷⁰ Cf. *Manoussakis and Others v Greece* above n 58, paras 48, 51-3. SE Berry, 'A Tale of Two Instruments: Religious Minorities and the Council of Europe's Rights Regime' (2012) 30 *Netherlands Quarterly of Human Rights* 10, 24-5.

⁷¹ AC, 'Opinion on Bosnia and Herzegovina' ACFC/INF/OP/I(2005)003 para 75; 'Opinion on Georgia' above n 52, para 93; 'Opinion on Slovenia' above n 52, para 46; 'Second Opinion on the Russian Federation' above n 52, para 173; AC, 'Second Opinion on Slovenia' adopted on 26 May 2005 ACFC/INF/OP/II(2005)005 para 98; 'Second Opinion on Spain' above n 52, para 110.

as manifestations of hostility by both the Georgian Orthodox Church and the population of the Georgian Orthodox faith. The Assyrians and Yezidi have also faced strong opposition, including violent attacks and petitions signed by members of the Georgian Orthodox population, when they were seeking to set up an appropriate place of worship.⁷²

The ability of the AC to review the situation generally prevailing in a State enables the identification of systematic discrimination, which may not be easily identifiable on a case-by-case basis. The AC has also identified difficulties gaining planning permission for the building of places of worship experienced by minority communities in Bosnia and Herzegovina,⁷³ Russia,⁷⁴ Slovenia⁷⁵ and Spain.⁷⁶

The AC reviews the implementation of FCNM rights at a national level, rather than issuing legal judgments. Yet, the identification of discrimination by the AC in its Opinions on State Reports may encourage States to engage with minorities and result in the resolution of the matter. For example, in relation to the situation of Muslims in Denmark, the AC noted under article 6 that '[t]he Advisory Committee is also aware that a solution has still not been found for the opening of the first full-scale mosque in Denmark, a matter that risks undermining intercultural dialogue with persons belonging to the Muslim faith'.⁷⁷ It additionally recommended that the authorities 'make further efforts to find a solution'.⁷⁸ Subsequently, planning permission was granted for two mosques to be built in Copenhagen.⁷⁹ Although the impact of the AC's intervention on the resolution of this issue is unclear, the Third

⁷² 'Opinion on Georgia' above n 52, para 93.

⁷³ 'Opinion on Bosnia and Herzegovina' above n 71, para 75.

⁷⁴ 'Second Opinion on the Russian Federation' above n 52, para 173; AC, 'Third Opinion on the Russian Federation' adopted on 24 November 2011 ACFC/OP/III(2011)010 paras 149, 153.

⁷⁵ Opinion on Slovenia adopted on 12 September 2002 ACFC/INF/OP/I(2005)002 para 46; 'Second Opinion on Slovenia' above n 71, para 98.

⁷⁶ 'Second Opinion on Spain' above n 52, para 110; AC, 'Third Opinion on Spain' adopted on 22 March 2012 ACFC/OP/III(2012)003 para 75, 83. See also, AC, 'Opinion on Montenegro' adopted on 28 February 2008 ACFC/OP/I(2008)001 para 66.

⁷⁷ AC, 'Second Opinion on Denmark' adopted on 09 December 2004 ACFC/INF/OP/II(2004)005 para 88.

⁷⁸ *Ibid.*, para 93.

⁷⁹ —, 'Vejen er banet for to moskeer i København' *Politiken* (25 February 2010) <www.politiken.dk/politik/article910841.ece> accessed 1 December 2011; —, 'Stort flertal stemmer for stormoske i København' *Politiken* (16 April 2010) <www.politiken.dk/indland/article949032.ece> accessed 1 December 2011; P Buhl Andersen, 'København er stort skridt tættere på moske' *Politiken* (17 January 2011) <www.politiken.dk/indland/ECE1169886/koebenhavn-er-stort-skridt-taettere-paa-moske/> accessed 1 December 2011.

Danish State Report did stress that progress had been made in relation to the proposals for the two mosques.⁸⁰ By encouraging States to engage in dialogue with minorities, the AC may have led to a mutually acceptable agreement to be reached and planning permission to be granted.⁸¹

5.4.3. The Swiss Minaret Ban

A difference in approach between the AC and UN bodies, on the one hand, and the ECtHR, on the other, can be discerned in relation to the Swiss ban on the construction of minarets, following a referendum in 2009. As noted by Evans:

From a legal standpoint, it is easy to see that an absolute prohibition on the construction of minarets would be difficult—if not impossible—to reconcile with an even-handed, non-discriminatory and neutral approach to the regulation of the design and construction of places of worship.⁸²

Accordingly, the AC criticised the proposed ban on the building of minarets in Switzerland prior to the referendum, noting that '[n]egative attitudes towards Muslims have also been stirred following the launching of a popular initiative to ban the building of minarets'.⁸³ The UN Special Rapporteur on Freedom of Religion or Belief has subsequently 'indicated that a ban on minarets amounted to an undue restriction of the freedom to manifest one's religion and constituted clear discrimination against members of the Muslim community'.⁸⁴ The HRC has also made comparable observations, in its Concluding Observations on Switzerland.⁸⁵

⁸⁰ AC, 'Third Report Submitted by Denmark pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities' received on 30 March 2010 ACFC/SR/III(2010)004, 23-24.

⁸¹ 'Second Opinion on Denmark' above n 77, paras 88, 93; 'Third Report Submitted by Denmark' above n 81, 23-24. See, further, Berry, above n 70, 26.

⁸² MD Evans, 'From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression Before the European Court of Human Rights' (2010-2011) 26 *Journal of Law & Religion* 345, 363.

⁸³ AC, 'Second Opinion on Switzerland' adopted on 29 February 2008 ACFC/OP/II(2008)002 para 89.

⁸⁴ UNGA, 'The Interim Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir' (29 July 2010) UN doc A/65/207 para 8.

⁸⁵ HRC, 'Concluding Observations of the Human Rights Committee – Switzerland' (3 November 2009) UN doc CCPR/C/CHE/CO/3 para 8.

Furthermore, the Parliamentary Assembly to the Council of Europe (PACE) has called upon

Switzerland to enact a moratorium on, and to repeal as soon as possible, its general prohibition on the construction of minarets for mosques, which discriminates against Muslim communities under Articles 9 and 14 of the European Convention on Human Rights (ETS No. 5); the construction of minarets must be possible in the same way as the construction of church towers, subject to the requirements of public security and town planning.⁸⁶

However, while PACE considered that the ban constituted a breach of article 9 and 14 ECHR, the ECtHR was unable to consider the issue in the cases of *Ouardiri and Ligue des Musulmans de Suisse and others v Switzerland*. The representative organisations failed to satisfy the victim test even though they purported to represent Swiss Muslim minorities, as they had not planned to construct a minaret.⁸⁷ Under article 12 of Protocol 14 ECHR, applications will be declared inadmissible if 'the applicant has not suffered a significant disadvantage'.⁸⁸ Thus, while the ECtHR can hear collective complaints,⁸⁹ instances where measures negatively interfere with the rights of minority as a whole but do not have a clearly identifiable victim cannot be heard.⁹⁰

Consequently, while the AC, PACE, HRC and UN Special Rapporteur on Religion or Belief have stressed that the ban on the building of minarets constitutes a violation of the right to manifest religion, the ECtHR has been unable to consider the issue. Notably, the differing nature of the mandates of the AC and ECtHR has allowed the AC to criticise measures that have the potential to discriminate against persons belonging to religious minorities, whereas the mandate of the ECtHR has

⁸⁶ PACE, Recommendation 1927 (2010) 'Islam, Islamism and Islamophobia in Europe' para 3.12.

⁸⁷ *Ouardiri and Ligue des Musulmans de Suisse and Others v Switzerland* above n 51.

⁸⁸ Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention CETS No 194, entered into force 1 June 2010.

⁸⁹ J Rivers, 'Religious Liberty as a Collective Right' in R O'Dair and A Lewis (eds), *Law and Religion – Current Legal Issues* (OUP 2001) 228-29.

⁹⁰ See, for example, *Ouardiri and Ligue des Musulmans de Suisse and Others v Switzerland* above n 51; PACE, 'Report on an Additional Protocol to the European Convention on Human Rights on National Minorities' (23 February 2012) Doc 12879, 14 FN 57.

inhibited the consideration of the Swiss ban on minarets on the basis of a lack of identifiable victim. The wide margin of appreciation afforded to States in planning decisions may further inhibit the ECtHR from finding a violation of article 9 ECHR in cases concerning the ban on the building of minarets.

5.4.4. Preliminary Conclusions

The margin of appreciation in planning permission cases prevents the ECtHR from considering in detail the potential implications of discrimination in this area for the exercise of the right to freedom of religion. This has the potential to negatively impact the right of religious minorities to build places of worship. In contrast, additional support for the claims of European Muslims is found under the FCNM. The AC has identified instances where discriminatory planning policies or decisions have restricted the right of minorities to build places of worship and has arguably contributed to the finding of a mutually acceptable solution. Accordingly, under the Council of Europe's rights regime, an added-value to minority rights protection for European Muslims can be discerned.

Within the UN system, less attention has been paid to the right to build places of worship. Nonetheless, the reaction of the HRC and the UN Special Rapporteur on Freedom of Religion or Belief to the Swiss ban on minarets indicates that discriminatory planning measures do not comply with the right to freedom of religion. It is, therefore, unlikely that European Muslims would derive any additional benefit from UN minority rights protection.

5.5. FRIDAY PRAYERS AND RELIGIOUS HOLIDAYS

The day of religious observance and holidays of the majority tend to be reflected in the working practices and national holidays of the State.⁹¹ This is true throughout Western Europe, where Sunday tends to be designated as a day of rest and significant Christian religious dates constitute national holidays.⁹² As a result, claims have been made by British Muslims under freedom of religion and non-

⁹¹ Krishnaswami, above n 20, 35

⁹² P Cumper, 'Article 9: Freedom of Religion' in DJ Harris and others (eds), *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 434.

discrimination in relation to the right to attend Friday Prayer at a mosque⁹³ and to take leave from employment in order to celebrate *Eid* and go on *haji*.⁹⁴ Notably, in *Ahmad v Inner London Education Authority*, a case which concerned the right of a teacher to take an extended lunch break in order to attend Friday Prayer, evidence was given by an Islamic Religious Leader 'that Friday is a day on which a Muslim is by the Koran required to attend prayers and thereafter return to work'.⁹⁵ Furthermore, *JH Walker v Hussain and Others* concerned changes in the holiday arrangements for factory employees that prevented Muslim employees from taking time off during *Eid*.⁹⁶ In addition to seeking the accommodation of these rights through the courts, it has been suggested that British Muslims have successfully compromised with their employers in order to attend Friday prayer and celebrate religious festivals.⁹⁷

5.5.1. Friday Prayers, Religious Holidays and Generally Applicable Human Rights Standards

The HRC has expressly recognised that under article 18 ICCPR '[t]he concept of worship extends to ... the observance of holidays and days of rest'.⁹⁸ Similarly article 6(h) of the UN Declaration on Religion or Belief, recognises that the right to freedom of religion or belief encompasses '[t]o observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief'. However, as previously noted, freedom of religion constitutes a negative right. Therefore, while States must not interfere with the right of persons belonging to religious minorities to observe days of rest and holidays, this does not necessarily lead to the conclusion that the State is required to take positive measures in order to accommodate this aspect of religious worship.

⁹³ *Ahmad v Inner London Education Authority* [1978] QB 36, [1977] 1 All ER 574; *Cherfi v G4S Security Services Ltd* Appeal No. UKEAT/0379/10/DM, EAT (2011) WL 1151919; *Ali and Others v Capri Shoes* (1991) Industrial Relations Legal Information Bulletin 439; *Ahmad v United Kingdom* (1981) 22 DR 27.

⁹⁴ *JH Walker v Hussain and Others* [1996] ICR 291; *Khan v G & S Spencer Group* ET Case no. 1803250/2004 (12 January 2005). See also, in relation to time away from work due to bereavement *Hussain v Bhullar Brothers t/a BB Supersave* ET case no. 1806638/2004 (5 July 2005).

⁹⁵ *Ahmad v Inner London Education Authority* above n 93.

⁹⁶ *JH Walker v Hussain and Others* above n 94.

⁹⁷ Khaliq, above n 7, 346.

⁹⁸ HRC, above n 16, para 4. See further, article 6(h) UN Declaration on Religion or Belief.

The Krishnaswami report emphasised the accommodation of the observance of religious holidays within public institutions,⁹⁹ rather than interpreting freedom of religion to impose positive duties on the State. Notably, in relation to the observance of days of rest, Krishnaswami suggested that although '[i]n many areas special permission is granted to persons of certain faiths to observe a weekly day of rest different from that of the majority, but this is not always possible, since public convenience usually requires some standardization of working days'.¹⁰⁰ Hence, for practical reasons, persons belonging to religious minorities may not be able to observe their day of religious observance on equal terms with the majority. Nonetheless, the UN Special Rapporteur on Religion or Belief has encouraged States to accommodate the days of rest of religious minorities.¹⁰¹

In the context of the implementation of the UN Declaration on Religion or Belief it has also been emphasised that pilgrimage constitutes a protected manifestation of religion:

The Special Rapporteur has also been informed of infringements of the freedom to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief. In Czechoslovakia, for instance, the authorities allegedly obstructed the annual pilgrimage to Levoča.¹⁰²

This again indicates that States are under a duty to not to interfere with the exercise of this right rather than a duty to facilitate it. Similarly, Krishnaswami has indicated that States must not prevent the religious from going on pilgrimage.¹⁰³ Thus, the interpretation of freedom of religion in the UN, as a generally applicable human rights standard, indicates that States are only under a duty to not interfere with the right to observe days of rest, celebrate religious holidays and go on pilgrimage.

⁹⁹ Krishnaswami, above n 20, 35-6.

¹⁰⁰ *Ibid.*, 35.

¹⁰¹ Commission on Human Rights (1986), above n 37, para 57; Commission on Human Rights, 'Civil and Political Rights, including the Question of: Religious Intolerance – Report submitted by Mr. Abdelfattah Amor, in accordance with Commission on Human Rights resolution 2001/42 Addendum Visit to Argentina' (16 January 2002) UN doc E/CN.4/2002/73/Add.1 para 125.

¹⁰² Commission on Human Rights, above n 37, para 47. [sic]

¹⁰³ Krishnaswami, above n 20, 32.

The ECommHR has also interpreted the right to observe holidays and days of religious observance particularly narrowly in two criticised decisions.¹⁰⁴ In *Stedman v UK*, a private employer required employees to work on Sundays contrary to the applicant's beliefs¹⁰⁵ and in *Ahmad v UK* a Local Education Authority did not allow the applicant to take time off work to attend Friday Prayer.¹⁰⁶ The ECommHR found both cases to be inadmissible on the grounds that the applicants had an element of 'choice' when accepting the employment, which prevented them from practicing their religion.¹⁰⁷ Consequently, as 'the freedom of religion can, in essence be "contracted away"',¹⁰⁸ these decisions reaffirm that States are not under a positive obligation to guarantee the right to observe religious worship.

However, the extent to which those adhering to a particular belief system are left with a 'choice' in this regard has been questioned.¹⁰⁹ Cumper has suggested that this approach 'rests on the questionable assumption that everyone seeking to manifest their religion or belief will, in a competitive labour market, have a "real choice"'.¹¹⁰ In contrast, the applicants may have been left with no choice but to resign from their positions as their spiritual well-being was at stake.¹¹¹ The 'choice' faced by European Muslims, on the basis of the ECommHR's narrow construction of the right observe religious worship may be between 'truth and salvation' on the one hand¹¹² and economic security, on the other.

Furthermore, while the jurisprudence in *Ahmad v United Kingdom* and *Stedman v United Kingdom* appears to be consistent, as Cumper explains:

¹⁰⁴ See, for example, C Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001) 129; MD Evans, 'Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions' in P Cane, C Evans and Z Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008) 296; Cumper, above n 92, 434.

¹⁰⁵ *Stedman v UK* App no 29107/95 (Commission Decision, 9 April 1997).

¹⁰⁶ *Ahmad v United Kingdom* above n 93.

¹⁰⁷ *Stedman v UK* above n 105.

¹⁰⁸ MD Evans, above n 104, 296.

¹⁰⁹ S Leader, 'Freedom and Futures: Personal Priorities, Institutional Demands and Freedom of Religion' (2007) 70 *Modern Law Review* 713, 725.

¹¹⁰ Cumper, above n 92, 434.

¹¹¹ C Evans, above n 104, 129.

¹¹² *Ibid.*

[G]iven that most employers fix their working week around the Christian calendar, the Christian employee who ultimately 'chooses' to seek alternative employment is likely to find a convivial working environment more easily than someone from outside the tradition.¹¹³

Therefore, the working arrangements in Western Europe more readily accommodate those who belong to the Christian tradition. Although this should not be a cause for regret, it does indicate that additional measures may be required in order to ensure that European Muslims are not disadvantaged in the workplace.

By emphasising the ability of the applicants to resign from their positions, the ECommHR affirmed the narrow scope of article 9 ECHR. As long as the State refrains from coercion and individuals are free to resign from positions that do not accommodate their religious beliefs, then the requirements of this provision are fulfilled. States are not required to take positive measures to ensure the ability of the religious to observe days of rest or attend worship, even when the religious beliefs of the majority are advantaged for historical reasons. The ECtHR took a similar approach in *Kosteski v the Former Yugoslav Republic of Macedonia*, which concerned the absence of a Muslim from work to celebrate a religious holiday.¹¹⁴

The ECommHR's decision in *Ahmad v United Kingdom* is of additional relevance to European Muslims, as 'the Commission suggested that no Article 9 issue was raised because the applicant had not shown that it was a *requirement* of the religion that he attend Friday prayers'.¹¹⁵ The ECommHR can, thus, be seen to limit the scope of right to 'worship', to exclude attendance of 'Friday Prayer' from the accepted manifestations of Islam. Similarly, in *Kosteski v the Former Yugoslav Republic of Macedonia*, the ECtHR held that 'while it may be that this absence from work was motivated by the applicant's intention of celebrating a Muslim festival it is not persuaded that this was a manifestation of his beliefs in the sense protected by Article 9 of the Convention'.¹¹⁶ The Strasbourg institutions' consideration of the validity of the applicants' interpretation of the requirements of their own religion in

¹¹³ Cumper, above n 92, 434.

¹¹⁴ *Kosteski v the Former Yugoslav Republic of Macedonia* App no 55170/00 (ECtHR 13 April 2006). See also, *Sessa v Italy* ECHR 2012 paras 34-9.

¹¹⁵ C Evans, above n 104, 177. [Emphasis added].

¹¹⁶ *Kosteski v the Former Yugoslav Republic of Macedonia* above n 114, para 38.

these cases seems to disregard the underlying purpose of freedom of religion – to protect the religious from interference from the State or those who do not share the same beliefs.

5.5.2. Friday Prayers, Religious Holidays and Minority Rights Standards

In contrast to freedom of religion under generally applicable human rights standards, the right of persons belonging to minorities 'to practise their religion, in community with the other members of the group' may offer more protection in relation to the observation of Friday Prayer and religious holidays, as minority rights standards may also require positive measures to ensure their achievement.¹¹⁷ The former UN Working Group on Minorities did not pay specific attention to the observation of religious days of rest and holidays by persons belonging to religious minorities. However, the right 'to profess and practise ... religion'¹¹⁸ was interpreted to impose positive obligations upon States and, in particular, to 'ensure that individuals and organizations of the larger society do not interfere or discriminate'.¹¹⁹ This may imply that the State is not only required to accommodate requests for time off work from European Muslims in order to celebrate *Eid* or attend Friday Prayer, but it is also required to ensure that private individuals also accommodate this right.

In relation to the FCNM, Machniykova has suggested that:

Observation of religion holidays in accordance with the precepts of one's religion or belief is another issue where positive measures might be required on the part of the state with respect to national minorities. It is quite common for a state's holidays to correspond to the religious holidays observed by the dominant faith in the country. In light of Article 4(2) FCNM, it would be desirable for parties to allow national minorities, where possible, to choose alternative days in accordance with their religious beliefs...¹²⁰

¹¹⁷ Commission on Human Rights, above n 6, para 33; HRC, above n 30, para 6.2. See also, Z Machniykova, 'Article 8' in M Weller (ed), *The Rights of Minorities – A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP 2005) 252.

¹¹⁸ Article 2(1) UN Declaration on Minorities.

¹¹⁹ Commission on Human Rights, above n 6, paras 33-4; HRC, above n 30, para 6.2.

¹²⁰ Machniykova, above n 117, 252.

The AC to the FCNM has focused on the accommodation of religious holidays by public authorities, under articles 5 and 8 FCNM. Specifically, the AC has noted with satisfaction the inclusion of minority religious holidays within State public holidays,¹²¹ and provision for persons belonging to minorities to take alternative days off work to celebrate religious holidays.¹²² However, despite welcoming such measures, the AC has also noted, in relation to Poland, that it had 'been informed by a representative of the Karaim minority, that in practice, this right was not respected with regard to their community'.¹²³ Consequently, legal provision is not enough; States must ensure that the right of persons belonging to religious minorities to celebrate religious holidays is guaranteed in practice.

Furthermore, under the FCNM, States are required to prevent interference with this right by third parties. The AC has been critical of the scheduling of examinations on religious holidays¹²⁴ and the interruption of Friday prayer.¹²⁵ The AC has also noted that measures taken to allow persons belonging to minorities may raise issues in respect of equality:

The obligation to work on another day to compensate for the absence from work on religious holidays, which are not by law non-working days, is perceived by some persons belonging to national minorities as an infringement of their freedom of religion, as no corresponding obligation is placed on the persons celebrating Roman Catholic holidays, which are by law public holidays.¹²⁶

Thus, under the FCNM, States are not only required to allow European Muslims to observe Friday Prayer and *Eid* but they must also ensure that measures are adopted to facilitate the exercise of this right in practice. This includes active measures to ensure that third parties do not interfere with religious practice and may require

¹²¹ AC, 'Second Opinion on Kosovo' adopted on 5 November 2009 ACFC/OP/II(2009)004 para 107; AC, 'Second Opinion on Poland' adopted on 20 March 2009 ACFC/OP/II(2009)002 para 108.

¹²² 'Second Opinion on Poland' above n 121, para 109.

¹²³ *Ibid.*, para 109.

¹²⁴ AC, 'Opinion on Latvia' adopted on 9 October 2008 ACFC/OP/I(2008)002 para 60; *Ibid.*, para 110.

¹²⁵ AC, 'Third Opinion on Moldova' adopted on 26 June 2009 ACFC/OP/III(2009)003 para 104.

¹²⁶ 'Second Opinion on Poland' above n 121, para 110.

guarantees that European Muslims can take annual leave to observe religious holidays.

5.5.3. Preliminary Conclusions

The right of European Muslims to observe Friday Prayers and religious holidays appears to find greater protection under minority rights standards than under freedom of religion, in generally applicable human rights instruments. In particular, minority rights standards have been interpreted to impose positive obligations upon States by minority rights bodies. Specifically, the AC and former UN Working Group on Minorities have indicated that States must take measures to ensure that third parties do not interfere with this right. In contrast, the Krishnaswami report and the jurisprudence of the ECommHR have both construed the right to freedom of religion narrowly in this respect. The State is primarily required not to interfere with the right to observe days of worship, religious holidays and to go on pilgrimage. Although the UN Special Rapporteur on Religion or Belief has approved of steps taken to accommodate religious days of rest, there appears to be no obligation for the State to actively accommodate minority practices under generally applicable human rights standards, even though days of rest and State holidays tend to reflect the religious traditions of the majority. Consequently, an added-value to minority rights protection can be discerned in relation to the right of European Muslims to attend Friday prayers and observe religious holidays.

5.6. BEARDS AND RELIGIOUS ATTIRE

The wearing of beards and modest clothing including the *hijab*, *jilbab*¹²⁷ and *niqab*¹²⁸ are accepted to constitute manifestations of Islam¹²⁹ and, as Rehman notes,

¹²⁷ '[A] long plain dress which reaches the ankles; it effectively conceals the shape of a woman's arms and legs'. D McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart 2006) 180.

¹²⁸ '[A] veil which covers her entire face and head save for her eyes'. Definition from: *X (by her father and litigation friend) v the Headteachers of Y Schools and the Governors of Y School* [2007] EWHC 298 (Admin) para 1.

¹²⁹ *X v Austria* (1965) 16 CD 20; *Hudoyberganova v Uzbekistan* Communication no 931/2000 UN doc CCPR/C/82/D/931/2000 para 6.2; *Dahlab v Switzerland* ECHR 2001-V; *Şahin v Turkey* ECHR 2005-XI para 78.

'Muslims communities increasingly maintain a specific dress code'.¹³⁰ British Muslims have made claims to accommodation in relation to the wearing of beards and modest clothing in the workplace¹³¹ and at school.¹³² Specifically, claims to the accommodation of religious clothing in the workplace have been brought in *Azmi v Kirkless Metropolitan Borough Council*, in relation to the right to wear the *niqab*,¹³³ and in *Noah v Desrosiers t/a Wedge*, in relation to the right to wear the *hijab*.¹³⁴ Ansari has noted that '[b]eards too have sometimes caused problems, with examples of Muslim boys not being allowed to go to school unless they shave'.¹³⁵ Furthermore, while the majority of schools have permitted the wearing of the *hijab*,¹³⁶ claims have been made by British Muslims in relation to restrictions placed on wearing of the *jilbab*¹³⁷ and *niqab*.¹³⁸ As Belgium and France have placed wider restrictions on the right to wear religious attire by prohibiting the wearing of the *burqa*¹³⁹ and *niqab* in public,¹⁴⁰ these manifestations of Islam merit additional attention.

The wearing of religious attire and beards have been recognised as legitimate manifestations of religion under article 9 ECHR, article 18 ICCPR and article 8

¹³⁰ J Rehman, 'Islam, "War on Terror" and the Future of Muslim Minorities in the United Kingdom: Dilemmas of Multiculturalism in the Aftermath of the London Bombings' (2007) 29 Human Rights Quarterly 831, 854.

¹³¹ *Malik v Bertram Personnel Group* (1991) 7 EOR 5; *Hussain v Midland Cosmetic Sales Plc and Others* EAT/915/00 2002 WL 499015 (9 May 2002); *Mohmed v West Coast Trains Ltd* UKEAT/0682/05/DA; ET Case No. 2201814/2004 (12-14 October 2004; 20 May 2005) EAT (2006) WL 25224803 (30 August 2006); *Azmi v Kirkless Metropolitan Borough Council* [2007] UKEAT 0009_07_3003; *Noah v Desrosiers t/a Wedge* [2008] Employment Tribunal Case No. 2201867/07 (29 May 2008); *Farrah v The Global Luggage Co Ltd* [2012] ET 2200147/2012 (1 June 2012) (Unreported).

¹³² *Begum (by her litigation friend, Rahman)(Respondent) v Headteacher and Governors of Denbigh High School (Appellants)* [2006] UKHL 15; *X (by her father and litigation friend) v the Headteachers of Y Schools and the Governors of Y School* above n 128.

¹³³ *Azmi v Kirkless Metropolitan Borough Council* above n 131.

¹³⁴ *Noah v Desrosiers t/a Wedge* above n 131, para 153.

¹³⁵ Ansari, above n 14, 17.

¹³⁶ S Knights, 'Religious Symbols in the School: Freedom of Religion, Minorities and Education' (2005) 5 European Human Rights Law Review 499, 507. See also, S Poulter, 'Muslim Headscarves in School: Contrasting Legal Approaches in England and France' (1997) 17 Oxford Journal of Legal Studies 43, 67-8; McGoldrick above n 127, 177-9; Ansari, above n 10, 273.

¹³⁷ *Begum (by her litigation friend, Rahman)(Respondent) v Headteacher and Governors of Denbigh High School (Appellants)* above n 132.

¹³⁸ *X (by her father and litigation friend) v the Headteachers of Y Schools and the Governors of Y School* above n 128.

¹³⁹ A veil that covers the face entirely. R McCrea, 'The Ban on the Veil and European Law' (2013) 13 Human Rights Law Review 57, 59.

¹⁴⁰ Loi no 2010-1192 interdisant la dissimulation du visage dans l'espace public of 11 October 2010, JO 12 October 2010; Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage of 1 June 2011, JO Le Moniteur 13 July 2011.

FCNM.¹⁴¹ As the respective monitoring bodies have taken a differing approach to the permissible limitations to this right, it is necessary to consider the approach under the generally applicable human rights instruments –the ECHR and ICCPR– independently, in addition to the approach taken under minority rights instruments.

5.6.1. Beards, Religious Attire and the ECHR

The growing of beards and wearing of religiously prescribed attire have been accepted as legitimate manifestations of religion by the Strasbourg institutions.¹⁴² The right to grow a beard as a manifestation of religion has only been considered under the ECHR on one occasion. In *X v Austria*, it was held that the restriction of a prisoner's right to grow a beard was legitimate on the grounds of public order. The ECommHR, thus, afforded the State a wide margin of appreciation.¹⁴³ It is not possible to draw inferences from this case, as the ECommHR has tended to recognise the need to restrict freedom of religion in order to maintain public order in the prison context.¹⁴⁴ Hence, the context of the claim in this case may have obscured the basis of the ECommHR's decision.

In direct contrast, the jurisprudence of the ECtHR regarding the wearing of religious attire has evolved significantly in recent years. As the wearing of the *hijab* by Muslims is accepted to be a legitimate manifestation of Islam, the ECtHR has primarily considered the extent to which the right to wear religiously prescribed clothing can be limited under article 9(2) ECHR in the context of the wearing of the *hijab* by teachers, students and pupils in State institutions.¹⁴⁵ Restrictions on article 9

¹⁴¹ *Dahlab v Switzerland* above n 129; *Şahin v Turkey* above n 129, para 78; HRC, above n 16, para 4; *Hudoyberganova v Uzbekistan* above n 129, para 6.2; AC, 'Second Opinion on the United Kingdom' adopted on 6 June 2007 ACFC/OP/II(2007)003 paras 158, 161.

¹⁴² *X v Austria* above n 129; *Dahlab v Switzerland* above n 129; *Şahin v Turkey* above n 129, para 78. Cf. *Karaduman v Turkey* (1993) 74 DR 93, 108-09, where the ECommHR held that '[t]he purpose of the photograph affixed to a degree certificate is to identify the person concerned. It cannot be used by that person to manifest his religious beliefs'.

¹⁴³ *X v Austria* above n 129.

¹⁴⁴ PM Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP 2005) 324.

¹⁴⁵ *Dahlab v Switzerland* above n 129; *Şahin v Turkey* above n 129, para 99; *Köse and 93 Others v Turkey* ECHR 2006-II; *Dogru v France* App no 27058/05 (ECtHR 4 December 2008) para 60; *Aktas v France* App no 43563/08 (ECtHR 30 June 2009); *Bayrak v France* App no 14308/08 (ECtHR 30 June 2009); *Gamaleddyn v France* App no 18527/08 (ECtHR 30 June 2009); *Ghazal v France* App no 29134/08 (ECtHR 30 June 2009). Cf. *Karaduman v Turkey* above n 142, 108-09.

ECHR must be prescribed by law, pursue one of the legitimate aims identified in article 9(2) ECHR and be 'necessary in a democratic society'. States have, however, been afforded a wide margin of appreciation in this respect¹⁴⁶ and a violation of article 9 has only been found in cases concerning the wearing of religious attire outside of State institutions.¹⁴⁷

In the context of the wearing of religious attire in State institutions, in *Dahlab v Switzerland*,¹⁴⁸ the ECtHR affirmed the State's claim that the wearing of a 'powerful religious symbol', such as a headscarf, by a teacher in a State school could not be reconciled with the principle of State neutrality. Therefore, the limitation of the right to manifest religion was legitimate on the grounds of 'the protection of the rights and freedoms of others, public safety and public order'.¹⁴⁹ This approach was reaffirmed in *Şahin v Turkey*, which concerned a ban on headscarves in Turkish universities. In this case, the Court emphasised the importance of 'national traditions' and 'the specific domestic context' and, accordingly, held that the interference was necessary in order to ensure gender equality, the democratic system and the secularism of the State.¹⁵⁰ The ECtHR took a similar approach to the wearing of religious attire by school pupils in France and Turkey in, amongst others, *Köse and 93 Others v Turkey*, *Dogru v France* and *Aktas v France*.¹⁵¹ The Court's use of the margin of appreciation in these cases has been subject to criticism due to its alleged negation of the proportionality test and uncritical acceptance that limitations of this

¹⁴⁶ T Lewis, 'What Not to Wear: Religious Rights, the European Court and the Margin of Appreciation' (2007) 56 *International and Comparative Law Quarterly* 395.

¹⁴⁷ *Arslan and Others v Turkey* App no 41135/98 (ECtHR 23 February 2010); *Eweida and Others v United Kingdom* App nos 48420/10, 36516/10, 51671/10, 59842/10 (ECtHR 15 January 2013). Cf. *Kavakçı v Turkey* App no 71907/01 (ECtHR 5 April 2007), which was decided under article 1 Protocol 3 ECHR.

¹⁴⁸ *Dahlab v Switzerland* above n 129.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Şahin v Turkey* above n 129, paras 109, 116.

¹⁵¹ *Köse and 93 Others v Turkey* above n 145; *Dogru v France* above n 145, para 60; *Aktas v France* above n 145; *Bayrak v France* above n 145; *Gamaleddyn v France* above n 145; *Ghazal v France* above n 145. See also, *Kurtulmus v Turkey* ECHR 2006-II; *Kervanci v France* App no 31645/04 (ECtHR 4 December 2008).

manifestation are legitimate in order to uphold gender equality,¹⁵² secularism¹⁵³ and pluralism and tolerance.¹⁵⁴

5.6.1.1. Gender Equality and the Hijab

The ECtHR has been criticised for accepting the justification in *Şahin* and *Dahlab* that the limitation on the right to wear the *hijab* was permissible as it is 'hard to reconcile with the principle of gender equality'.¹⁵⁵ Specifically, in relation to *Şahin*, Lewis maintains that '[t]he argument centred not on the individual's behaviour but on the reactions of others—what those around her would read into her clothes'.¹⁵⁶ As a result, the conduct of the applicants in these cases was not necessarily contrary to gender equality.¹⁵⁷ The ECtHR has inferred a meaning to the *hijab*, which affirms a commonly held belief in Europe: 'that the *Qur'an* and Islam are oppressive to women', rather than considering the applicants' motivations and the extent to which this presumption holds true.¹⁵⁸ Judge Tulkens, in her dissenting opinion in *Şahin*, thus, noted:

It is not the Court's role to make an appraisal of this type – in this instance a unilateral and negative one – of a religion or religious practice, just as it is not its role to determine in a general and abstract way the signification of wearing the headscarf or to impose its viewpoint on the applicant.¹⁵⁹

¹⁵² *Dahlab v Switzerland* above n 129; *Şahin v Turkey* above n 129, para 109.

¹⁵³ *Dahlab v Switzerland* above n 129; *Şahin v Turkey* above n 129, para 109-10, 114; *Dogru v France* above n 145, para 72; *Aktas v France* above n 145. See also, *Refah Partisi (The Welfare Party) and Others v Turkey* ECHR 2003-II, para 93.

¹⁵⁴ *Dahlab v Switzerland* above n 129; *Şahin v Turkey* above n 129, para 114; *Dogru v France* above n 145, paras 72, 75; *Aktas v France* above n 145.

¹⁵⁵ *Şahin v Turkey* above n 129, para 111.

¹⁵⁶ Lewis, above n 146, 409. See also A Vakulenko, "'Islamic Headscarves" and the European Convention on Human Rights: An Intersectional Perspective' (2007) 16 *Social Legal Studies* 183; Evans, above n 43, 68.

¹⁵⁷ *Ibid.*

¹⁵⁸ C Evans, 'The "Islamic Scarf" in the European Court of Human Rights' (2006) 7 *Melbourne Journal of International Law* 52, 65.

¹⁵⁹ *Şahin v Turkey* above n 129, Judge Tulkens Dissenting Opinion para 12.

By basing its decision on the presumption that the *hijab* is contrary to gender equality, rather than the specific circumstances of the applicant, the ECtHR, in these cases, failed to consider the proportionality of the restriction placed on the applicant's right to manifest religion, as required by article 9(2) ECHR.

In contrast to the approach taken by the ECtHR, Evans and Petkoff have suggested that:

[I]n the cases of both *Begum* and *Sahin* the applicants did what they were educated to do: they made free choices; they chose to be different in a pluralistic society. The manifestation of the freedom happened to take the form of a Muslim covering garment. Such a garment, therefore, can be an expression as much of free choice as of subservience to tradition.¹⁶⁰

However, in *Şahin v Turkey* and *Dahlab v Switzerland* the majority's perception of the *hijab* was attributed to the applicant and, accordingly, the need to ensure gender equality was prioritised over the freedom of religion of the applicant. Thus, 'in both *Dahlab* and *Şahin*, the headscarf was attributed a highly abstract and essentialized meaning of a religious item extremely detrimental to gender equality'.¹⁶¹ The right of European Muslims to wear the *hijab* appears to be subject to restriction under the ECHR on the grounds of gender equality, regardless of the individual's beliefs or the exercise of choice when wearing the *hijab*.

5.6.1.2. *Secularism and the Hijab*

In justifying the wide interpretation of the margin of appreciation in these cases, the ECtHR has established that the principle of secularism is 'consistent with the values underpinning the Convention',¹⁶² specifically in relation to democracy.¹⁶³ Therefore,

¹⁶⁰ M Evans and P Petkoff, 'A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights' (2008) 36 *Religion, State & Society* 205, 209.

¹⁶¹ Vakulenko, above n 156, 192. See also, P Bosset, 'Mainstreaming Religious Diversity in a Secular and Egalitarian State: The Road(s) Not Taken in Leyla Şahin v. Turkey' in E Brems (ed), *Diversity and European Human Rights – Rewriting Judgments of the ECHR* (CUP 2013) 204.

¹⁶² *Şahin v Turkey* above n 129, para 114.

if a manifestation of religion is perceived to be a threat to this principle, limitations on article 9 ECHR may be justified on the grounds that they are necessary 'for the protection of the rights and freedoms of others' and 'public order'.¹⁶⁴ In a number of cases '[t]he Court reiterates that an attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of article 9 of the Convention'.¹⁶⁵ Additionally, the ECtHR noted in *Dogru v France*:

[T]hat in France, as in Turkey or Switzerland, secularism is a constitutional principle, and a founding principle of the Republic, to which the entire population adheres and the protection of which appears to be of prime importance, in particular in schools.¹⁶⁶

Consequently, the ECtHR has viewed dissent from the established consensus as a threat to democracy. While article 17 establishes that the Convention does not protect those seeking to destroy the rights and freedoms of others, the Strasbourg institutions did not consider whether the applicants in fact posed a threat to democracy.¹⁶⁷ Notably, the ECtHR has been criticised for its reasoning in *Şahin* on the grounds that instead of requiring proof of the need to limit the manifestation it proceeded on the 'likelihood of future (in their view) undesirable events'¹⁶⁸ based on 'little more than an assertion'.¹⁶⁹ By not considering whether the applicant, in fact, posed a threat to secularism, the ECtHR was not able to adequately consider whether the limitation satisfied the proportionality requirement under article 9(2) ECHR.¹⁷⁰

Carolyn Evans has also noted that '[i]n the headscarf cases, the Court ... does not probe for an anti-Muslim agenda; it does not raise the question of the elevated

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*, para 99; *Dogru v France* above n 145, para 60.

¹⁶⁵ *Dogru v France* above n 145, para 72. See also, *Refah Partisi (The Welfare Party) and Others v Turkey* above n 153, para 93; *Şahin v Turkey* above n 129, para 114; *Aktas v France* above n 145; *Bayrak v France* above n 145; *Gamaleddyn v France* above n 145; *Ghazal v France* above n 145.

¹⁶⁶ *Dogru v France* above n 145, para 72.

¹⁶⁷ M Borovali, 'Islamic Headscarves and Slippery Slopes' (2009) 30 *Cardozo Law Review* 2593, 2594; *Şahin v Turkey* above n 129, Judge Tulkens Dissenting Opinion para 5.

¹⁶⁸ Borovali, above n 167, 2594.

¹⁶⁹ MD Evans, above n 104, 307. See also *Şahin v Turkey* above n 129, Judge Tulkens Dissenting Opinion para 5.

¹⁷⁰ *Şahin v Turkey* above n 129, Judge Tulkens Dissenting Opinion.

position of secularism'.¹⁷¹ Even if the applicants had posed a threat to secularism in these cases, this does not necessarily suggest that they posed a threat to democracy. Democracy, and the protection of minorities from the tyranny of the majority, hinges on the ability of citizens to dissent from mainstream opinion. However, the ECtHR fails to protect those who do not subscribe to the view that it is necessary to impose limitations on the right to manifest religion in order to ensure State neutrality but equally do not pose a direct threat to democracy.

By equating secularism with neutrality, the ECtHR overlooks the fact that secularism is itself an ideology.¹⁷² Thus, the ECtHR's approach in these cases runs the risk of restricting the manifestation of religious minority practices, in order to uphold the dominant ideology or belief in the State. Malcolm Evans has, thus, submitted that the ECtHR 'is embracing a form of "secular fundamentalism"'.¹⁷³ It is no coincidence that cases involving the prohibition of religious symbols in public institutions have increased as European States have become more secular¹⁷⁴ and religious minorities, especially Muslims, are experiencing increased intolerance and discrimination.¹⁷⁵ Although religious freedom was originally considered by the Strasbourg institutions to be one of the foundations of democracy and central to pluralism,¹⁷⁶ in recent judgments of the ECtHR, its position appears to have been usurped by 'secularism'.¹⁷⁷

Malcolm Evans has, specifically, argued that '[a] system of human rights protection of religious belief which fails to embrace manifestations which challenge

¹⁷¹ C Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture' (2010-2011) 26 *Journal of Law and Religion* 331, 336.

¹⁷² B Wilson, 'Secularisation: Religion in the Modern World' in S Sutherland and P Clarke (eds), *The World's Religions, the Study of Religion, Traditional and New Religion* (2nd edn, Routledge 1991) 196; K Boyle, 'Human Rights, Religion and Democracy: The Refah Party Case' (2004) 1 *Essex Human Rights Law Review* 1, 14-5; MD Evans, 'Neutrality In and After *Lautsi v. Italy*' in J Temperman (ed), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Martinus Nijhoff 2012) 349.

¹⁷³ M Evans, 'Human Rights and the Freedom of Religion' in M Ipgrave (ed), *Justice & Rights – Christian and Muslim Perspectives* (Georgetown University Press 2009) 115.

¹⁷⁴ See, for example, PACE, Recommendation 1804 (2007) 'State, Religion, Secularity and Human Rights'. See also, ZR Calo, 'Pluralism, Secularism and the European Court of Human Rights' (2010-2011) 26 *Journal of Law and Religion* 261, 268-269

¹⁷⁵ European Union Agency for Fundamental Rights (FRA), 'Data in Focus Report 2 – Muslims' <fra.europa.eu/fraWebsite/research/publications/publications_per_year/2009/pub_dif2_en.htm> accessed 18 January 2013.

¹⁷⁶ *Kokkinakis v Greece* (1993) Series A no 260-A para 31. See also, *Serif v Greece* ECHR 1999-IX.

¹⁷⁷ *Dahlab v Switzerland* above n 129; *Şahin v Turkey* above n 129 para 114; *Dogru v France* above n 145, paras 72, 75; *Aktas v France* above n 145; *Bayrak v France* above n 145; *Gamaleddyn v France* above n 145; *Ghazal v France* above n 145.

secularist approaches to public life is a truncated vision of the freedom of religion'.¹⁷⁸ Nonetheless, in cases concerning the *hijab* the ECtHR appears to equate a threat to secularism with a threat to the foundations of democracy. Even though secularism has been equated with democracy by the Strasbourg institutions, this does not lead to the conclusion that it should be prioritised above freedom of religion.

As has been explained by Bielefeldt in the context of article 18 ICCPR, freedom of religion is a 'first order' principle, whereas 'neutrality' is a 'second order' principle, '[t]urning the order of things upside down and pursuing a policy of enforced privatization or societal marginalization of religions in the name of "neutrality" would thus clearly amount to a violation of human rights'.¹⁷⁹ By insufficiently carrying out the proportionality analysis in these cases the ECtHR appears to have done exactly this and, in so doing, has limited the right of European Muslims to manifest their religion by wearing religious attire, regardless of the individual adherent's attitude to democracy or secularism.

However, in *Kavakçi v Turkey*, the ECtHR found a violation of article 1 Protocol 3 ECHR, the right to vote and stand for election, when a parliamentarian was prevented from taking up her seat because she wore the *hijab*. Hence, in direct contrast to the ECtHR's jurisprudence in cases concerning the *hijab* under article 9 ECHR, in this instance the requirement of secularism became a secondary consideration as the democratic right to stand for election had been infringed.¹⁸⁰ As noted by Greer, 'it must surely be more than a matter of semantics that the Strasbourg system is concerned with the protection of human rights in a democratic context, rather than with the protection of democracy in a human rights context'.¹⁸¹

¹⁷⁸ MD Evans, above n 104, 307.

¹⁷⁹ H Bielefeldt, 'Freedom of Religion of Belief—A Human Right under Pressure' (2012) 1 Oxford Journal of Law and Religion 15, 32.

¹⁸⁰ *Kavakçi v Turkey* above n 147, paras 43-6.

¹⁸¹ S Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Human Rights Files No. 1, Council of Europe Publishing 2000) 26.

5.6.1.3. *Pluralism and Tolerance and the Hijab*

The elimination of visible difference in the public sphere is likely to increase intolerance of minorities.¹⁸² Specifically, Martínez-Torrón argues:

As long as teachers respect the students' belief and do not attempt to proselytise them, the evidence of religious pluralism could be more consistent with a neutral attitude of the State, and more educative for the students, than a fictional absence of religion on the part of the school personnel.¹⁸³

Yet, in the *hijab* cases, somewhat counter-intuitively, the ECtHR has justified the wide margin of appreciation on the basis that restrictions on the right to manifest religion may be necessary to ensure tolerance and pluralism in society.¹⁸⁴ Notably, in *Şahin*, the ECtHR accepted that restrictions on the *hijab* may legitimately pursue the 'aim of ensuring peaceful coexistence between students of various faiths and thus protecting public order and the beliefs of others'.¹⁸⁵ In contrast, in *Eweida and Others v United Kingdom*, a case concerning the restriction on a Christian's ability to wear a crucifix,¹⁸⁶ the ECtHR accepted that the right to manifest religion,

is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others.¹⁸⁷

It is unclear why the ECtHR accepts that the communication of the applicant's religion through the wearing of a crucifix in *Eweida* is necessary to sustain pluralism and tolerance in society, whereas the limitation of the *hijab* is necessary to achieve

¹⁸² Evans, above n 171, 342.

¹⁸³ J Martínez-Torrón, 'Limitations on Religious Freedom in the Case Law of the European Court of Human Rights' (2005) 19 *Emory International Law Review* 587, 622.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Şahin v Turkey* above n 129, para 111.

¹⁸⁶ *Eweida and Others v United Kingdom* above n 147, para 94.

¹⁸⁷ *Ibid.*

similar ends in *Şahin*. However, this may be explained by the meaning ascribed by the ECtHR to the different religious symbols. In *Lautsi v Italy*, the ECtHR accepted that a crucifix 'is an essentially passive symbol'.¹⁸⁸ In contrast, in *Dahlab* the *hijab*, was understood to be a 'powerful external symbol'.¹⁸⁹ Thus, the ECtHR appears to have categorised religious symbols, on the basis of the meaning ascribed to them by members of the majority, rather than their meaning and importance to the applicant in the case. In order to guarantee pluralism and tolerance, the ECtHR seems to suggest that passive symbols must be permitted and symbols that are perceived to be antagonistic, such as the *hijab*, may be subject to restrictions.

Furthermore, in *Aktas v France*, despite recognising that '[p]luralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals which are justified in order to maintain and promote the ideals and values of a democratic society',¹⁹⁰ the ECtHR failed to probe whether the State, as well as the applicant, had been willing to compromise.¹⁹¹ Therefore, by shifting the burden of proof from the State, the ECtHR did not consider whether the restriction on the applicant's ability to cover her hair in school constituted the *less restrictive alternative*. The absence of the proportionality test in the ECtHR's reasoning, in this case, leads to the conclusion that the ECtHR abrogated its duty to ensure that the restriction on the applicant's rights was proportionate to the aim pursued.

5.6.1.4. Religious Attire Outside State Institutions

The ECtHR has allowed States to justify restrictions on the right to wear the *hijab* within State institution by reference to secularism or the aim of facilitating pluralism and tolerance in State institutions. In contrast, the ECtHR has not permitted States the same degree of discretion outside State institutions.¹⁹² The case of *Ahmet Arslan and Others v Turkey* concerned the prosecution of members of the *Aczimendi tankai*

¹⁸⁸ *Lautsi and Others v Italy* ECHR 2011 para 72.

¹⁸⁹ *Dahlab v Switzerland* above n 129.

¹⁹⁰ *Aktas v France* above n 145; *Bayrak v France* above n 145; *Gamaleddyn v France* above n 145; *Ghazal v France* above n 145. See also, *Dogru v France* above n 145, para 62; *Şahin v Turkey* above n 129, para 108.

¹⁹¹ *Aktas v France* above n 145; Berry, above n 70, 32-3.

¹⁹² *Arslan and Others v Turkey* above n 147; *Eweida and Others v the United Kingdom* above n 147.

religious group for wearing religious attire outside a mosque, prior to attending a religious ceremony. As the individuals were not representatives of the State, were not wearing religious attire in public schools, were not proselytising and did not constitute a threat to public order, the restriction on the right to wear religious attire in public was held to be disproportionate.¹⁹³ On the basis of the ECtHR's decisions in *Ahmet Arslan and Others v Turkey* and *Eweida and Others v United Kingdom* it appears that States can only claim a wide margin of appreciation in relation to the limitation of the right to wear religious attire in secular, State institutions.

These cases may have implications for the consideration of the laws introduced in Belgium¹⁹⁴ and France¹⁹⁵ that forbid the covering of the face in public and, thus, in effect prohibit the wearing of the *burqa* and *niqab* by Muslims. Yet, as noted by Malcolm Evans, in relation to *Ahmet Arslan and Others v Turkey*, '[t]his analysis seems to suggest that the Court might object in principle to generalized restrictions on wearing religious clothing in public spaces—but it held back from doing so'.¹⁹⁶ Although France and Belgium appear to be unable, on the basis of *Ahmet Arslan and Others v Turkey*, to argue that it is necessary to prohibit the wearing of the *burqa* in public on the grounds of secularism,¹⁹⁷ they may, nonetheless, attempt to justify such restrictions on the grounds of gender equality.

The Parliamentary Assembly to the Council of Europe, in Resolution 1743 (2010), noted that 'this tradition could be a threat to women's dignity and freedom. No woman should be compelled to wear religious apparel by her community or family. Any act of oppression, sequestration or violence constitutes a crime that must be punished by law'.¹⁹⁸ However, the Parliamentary Assembly, further warned that 'a general prohibition of wearing the *burqa* and the *niqab* would deny women who freely desire to do so their right to cover their face'.¹⁹⁹ Given the willingness of the ECtHR to accept that the *hijab* is contrary to gender equality, regardless of the

¹⁹³ *Arslan and Others v Turkey* above n 147, para 48-52.

¹⁹⁴ Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage of 1 June 2011, JO Le Moniteur 13 July 2011.

¹⁹⁵ Loi no 2010–1192 interdisant la dissimulation du visage dans l'espace public of 11 October 2010, JO 12 October 2010. *SAS v France* App no 43835/11 (Communicated).

¹⁹⁶ Evans, above n 82, 367.

¹⁹⁷ M Hunter-Henin, 'Why the French Don't Like the *Burqa*: *Laïcité*, National Identity and Religious Freedom' (2012) 61 ICLQ 613, 636; McCrea, above n 139, 75.

¹⁹⁸ PACE, Resolution 1743 (2010) 'Islam, Islamism and Islamophobia in Europe' para 15.

¹⁹⁹ *Ibid.*, para 16.

meaning attributed to the *hijab* by the applicants in these cases, it appears likely that the ECtHR will extend this reasoning to the *burqa* in due course.

As a result, even though France and Belgium will not be able to justify the restriction on the *burqa* and *niqab* on the basis of secularism, the 'powerful normative status' of gender equality in international human rights law,²⁰⁰ and the somewhat paternalistic stance of the ECtHR in these cases²⁰¹ leads to the conclusion that France and Belgium would be able to argue that a limitation on the right to wear the *burqa* in public falls within the State's margin of appreciation on the grounds that it is necessary to promote gender equality.

Additionally, in *Phull v France*, a case concerning the requirement that a *Sikh* man remove his turban to pass through a security check at an airport, the ECtHR was willing to accept the interference with the right to wear religious attire in public on the grounds of public safety.²⁰² The Parliamentary Assembly has been willing to accept, in the context of the prohibition on the wearing of the *burqa* and *niqab*, that '[l]egal restrictions to this freedom may be justified where necessary in a democratic society, in particular for security purposes'.²⁰³ Consequently, concerns over security and public order may be raised, in addition to gender equality, in order to justify the prohibition on the *burqa* in public.

Hill submits that 'the cases reveal the Court's sympathy for the interrelatedness of all the arguments France is likely to present, including the rights of others, public order, gender equality, and the protection of the secular nature of the state'.²⁰⁴ Yet, in direct contrast, Hunter-Henin suggests '[d]ignity and equality between genders have been implicitly recognized by European case-law but this may not (or no longer) be seen by the ECtHR as justification for paternalistic measures in the absence of immediate threats to public order'.²⁰⁵

The ECtHR's judgments in *Ahmet Arslan* and *Eweida* do not necessarily establish the limits of the State's margin of appreciation in relation to the right to

²⁰⁰ D McGoldrick, 'Multiculturalism and its Discontents' (2005) 5 Human Rights Law Review 27, 53. *Dahlab v Switzerland* above n 129; *Şahin v Turkey* above n 129, paras 111, 115; *Dogru v France* above n 145, para 64.

²⁰¹ *Şahin v Turkey* above n 129, Judge Tulkens Dissenting Opinion para 12; Evans, above n 158, 65-69.

²⁰² *Phull v France* ECHR 2005-I.

²⁰³ PACE, above n 198, para 16.

²⁰⁴ RW Hill, 'The French Prohibition on Veiling in Public Places: Rights Evolution or Violation?' (2012) Oxford Journal of Law and Religion (Advance Access published 14 December 2012) 20.

²⁰⁵ Hunter-Henin, above n 197, 635.

manifest religion by wearing religious attire. As a result, it not possible to predict the approach the ECtHR will take in *SAS v France* when considering the ban on the wearing of the *burqa* in public.²⁰⁶ However, the ECtHR's approach to the manifestation of Islam in previous cases indicates that the right of European Muslims to manifest religion by wearing religious attire may be limited further in the name of gender equality and public order.

5.6.1.5. Preliminary Conclusions

The ECtHR has given States a wide margin of appreciation to restrict the wearing of religious attire in State institutions on the grounds of pluralism and tolerance, secularism and gender equality. Consequently, no violations of article 9 have been found in cases concerning the *hijab* as these have all taken place in State institutions regardless of the claimants' beliefs. In addition to inferring the meaning of religious clothing, the ECtHR has not considered the importance of the manifestation of religion to the applicants in these cases,²⁰⁷ the likely impact of the restriction on the applicants,²⁰⁸ the threat posed by the applicant²⁰⁹ or the proportionality of the restriction. Thus, '[i]n matters relating to religious symbolism in the public realm, the Court's understanding of the State, rather than the impact of its approach on the rights of the individuals in question, appears to have taken center stage'.²¹⁰ The ECtHR also appears to have taken a contradictory position in *Şahin v Turkey* as compared to *Eweida and Others v United Kingdom* in relation to the need to restrict religious symbols in order to ensure pluralism and tolerance.

While the ECtHR has not permitted States a wide margin of appreciation to restrict the wearing of religious attire outside State institutions, its previous jurisprudence in relation to the *hijab* suggests that it may consider the prohibition on wearing the *burqa* in public in Belgium and France to be justified by gender equality and public order. The restrictive approach of the ECtHR to the wearing of the *hijab*

²⁰⁶ *SAS v France* above n 195.

²⁰⁷ Evans, above n 171, 341.

²⁰⁸ *Ibid.*

²⁰⁹ *Şahin v Turkey* above n 129, Judge Tulkens Dissenting Opinion para 5; Borovali, above n 167, 2594; MD Evans, above n 104, 307.

²¹⁰ Evans, above n 82, 355.

appears be symptomatic of wider concerns regarding the compatibility of Islam with secular State structures and Western values. Judge Tulkens has, specifically, noted:

In the case law of the Court today, I also observe that the main limitations to the right of religious freedom (and also the freedom of thought or conscience) are motivated by the need to protect democratic societies from the danger of Islam ...²¹¹

As a result, the right of European Muslims to manifest their religion through the wearing of religious attire is unlikely to find extensive protection under article 9 ECHR.

5.6.2. Beards, Religious Attire and the ICCPR

The approach taken by the Strasbourg institutions in relation to religious attire, contrasts with the approach taken by the UN. The HRC has explicitly noted that '[t]he observance and practice of religion or belief may include [...] the wearing of distinctive clothing or headcoverings'.²¹² The CESCR has also recognised that specific clothing may find protection under article 15(1)(a) ICESCR, the right to take part in cultural life.²¹³ While modest attire is a requirement of Islam, the form such attire takes may also reflect the ethnic and cultural background of the individual.²¹⁴ However, although the right to cultural life may be of relevance to European Muslims in this context, the CESCR has not given further consideration to this point.

The case of *Hudoyberganova v Uzbekistan* concerned the exclusion of a student from a university for wearing the *hijab*.²¹⁵ The HRC recognised that academic institutions may in certain instances limit this right but the failure of the State to provide a justification for the limitation of the applicant's right led the HRC

²¹¹ F Tulkens, 'The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism' (2009) 30 *Cardozo Law Review* 2575, 2587.

²¹² HRC, above n 16, para 4. See also, *Singh (Ranjit) v France* Communication no 1876/2009, UN doc CCPR/C/102/D/1876/2009 paras 8.3 and 8.4.

²¹³ CESCR, above n 26, para 13.

²¹⁴ C Dwyer, 'The Geographies of Veiling: Muslim Women in Britain' (2008) 93 *Geography* 140, 144-45.

²¹⁵ *Hudoyberganova v Uzbekistan* above n 129, para 6.2.

to find a violation of article 18(2) ICCPR.²¹⁶ In relation to the forcible shaving of a Muslim's beard in *Boodoo v Trinidad and Tobago*, the HRC found a violation of article 18 recognising that 'the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts and that the concept of worship extends to ritual and ceremonial acts giving expression to belief, as well as various practices integral to such acts'.²¹⁷ Similarly to *Hudoyberganova v Uzbekistan*, had the State attempted to justify the limitation of the manifestation of religion by growing a beard, in accordance with article 18(3) ICCPR, the HRC may not have found a violation of the applicant's rights in this case.²¹⁸ Nonetheless, *Hudoyberganova v Uzbekistan* and *Boodoo v Trinidad and Tobago* reaffirm that these manifestations of religion find protection under article 18(1) ICCPR and any limitation of this right must be 'necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.²¹⁹

The HRC has consistently interpreted the permissible limitations to the right to freedom of religion more narrowly than the Strasbourg institutions.²²⁰ It is firmly established that limitations on the freedom to manifest religion under article 18 ICCPR must be 'strictly interpreted [...] Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated'.²²¹ Furthermore, the UN Special Rapporteur on Religion or Belief has stressed:

²¹⁶ *Ibid.*

²¹⁷ *Boodoo v Trinidad and Tobago* Communication no 721/1996, UN doc CCPR/C/74/D/721/1996 para 6.6.

²¹⁸ *Singh Bhinder v Canada* Communication no 208/1986, UN doc CCPR/C/37/D/208/1986 para 6.2.

²¹⁹ Article 18(3) ICCPR.

²²⁰ HRC, above n 16, para 4; *Singh Bhinder v Canada* above n 218, para 6.2; *Singh (Ranjit) v France* above n 212, para 8.4.

²²¹ HRC, above n 16, para 8; *Singh Bhinder v Canada* above n 218, para 6.2; *Singh (Ranjit) v France* above n 212, para 8.4.

[T]he burden of justifying a limitation upon the freedom to manifest one's religion or belief lies with the State. Consequently, a prohibition of wearing religious symbols which is based on mere speculation or presumption rather than on demonstrable facts is regarded as a violation of the individual's religious freedom.²²²

Accordingly, in two cases the HRC has diverged from the ECtHR's jurisprudence in relation to limitations placed on the wearing of religious head coverings in France and, in particular, has scrutinised the justifications given by the State for the limitation of this right.²²³

In *Ranjit Singh v France*, the HRC considered the requirement that Sikhs remove their turbans in photographs for identification purposes,²²⁴ a requirement justified by France on the grounds of public order and public safety.²²⁵ Although the HRC recognised that the aim was legitimate,²²⁶ it found:

[T]hat the State party has not explained why the wearing of a Sikh turban covering the top of the head and a portion of the forehead but leaving the rest of the face clearly visible would make it more difficult to identify the author than if he were to appear bareheaded, since he wears his turban at all times.²²⁷

Hence, the HRC exercised a higher level of scrutiny of the justifications given by the State for the restriction of the right to manifest religion than the ECtHR and, in particular, considered the legitimacy of such justifications.

Furthermore, in *Bikramjit Singh v France*, the HRC considered the legitimacy of the prohibition on wearing religious symbols in states schools on the grounds of public order and in order to uphold 'the constitutional principle of

²²² Commission on Human Rights, 'Civil and Political Rights, including the Question of Religious Intolerance – Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir' (9 January 2006) UN doc E/CN.4/2006/5 para 53.

²²³ *Singh (Ranjit) v France* above n 212, para 8.4; *Singh (Bikramjit) v France* Communication no 1852/2008 UN doc CCPR/C/106/D/1852/2008 para 8.7.

²²⁴ *Singh (Ranjit) v France* above n 212, paras 2.1-2.2.

²²⁵ *Ibid.*, para 5.3.

²²⁶ *Ibid.*, para 8.4. See also, Commission on Human Rights, above n 222, para 55(b).

²²⁷ *Ibid.*

secularism (laïcité)'.²²⁸ The HRC was, similarly to the ECtHR, willing to acknowledge the value of secularism: 'the principle of secularism (laïcité), is itself a means by which a State party may seek to protect the religious freedom of all its population'.²²⁹ However, it was 'of the view that the State party has not furnished compelling evidence that by wearing his keski the author would have posed a threat to the rights and freedoms of other pupils or to order at the school'.²³⁰ In particular, the penalty of expulsion from school was considered to be disproportionate and not based on the conduct of the applicant himself.²³¹ Thus, the HRC was not willing to accept that the restriction on the applicant's rights was justified by the pursuit of secularism alone.

In direct contrast to the ECtHR in the *Şahin* case,²³² the HRC has balanced 'the sacrifice of those persons' rights' against the legitimacy of the State's justification for limiting the manifestation of religion.²³³ By considering the threat posed by the individual applicant, as opposed to basing its decisions on 'mere worries or fears' asserted by the State,²³⁴ the HRC has been able to find a violation of freedom of religion in these cases²³⁵ and, as a result, establish a higher standard of protection than under the ECHR. Additionally, 'secularism' as a constitutional principle was not accepted by the HRC to constitute a sufficient justification by itself for the limitation of the right to manifest religion in State institutions.

The UN Special Rapporteur on Religion or Belief has, however, noted that limitations on the right to manifest religion by wearing religious attire may be justifiable:

²²⁸ *Singh (Bikramjit) v France* above n 223, para 8.2.

²²⁹ *Ibid.*, para 8.6.

²³⁰ *Ibid.*, para 8.7.

²³¹ *Ibid.*

²³² *Şahin v Turkey* above n 129, Judge Tulkens Dissenting Opinion para 5; Borovali, above n 167, 2594; MD Evans, above n 104, 307

²³³ *Singh (Bikramjit) v France* above n 223, para 8.7.

²³⁴ *Şahin v Turkey* above n 129, Judge Tulkens Dissenting Opinion para 5.

²³⁵ *Singh (Ranjit) v France* above n 212, para 8.4; *Singh (Bikramjit) v France* above n 223, para 8.7.

[I]f the interference is crucial to protect the rights of women, religious minorities and vulnerable groups or if the wearer must be properly identifiable, e.g. on an identity card photograph or at security checks. ... Special attention should be paid to the protection of women's rights, in particular in the context of wearing the full head-to-toe veil.²³⁶

Nonetheless, European Muslims are more likely to find a higher standard of protection of the right to wear religious attire under article 18 ICCPR than article 9 ECHR.

5.6.3. Beards, Religious Attire and Minority Rights Standards

Neither General Comment No 23 nor the Commentary to the UN Declaration on Minorities elaborate upon 'the right ... to profess and practise ... religion' through the wearing of religious attire. The AC initially pursued a similar approach and did not consider religious rights in great detail during its consideration of the first round of State Reports under the FCNM. Specifically, in 2004 Hofmann, the former Chairperson of the AC to the FCNM, noted that the 'provision on the freedom to manifest one's religion has so far been of only minor relevance for the monitoring activities of the Advisory Committee'.²³⁷ This perhaps indicates an initial presumption that freedom of religion would be sufficient to protect the right of persons belonging to religious minorities to manifest their religion. Nonetheless, since 2007, the AC has increasingly considered the right to wear religious attire under articles 6 and 8 of the FCNM.²³⁸ Although the wearing of specific attire may constitute a cultural rather than religious practice,²³⁹ consideration has only been given to the right to wear religious clothing under the FCNM.

²³⁶ UNGA, above n 84, para 34.

²³⁷ R Hofmann, 'The Work of the Advisory Committee under the Framework Convention for the Protection of National Minorities, with Particular Emphasis on the Case of Germany' in M Scheinin, and R Toivanen (eds), *Rethinking Non-Discrimination and Minority Rights* (Institute for Human Rights Åbo Akademi University and Deutsches Institut für Menschenrechte 2004) 76.

²³⁸ 'Second Opinion on the United Kingdom' above n 141, paras 158, 161; 'Third Opinion on Spain' above n 76, para 75; 'Third Opinion on the Russian Federation' above n 74, paras 91, 151; AC, 'Third Opinion on Sweden' adopted on 23 May 2012 ACFC/OP/III(2012)004 para 66.

²³⁹ CESCR, above n 26, para 13.

The AC has expressed concern at the intolerance of Muslims wearing the *hijab* and beards, noting in particular that such hostility is discriminatory²⁴⁰ and has the potential to infringe the freedom to manifest religion.²⁴¹ In its Third Opinion on Spain, the AC noted, in relation to article 6 FCNM, that '[p]ublic discourse around the issue of wearing a headscarf (*hijab*) in public places, notably in schools, has also contributed to singling out the Muslim community'.²⁴² Thus, the prohibition on wearing of religious symbols in State schools in a number of Western European States has the potential to undermine intercultural dialogue and tolerance, despite the acceptance by the ECtHR of arguments to the contrary.²⁴³

The divergence in the approach taken by the AC, on the one hand, and the ECtHR, on the other, to religious attire, is evidenced by the AC's consideration of a move to restrict the wearing of the *niqab* in schools in the UK. The British government sought to justify such a restriction on the ground of security, an area where the Strasbourg institutions have awarded an extremely wide margin of appreciation.²⁴⁴ However, in contrast, the AC expressed concern that new guidance relating to school uniforms may lead to the banning of the *niqab* in schools, noting the importance of allowing minorities to wear religiously prescribed clothing.²⁴⁵ It further noted:

[T]hat the governing boards of schools in England already had the right to set their own regulations concerning school uniform and that most have opted for a permissive approach. There is a risk that the new guidance may be interpreted by schools in a way that restricts the right of every person belonging to a national minority to manifest his or her religion and/or belief.²⁴⁶

Specifically, the AC recommended:

²⁴⁰ 'Third Opinion on the Russian Federation' above n 74, para 91.

²⁴¹ *Ibid.*, para 151.

²⁴² 'Third Opinion on Spain' above n 76, para 75.

²⁴³ *Köse and 93 Others v Turkey* above n 145; *Aktas v France* above n 145; *Bayrak v France* above n 145; *Gamaleddyn v France* above n 145; *Ghazal v France* above n 145.

²⁴⁴ *Phull v France* above n 202; G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007) 91.

²⁴⁵ 'Second Opinion on the United Kingdom' above n 141, para 158.

²⁴⁶ *Ibid.*, para 158.

Educational authorities and schools must take the necessary steps to inform and consult with minority ethnic communities when decisions are taken or policies adopted which may affect the rights of minority ethnic pupils to manifest their religion and/or belief at school.²⁴⁷

Despite the fact that such measures were being considered 'on grounds of security, safety or learning concerns',²⁴⁸ the United Kingdom was expected to engage in dialogue and compromise with religious minorities. This approach is consistent with the view that the manifestation of religion is of particular importance if minorities are to be able to maintain their identity and, as a result, should not be limited, unless absolutely necessary.

In the specific instance outlined above, the government of the United Kingdom was quick to rebut the concerns of the AC,²⁴⁹ indicating the influence of the Opinions of the AC on the practice of States. Hence, the State did not attempt to justify the legitimacy of such action, instead choosing to appease the AC.²⁵⁰

5.6.4. Preliminary Conclusions

The approach of the ECtHR, on the one hand, and the AC and HRC, on the other, to the permissible limitations on the right to manifest religion by wearing religious attire provides significantly differing levels of protection to European Muslims. The AC and HRC have interpreted the permissible limitations of the right to manifest religion narrowly in this respect and do not permit States a wide margin of appreciation. In contrast, the ECtHR has permitted States a wide margin of

²⁴⁷ *Ibid.*, para 161.

²⁴⁸ *Ibid.*, para 158.

²⁴⁹ AC, 'Comments of the Government of the United Kingdom on the Opinion of the Advisory Committee on the Implementation of the Framework Convention for the Protection of National Minorities in the United Kingdom' received on 26 October 2007 GVT/COM/II(2007)003, 21.

²⁵⁰ The AC did not raise the question of a number of cases in the UK concerning the right of pupils to wear religiously prescribed attire to school. See, for example, *Begum (by her litigation friend, Rahman)(Respondent) v Headteacher and Governors of Denbigh High School (Appellants)* above n 132; *X (by her father and litigation friend) v the Headteachers of Y Schools and the Governors of Y School* above n 128. This can be explained in part by the weight the English Courts placed on consultation by the schools with local ethnic minority communities in these cases, and the availability of alternative schools where the pupils would have been able to manifest their religion.

appreciation on the grounds of gender equality,²⁵¹ secularism²⁵² and pluralism and tolerance.²⁵³

The HRC has not considered secularism to constitute a legitimate justification for the restriction of the right to wear religious attire, without evidence of the threat posed by the individual,²⁵⁴ in direct contrast to the approach of the ECtHR.²⁵⁵ The approach of the HRC appears to indicate that justifications for the limitation of this right based on gender equality under the ICCPR must also be based on the behaviour of the applicant, rather than the concerns of the majority. Additionally, while the ECtHR has suggested that the restriction of *hijab* in State institutions may be necessary in order to ensure tolerance of difference,²⁵⁶ the AC has taken an opposing view and has noted that restrictions on religious attire may undermine intercultural dialogue and tolerance.²⁵⁷

The inclusion of a minority rights provision, article 27, in the ICCPR may in part explain the divergence in the interpretation of freedom of religion by the HRC and ECtHR. The HRC has recognised the interrelated nature of the rights contained in the ICCPR²⁵⁸ and has used article 27 ICCPR as an interpretative tool, when considering the scope of other Covenant rights.²⁵⁹ Furthermore, the HRC is not dominated by experts drawn from any one religious or cultural background²⁶⁰ and has established that 'the concept of morals should not be drawn exclusively from a single tradition'.²⁶¹ In contrast, Carolyn Evans has noted the ECtHR's 'general reluctance to acknowledge the value and religious importance of many religious

²⁵¹ *Dahlab v Switzerland* above n 129; *Şahin v Turkey* above n 129, para 109.

²⁵² *Dahlab v Switzerland* above n 129; *Şahin v Turkey* above n 129, para 109-10, 114; *Dogru v France* above n 145, para 72; *Aktas v France* above n 145. See also, *Refah Partisi (The Welfare Party) and Others v Turkey* above n 153, para 93.

²⁵³ *Dahlab v Switzerland* above n 129; *Şahin v Turkey* above n 129, para 114; *Dogru v France* above n 145, paras 72, 75; *Aktas v France* above n 145.

²⁵⁴ *Singh (Bikramjit) v France* above n 223, para 8.7.

²⁵⁵ *Şahin v Turkey* above n 129, Judge Tulkens Dissenting Opinion para 5.

²⁵⁶ *Ibid.*, para 111.

²⁵⁷ 'Third Opinion on Spain' above n 76, para 75.

²⁵⁸ *Diergaardt (late Captain of the Rehoboth Baster Community) and Others v Namibia* Communication no 760/1997, UN doc CCPR/C/69/D/760/1997 Scheinin dissenting opinion. See also, UNGA, 'Vienna Declaration and Programme of Action' UN doc A/CONF.157/24 (Part I), ch III, s I, para 5

²⁵⁹ *Hopu and Bessert v France* Communication no 549/1993, UN doc CCPR/C/60/D/549/1993/Rev.1 para 10.3. Cf Individual opinion by Committee members David Kretzmer and Thomas Buergenthal, cosigned by Nisuke Ando and Lord Colville para 5.

²⁶⁰ K Boyle, 'Freedom of Religion in International Law' in J Rehman, and SC Breau (eds), *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices* (Martinus Nijhoff 2007) 43.

²⁶¹ *Ibid.*

practices outside of Christianity'.²⁶² By allowing States a wide margin of appreciation, the ECtHR may permit the 'the moralistic preferences of the majority'²⁶³ to be prioritised over the rights of religious minorities.

In relation to the right to manifest religion by wearing religious attire, a higher a level of protection for European Muslims can be observed under minority rights standards, than under generally applicable human rights standards, within the Council of Europe's rights regime. However, the HRC has taken a similar approach to the AC in its recent decisions and has not been willing to restrict the right to manifest religion by wearing religious attire without compelling justification. Therefore, in relation to this right, there does not appear to be an added-value to minority rights protection within the UN system for European Muslims.

5.7. EDUCATION IN MAINSTREAM SCHOOLS

Education is of importance if minorities are to transmit their culture, religion and language to future generations and ensure the continued existence of their community. Concerns have been raised as to the suitability of the education provided in State schools in the UK for British Muslims, particularly in relation to Religious Education and prescribed acts of collective daily worship,²⁶⁴ as well the lack of provision of single-sex education and cultural and linguistic education.²⁶⁵

Although separate schooling for persons belonging to minorities may enable the provision of targeted and culturally appropriate education, the AC has indicated a preference for minorities to attend mainstream schools in order to foster tolerance and intercultural dialogue.²⁶⁶ Similarly, the UN Special Rapporteur on Religion or Belief has stressed that '[s]chools may offer unique possibilities for constructive

²⁶² Evans, above n 158, 56. See also, K Alidadi and M-C, Foblets, 'Framing Multicultural Challenges in Freedom of Religion Terms: Limitations of Minimal Human Rights for Managing Religious Diversity in Europe' (2012) 30 *Netherlands Quarterly of Human Rights* 388, 405.

²⁶³ G Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 *Oxford Journal of Legal Studies* 705, 729.

²⁶⁴ A Bradney, 'The Legal Status of Islam within the United Kingdom' in S Ferrari and A Bradney (eds), *Islam and European Legal Systems* (Ashgate 2000) 189; Ansari, above n 10, 273; Knights, above n 9, 111.

²⁶⁵ *R. (K) v London Borough of Newham* [2002] EWHC 405 (Admin). T Modood, S Beishon and S Virdee, *Changing Ethnic Identities* (Policy Studies Institute 1994) 54-5; Ansari, above n 14, 11, 21-2.

²⁶⁶ AC, *Commentary on Education under the Framework Convention for the Protection of National Minorities* adopted on 2 March 2006 ACFC/25DOC(2006)002, 16-17.

dialogue among all parts of society and human rights education in particular can contribute to the elimination of negative stereotypes that often adversely affect members of religious minorities'.²⁶⁷ Ringelheim notes, 'whereas separate schooling in the minority language or religion may appear as the best way to protect minorities' distinct identity, it may isolate them and jeopardize their integration within the broader society'.²⁶⁸ Hence, in relation to minority education, it may be necessary to balance the preservation of minority identity with the need to ensure tolerance of pluralism.

5.7.1. Religious Education and Collective Daily Worship

A uniform approach to religious education has not evolved in Europe. While States such as Albania, France and the Former Yugoslav Republic of Macedonia do not provide religious education in mainstream education, in other European States there is 'a high level of ecclesiastical participation' in the provision of religious education.²⁶⁹ Although, as Cumper notes, there 'is a low degree of Church involvement' in the provision of religious education in the UK,²⁷⁰ religious education and an act of collective daily worship are compulsory in non-denominational State funded schools in England.²⁷¹ Notably, both religious education and collective daily worship prioritise Christianity over other religions and collective daily worship introduces a confessional element into neutral education.²⁷²

The Muslim Council of Britain has highlighted that:

²⁶⁷ UNGA, 'Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt' (15 December 2010) UN doc A/HRC/16/53 para 58.

²⁶⁸ J Ringelheim, 'Between Identity Transmission and Equal Opportunities: The Multiple Dimensions of Minorities' Right to Education' in K Henrard (ed), *The Interrelationship Between the Right to Identity of Minorities and their Socio-Economic Participation* (Martinus Nijhoff 2013) 91. See also, S Langlaude, 'Children and Religion under Article 14 UNCRC: A Critical Analysis' (2008) 16 *International Journal of Children's Rights* 475, 492.

²⁶⁹ P Cumper, 'Religious Education in Europe in the Twenty-First Century' in M Hunter-Henin (ed), *Law, Religious Freedoms and Education in Europe* (Ashgate 2011) 209.

²⁷⁰ *Ibid.*

²⁷¹ School Standards and Framework Act (SSFA) 1998 s. 69(1) and 70(1).

²⁷² Education Act 1996 s 375(3); SSFA 1998 Schedule 20 s. 3(2), 3(3). See also, Department for Children, Schools and Families, 'Religious Education in English Schools: Non-Statutory Guidance 2010' 10
<<http://www.education.gov.uk/schools/teachingandlearning/curriculum/a0064886/religious-education-in-english-schools-non-statutory-guidance-2010>> accessed 4 March 2012.

There are many schools with a significant or a high composition of Muslim pupils, in which the syllabus time allocation does not take adequate account of or reflect their religious background, resulting in a relatively small proportion of study time in RE being devoted to the study of Islam.²⁷³

Furthermore, the Muslim Council of Britain has regretted that '[t]he vast majority of Muslim pupils in the maintained sector do not receive any act of collective worship appropriate to their family and faith background'.²⁷⁴

While not all British Muslims have objected to the teaching of religious education in non-religious State schools,²⁷⁵ a significant proportion of British Muslims are reported to have withdrawn their children from both religious education and collective worship,²⁷⁶ in accordance with the School Standards and Framework Act.²⁷⁷ However, in accordance with national law, the cost of alternative education for those pupils who are withdrawn from religious education and acts of daily worship cannot be borne by the school or the Local Education Authority (LEA).²⁷⁸ Consequently, religious education focusing on Christianity is provided for the majority at the expense of the school or LEA in England, whereas the minority must either provide for its own education or forgo it.²⁷⁹

5.7.1.1. Religious Education and Generally Applicable Human Rights Standards

Generally applicable human rights instruments and minority rights standards have recognised that non-confessional religious education, which focuses on both majority and minority religions, may lead to increased tolerance and intercultural understanding.²⁸⁰ Nonetheless, generally applicable human rights instruments also

²⁷³ The Muslim Council of Britain, above n 351, 41.

²⁷⁴ *Ibid.*, 44.

²⁷⁵ Bradney, above n 264, 187.

²⁷⁶ Bradney, above n 264, 189;

²⁷⁷ SSFA 1998 s. 71.

²⁷⁸ SSFA 1998 Schedule 19 s. 2(3).

²⁷⁹ C Hamilton and B Watt, 'A Discriminating Education – Collective Worship in Schools' (1996) 8 *Child and Family Law Quarterly* 28.

²⁸⁰ Commission on Human Rights, above n 6, paras 66-9; Council of Europe, above n 6, para 71; OSCE Office for Democratic Institutions and Human Rights, 'Toledo Guiding Principles on Teaching About Religions and Beliefs in Public Schools' (OSCE/ODIHR 2007) 12. See also,

explicitly recognise 'the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions'.²⁸¹ Furthermore, article 14(2) CRC provides that 'States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child'. Notably, while article 18(4) ICCPR and article 2 Protocol 1 ECHR emphasise the rights of parents to educate their children in accordance with their own convictions, the Committee on the Rights of the Child, under article 14(2) CRC, has increasingly stressed that 'the child's opinion in the matter must be sought, that when they are old and mature enough they must be allowed to choose what to do, and they must not have to ask for parental permission'.²⁸²

Religious education is essential if persons belonging to religious minorities are to maintain their distinct identity. If minorities are prevented from utilising education in order to preserve their identity, '[e]ducation can also be a formidable tool of assimilation'.²⁸³ However, in accordance with article 14(2) CRC, the right of the child to choose in relation to religious education cannot be violated in order to facilitate the preservation of minority identity.

As established by the ECommHR in *Graeme v United Kingdom*:

Article 2 of Protocol No. 1 (P1-2), for practical reasons, could not require that educational facilities provided by the State cater for all parental philosophical or religious convictions. Such facilities should only ensure that there is no indoctrination of pupils which might be considered as not respecting parents' views.²⁸⁴

Commission on Human Rights, 'Report submitted by Mr. Abdelfattah Amor, Special Rapporteur on Freedom of Religion or Belief, in accordance with Commission on Human Rights resolution 2000/33' (14 March 2002) UN doc E/CN.4/2002/73 43 para r; 44 para 7(b); C Evans, 'Religious Education in Public Schools: An International Human Rights Perspective' (2008) 8 Human Rights Law Review 449, 470.

²⁸¹ Article 18(4) ICCPR; article 13(3) ICESCR; article 2 Protocol 1 ECHR; Articles 5(1) and (2) UN Declaration on Religion.

²⁸² Langlaude, above n 268, 491.

²⁸³ P Thornberry, 'Education' in M Weller (ed), *Universal Minority Rights - A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (OUP 2007) 328.

²⁸⁴ *Graeme v United Kingdom* (1990) 64 DR 158.

Thus, article 2 Protocol 1 ECHR and article 18(3) ICCPR do not place an obligation upon the State to provide a specific form of religious education. Instead, the HRC and ECtHR have expressed a preference for the religious education provided in non-denominational State schools to be neutral and objective²⁸⁵ and, further, under the ECHR, critical and pluralistic.²⁸⁶ In *Hartikainen v Finland* the HRC held 'that instruction in the study of the history of religions and ethics' was not 'incompatible with article 18 (4), if such alternative course of instruction is given in a neutral and objective way and respects the convictions of parents and guardians who do not believe in any religion'.²⁸⁷

Furthermore, in *Leirvåg v Norway* and *Folgerø and Others v Norway* the HRC and ECtHR, respectively, considered the prioritisation of Christianity in the mandatory subject of 'Christian Knowledge and Religious and Ethical Education'. Notably, the ECtHR was willing to accept that States are permitted a wide margin of appreciation in relation to religious education in State Schools and, in particular, that emphasis on Christianity 'cannot ... of its own be viewed as a departure from the principles of pluralism and objectivity amounting to indoctrination'.²⁸⁸ As noted by Temperman, 'giving more attention to certain religions, for instance the three largest present in a country, does not necessarily indicate a transgression of neutrality or objectivity as long as the focus on any specific religion is not disproportionate'.²⁸⁹ Thus, the prioritisation of Christianity, within non-confessional religious education does not appear *per se* to be problematic from the perspective of generally applicable human rights law.

However, both the ECtHR and HRC accepted that the combination of the prioritisation of Christianity and the fact that 'at least some of the activities in

²⁸⁵ *Hartikainen v Finland* Communication no 40/1978, UN doc CCPR/C/OP/1 at 74 (1984) 9 April 1981 para 10.4; *Leirvåg v Norway* Communication no 1155/2003, UN doc CCPR/C/82/D/1155/2003 paras 14-2-14.3; *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) Series A no 23 para 53; *Folgerø and Others v Norway* ECHR 2007-III para 84(h); *Zengin v Turkey* App no 1448/04 (ECtHR 9 October 2007) paras 51-2; HRC, above n 16, para 6; 'Toledo Guiding Principles' above n 280, 68-70; CESCR, 'General Comment No 13' on 'The Right to Education' UN doc E/C.12/1999/10 para 28.

²⁸⁶ *Folgerø and Others v Norway* above n 285, para 84(h).

²⁸⁷ *Hartikainen v Finland* above n 285, para 10.4.

²⁸⁸ *Folgerø and Others v Norway* above n 285, para 89.

²⁸⁹ J Temperman, 'State Neutrality in Public School Education: An Analysis of the Interplay Between the Neutrality Principle, the Right to Adequate Education, Children's Right to Freedom of Religion or Belief, Parental Liberties, and the Position of Teachers' (2010) 32 Human Rights Quarterly 865, 878.

question involve, on their face, not just education in religious knowledge, but the actual practice of a particular religion', such as prayers, singing hymns and attendance at Church services, led to the conclusion that the religious education provided could not be considered to be neutral and objective.²⁹⁰ Specifically, the fact that there were qualitative in addition to quantitative differences in the teaching of different religions, was significant in the ECtHR's view as 'in view of these disparities, it is not clear how the further aim, set out in item (v), to "promote understanding, respect and the ability to maintain a dialogue between people with different perceptions of beliefs and convictions" could be properly attained'.²⁹¹

In General Comment No 22, the HRC noted 'that public education that includes instruction in a particular religion or belief is inconsistent with article 18.4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians'.²⁹² As a result, such education may still be permissible provided that non-discriminatory exemptions are available.²⁹³ Nonetheless, in both *Folgerø and Others v Norway* and *Leirvåg v Norway* a violation had still occurred, as the partial scheme of exemptions provided, which required that parents and/or students justify the exemption, was inadequate to safeguard this right.²⁹⁴

On the basis of *Leirvåg v Norway* and *Folgerø v Norway*, it would appear that the combination of the requirement that Christianity is prioritised within the curriculum and that students must take part in a primarily Christian act of daily worship in England, would be problematic from the perspective of article 2 Protocol 1 ECHR and article 18(4) ICCPR as this does not satisfy the criteria of being neutral and objective. Yet, as non-discriminatory exemptions are available, there has not been a violation of these rights.

²⁹⁰ *Leirvåg v Norway* above n 285, para 14.3; *Folgerø and Others v Norway* above n 285, para 99.

²⁹¹ *Folgerø and Others v Norway* above n 285, para 95.

²⁹² HRC, above n 16, para 6.

²⁹³ *Angeleni v Sweden* (1986) 51 DR 41; *Hartikainen v Finland* above n 285, para 10.4; *Leirvåg v Norway* above n 285, para 14.6; *Zengin v Turkey* App no 1448/04 (ECtHR 9 October 2007) paras 53, 76; 'Toledo Guiding Principles' above n 280, 68-70; CESCR, above n 285, para 28. See also, Temperman, above n 289, 877.

²⁹⁴ *Leirvåg v Norway* above n 285, paras 14.4-14.7; *Folgerø and Others v Norway* above n 285, paras 97-100. See also, *Zengin v Turkey* App no 1448/04 (ECtHR 9 October 2007) paras 53, 76.

However, in *Leirvåg v Norway* the HRC also observed that 'loyalty conflicts experienced by the children, amply illustrate these difficulties'.²⁹⁵ Thus, the provision of exemptions may not necessarily be sufficient to resolve the issues surrounding confessional religious education. Carolyn Evans has suggested that '[e]xemptions work best when they can be for a whole subject and when a meaningful alternative class is available to substitute for the one that is being missed'.²⁹⁶ Similarly, the UN Special Rapporteur on Religion or Belief has recommended that 'wherever possible, students not participating in religious instruction due to their different faith should have access to alternative courses provided by the school'.²⁹⁷

While in *Graeme v United Kingdom*, the ECommHR under article 2 Protocol 1 ECHR recognised that the provision of alternative education would be impractical,²⁹⁸ the HRC, CESCR and ECommHR have established that should provision be made, this must not be discriminatory.²⁹⁹ *Waldman v Canada*, concerned the privileged State funding of Roman Catholic Schools. Under article 26 ICCPR, the HRC held that although the State is not obliged to provide funding for religious schools, 'if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination'.³⁰⁰ The ECommHR similarly indicated in *X v United Kingdom* that 'when it is clear that Article 2 of the First Protocol does not give rise to an obligation to subsidise any particular type of education, Article 14 would require that the authorities do not discriminate in the provision of available financial subsidies'.³⁰¹ Accordingly, the prioritisation of Christianity in religious education in England and the required daily act of worship in non-religious State schools leads to the conclusion that alternative religious education should be provided for those who do not subscribe to the same faith as the majority.

²⁹⁵ *Leirvåg v Norway* above n 285, para 14.7.

²⁹⁶ Evans above n 280, 469.

²⁹⁷ UNGA, 'Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt' (15 December 2010) UN doc A/HRC/16/53 para 50.

²⁹⁸ *Graeme v United Kingdom* above n 284.

²⁹⁹ *Waldman v Canada* Communication no 694/1996, UN doc CCPR/C/67/D/694/1996 para 10.6; CESCR, above n 285, para 28.

³⁰⁰ *Waldman v Canada* above n 299, para 10.6. See also, Human Rights Council, 'Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt' (22 December 2011) UN doc A/HRC/19/60 para 72.

³⁰¹ *X v United Kingdom* (1978) 14 DR 179, 182.

Furthermore, in *Grzelak v Poland*, the ECtHR found that 'the absence of a mark for "religion/ethics" on the third applicant's school certificates throughout the entire period of his schooling amounted to a form of unwarranted stigmatisation of the third applicant' and, thus, constituted a violation of article 14, non-discrimination, taken in conjunction with article 9 ECHR, freedom of religion.³⁰² Cumper has interpreted this decision to:

[I]mpose more rigorous obligations on States under Articles 9 and 14 rather than Art 2 P.1. Thus, it is incumbent on schools to make an appropriate degree of provision for students who are removed from RE lessons because mere withdrawal on its own would appear to be insufficient. Whilst propriety might turn on the facts of a particular case, it seems clear that requiring an 'opted out' student to, for example, wait in the corridor for the duration of an RE lesson is almost certainly incompatible with the ECHR.³⁰³

However, it is worth noting that in this case the ECtHR decision was influenced by the connection between Roman Catholicism and national identity in Poland and, thus, the potential for the lack of mark to lead to the stigmatisation of the applicant.³⁰⁴ The exemptions provided from religious education in England may be insufficient to protect the freedom of religion of religious minorities, as State maintained schools are not required to provide alternative education for those who have opted out of religious education and if they do provide an alternative the School and the LEA must not bear the cost.³⁰⁵ Therefore, although the situation in the England would not disclose a violation of article 2 Protocol 1 ECHR, it may disclose a violation of article 14 taken in conjunction with article 9 ECHR if the failure to provide alternative religious education led to the stigmatisation of the applicant.

While the ECtHR and HRC have taken a broadly analogous approach to the provision of confessional religious education in State Schools, a divergence has arisen in relation to the integration of religion into the wider curriculum. The ECtHR

³⁰² *Grzelak v Poland* App no 7710/02 (ECtHR 15 June 2010) paras 99-101.

³⁰³ Cumper, above n 269, 217-18.

³⁰⁴ *Grzelak v Poland* above n 302, para 95.

³⁰⁵ SSFA 1998 Schedule 19 s. 2(3).

has been willing to allow States a wide margin of appreciation when religion has been integrated into the wider curriculum, as exemptions would be impractical.³⁰⁶ In direct contrast, the HRC has expressed concern at the 'religious integrated curriculum' in State run denominational schools in Ireland and, specifically, that this 'depriv[-es] many parents and children who so wish to have access to secular primary education'.³⁰⁷ Temperman suggests that '[i]f the state fails to provide sufficient exemption schemes in this context, serious human rights violations are inevitable; people are forced to sacrifice either their religious freedoms or the right to education'.³⁰⁸ Consequently, a higher level of protection from unwanted religious education exists under article 18 ICCPR than article 2 Protocol 1 ECHR.

5.7.1.2. Religious Education and Minority Rights Standards

Under article 8 FCNM, the AC to the FCNM has indicated a preference for religious diversity to be reflected in the curriculum,³⁰⁹ and for participation in religious education to be voluntary.³¹⁰ Accordingly, the AC criticised the compulsory nature of Christian-centric religious education and the requirement of acts of daily worship in State-maintained schools in the United Kingdom.³¹¹ In particular, in its Second Opinion on the United Kingdom, the AC encouraged the British government to provide additional guidance for teachers 'on the importance of covering non-Christian religions and/or beliefs in the study of religion'.³¹² The imposition of religion on students, for example, by holding school ceremonies in churches, has also been singled out for criticism.³¹³

In the context of the UK, the AC also noted that despite opt-outs being provided upon parental or student demand, 'schools do not provide adequate

³⁰⁶ *Folgerø and Others v Norway* above n 285, para 84(g).

³⁰⁷ HRC, 'Concluding Observations of the Human Rights Committee – Ireland' (30 July 2008) UN doc CCPR/C/IRL/CO/3 para 22.

³⁰⁸ Temperman, above n 289, 880.

³⁰⁹ 'Opinion on Norway' above n 54, para 40; AC, above n 266, 31.

³¹⁰ AC, 'Opinion on Croatia' adopted on 6 April 2001 ACFC/INF/OP/I(2002)003 para 49; AC, above n 266, 31.

³¹¹ 'Second Opinion on the United Kingdom' above n 141, 155, 159-60; AC, 'Third Opinion on the United Kingdom' adopted on 30 June 2011 ACFC/OP/III(2011)006 paras 133-34.

³¹² 'Second Opinion on the United Kingdom' above n 141, 159.

³¹³ 'Second Opinion on the United Kingdom' above n 141, para 159; 'Third Opinion on the United Kingdom' above n 311, paras 134.

alternative activities for pupils who have opted- out'.³¹⁴ Moreover, while the AC welcomed the provision of partial exemptions from religious education in relation to Norway, it indicated that full exemptions would be preferable.³¹⁵ Therefore, under the FCNM, exemptions from religious education must be effective and are likely to be insufficient if alternative education is unavailable. In contrast, there does not appear to be a comparable requirement under generally applicable human rights standards.

The provision of religious education has not been explicitly considered under the UN Declaration on Minorities or article 27 ICCPR. Nonetheless, the Commentary of the UN Working Group on Minorities establishes that '[i]n the same way as the State provides funding for the development of the culture and language of the majority, it shall provide resources for similar activities of the minority'.³¹⁶ Thus, the State provision of Christian religious education and acts of daily collective worship in State schools the UK, and the absence of similar provision for minority religions, appears to violate article 4(2) UN Declaration on Minorities. As persons belonging to minorities pay taxes on the same basis as members of the majority, the decision that alternative education cannot be provided for persons belonging to the minority at the expense of the school or LEA amounts to discrimination.

5.7.1.3. Preliminary Conclusions

Article 18(4) ICCPR and article 2 Protocol 1 ECHR have been interpreted in a similar manner by the HRC and ECtHR respectively. Religious education within State schools should preferably be neutral and objective. However, providing that non-discriminatory exemptions from confessional religious education are made available, this is likely to satisfy generally applicable human rights standards unless the applicant can evidence that s/he will face stigmatisation as a result of the failure to provide appropriate alternative education. In contrast, the AC has expressed a preference for non-confessional education, even when exemptions are available. Furthermore, the AC has acknowledged that such exemptions can only be effective if alternative education is available.

³¹⁴ 'Second Opinion on the United Kingdom' above n 141, paras 156, 160.

³¹⁵ 'Opinion on Norway' above n 54, para 40.

³¹⁶ Commission on Human Rights, above n 6, para 56.

The Strasbourg Institutions, HRC, under article 26 ICCPR, and the former UN Working Group on Minorities have stressed that there should not be discrimination in the provision of minority religious education. Yet, the Commentary to the UN Declaration on Minorities additionally stresses that resources for the development of minority identity must be provided on equal terms with the majority. Consequently, there is an added-value to minority rights protection in relation to the provision of religious education for persons belonging to minorities in both the Council of Europe and UN.

5.7.2. Cultural and Linguistic Education

In addition to appropriate religious education, British Muslims have expressed the desire for State schools to foster their culture and languages³¹⁷ and provide culturally appropriate education.³¹⁸ Yet, as a result of the diverse cultures and languages represented in the British Muslim community, this cannot simply be achieved through a one-size-fits-all approach.

Aside from the provision of religious education in accordance with the parents' beliefs, attention has been paid to the cultural and linguistic educational needs of persons belonging to minorities in generally applicable human rights instruments. Article 2 Protocol 1 ECHR and article 13 ICESCR establish a general 'right to education'. However, article 15 ICESCR also establishes that:

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

...

³¹⁷ R Jackson, 'Should the State Fund Faith Based Schools? A Review of the Arguments' (2003) 25 *British Journal of Religious Education* 89, 91; Modood, Beishon and Virdee, above n 265, 54; Ansari, above n 14, 11.

³¹⁸ D Joly, *Britannia's Crescent: Making a Place for Muslims in British Society* (Avebury 1995) 151-2; P Meredith, 'Incorporation of the European Convention on Human Rights into UK Law – Implications for Education' (1998) 2 *European Journal for Education Law and Policy* 7, 18-19; Bradney, above n 264, 185, 188-9; D McGoldrick, 'Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws' (2009) 9 *Human Rights Law Review* 603, 635.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

Education can be interpreted to be a necessary precondition for 'the conservation, the development and the diffusion' of minority culture. CERD has addressed the education rights of racial minorities under article 5(e)(v) ICERD, which establishes 'the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ... The right to education and training'.³¹⁹ Furthermore, the Committee on the Rights of the Child has recognised that 'the education of the child shall be directed to ... (c) The development of ... his or her own cultural identity, language and values'.³²⁰

Additional recognition of the educational needs of persons belonging to minorities has been provided under the UN Declaration on Minorities. The former UN Working Group on Minorities recognised that the maintenance of minority identity requires both non-interference by the State with the transmission of the minority language and culture,³²¹ and the provision of resources by the State in order to enable the maintenance of minority identity on equal terms with the majority.³²² Specifically, the Commentary to the UN Declaration on Minorities has recognised:

The language and educational policies of the State concerned are crucial in this regard. Denying minorities the possibility of learning their own language and of receiving instruction in their own language, or excluding from their education the transmission of knowledge about their own culture, history, tradition and language, would be a violation of the obligation to protect their identity.³²³

³¹⁹ CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination – People's Republic of China' (27 September 1996) UN doc CERD/C/304/Add.15 paras 17, 30.

³²⁰ Article 29(1) CRC.

³²¹ Commission on Human Rights, above n 6, para 28. See also, K Henrard, 'Education and Multiculturalism: The Contribution of Minority Rights?' (2000) 7 *International Journal on Minority and Group Rights* 393, 394.

³²² Commission on Human Rights, above n 6, para 56.

³²³ *Ibid.*, para 28.

Additionally, 'there is a need for both multicultural and intercultural education. Multicultural education involves educational policies and practices that meet the separate educational needs of groups in society belonging to different cultural traditions'.³²⁴ Consequently, under the UN Declaration on Minorities, European States may be required to take measures to meet the educational needs of European Muslim communities.

The interpretation of the right to education by the AC provides even more detailed elaboration of the obligations of States in this respect. In particular, it appears that positive obligations upon the State may be inferred, when limitations lead to discriminatory treatment³²⁵ or inhibit the ability of persons belonging to minorities to maintain their distinct identity.³²⁶ Specifically, in relation to Austria, the AC has noted that:

The Czech and Slovak minorities, who are located mainly in Vienna and are relatively few in number, have serious difficulties preserving and developing their cultural and linguistic heritage. It is therefore essential that the authorities adopt further measures to enable these minorities to preserve their identities, particularly in education.³²⁷

The AC has also explicitly encouraged states to take a proactive approach and to fund minority education, notably, in relation to language, under article 14,³²⁸ but also under other rights including articles 6³²⁹ and 13.³³⁰

³²⁴ *Ibid.*, para 66.

³²⁵ AC, 'Opinion on the Russian Federation' adopted on 13 September 2002 ACFC/INF/OP/I(2003)005 para 36; 'Second Opinion on Poland' above n 121, para 167; 'Second Opinion on Sweden' above n 35, para 143; AC, above n 266, 9-10.

³²⁶ See, for example, 'Opinion on Austria' above n 54, paras 26, 94; AC, 'Opinion on Cyprus' adopted on 6 April 2001 ACFC/INF/OP/I(2002)004 para 29; AC, above n 266, 9-10.

³²⁷ 'Opinion on Austria' above n 54, paras 26.

³²⁸ AC, 'Opinion on the United Kingdom' adopted on 30 November 2001 ACFC/INF/OP/I(2002)006 para 91; 'Second Opinion on the United Kingdom' above n 141, paras 219-20; 'Third Opinion on Finland' above n 35, paras 140, 148; AC, 'Third Opinion on Germany' adopted on 27 May 2010 ACFC/OP/III(2010)003 paras 158, 165; AC, 'Third Opinion on Norway' adopted on 30 June 2011 ACFC/OP/III(2011)007 paras 112-13; 'Third Opinion on the United Kingdom' above n 311, paras 184, 186; AC, above n 266, 26-7.

³²⁹ 'Opinion on Austria' above n 54, para 35; AC, 'Opinion on Germany' adopted on 1 March 2002 ACFC/INF/OP/I(2002)008 para 36; 'Third Opinion on Spain' above n 76, para 83.

³³⁰ 'Opinion on Austria' above n 54, para 60; 'Second Opinion on Austria' above n 54, para 155; AC, 'Second Opinion on Germany' adopted on 1 March 2006 ACFC/OP/II(2006)001 para 130;

5.7.2.1. Cultural Education

It has been suggested that the teaching of history reflects the majority's view of the history of the UK and, hence, may be unacceptable to persons belonging to minorities, particularly when the minorities in question have been subjugated as a result of colonialism.³³¹ Citizenship Education emphasises 'the diverse national, regional, ethnic and religious cultures, groups and communities in the UK and the connections between them'.³³² However, it primarily serves the purpose of encouraging intercultural dialogue and tolerance rather than the maintenance of minority identity.³³³

Although generally applicable human rights instruments explicitly recognise 'the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions',³³⁴ no comparable provision exists in relation to cultural education. Specifically, in the *Belgian Linguistics Case*, the ECtHR held that '[t]o interpret the terms "religious" and "philosophical" as covering linguistic preferences would amount to a distortion of their ordinary and usual meaning and to read into the Convention something which is not there'.³³⁵ The ECtHR's analysis can be applied by analogy to cultural education. Thus, while religious education should be neutral and objective,³³⁶ this requirement does not

'Second Opinion on Sweden' above n 35, paras 141-43; 'Third Opinion on Austria' above n 54, para 113; AC, above n 266, 22-3.

³³¹ V Uberoi, 'Do Policies of Multiculturalism Change National Identities' (2008) 79 *The Political Quarterly* 404, 409; A Osler, 'Patriotism, Multiculturalism and Belonging: Political Discourse and the Teaching of History' (2009) 61 *Educational Review* 85, 97.

³³² Department for Education, 'Citizenship: Key Concepts – Key Stage 3' (25 November 2011) <<http://www.education.gov.uk/schools/teachingandlearning/curriculum/secondary/b00199157/citizenship/ks3/programme/concepts>> accessed 5 March 2012; Department for Education, 'Citizenship: Key Concepts – Key Stage 4' (25 November 2011) <<http://www.education.gov.uk/schools/teachingandlearning/curriculum/secondary/b00199157/citizenship/ks4/programme/concepts>> accessed 5 March 2012. See also, Bradney, above n 264, 189.

³³³ R Race, *Multiculturalism and Education* (Continuum 2011) 113.

³³⁴ Article 18(4) ICCPR; article 13(3) ICESCR; article 2 Protocol 1 ECHR; Articles 5(1) and (2) UN Declaration on Religion.

³³⁵ *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v Belgium* (1968) Series A no 6, 29 (*Belgian Linguistics Case*).

³³⁶ *Hartikainen v Finland* above n 285, para 10.4; *Leirvåg v Norway* above n 285, paras 14-2-14.3; *Kjeldsen, Busk Madsen and Pedersen v Denmark* above n 285, para 53; *Folgerø and Others v Norway* above n 285, para 84(h); *Zengin v Turkey* above n 285, paras 51-2; HRC, above n 16, para 6; 'Toledo Guiding Principles' above n 280, 68-70; CESCR, above n 285, para 28.

extend to other subjects such as history where the perspective of the majority may also be prioritised under the ECHR.

Within the UN system the right to access cultural education has been recognised under the ICCPR, ICESCR, CRC and ICERD. Notably, this right has been linked to minority rights protection under the ICCPR and CRC,³³⁷ both of which contain a minority rights provision,³³⁸ and the right to cultural life under the ICESCR.³³⁹ For example, the Committee on the Rights of the Child has recognised the need to provide 'for the teaching of their culture and history' in relation to linguistic minorities in Estonia.³⁴⁰ Furthermore, under article 15(1)(a) ICESCR, the right to cultural life, the CESCR has recognised that 'minorities have the right to ... forms of education'.³⁴¹ Thus, the CESCR has expressed concern 'that there are very limited possibilities for children of minorities to enjoy education ... about their own culture in public schools' in Japan.³⁴² The recognition of the interdependent nature of human rights standards has allowed UN human rights bodies to interpret the right to education in the light of the right of persons belonging to minorities to preserve their identity. As noted by Thornberry, in relation to article 27 ICCPR, '[t]he underlying right to identity is crucial, and the state educational system must be arranged to facilitate the retention and promotion of the minority's identity'.³⁴³

CERD has similarly stressed the need to include the culture and history of minorities in school curricula and textbooks.³⁴⁴ In relation to Mauritania, CERD recommended that '[r]oom should be made for Berber language, history and civilization in school textbooks, education and cultural events'.³⁴⁵ Thus, the right to access cultural education under UN generally applicable human rights instruments

³³⁷ HRC, 'Comments of the Human Rights Committee – Norway' (4 November 1993) UN doc CCPR/C/79/Add.27 para 11; Committee on the Rights of the Child, 'Concluding Observations: Estonia' (17 March 2003) UN doc CRC/C/15/Add.196 para 43(f).

³³⁸ Article 27 ICCPR; article 30 CRC.

³³⁹ CESCR, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights – Japan' (24 September 2001) UN doc E/C.12/1/Add.67 para 32.

³⁴⁰ Committee on the Rights of the Child, above n 337, para 43(f).

³⁴¹ CESCR, above n 26, para 32.

³⁴² CESCR, above n 339, para 32.

³⁴³ Thornberry, above n 283, 335.

³⁴⁴ CERD, above n 319, paras 17, 30, 420; CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination – Mauritania' (10 December 2004) UN doc CERD/C/65/CO/5.

³⁴⁵ CERD, above n 344.

includes the provision of appropriate resources and the inclusion of minority culture within the curriculum.

From the perspective of minority rights protection, the Commentary to the UN Declaration on Minorities and the AC have stressed that history should also be presented in an unbiased manner and must not foster negative stereotypes.³⁴⁶ Therefore, the majority's understanding of the history of the State should not be the only perspective taught in history classes. Additionally, minority rights bodies—the AC and the former UN Working Group on Minorities— have asserted that mainstream education should foster knowledge of minority cultures and traditions under article 12 FCNM and article 4(4) UN Declaration on Minorities, respectively.³⁴⁷ In relation to Armenia, for example, the AC expressed concern that 'the culture, history, religion and traditions of persons belonging to national minorities are only taught in special Sunday classes, not as part of the general teaching curriculum'.³⁴⁸ Consequently, through the reporting process, the AC has been able to maximise the scope of the education rights contained in the FCNM and has required that States provide minority cultural education within the mainstream curriculum. As previously noted, the Commentary to the UN Declaration on Minorities has stressed the need for the State to provide resources to facilitate the preservation of minority culture, which inevitably requires educational measures.³⁴⁹

As the ECtHR has not recognised a right to cultural education, there appears to be an added-value to the application of minority rights standards to European Muslims within the Council of Europe system in this respect. UN human rights bodies have recognised the importance of education for the preservation of minority and cultural identity. Notably, the HRC, Committee on the Rights of the Child and UN Working Group on Minorities have relied upon minority rights standards when interpreting the requirements of cultural education. However, CERD and CESCR

³⁴⁶ Commission on Human Rights, above n 6, para 67. See for example, 'Opinion on Bosnia and Herzegovina' above n 71, para 88; 'Opinion on Croatia' above n 310, para 47.

³⁴⁷ Commission on Human Rights, above n 6, paras 65-70; Council of Europe, above n 6, para 71; AC, 'Opinion on "the former Yugoslav Republic of Macedonia"' adopted on 27 May 2004 ACFC/INF/OP/I(2005)001 para 74; AC, 'Opinion on Lithuania' adopted on 21 February 2003 ACFC/INF/OP/I(2003)008 para 62; 'Opinion on Montenegro' above n 76, para 79; 'Opinion on Norway' above n 54, para 53; AC, 'Opinion on Serbia and Montenegro' adopted on 27 November 2003 ACFC/INF/OP/I(2004)002 para 86; AC, 'Second Opinion on Bosnia and Herzegovina' adopted on 9 October 2008 ACFC/OP/II(2008)005 paras 172-74; 'Second Opinion on Kosovo' above n 121, para 199.

³⁴⁸ AC, 'Opinion on Armenia' adopted on 16 May 2002 ACFC/INF/OP/I(2003)001 para 65.

³⁴⁹ Commission on Human Rights, above n 6, paras 28 and 56.

have interpreted the State's obligations in a similar manner, utilising generally applicable human rights standards. Thus, there does not appear to be an added-value to minority rights protection within the UN system in relation to the provision of cultural education for European Muslims.

5.7.2.2. *Culturally Appropriate Education*

British Muslim communities have raised concerns over the decline in provision of single-sex education³⁵⁰ and the appropriateness of sex education and mixed physical education classes both generally and in the context of mixed education.³⁵¹ Specifically, in relation to the decline in provision of single-sex education, Ansari has noted that 'Muslim parents have resented this decline in provision and the demand for Muslim voluntary-aided schools grew steadily from the late 1980s'.³⁵² Furthermore, the Muslim Council of Britain has suggested that:

In addressing issues such as sexual conduct and behaviour, abortion, contraception, sexual orientation, hygiene, forced marriages, drugs, child abuse and relationships between males and females, Islamic moral perspectives should be included and explored when teaching Muslim pupils.³⁵³

In *Kjeldsen, Busk Madsen and Pedersen v Denmark*, the ECtHR considered the conformity of compulsory sex education in State schools with article 2 Protocol 1 ECHR. Although the ECtHR found that sex education fell within article 2 Protocol 1 ECHR,³⁵⁴ it held that compulsory sex education did not 'offend[-] the applicants' religious and philosophical convictions to the extent forbidden by the second sentence of Article 2 of the Protocol'.³⁵⁵ In particular, the ECtHR noted that the

³⁵⁰ Ansari, above n 14, 21-2; Meredith, above n 318, 18-19; Bradney, above n 264, 188-9.

³⁵¹ Joly, above n 318, 151-2; Bradney, above n 264, 185; The Muslim Council of Britain, *Towards Greater Understanding – Meeting the Needs of Muslim Pupils in State Schools: Information & Guidance for Schools* (The Muslim Council of Britain 2007) 36-40, 47-9; McGoldrick, above n 318, 635.

³⁵² Ansari, above n 14, 22. See also, Nielsen, above n 3, 60-1.

³⁵³ The Muslim Council of Britain, above n 351, 48.

³⁵⁴ *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) Series A no 23 para 51.

³⁵⁵ *Ibid.*, para 54.

availability of 'heavily subsidised' private schools and home schooling 'preserves an important expedient for parents who, in the name of their creed or opinions, wish to dissociate their children from integrated sex education'.³⁵⁶ Consequently, the ECHR does not provide a right for European Muslims to withdraw their children from compulsory sex education on religious grounds. Notably, however, the Education Act 1996 does allow British Muslim children to be withdrawn from sex education that does not form part of the national curriculum.³⁵⁷

Additionally, in *Lautsi v Italy*, the ECtHR noted that:

The fact remains that the Contracting States enjoy a margin of appreciation in their efforts to reconcile exercise of the functions they assume in relation to education and teaching with respect for the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions ... *That applies to organisation of the school environment and to the setting and planning of the curriculum.*³⁵⁸

Thus, as the State retains a margin of appreciation in relation to the organisation of the school environment, European Muslims do not appear to be able to claim a right to single-sex mainstream education or to withdraw their children from sex education under article 2 Protocol 1 ECHR.

However, the closure of single-sex schools in the UK may inhibit girls from attending mainstream schools or from gaining a full education, especially if they are exempted from parts of the curriculum on cultural grounds, as their culture or religion prevents them from participating alongside boys.³⁵⁹ Notably, the CESCR, Committee on the Rights of the Child and AC have established that mainstream

³⁵⁶ *Ibid.*, para 54.

³⁵⁷ Education Act 1996 s. 405.

³⁵⁸ *Lautsi and Others v Italy* above n 188, para 69. [Emphasis added].

³⁵⁹ Education Act 1996 s. 405. See also, Meredith, above n 318, 18-19; Bradney, above n 264, 188-9.

education must be 'culturally appropriate'.³⁶⁰ Additionally, under the ICESCR the State must not take measures that lead to the exclusion of girls from education.³⁶¹

The extent to which States are expected to submit to demands for segregated education under international law is unclear, as this may raise questions of gender equality. Minority rights instruments establish that minority identity finds protection 'except where specific practices are in violation of national law and contrary to international standards'.³⁶² Furthermore, the Committee on the Rights of the Child has opposed the '[m]andatory requirement by law in some states of segregation of boys and girls in schools'.³⁶³ Yet, segregated education may not be problematic provided that this decision is left to parents, rather than being based on a legal requirement. The Committee on the Elimination of Discrimination against Women has not explicitly opposed gender-segregated education unless such education limits the opportunities of women³⁶⁴ or results in gender role stereotyping.³⁶⁵

The provision of single-sex education in the UK does not appear to be problematic from the perspective of gender equality provided that it meets these requirements. In contrast, the failure to provide such education may negatively impact the quality of education received by Muslim girls, as exemptions have been provided from education that is considered to be inappropriate in a mixed environment, from a cultural or religious perspective.³⁶⁶ While the ECHR does not appear to protect the rights of persons belonging to minorities to access culturally appropriate education, the monitoring bodies of both generally applicable human rights standards and minority rights standards —the CESCR, Committee on the Rights of the Child and AC— have recognised that education must be 'culturally appropriate'. Thus, within the Council of Europe there is an added-value to minority

³⁶⁰ CESCR, above n 285, paras 6(c), 50; Committee on the Rights of the Child, 'Concluding Observations: Canada' (27 October 2003) UN doc CRC/C/15/Add.215 para 45(a); AC, above n 266, 28.

³⁶¹ CESCR, above n 285, para 50.

³⁶² Articles 4(2) and 8(2) UN Declaration on Minorities; article 20 FCNM.

³⁶³ Committee on the Rights of the Child, 'Concluding Observations: Nigeria' (13 April 2005) UN doc CRC/C/15/Add.257 para 61(f).

³⁶⁴ Committee on the Elimination of Discrimination against Women, 'Concluding Comments: Brazil' UN doc A/58/38(Supp) para 122.

³⁶⁵ Committee on the Elimination of Discrimination against Women, 'Concluding Comments: Austria' UN doc A/55/38(Supp) para 231; Committee on the Elimination of Discrimination against Women, 'Concluding Comments: Slovakia' UN doc A/53/38/Rev.1(Supp) para 85.

³⁶⁶ Bradney, above n 264, 188.

rights protection. However, there does not appear to be an added-value to minority rights protection within the UN in this respect.

5.7.2.3. Linguistic Education

As previously noted, British Muslims have expressed the desire for State schools to provide linguistic education.³⁶⁷ Specifically, the Muslim Council of Britain has suggested:

Arabic, the language of the Qur'an, holds an important status for all Muslims regardless of their linguistic backgrounds ... Offering Arabic as an option in both primary and secondary schools would provide Muslim children with wider linguistic skills and offers greater access to their religious and cultural heritage, thus giving them a stronger sense of self-esteem and achievement.³⁶⁸

The British National Curriculum permits tuition in a variety of languages including Arabic and Urdu.³⁶⁹ However, while LEAs are permitted to provide such language education, there is no obligation for them to do so.³⁷⁰

The *Belgian Linguistics Case* in the ECtHR concerned the right to receive education in a specific language, as opposed to the right to learn a language and, therefore, is only of limited relevance to European Muslims. As noted above, in the *Belgian Linguistics Case*, the ECtHR held that the right of parents to educate their children in accordance with the religious and philosophical beliefs could not be extended to linguistic preferences.³⁷¹ While, in this case, the ECtHR found a violation of article 14 ECHR, non-discrimination, in conjunction with the first

³⁶⁷ Jackson, above n 317, 91; Modood, Beishon and Virdee, above n 265, 54; Ansari, above n 14, 11.

³⁶⁸ The Muslim Council of Britain, above n 351, 50.

³⁶⁹ Department for Education, 'Modern foreign languages (MFL): Languages that schools may teach' (25 November 2011) <<http://www.education.gov.uk/schools/teachingandlearning/curriculum/secondary/b00199616/mfl/languages>> accessed 5 February 2013.

³⁷⁰ Meredith, above n 318, 21.

³⁷¹ *Belgian Linguistics Case* above n 335, 29.

sentence of article 2 Protocol 1 ECHR, the right to education,³⁷² the ECHR does not include a right to education in a specific language in the absence of discrimination.

In contrast, the HRC's General Comment No 22 notes that 'the use of a particular language customarily spoken by a group' constitutes a protected manifestation of religion under article 18 ICCPR.³⁷³ The formulation of this statement is narrow and appears to require that States do not interfere with 'the use of a particular language', rather than take positive measures to ensure its preservation. Furthermore, arguably only Arabic would fall within the scope of article 18 ICCPR, as a manifestation of Islam, rather than other languages commonly spoken by British Muslims such as Urdu, which form an element of the cultural, rather than religious, identity of British Muslim communities.

However, the CRC, ICESCR and ICERD establish the right to mother tongue language education. Article 29(1) CRC establishes that 'the education of the child shall be directed to ... (c) The development of ... his or her own ... language'. Further, article 30 CRC, contains a similar formulation to article 27 ICCPR and recognises that '[i]n those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right ... to use his or her own language'. Thus, the Committee on the Rights of the Child has recognised the significance of linguistic education for the preservation of minority identity and, in particular, has encouraged Estonia '[t]o take all the appropriate measures to implement regulation No. 09 for mother-tongue instruction for students whose mother tongue is not Estonian'.³⁷⁴ Similarly, the CESCR has called upon Estonia 'to ensure that ethnic groups continue to have ample opportunities to be educated in their own languages, as well as to use these languages in public life'³⁷⁵ and has recommended that France 'increase its efforts to preserve regional and minority cultures and languages, and that it undertake measures to improve education on, and education in, these languages'.³⁷⁶

³⁷² *Ibid.*, 82-3.

³⁷³ HRC, above n 16, para 4.

³⁷⁴ Committee on the Rights of the Child, above n 337, para 43(f). See also, Committee on the Rights of the Child, 'Concluding Observations: Costa Rica' (21 September 2005) UN doc CRC/C/15/Add.266 para 58.

³⁷⁵ CESCR, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights – Estonia' (19 December 2002) UN doc E/C.12/1/Add.85 para 57.

³⁷⁶ CESCR, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights – France' (30 November 2001) UN doc E/C.12/1/Add.72 para 26.

Although ICERD does not contain a right to linguistic education, CERD has also recognised the right to tuition in minority languages. For example, in relation to France, CERD noted 'shortcomings in the teaching of the languages of certain ethnic groups - particularly Arabic, Amazigh or Kurdish - in the education system' and encouraged 'the State party to promote the teaching of the languages of these groups in the education system'.³⁷⁷ Thus, generally applicable human rights standards have recognised that persons belonging to minorities have the right to receive tuition in their mother tongue. Notably, CERD has explicitly recognised this right in relation to the languages of 'new minorities'.

In contrast to generally applicable human rights instruments, the FCNM contains an express right to linguistic education. Article 14 FCNM establishes that 'every person belonging to a national minority has the right to learn his or her minority language'. Although the AC's recommendations under article 14 FCNM have been described as 'uncommonly weak',³⁷⁸ the AC has explicitly encouraged states to take a proactive approach and to fund minority language education under this right.³⁷⁹ Specifically, in relation to the UK, the AC has stressed:

While understanding that more emphasis is placed on providing classes of English for immigrants ... it is of the opinion that it is also important to support the preservation of minority languages of these persons, not only as a personal asset for the persons concerned but also in order to value their culture.³⁸⁰

Thus, the AC has taken a firm stance and encouraged the UK to improve funding for supplementary schools providing language education for minority ethnic languages,

³⁷⁷ CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination – France' (18 April 2005) UN doc CERD/C/FRA/CO/16 para 23. See also, CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination – Finland' (7 April 1999) UN doc CERD/C/304/Add.66 para 5; CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination – Luxembourg' (18 April 2005) UN doc CERD/C/LUX/CO/13.

³⁷⁸ D Wilson, 'Educational Rights of Persons Belonging to National Minorities' (2004) 10 *International Journal on Minority and Group Rights* 315, 335.

³⁷⁹ 'Opinion on the United Kingdom' above n 328, para 91; 'Second Opinion on the United Kingdom' above n 141, paras 219-20; 'Third Opinion on Finland' above n 35, paras 140, 148; 'Third Opinion on Germany' above n 328, paras 158, 165; 'Third Opinion on Norway' above n 328, paras 112-13; 'Third Opinion on the United Kingdom' above n 311, paras 184, 186; AC, above n 266, 26-7.

³⁸⁰ 'Third Opinion on the United Kingdom' above n 311, para 184.

including Urdu, and improve provision in the mainstream education system.³⁸¹

Additionally, the Commentary to the UN Declaration on Minorities reveals that '[i]n the same way as the State provides funding for the development of the ... language of the majority, it shall provide resources for similar activities of the minority'.³⁸² As the 'development of the ... language of' the minority is dependant upon linguistic education, article 4(2) UN Declaration on Minorities has been interpreted to require the provision of minority language education. While the Commentary to the UN Declaration on Minorities has stressed that 'new minorities' should learn 'the language of the country of immigration as quickly and as effectively as possible', it has also recognised that '[s]hould ... some new minorities settle compactly together in a region of the country and in large number, there is no reason to treat them differently from old minorities'.³⁸³ Consequently, both the AC and UN Working Group on Minorities have affirmed that persons belonging to 'new minorities' are able to claim the right to access linguistic education in order to preserve their identity.

The only express right to linguistic education is found in article 14 FCNM. However, the Committee on the Rights of the Child, CESCR and CERD have interpreted education rights to include the right to linguistic education. Furthermore, article 18 ICCPR provides the right to learn languages associated with religious practice. Notably, CERD, the AC and the UN Working Group on Minorities have recognised the right of persons belonging to 'new minorities' to receive tuition in their mother tongue. Thus, an added-value to minority rights protection for European Muslims cannot be discerned within the UN human rights regime. However, as the ECtHR has not recognised a right to linguistic education there is a clear added-value to minority rights protection within the Council of Europe for European Muslims.

5.7.2.4. *Preliminary Conclusions*

The right of persons belonging to minorities to access cultural and linguistic education has not been recognised under the ECHR. In contrast, under the FCNM, the AC has established that States have positive obligations in respect of minority

³⁸¹ 'Second Opinion on the United Kingdom' above n 141, paras 219-20; *ibid.*, para 186.

³⁸² Commission on Human Rights, above n 6, para 56.

³⁸³ *Ibid.*, para 64.

education and, in particular, should provide cultural and linguistic education for persons belonging to minorities within the mainstream curriculum. Furthermore, the AC has recognised the education should be 'culturally appropriate'. Consequently, there is a clear added-value to minority rights protection within the Council of Europe's rights regime.

Under the UN Declaration on Minorities, States are required to provide funding to facilitate the preservation of the culture and language of minorities on equal terms with the majority, including through educational measures. Similarly, the monitoring bodies of generally applicable human rights instruments within the UN have recognised the right of persons belonging to minorities to cultural and linguistic education. However, this interpretation has been influenced by the minority rights provisions in the CRC and ICCPR and, thus, demonstrates the interrelated nature of human rights standards within the UN system. However, the CESCR and CERD have interpreted educational rights similarly, in the absence of a minority rights provision.³⁸⁴ The CESCR has also recognised that education should be 'culturally appropriate'. Hence, there does not appear to be an added-value to minority rights protection within the UN system, in relation to the provision of linguistic and cultural education for European Muslims.

5.8. STATE-FUNDED RELIGIOUS SCHOOLS

Muslims in the UK have made increasing claims for State funding for faith schools. However, as noted by Khaliq '[t]he call from certain sections of the Muslim population to allow the establishment of "Muslim schools" which are funded by the state had consistently been denied until 1998'.³⁸⁵ Claims to State funding for 'Muslim schools' have not been made using the language of identity preservation but in the language of equality, as both the majority religion –Anglicanism– and some minority religions –Catholicism and Judaism– have historically been able to gain State funding for their schools.³⁸⁶ Until recently other minority religions, including Islam,

³⁸⁴ As noted in Chapter 3, 15(1)(a) ICESCR has been interpreted in a similar way to article 27 ICCPR, although it does not constitute a minority rights provision.

³⁸⁵ Khaliq, above n 7, 348. See, for example, *R v Secretary of State for Education and Science, ex parte Yusuf Islam* [1994] ELR 111.

³⁸⁶ Ansari, above n 10, 273; *ibid.*, 348-9; Mondal, above n 10, 4; Modood, Beishon and Virdee, above n 265, 55, 59; C Tinker, 'Rights, Social Cohesion and Identity: Arguments For and Against

had been excluded from such State funding.³⁸⁷ In 2011, of approximately 7,000 State maintained faith schools, only twelve were Muslim, in comparison to over 6,000 Christian schools and 42 Jewish schools.³⁸⁸ Further, only one of 218 faith academies open in November 2011 were Muslim and there were no Muslim free schools.³⁸⁹ As Islam constituted the second largest religion in England and Wales in the 2011 census, this appears to raise questions of discrimination.³⁹⁰ The 139 independent Muslim schools also indicate that a demand for Muslim faith schools exists.³⁹¹

While generally applicable human rights instruments establish 'the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions',³⁹² freedom of religion has been interpreted to constitute a negative right.³⁹³ Bielefeldt has noted that:

[P]rivate schools, depending on their particular rationale and curriculum, might accommodate the more specific educational interests or needs of parents and children, including in questions of religion or belief. Indeed, many private schools have a specific denominational profile which can make them particularly attractive to adherents of the respective denomination. ... In this sense, private schools constitute a part of the institutionalized diversity within a modern pluralistic society.³⁹⁴

However, he has also recognised the limits of article 18 ICCPR in this respect: 'States are not obliged under international human rights law to fund schools which

State-Funded Muslims Schools in Britain' (2009) 12 Race, Ethnicity and Education 539, 542; Knights, above n 9, 103.

³⁸⁷ Bradney, above n 264, 189.

³⁸⁸ Department for Education, 'Faith schools: Maintained faith schools' (7 June 2011) <<http://www.education.gov.uk/schools/leadership/typesofschools/b0066996/faith-schools/maintained>> accessed 29 January 2012.

³⁸⁹ Department for Education, 'Faith Schools: Faith Academies' (31 January 2013) <<http://www.education.gov.uk/schools/leadership/typesofschools/b0066996/faith-schools/faith>> accessed 6 February 2013.

³⁹⁰ Office of National Statistics, Religion in England and Wales 2011, 11 December 2012 <<http://www.ons.gov.uk/ons/rel/census/2011-census/key-statistics-for-local-authorities-in-england-and-wales/rpt-religion.html>> accessed 6 February 2013.

³⁹¹ Department for Education, above n 389.

³⁹² Article 18(4) ICCPR; Article 13(3) ICESCR; Article 2 Protocol 1 ECHR.

³⁹³ Ghana, above n 29, 64-5.

³⁹⁴ Human Rights Council, 'Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt' (15 December 2010) UN doc A/HRC/16/53 para 54.

are established on a religious basis'.³⁹⁵ Furthermore, the CESCR's General Comment No 13 establishes that 'a State must respect the availability of education by not closing private schools'.³⁹⁶ Hence, generally applicable human rights standards recognise the rights of persons belonging to religious minorities to establish their own private educational institutions, without placing an obligation upon States to fund such institutions.³⁹⁷ Still, as previously noted, in *Waldman v Canada* and *X v United Kingdom*, the HRC and ECommHR established, respectively, that the denial of funding for religious schools must not be discriminatory.³⁹⁸ The potentially discriminatory denial of funding for Muslim private schools in the UK may, therefore, constitute a violation of article 26 ICCPR and article 2 Protocol 1 ECHR read in conjunction with article 14 ECHR.

The right of persons belonging to minorities to establish their own institutions, including 'educational establishments' was recognised by the PCIJ in the *Minority Schools in Albania* to be a fundamental principle underpinning the minority rights regime.³⁹⁹ Yet, minority rights standards, in this respect, appear to have a similar negative formulation to generally applicable human rights standards.⁴⁰⁰ Thus, while article 13(1) FCNM establishes that '[w]ithin the framework of their education systems, the Parties shall recognise that persons belonging to a national minority have the right to set up and to manage their own private educational and training establishments', article 13(2) FCNM limits this right: '[t]he exercise of this right shall not entail any financial obligation for the Parties'.⁴⁰¹

Nonetheless, the Commentary of the UN Working Group on Minorities suggests that article 4(2) UN Declaration on Minorities 'may require economic resources from the State. In the same way as the State provides funding for the

³⁹⁵ *Ibid.* para 54.

³⁹⁶ CESCR, above n 285, para 50.

³⁹⁷ Article 13 (3) ICESCR; CESCR, above n 285, para 29; Henrard, above n 321, 403; MA Martín Estébanez, 'The United Nations International Covenant on Economic, Social and Cultural Rights' in K Henrard and R Dunbar (eds), *Synergies in Minority Protection - European and International Law Perspectives* (CUP 2008) 235; F Coomans, 'UNESCO's Convention Against Discrimination in Education' in K Henrard and R Dunbar (eds), *Synergies in Minority Protection - European and International Law Perspectives* (CUP 2008) 305; Temperman, above n 289, 883.

³⁹⁸ *Waldman v Canada* above n 299, para 10.6; *X v United Kingdom* above n 301, 182. See, however, Evans, above n 56, 360-62.

³⁹⁹ *Minority Schools in Albania* PCIJ Series A./B. Advisory Opinion of April 6 1935, 17, 19.

⁴⁰⁰ Article 13 FCNM; CSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* para 32; Henrard, above n 321, 403; Wilson, above n 378, 334.

⁴⁰¹ See further, HCNM, 'The Hague Recommendations Regarding the Education Rights of National Minorities and Explanatory Note' (October 1996) 13.

development of the culture and language of the majority, it shall provide resources for similar activities of the minority'.⁴⁰² Consequently, the right to education of persons belonging to minorities may impose a financial obligation upon the State if the denial of funding leads to discrimination⁴⁰³ or inhibits the ability of persons belonging to minorities to maintain their distinct identity.⁴⁰⁴

Similarly, the AC has consistently encouraged states to take a proactive approach, in relation to the funding of minority education, despite article 13(2) FCNM.⁴⁰⁵ For example in relation to the UK, despite 'noting the limited demand expressed to date for being taught ethnic minority languages or for receiving instruction in these languages', the AC has encouraged 'the Government to take a more proactive approach'.⁴⁰⁶ Furthermore, in relation to religious schools, the AC has suggested that Sweden 'review the decision taken on Jewish schools and ensure that any decisions on public funding for private schools continue to be based on non-discriminatory criteria'.⁴⁰⁷

The AC has also consistently encouraged the State to provide funding for minority language education in private educational establishments, including schools, supplementary schools and 'educational activities outside regular school hours (such as so-called Sunday schools and summer camps)'.⁴⁰⁸ Accordingly, the interpretation of the FCNM by the AC appears to indicate that, in practice, States may be required to fund private minority education if adequate provision is not made within mainstream education and this has the potential to impact the ability of persons belonging to minorities to preserve their identity. Thus, as a result of the

⁴⁰² Commission on Human Rights, above n 6, para 56.

⁴⁰³ 'Opinion on the Russian Federation' above n 325, para 36; 'Second Opinion on Poland' above n 121, para 167; 'Second Opinion on Sweden' above n 35, para 143; AC, above n 266, 9-10.

⁴⁰⁴ See, for example, 'Opinion on Austria' above n 54, paras 26, 94; 'Opinion on Cyprus' above n 326, para 29; AC, above n 266, 9-10.

⁴⁰⁵ 'Opinion on Austria' above n 54, paras 35, 60; 'Opinion on the United Kingdom' above n 328, para 91; 'Second Opinion on Austria' above n 54, para 155; 'Second Opinion on Germany' above n 330, para 130; 'Second Opinion on Sweden' above n 35, paras 141-43; 'Second Opinion on the United Kingdom' above n 141, paras 219-20; 'Third Opinion on Austria' above n 54, para 113; 'Third Opinion on Finland' above n 35, paras 140, 148; 'Third Opinion on Germany' above n 328, paras 158, 165; 'Third Opinion on Norway' above n 328, paras 112-13; 'Third Opinion on the United Kingdom' above n 311, paras 184, 186; AC, above n 266, 26-7.

⁴⁰⁶ 'Opinion on the United Kingdom' above n 328, para 91.

⁴⁰⁷ 'Second Opinion on Sweden' above n 35, paras 142-43.

⁴⁰⁸ 'Second Opinion on Austria' above n 54, para 155; 'Second Opinion on Poland' above n 121, paras 166-67; 'Second Opinion on Sweden' above n 35, para 141; 'Second Opinion on the United Kingdom' above n 141, para 220; 'Third Opinion on Austria' above n 54, para 113; AC, 'Third Opinion on Denmark' adopted on 31 March 2011 ACFC/OP/III(2011)002 para 111; 'Third Opinion on Finland' above n 35, para 148; AC, above n 266, 13.

programmatic nature of the rights contained in the FCNM, the AC has been able to maximise the scope of the education rights through the State reporting process and has required that States take positive measures to ensure that these rights are upheld.

Both generally applicable human rights and minority rights standards establish that although the State must permit persons belonging to minorities to found private educational establishments, this does not entail any financial obligation upon the State. However, the funding of private schools may not be denied on discriminatory basis.⁴⁰⁹ As the right to maintain and promote minority identity entails positive obligations⁴¹⁰ minority rights standards have an added-value, insofar as States may be required to fund minority schools in order to realise this right in practice. Nonetheless, as the primary claim made by British Muslim communities concerns the provision of funding for religious schools on a non-discriminatory basis, there may not be an added-value to minority rights protection.

5.9. SHARIA AS A SYSTEM OF PERSONAL LAW

Regular claims for the accommodation of Muslim family law in the UK have been made by Muslim representative organisations, including the Union of Muslim Organisations, since the 1970s.⁴¹¹ Such claims have proven to be controversial, as *sharia* is perceived to include punishments such as stoning and limb amputations and the death sentence for apostasy.⁴¹² Yet, there is little evidence to suggest that such claims have popular support from within the Muslim community.⁴¹³ For the most

⁴⁰⁹ *Waldman v Canada* above n 299, para 10.6; Human Rights Council, above n 394, para 54; CESCR, above n 285, para 54. 'Opinion on the Russian Federation' above n 325, para 36; 'Second Opinion on Poland' above n 121, para 167; 'Second Opinion on Sweden' above n 35, para 143; AC, above n 266, 9-10; Commission on Human Rights, above n 6, para 56.

⁴¹⁰ Articles 1(2), 2(1) and 4(2) UN Declaration on Minorities; HRC, above n 30, para 6.1; Commission on Human Rights, above n 6, paras 29-30, 33, 56; G Gilbert 'Article 5' in M Weller (ed), *The Rights of Minorities – A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP 2005) 158.

⁴¹¹ Bradney, above n 264, 187; Ansari, above n 14, 23; Nielsen, above n 3, 55; I Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States – Dynamic Legal Pluralism in England, Turkey and Pakistan* (Ashgate 2005) 59-60; G Douglas and others, *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts* Report of a Research Study funded by the AHRC (Cardiff Law School 2011) 15 <<http://www.law.cf.ac.uk/clr/research/cohesion.html>> accessed 22 March 2012.

⁴¹² *Refah Partisi (The Welfare Party) and Others v Turkey* above n 153, para 123; McGoldrick, above n 318, 621; P Shah, 'Transforming to Accommodate? Reflections on the Shari'a Debate in Britain' in R Grillo and others (eds), *Legal Practice and Cultural Diversity* (Ashgate 2009) 77-80.

⁴¹³ Bradney, above n 264, 187; McGoldrick, above n 318, 618.

part, claims to legal accommodation and the enforcement of *sharia* in the UK refer to *sharia* as a system of Personal Law.⁴¹⁴ In particular, claims have taken two forms: the recognition of the Muslim marriage ceremony (the *nikah*)⁴¹⁵ and divorce (including *talaq*⁴¹⁶ but also *khul*⁴¹⁷);⁴¹⁸ and the recognition of the role of *Sharia* Councils.

British Muslims have experienced difficulties registering premises for the purpose of the solemnisation of religious marriages, which, in turn, have inhibited the recognition of the *nikah* in national law.⁴¹⁹ Rehman notes that 'Muslims also complain that unlike Jews and Quakers, they are not granted any exemptions for the laws governing the solemnization of marriage in England'.⁴²⁰ Furthermore, the non-recognition of the traditional *nikah* in national law has had implications for the role of Islamic divorce. Unless a Muslim marriage is registered in national law, the civil courts do not have a role to play in its termination and, instead, British Muslims rely on informal mechanisms, such as the estimated 85 unofficial *Sharia* Councils operational in the UK, to terminate their marriage in accordance with their religious beliefs.⁴²¹ The status of *Sharia* Councils has become the topic of increasing debate⁴²²

⁴¹⁴ D Pearl and W Menski, *Muslim Family Law* (3rd edn Sweet and Maxwell 1998) 68-9; P Shah, 'Between God and the Sultana? Legal Pluralism in the Muslim Diaspora' in JS Nielsen and L Christoffersen (eds), *Shari'a as Discourse – Legal Traditions and the Encounter with Europe* (Ashgate 2010) 130.

⁴¹⁵ *R v Bham* [1966] 1 QB 159; *M v M (Divorce: Jurisdiction: Validity of Marriage)* [2001] 2 FLR 6; *AM v AM* [2001] 2 FLR 6; *G v M* [2011] EWHC 2651 (Fam) (17 October 2011); *El-Gamal* [2011] QB (22 December 2011: unreported) <<http://www.law.cf.ac.uk/clr/networks/lrsncd11.html>> accessed 13 February 2012.

⁴¹⁶ Unilateral divorce by the husband by pronouncing *talaq* three times.

⁴¹⁷ 'Divorce at the instance of the wife with the husband's agreement and on the basis that she will forgo her right to dower'. S Poulter, *Ethnicity, Law and Human Rights* (OUP 1998) 207.

⁴¹⁸ See, for example, *R v Hammersmith Superintendent Registrar of Marriages ex parte Mir-Anwaruddin* [1917] 1 KB 634; *Maher v Maher* [1951] 2 All ER 37; *Quazi v Quazi* [1980] AC 744; *R v Secretary of State for the Home Department ex parte Fatima (Ghulam)* [1986] 2 WLR 693.

⁴¹⁹ Marriage Act 1949 s. 41(2); *Church of Jesus Christ of Latter-Day Saints v Henning* [1964] AC 420; *M v M (Divorce: Jurisdiction: Validity of Marriage)* above n 415. Cf. *G v M* above n 415. Bradney, above n 264, 184; J Rivers, *The Law of Organized Religions – Between Establishment and Secularism* (OUP 2010) 152; E Nimni, 'Cultural Minority Self-governance' in M Weller (ed), *Political Participation of Minorities: A Commentary on International Standards and Practice* (OUP 2010) 659.

⁴²⁰ Rehman, above n 130, 856 [sic]; Lord Hardwicke's Marriage Act 1753. See also, Douglas and others, above n 411, 13.

⁴²¹ McLoughlin and Abbas, above n 9, 558; Douglas and others, above n 411, 28.

⁴²² Hansard, Arbitration and Mediation Services (Equality) Bill, HL Deb, 19 October 2012, c1682. See generally, R Williams, 'Civil and Religious Law in England: A Religious Perspective' (2008) 10 Ecclesiastical Law Journal 262; S Bano, 'In Pursuit of Religious and Legal Diversity: A Response to the Archbishop of Canterbury and the "Sharia Debate" in Britain' (2008) 10

and, notably, the Arbitration and Mediation Services (Equality) Bill was introduced in the House of Lords in 2011, in order to protect Muslim women from the perceived discrimination faced in *Sharia* Councils.⁴²³

5.9.1. Religious Marriage and Divorce

The ECtHR has established that States must remain neutral between different religions and denominations.⁴²⁴ Specifically, in the case of *Savez Crkava Riječ Života and Others v Croatia*, the refusal to recognise the religious marriages of particular groups for civil purposes, when other groups had been granted such recognition was held to constitute a violation of non-discrimination, article 14, in conjunction with freedom of religion, article 9 ECHR.⁴²⁵

However, in the *Refah Partisi (The Welfare Party) and others v Turkey*, the ECtHR indicated that the introduction of separate systems of personal law for different communities, in particular personal law based on *sharia*, was incompatible with human rights standards and, therefore, cannot find protection under the ECHR.⁴²⁶ In this case the ECtHR appears to prejudge the compatibility of *sharia* with human rights standards, based on a generalised interpretation of the practice of European Muslims.⁴²⁷ Notably, in his concurring opinion in *Refah Partisi* Judge Kovler regretted 'the assessment to be made of sharia, the legal expression of a religion whose traditions go back more than a thousand years, and which has its fixed points of reference and its excesses, like any other complex system'.⁴²⁸ While the unequal treatment of religious marriages in national law may violate the ECHR, the ECtHR's decision in *Refah* appears to indicate that States can justify such

Ecclesiastical Law Journal 283, 284-6; Shah, above n 412, 77-80; M Malik, *Minority Legal Orders in the UK - Minorities, Pluralism and the Law* (British Academy Policy Centre 2012).

⁴²³ Hansard, above n 422. See also, K McVeigh and A Hill, 'Bill Limiting Sharia Law is Motivated by "Concern for Muslim Women"' *The Guardian* (8 June 2011) <<http://www.guardian.co.uk/law/2011/jun/08/sharia-bill-lords-muslim-women>> accessed 15 July 2013.

⁴²⁴ *Religionsgemeinschaft der Zeugen Jehovas and Others v Austria* App no 40825/98 (ECtHR 31 July 2008) paras 97-99.

⁴²⁵ *Savez Crkava Riječ Života and Others v Croatia* App no 7798/08 (ECtHR 9 December 2010) paras 58, 92-93.

⁴²⁶ *Refah Partisi (The Welfare Party) and Others v Turkey* above n 153, paras 93, 123.

⁴²⁷ Boyle, above n 172, 12-3.

⁴²⁸ *Refah Partisi (The Welfare Party) and Others v Turkey* above n 153, Concurring Opinion of Judge Kovler.

inequality in relation to the *niqah* on the grounds that *sharia* is incompatible with Convention rights.

In contrast, the recognition of religious marriages and divorces has not been considered in great detail within the UN system. The Krishnaswami report indicated that the recognition of some religious marriages in national law but not others would constitute discrimination. Yet,

[s]ince, however, such individuals may contract a civil marriage — and in addition are not precluded from celebrating their marriage in accordance with the rites of their own religion or belief — this inequality does not have serious consequences.⁴²⁹

This view has subsequently been affirmed by the HRC, under article 23, the right to a family life, which acknowledged that although freedom of religion requires 'the possibility of both religious and civil marriages', the requirement that a religious marriage is 'conducted, affirmed or registered also under civil law is not incompatible with the Covenant'.⁴³⁰ Furthermore, in relation to divorce, Krishnaswami argues that as long as individuals are able to obtain a civil divorce, '[e]ven when the prescriptions of the law are identical with those of the faith of the majority, the result cannot be considered discriminatory'.⁴³¹ Thus, as the right to marry and divorce in accordance with religious law has been interpreted extremely narrowly within the UN, the unequal treatment of religious marriage and divorce in the UK does not appear to violate freedom of religion or the right to a family life, within the ICCPR.

Thornberry has suggested that the approach of the ECtHR to *sharia* in *Refah Partisi* significantly differs to that taken within the UN system: 'UN and other bodies necessarily address States with a plurality of legal systems and cultural forms in situations where sweeping judgments of incompatibility with human rights norms would not be regarded as helpful or appropriate'.⁴³² Both the Committee on the

⁴²⁹ Krishnaswami, above n 20, 37.

⁴³⁰ HRC, 'General Comment No 19' on 'Protection of the Family, the Right to Marriage and Equality of the Spouses' UN doc HRI/GEN/1/Rev.9 (Vol.I) 198, para 4.

⁴³¹ Krishnaswami, above n 20, 38.

⁴³² P Thornberry, 'A Critique of European Standards on Minority Rights' paper presented 22 April 2004, Robert Schuman Centre for Advanced Studies, Florence, 22. Cited in A Verstichel,

Rights of the Child and the Committee on the Elimination of Discrimination against Women have stressed that marriages and divorces conducted in accordance with religious law must not perpetuate gender equality.⁴³³ Nonetheless, while religious personal law must conform with international human rights standards, UN human rights bodies have not prejudged the compatibility of *sharia* with these standards.

Minority rights standards may provide additional protection to the rights of persons belonging to religious minorities to contract marriages in accordance with their religious beliefs. Ghana has, notably, submitted that in the context of religious minorities, 'the term "culture" may be the most apt description for their ... practice of relevant rites'.⁴³⁴ In fact, the former UN Independent Expert on Minorities Issues, McDougall has indicated that 'personal laws and the preservation of customary laws or practices' do fall within the scope of article 27 ICCPR.⁴³⁵ As a result, the recognition of minority marriage and divorce in accordance with *sharia*, may find support as a protected cultural practice or 'way of life' within article 27 ICCPR and article 4(2) UN Declaration on Minorities.⁴³⁶ In contrast, even though the AC has recognised the value of mechanisms of cultural autonomy,⁴³⁷ it has not explicitly considered the role of personal law in the preservation of minority identity.

In conclusion, within the UN system freedom of religion and the right to a family life have been interpreted narrowly and the requirement that persons belonging to religious minorities must contract a civil marriage, in addition to a religious marriage, is not considered to be problematic.⁴³⁸ In contrast, as the personal laws of minorities have been recognised as falling within the scope of article 27

Participation, Representation and Identity: The Rights of Persons Belonging to Minorities to Effective Participation in Public Affairs: Content, Justification and Limits (Intersentia 2009) 115.

⁴³³ Committee on the Rights of the Child, 'Concluding Observations: India' (26 February 2004) UN doc CRC/C/15/Add.228 para 29; Committee on the Elimination of Discrimination against Women, 'Concluding Observations: Bangladesh' UN doc A/59/38 part II (2004) 134 para 247; Committee on the Elimination of Discrimination against Women, 'Concluding Observations: Greece' (2 February 2007) UN doc CEDAW/C/GRC/CO/6 paras 33-4.

⁴³⁴ Ghana, above n 29, 62.

⁴³⁵ Human Rights Council, 'Background Document by the Independent Expert on Minority Issues, Gay McDougall, on Minorities and Effective Political Participation' (8 October 2009) UN doc A/HRC/FMI/2009/3 para 57. See also, HCNM, 'The Lund Recommendations on the Effective Participation of National Minorities in Public Life' (September 1999) para 18.

⁴³⁶ Commission on Human Rights, above n 6, paras 6, 56; HRC, above n 30, para 3.2.

⁴³⁷ AC, *Commentary on The Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs* adopted on 27 February 2008 ACFC/31DOC(2008)001 para 135; 'Third Opinion on Germany' above n 328, para 182; AC, 'Opinion on Moldova' adopted on 1 March 2002 ACFC/INF/OP/I(2003)002 para 92; AC, 'Second Opinion on Romania' adopted on 24 November 2005 ACFC/OP/II(2005)007 para 185.

⁴³⁸ HRC, above n 430, para 4.

ICCPR, an added-value to minority rights protection can be discerned. Although the ECtHR has held that the refusal to recognise the religious marriages of specific communities constitutes discrimination, the application of this principle to European Muslims may be restricted by the ECtHR's decision in the *Refah Partisi* case.

5.9.2. *Sharia* Councils and Personal Law

The operation of unofficial *Sharia* Councils in the United Kingdom has led to concerns in relation to the protection of women's rights.⁴³⁹ Yet, the establishment of legally recognised mechanisms of cultural autonomy, for the purpose of regulating Muslim personal law may allow these communities to marry and divorce in accordance with their beliefs and also facilitate the regulation of *Sharia* Councils, which would be beneficial from the perspective of upholding women's rights.

Although the ECtHR has taken a wide view of the scope of freedom of religion in relation to the recognition of religious marriages and divorces, in relation to personal law that results in a 'plurality of legal systems' a more restrictive approach has been taken.⁴⁴⁰ Specifically, the ECtHR concluded that 'a plurality of legal systems' would be incompatible with human rights,⁴⁴¹ and the State's role as 'the impartial organiser of the practice of the various beliefs and religions in a democratic society'.⁴⁴² Therefore, the establishment of a system of personal law was considered to be incompatible with secularism and the requirements of democracy in *Refah Partisi*.⁴⁴³

However, Western European States, including the UK and Denmark, are not secular as they maintain links between the Church and the State. As a result, secularism cannot be claimed to constitute a necessary precondition of democracy. Furthermore, while States such as France, Germany and Turkey have upheld the

⁴³⁹ S Poulter, 'Ethnic Minority Customs, English Law and Human Rights' (1987) 36 ICLQ 589, 601; Poulter, above n 417, 217.

⁴⁴⁰ *Refah Partisi (The Welfare Party) and Others v Turkey* above n 153; *Savez Crkava Riječ Života and Others v Croatia* above n 425.

⁴⁴¹ *Refah Partisi (The Welfare Party) and Others v Turkey* above n 153, para 119.

⁴⁴² *Ibid.*

⁴⁴³ *Ibid.*, para 93; *Şahin v Turkey* ECHR 2005-XI, 114-16; *Dogru v France* above n 145, para 66, 72. See also, Boyle, above n 172, 14; H-M ten Napel, 'The European Court of Human Rights and Political Rights: The Need for More Guidance' (2009) 5 European Constitutional Law Review 464, 475; J Vidmar, 'Multiparty Democracy: International and European Human Rights Law Perspectives' (2010) 23 Leiden Journal of International Law 209, 230.

constitutional role of secularism, in particular the strict separation of religion and public life,⁴⁴⁴ as secularism is an ideological belief,⁴⁴⁵ the exclusion of religion from the public sphere on this basis cannot be considered to constitute a neutral or impartial position. Thus, a system of personal law should not be considered to interfere with the rights of others, without convincing justification. Nonetheless, on the basis of the ECtHR's decision in *Refah Partisi*, it appears that British Muslims cannot claim a right to the legal recognition of *Sharia* Councils under the ECHR, even though the United Kingdom is not a secular State.

Further, in justifying the alleged incompatibility of a plurality of legal systems with human rights standards, the ECtHR argued that this,

would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy. A difference in treatment between individuals in all fields of public and private law according to their religion or beliefs manifestly cannot be justified under the Convention, and more particularly Article 14 thereof, which prohibits discrimination.⁴⁴⁶

As is established in the ECtHR's case law, not every difference in treatment amounts to discrimination for the purpose of article 14 and Protocol 12, as '[t]he right not to be discriminated against ... is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'.⁴⁴⁷ As persons belonging to minorities are disadvantaged in relation to the recognition of their marriages and divorces in national law, as compared to the majority, the establishment of a mechanism of cultural autonomy, in order to rectify such inequality, arguably constitutes 'treat[ing] differently persons whose situations are significantly different' and would not constitute discrimination.

⁴⁴⁴ *Dahlab v Switzerland* above n 129; *Dogru v France* above n 145; *Aktas v France* above n 145.

⁴⁴⁵ Wilson, above n 172, 196; Boyle, above n 172, 14-5.

⁴⁴⁶ *Refah Partisi (The Welfare Party) and Others v Turkey* above n 153, para 119.

⁴⁴⁷ *Thlimmenos v Greece* Application ECHR 2000-IV para 44. See also, *Stec and Others v United Kingdom* ECHR 2006-VI para 51; *DH et al v Czech Republic*, 2007-IV para 175; *Sejdić and Finci v Bosnia and Herzegovina* ECHR 2009 para 55. See, further, P Macklem, 'Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination' (2006) 4 *International Journal of Constitutional Law* 488, 509.

The ECtHR has indicated that the establishment of a separate system of personal law based on *sharia* would not find protection under the ECHR, on the basis that it would undermine the secular role of the State and would result in discrimination. However, arguably the ECtHR's reasoning in this case places too much importance on the role of secularism in safeguarding Convention rights and does not stand up to scrutiny. The decision of the ECtHR appears to be significantly influenced by the asserted incompatibility of *sharia* with Convention rights. Boyle has, in fact, suggested that '[t]he *Refah* case can be read to suggest that peaceful advocacy of the tenets of Islam is unprotected under the European Convention'.⁴⁴⁸ If this is the case, then *Sharia* Councils in the United Kingdom would not be able to claim the protection offered under the ECHR, regardless of whether, in practice, they interpret *sharia* in a manner that is compatible with the ECHR.

In direct contrast to the approach of the ECtHR, minority rights standards have been interpreted in a manner that recognises the value of mechanisms of cultural autonomy for the preservation of minority identity.⁴⁴⁹ The AC has frequently noted the contribution of mechanisms of cultural autonomy to ensuring that persons belonging to national minorities are able to maintain their distinct identity and participate in decisions of concern to the community, under article 15 FCNM.⁴⁵⁰ Furthermore, in relation to UN Declaration on Minorities, the former UN Independent Expert on Minorities Issues has recommended that the 'application of personal laws and the preservation of customary laws or practices, usually with exclusive jurisdiction' should fall within the competencies of cultural autonomies.⁴⁵¹

Minority rights standards require that the human rights of individuals must be guaranteed in the exercise of these rights.⁴⁵² Accordingly, mechanisms of cultural

⁴⁴⁸ Boyle, above n 172, 12.

⁴⁴⁹ *Diergaardt (late Captain of the Rehoboth Baster Community) and Others v Namibia*, above n 258, Scheinin dissenting opinion; Commission on Human Rights, above n 6, para 46; 'The Lund Recommendations' above n 435, paras 17-18; HCNM, 'The Lund Recommendations on the Effective Participation of National Minorities in Public Life and Explanatory Note' (September 1999) 29, paras 17-18; 'Copenhagen Document' above n 400, para 35. See also, G Gilbert, 'Autonomy and Minority Groups: A Right in International Law?' (2001-2002) 35 *Cornell International Law Journal* 307, 319.

⁴⁵⁰ AC, above n 437, para 135; 'Third Opinion on Germany' above n 328, para 182; 'Opinion on Moldova' above n 437, para 92; 'Second Opinion on Romania' above n 437, para 185.

⁴⁵¹ Human Rights Council, above n 435, para 57. See also, 'The Lund Recommendations' above n 435, para 18.

⁴⁵² Article 22 and 23 FCNM; Council of Europe, above n 6, paras 90-91. See also, 'The Lund Recommendations' above n 435, para 3; 'The Lund Recommendations and Explanatory Note'

autonomy that violate 'individual rights and freedoms' do not find support under minority rights standards. Nonetheless, the AC does not share the ECtHR's belief that mechanisms of cultural autonomy breach human rights *per se*. Additionally, the FCNM clearly establishes that '[e]very person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such'.⁴⁵³ A separate regime of personal law would not discriminate against individuals provided that they are able to opt-in or out of such a system.⁴⁵⁴

Accordingly, minority rights standards appear to support the establishment of *Sharia* Councils to regulate Muslim marriages and divorces, provided that this does not result in violations of international human rights standards. This is in direct contrast to the restrictive approach taken by the ECtHR, which appears to establish that a system of personal law based on *sharia* would be incompatible with Convention rights. Therefore, under both the UN and Council of Europe human rights regimes, there is an added-value to minority rights protection, in relation to the establishment of mechanisms of cultural autonomy to regulate personal law.

5.9.3. Preliminary Conclusions

Generally applicable human rights instruments do not appear to require that European Muslims be able contract legally binding marriages and divorces in accordance with their faith. UN human rights bodies have indicated that the requirement that persons belonging to minorities marry and divorce under civil law is not problematic. While the ECtHR has recognised that the failure to recognise the religious marriages of some minorities on a discriminatory basis would violate article 9 in conjunction with article 14 ECHR, the ECtHR has also indicated that *sharia* is incompatible with human rights standards.

In contrast, the UN Independent Expert on Minorities has recognised the importance of personal law for the preservation of the identity of persons belonging to minorities and that this may require the establishment of mechanisms of cultural autonomy. Also, the AC has acknowledged the value of mechanisms of cultural

above n 449, 18-9, para 3 and 29, para 17; articles 4(2) and 8(2) UN Declaration on Minorities; Commission on Human Rights, above n 6, paras 57 and 81.

⁴⁵³ Article 3(1) FCNM; Council of Europe, above n 6, paras 34-36.

⁴⁵⁴ Macklem, above n 447, 509.

autonomy, although that AC has not specifically addressed the issue of personal law. Accordingly, a clear added-value to minority rights protection exists for European Muslims.

5.10. CONCLUSION: THE ADDED-VALUE OF MINORITY RIGHTS PROTECTION FOR EUROPEAN MUSLIMS?

By utilising the claims made by British Muslims to the accommodation of their identity at a national level that primarily correspond to the claims of European Muslims more generally, this chapter has revealed a divergence in the scope of protection available to European Muslims under generally applicable human rights standards and minority rights standards. Still, a much greater divergence can be observed within the Council of Europe's human rights regime than within the UN human rights regime.

By using the claims made by British Muslims as an indication of European Muslim concerns relating to the preservation of their identity, it has been observed that no significant advantage can be discerned for European Muslims from minority rights protection in relation to the provision of *halal* food and the right to circumcise boys (see Annex 1). Although claims for the State funding of faith schools may find additional support under minority rights standards, support is also found under generally applicable human rights standards as the discriminatory denial of funding has formed the basis of British Muslim claims in this respect.

However, within the Council of Europe, the interpretation of the FCNM by the AC appears indicates a more sympathetic stance to claims made by European Muslims in relation to the right to wear religious attire, build places of worship and access linguistic and cultural education, as compared to the approach of the ECtHR (see Annex 1). In cases concerning the *hijab*, the ECtHR has indicated that manifestations of Islam may be considered to be *prima facie* incompatible with Convention rights and, consequently, excluded from the protection of article 9 ECHR. The ECtHR's jurisprudence in these cases is arguably based on the fears of the majority as opposed to the behaviour of the individuals in question. Additionally, the margin of appreciation permitted to States in planning permission cases has the potential to prevent the ECtHR from finding a violation of article 9 ECHR when

planning permission has been withheld on a discriminatory basis. The deference of the ECtHR to the inherently majoritarian margin of appreciation and unfounded fears of the majority in freedom of religion cases has, thus, led the rights of European Muslims to be interpreted narrowly under the ECHR.

In contrast, the AC has encouraged States to engage in dialogue with minority representatives in order to reach solutions regarding planning permission for mosques and the wearing of religious attire in schools. The mandate of the AC has, notably, enabled the identification of discrimination in planning decisions. As a result, there is a clear added-value of minority rights protection for European Muslim communities within the Council of Europe's rights regime in respect of the right to wear religious attire, build places of worship and to receive cultural and linguistic education in mainstream schools.

The HRC has taken a minority friendly approach to the interpretation of article 18 ICCPR (see Annex 1). Specifically, within the UN human rights regime, no significant added-value to minority rights protection can be discerned in relation to the wearing of religious attire as the HRC has recognised that this manifestation of religion can only be limited in exceptional circumstances. It is submitted that the recognition of the interrelated nature of the rights contained in the ICCPR combined with the presence of a minority rights provision has facilitated the interpretation of generally applicable human rights standards in a 'minority friendly' manner by the HRC. Additionally, the diverse backgrounds of the experts on the HRC may explain the divergence between the jurisprudence of the HRC and ECtHR in this respect.

Nonetheless, an added-value to minority rights protection under both the UN and Council of Europe's rights regimes can be discerned in relation to claims made by British Muslims that require positive measures to be taken by the State. These include the right to observe Friday Prayers and religious holidays, the right to religious education, the right to establish faith schools and mechanisms of cultural autonomy to regulate personal law (see Annex 1). This can be attributed to the AC, the HRC and the former UN Working Group on Minorities' recognition that the preservation of minority identity may require States to take positive measures. Notably, the programmatic nature of the rights contained in the FCNM has allowed the AC to develop the content of State obligations in relation to educational rights.

Furthermore, in contrast to the ECtHR, the AC and UN Independent Expert on Minority Issues have recognised the value of mechanisms of cultural autonomy.

Evans has submitted that 'the practical application of human rights approaches to the freedom of religion is structurally biased toward those forms of religious belief that are essentially private and individualist—one might say, pietistic—rather than communitarian in organizational orientation'.⁴⁵⁵ As noted in Chapter 4, Islam constitutes a way of life, which cannot be limited to the private sphere. While minority rights standards do not constitute group rights, monitoring bodies, including the AC and HRC, have recognised that there is a collective element to the exercise of minority rights standards. Moreover, minority rights standards impose additional obligations upon States and require that legitimate claims, in relation to the preservation of European Muslim identity, be met. Consequently, while it has been suggested that there would be no advantage to the application of minority rights standards to religious minorities,⁴⁵⁶ this chapter evidences that this is not the case (see Annex 1).

Freedom of religion is insufficient to protect the rights of European Muslims. Accordingly, as there is an added-value to minority rights protection in relation to the claims made by British Muslims to the preservation of their identity, European Muslims should be able to benefit from the additional protection offered under article 27 ICCPR, the UN Declaration on Minorities and the FCNM.

European Muslims have largely been excluded from minority rights protection. This indicates a hesitancy to recognise the legitimacy of their claims to the accommodation and preservation of their identity. Yet, as European Muslim communities are permanent residents and citizens of the Western European States in which they reside, contribute to these societies and have indicated the will to maintain their distinct identity, this exclusion is discriminatory. Given the connection between international law, in particular minority rights standards, and multiculturalist approaches to the accommodation of diversity in society, it appears that attempts made to pursue multiculturalist policies in respect of Western European Muslim communities have been insufficient.

⁴⁵⁵ Evans, above n 173, 115-16.

⁴⁵⁶ Henrard (2009), above n 1, 42.

Chapter 6:

The Added-Value of Minority Rights Protection for the Participation of European Muslims in Decisions Concerning Their Identity

6.1. INTRODUCTION

Multiculturalism has been criticised for placing too much emphasis on the maintenance and accommodation of difference, at the expense of commonality and equality.¹ Furthermore, it has been suggested that minority rights standards do not have an added-value for persons belonging to 'new minorities' and religious minorities. However, this thesis has revealed that although European Muslims have largely been excluded from minority rights protection, there is an added-value to minority rights protection for these communities in relation to claims relating to the preservation of their identity. The adoption of such protection would be consistent with the pursuit of multiculturalist policies by Western European States. Yet, if decisions concerning European Muslim identity are made solely by politicians who represent the concerns of the majority, then minority rights protection is likely to be insufficient to facilitate the preservation of European Muslim identity. Thus, it is also necessary to consider whether there would be an added-value to minority rights protection in relation to the participation of European Muslims in decisions concerning their identity.

The participation of minorities in the decision-making processes has been recognised as a requirement of minority rights protection² and a prerequisite of multicultural citizenship by theorists.³ Article 15 FCNM, article 2(3) UN Declaration

¹ See, for example, B Barry, *Culture and Equality – An Egalitarian Critique of Multiculturalism* (Harvard University Press 2001) 77; T Phillips, 'After 7/7: Sleepwalking to Segregation' 22 September 2005 <<http://www.humanities.manchester.ac.uk/socialchange/research/social-change/summer-workshops/documents/sleepwalking.pdf>> accessed 9 June 2011.

² Article 15 FCNM; articles 2(2) and 2(3) UN Declaration on Minorities; HCNM, 'The Lund Recommendations on the Effective Participation of National Minorities in Public Life' (September 1999).

³ W Kymlicka, *Multicultural Citizenship – A Liberal Theory of Minority Rights* (OUP 1995) 31-3; JT Levy, *The Multiculturalism of Fear* (OUP 2000) 150-54; M Murphy, *Multiculturalism: A Critical Introduction* (Routledge 2012) 31-4.

on Minorities and the Lund Recommendations establish the right of persons belonging to minorities to *effectively* participate in decisions concerning their identity.⁴ As minority identities will always be disadvantaged in comparison to the majority's identity in democratic States,⁵ the right to effective participation is fundamental if European Muslims are to be able to protect and promote their identity. As considered in Chapter 3, in order for political participation to be effective, persons belonging to minorities must be both present in decision-making bodies and able to influence the outcome of decision-making processes concerning the identity of their community.⁶

As established in Chapter 4, European Muslims may claim minority rights protection in relation to both their religious and ethnic identities. While secular States may object to the participation of the representatives of religious minorities in State decision-making processes, no distinction has been made between the right to effective participation of persons of religious minorities as compared to ethnic minorities in minority rights standards. In particular, Hadden has noted:

⁴ Article 15 FCNM; AC, *Commentary on The Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs* adopted on 27 February 2008 ACFC/31DOC(2008)001 paras 13-5; 'The Lund Recommendations', above n 2, para 1; article 2(3) UN Declaration on Minorities.

⁵ Kymlicka, above n 3, 31; K Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (Kluwer Law International 2000) 229; Z Machnyikova and L Hollo, 'The Principles of Non-Discrimination and Full and Effective Equality and Political Participation' in M Weller (ed), *Political Participation of Minorities: A Commentary on International Standards and Practice* (OUP 2010) 102.

⁶ K Henrard, "'Participation', 'Representation' and 'Autonomy' in the Lund Recommendations and their Reflections in the Supervision of the FCNM and Several Human Rights Conventions' (2005) 12 *International Journal on Minority and Group Rights* 133, 137; O Protsyk, 'Making Effective Use of Parliamentary Representation' in M Weller (ed), *Political Participation of Minorities: A Commentary on International Standards and Practice* (OUP 2010) 410.

There is no requirement in human rights law that states should be founded on secular principles or that they should insist on a strict separation of a state religion. But the more extreme forms of both secular and religious states clearly tend towards a monocultural and thus a broadly assimilationist objective, in which those who do not accept the prevailing values may feel excluded or disadvantaged by the requirements of public office.⁷

Accordingly, Modood warns:

[T]he public-private distinction works as a 'gag-rule' to exclude matters of concern to marginalised and subordinated groups, and the political integration of these minorities on terms of equality inevitably involves their challenging the existing boundaries of publicity. Integration flows from the process of discursive engagement as marginal groups begin to confidently assert themselves in the public space.⁸

Even secular European States make decisions that impact the ability of European Muslims to preserve their identity, for example, the prohibition on the *hijab* in schools in France⁹ and face coverings in public in Belgium and France.¹⁰ As secularism constitutes an ideological belief and is, hence, more comparable to religion than a neutral position,¹¹ the exclusion of European Muslims from decision-

⁷ T Hadden, 'Integration and Separation: Legal and Political Choices in Implementing Minority Rights' in N Ghanae and A Xanthaki (eds), *Minorities, Peoples and Self-Determination* (Martinus Nijhoff 2005) 181.

⁸ T Modood, 'The Place of Muslims in British Secular Multiculturalism' in N Ghanae (ed), *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Martinus Nijhoff 2003) 228.

⁹ Loi no 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics.

¹⁰ Loi no 2010-1192 interdisant la dissimulation du visage dans l'espace public of 11 October 2010, JO 12 October 2010; *SAS v France* App no 43835/11 (Communicated); Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage of 1 June 2011, JO Le Moniteur 13 July 2011.

¹¹ B Wilson 'Secularisation: Religion in the Modern World' in S Sutherland and P Clarke (eds), *The World's Religions, the Study of Religion, Traditional and New Religion* (2nd edn, Routledge 1991) 196; K Boyle, 'Human Rights, Religion and Democracy: The Refah Party Case' (2004) 1 Essex Human Rights Law Review 1, 14-5.

making processes may simply serve to ensure the dominance of the majority's ideological beliefs.

While Chapter 3 established the requirements of effective participation and the added-value of minority rights protection in this respect, this chapter will consider, specifically, whether minority rights protection would facilitate the participation of European Muslims in decisions concerning their identity. This chapter argues that although generally applicable human rights standards support the establishment of democratic political processes, this is insufficient to allow persons belonging to European Muslim minorities to *effectively* participate in decisions that concern their identity. The additional measures recommended by minority rights bodies are required if persons belonging to European Muslim minorities are to be able to influence decisions concerning their identity. Again, the political situation of British Muslims is used in this chapter to illustrate the extent to which the measures proposed by human rights and minority rights bodies to facilitate the political participation of persons belonging to minorities would benefit European Muslims. However, instances where the political situation differs in Western Europe will also be drawn out to ascertain whether an added-value to minority rights protection can be derived in alternative circumstances.

In order to determine whether minority rights protection would facilitate the effective participation of European Muslims in decisions concerning their identity, this chapter will first elaborate the scope of the right to vote and stand for election. Second, consideration will be given to legitimate minority representation in elected institutions through mainstream and minority political parties and the allocation of reserved seats. Third, this chapter will explore the design of the political process and the standards established under generally applicable human rights and minority rights standards in this respect. Finally, this chapter will examine the measures suggested by human rights and minority rights bodies in order to facilitate the influence of persons belonging to minorities over the outcome of decision-making processes, including the delegation of powers to local authorities and mechanisms of autonomy, veto rights, membership of Parliamentary Committees and consultative mechanisms.

6.2. THE RIGHT TO VOTE AND STAND FOR ELECTION

The ICCPR and ECHR explicitly recognise the right to vote and stand in elections. While article 25 ICCPR and article 1 of Protocol 3 to the ECHR do not contain an express limitations clause, neither right is absolute.¹² Both the HRC and the Strasbourg institutions have interpreted these political rights to be subject to implied limitations provided that such limitations are both reasonable and proportionate.¹³ It has been recognised that the 'active' right to vote can be subject to fewer restrictions than the 'passive' right to stand in elections.¹⁴ Nonetheless, the right to vote can be restricted on the grounds of age,¹⁵ mental capacity,¹⁶ residence¹⁷ and citizenship,¹⁸ provided that such restrictions are not arbitrary, indiscriminate or based on unjustified distinctions.¹⁹

Of the minority rights instruments, only the Lund Recommendations explicitly acknowledge the right to vote and stand for election.²⁰ Yet, the interpretation of article 15 FCNM and articles 2(2) and 2(3) of the UN Declaration on Minorities by minority rights bodies indicates that these constitute necessary prerequisites for the effective participation of persons belonging to minorities in

¹² *Ždanoka v Latvia* ECHR 2006-IV para 105; HRC, 'General Comment No 25' on 'The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Article 25)' UN doc CCPR/C/21/Rev.1/Add.7 para 4.

¹³ See, for example, *Mathieu-Mohin and Clerfayt v Belgium* (1987) Series A no 113 para 52; *Vito Sante Santoro v Italy* ECHR 2004-VI para 54; *Melnychenko v Ukraine* ECHR 2004-X para 56; *Ždanoka v Latvia* above n 12, paras 103, 115; *Gillot and Others v France* Communication no 932/2000, UN doc CCPR/C/75/D/932/2000 para 12.2; HRC, above n 12, para 4.

¹⁴ *Ždanoka v Latvia* above n 12, paras 105-6; *Tănase and Chirtoacă v Moldova* App no 7/08 (ECtHR 18 November 2008) para 113.

¹⁵ *X v United Kingdom* (1976) 9 DR 121, 122; *Luksch v Germany* (1997) 89-B DR 175, 176; HRC, above n 12, para 10.

¹⁶ HRC, above n 12, para 4; *Alajos Kiss v Hungary* App no 38832/06 (ECtHR 20 May 2010) paras 43-44.

¹⁷ *Luksch v Germany* above n 15, 176; *Polacco and Garofalo v Italy* App no 23450/94 (Commission decision, 15 September 1997); *Hilbe v Liechtenstein* ECHR 1999-VI; *Py v France* ECHR 2005-I para 48; *Doyle v United Kingdom* App no 30158/06 (ECtHR 6 February 2007); *Sevinger v Netherlands* App no 17173/07; 17180/07 (ECtHR 6 September 2007); *Sitaropoulos and Giakoumopoulos v Greece* App no 42202/07 (ECtHR 15 March 2012) para 69; *Gillot and Others v France* above n 13, paras 14.6-14.7.

¹⁸ Article 25 ICCPR; HRC, above n 12, para 3; *X v United Kingdom* above n 15, 122; *Makuc and Others v Slovenia* App no 2628/06 (ECtHR 31 May 2007) para 205-8.

¹⁹ *Melnychenko v Ukraine* above n 13, para 56, 59; *Hirst v United Kingdom (no. 2)* ECHR 2005-IX para 62, 82; *Alajos Kiss v Hungary* above n 16, paras 43-44; HRC, above n 12, para 4.

²⁰ 'The Lund Recommendations', above n 2, para 7.

public life.²¹ For example, in its *Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs*, the AC has noted that '[a]lthough it is legitimate to impose certain restrictions on non-citizens concerning their right to vote and to be elected, such restrictions should not be applied more widely than is necessary'.²²

States have been afforded a wide margin of appreciation regarding the measures required in order to achieve the *effective* participation of persons belonging to minorities:

Article 15, like other provisions contained in the Framework Convention, implies for the State Parties an obligation of result: they shall ensure that the conditions for effective participation are in place, but the most appropriate means to reach this aim are left to their margin of appreciation.²³

However, States must also guarantee the political rights contained in generally applicable human rights instruments, including the right to vote and stand for election.

Restrictions placed on the right to vote or stand for election on the grounds of citizenship or minority identity have the potential to inhibit the representation and participation of European Muslims in political processes. Due to the connection of the majority of British Muslims communities to the Commonwealth, large numbers of Muslims in the UK have obtained citizenship and, thus, have the right to vote and run for seats in Parliament, local government and the European Parliament.²⁴ In contrast to the UK, Muslim immigrants have experienced obstacles to citizenship in

²¹ AC, 'Opinion on Cyprus' adopted on 6 April 2001 ACFC/INF/OP/I(2002)004 paras 5 and 40; AC, above n 4, para 101; Human Rights Council, 'Background Document by the Independent Expert on Minority Issues, Gay McDougall, on Minorities and Effective Political Participation' (8 October 2009) UN doc A/HRC/FMI/2009/3 para 8, 19.

²² AC, above n 4, para 101.

²³ *Ibid.*, para 10. See also, article 1(2) UN Declaration on Minorities.

²⁴ British Nationality Act 1948 ss 1, 6; J Nielsen, *Muslims in Western Europe* (3rd edn, Edinburgh University Press 2004) 51-2.

a number of Western European States.²⁵ For example, CERD has noted that Muslims may be arbitrarily denied citizenship in some areas of Germany:

The Committee is concerned about the addition by some Länder of specific questions to citizenship questionnaires which may be discriminatory, in particular the questionnaire introduced in Baden-Württemberg, which was to be answered by citizens of the 57 member States of the organization of the Islamic Conference (OIC) who apply for German citizenship.²⁶

Still, even though the majority of British Muslims are able to vote, concerns have been raised in relation to voter apathy amongst Britain's Muslim communities,²⁷ which may be indicative of disenfranchisement.²⁸ It has also been suggested that voting in elections is *haram*, or forbidden in Islam.²⁹ Consequently, measures to encourage European Muslim participation in the electoral process may be required.³⁰

6.2.1. Citizenship and Restrictions on the Right to Vote and Stand for Election

Article 25 ICCPR is expressly reserved for citizens, whereas article 1 of Protocol 3 to the ECHR has been interpreted as being limited in this manner, even though the provision itself does not expressly state such a restriction.³¹ Nowak explains, '[f]rom a historical standpoint, the reason for voting conditions lay in the conviction that

²⁵ T Choudhury, *Muslims in Europe - A Report on 11 EU Cities* (Open Society Institute 2010) 187-88.

²⁶ CERD, 'Concluding Observation of the Committee on the Elimination of Racial Discrimination – Germany' (22 September 2008) UN doc CERD/C/DEU/CO/18 para 19.

²⁷ NA Kabir, *Young British Muslims, Identity, Culture, Politics and the Media* (Edinburgh University Press 2010) 203-4; Choudhury, above n 36, 189-91.

²⁸ A Verstichel, *Participation, Representation and Identity: The Rights of Persons Belonging to Minorities to Effective Participation in Public Affairs: Content, Justification and Limits* (Intersentia 2009) 236.

²⁹ H Ansari, *Muslims in Britain* (Minority Rights Group International 2002) 20; D Hussain, 'Political Participation in Britain and the "Europeanisation" of Fiqh' (2004) 44 *Die Welt des Islams* 376, 380; —, 'Warning Over Muslim Call Not to Vote' *BBC News* (11 April 2010) <http://news.bbc.co.uk/1/hi/uk_politics/election_2010/england/8614094.stm> accessed 29 February 2012.

³⁰ See generally, Muslim Vote 2010, 'Ensuring Muslims Vote in the General Elections' <<http://www.muslimvote.org.uk/>> accessed 28 February 2012.

³¹ *X v United Kingdom* above n 15, 122; *Makuc and Others v Slovenia* above n 18, para 205-8.

democratic participation called for a certain proximity to the State (citizenship).³² Therefore, the restriction of the right to vote and stand for election to citizens does not *per se* constitute discrimination. However, it has been widely recognised that minorities are frequently excluded from citizenship on a discriminatory basis.³³ This may in turn prevent persons belonging to minorities from exercising political rights. As previously noted, this is of specific concern in relation to European Muslims, as some States have adopted restrictive citizenship policies. Furthermore, this may also have broader implications, as research in Germany has concluded that Muslims without citizenship are less likely to want to integrate and do not identify with their country of residence.³⁴

The HRC has established that citizenship requirements should not be too onerous³⁵ and both the HRC and CERD have recommended the extension of voting rights in local elections to permanent or long-term residents.³⁶ For example, the HRC has concluded that:

³² M Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary* (2nd edn, NP Engel Publisher 2005) 577.

³³ See, for example, the Russian Declaration, Council of Europe, 'List of Declarations Made With Respect to Treaty No. 157 Framework Convention for the Protection of National Minorities' <<http://conventions.coe.int/treaty/Commun/ListeDeclarations.asp?NT=157&CV=1&NA=&PO=999&CN=999&VL=1&CM=9&CL=ENG>> accessed 1 April 2013; Commission on Human Rights, 'Towards Effective Political Participation and Representation of Minorities – Working Paper Prepared by Dr Fernand de Varennes' (1 May 1998) UN doc E/CN.4/Sub.2/AC.5/1998/WP.4, 2; S Wheatley, 'Non-Discrimination and Equality in the Rights of Political Participation for Minorities' (2002) 3 *Journal on Ethnopolitics and Minority Issues in Europe* 1, 6; G Gilbert, 'The Contribution of the European Court of Human Rights to the Promotion of the Effective Participation of National Minorities: Groping in the Dark for Something that May not Be There' (2009) 16 *International Journal of Minority and Group Rights* 611, 617; I Klímová-Alexander, 'Effective Participation by Minorities: United Nations Standards and Practice' in M Weller (ed), *Political Participation of Minorities: A Commentary on International Standards and Practice* (OUP 2010) 300.

³⁴ —, 'The World from Berlin "Unsurprising that Some Muslims Don't Identify with Germany"' *Spiegel Online International* (3 February 2012) <<http://www.spiegel.de/international/germany/0,1518,818880,00.html>> accessed 2 May 2012. See also, AC, 'Opinion on Germany' adopted on 1 March 2002 ACFC/INF/OP/I(2002)008 para 17; AC, 'Second Opinion on Germany' adopted on 1 March 2006 ACFC/OP/II(2006)001 para 13.

³⁵ HRC, 'Concluding Observations of the Human Rights Committee – Estonia' (9 November 1995) UN doc CCPR/C/79/Add.59 para 12; HRC, 'Concluding Observations of the Human Rights Committee – Estonia' (15 April 2003) UN doc CCPR/CO/77/EST para 14, 17; HRC, 'Comments of Human Rights Committee – Latvia' (26 July 1995) UN doc CCPR/C/79/Add.53 para 17; HRC, 'Concluding Observations of the Human Rights Committee – Latvia' (1 December 2003) UN doc CCPR/CO/79/LVA paras 16-18.

³⁶ HRC, 'Concluding Observations of the Human Rights Committee – Latvia' (1 December 2003) UN doc CCPR/CO/79/LVA para 18; CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination on Latvia' (10 December 2003) UN doc CERD/C/63/CO/7 paras 12-13.

[T]he State party should facilitate the integration process by enabling non-citizens who are long-term residents of Latvia to participate in local election and to limit the number of other restrictions on non-citizens in order to facilitate the participation of non-citizens in public life in Latvia.³⁷

In contrast, while the ECtHR has also recently acknowledged that the arbitrary denial of citizenship may give rise to a violation of article 8 ECHR,³⁸ this has not been connected to the right to vote and stand for election. As article 1 of Protocol 3 to the ECHR does not grant the right to vote in local elections if such political bodies do not have primary law-making powers,³⁹ it is unlikely that the ECtHR will require that States extend voting rights in local elections to non-citizens.

Similarly to the HRC and CERD, the AC to the FCNM and the former UN Working Group on Minorities have expressed concern at the arbitrary exclusion of persons belonging to minorities from citizenship.⁴⁰ Moreover, although the AC has recognised the legitimacy of restricting voting rights to citizens, it has argued that 'such restrictions should not be applied more widely than is necessary'.⁴¹ If a group is permanently resident and contributes to the economic and social life of the State, but its members are unable to gain citizenship, then it may be discriminatory to arbitrarily deny members of the group political rights.⁴² Hence, minority rights bodies have also recommended the extension of voting rights in local elections to permanent or long-term residents.⁴³ In particular, the Commentary to the UN Declaration on Minorities asserts that '[f]orms of participation by resident non-

³⁷ HRC, above n 36, para 18.

³⁸ *Kurić and Others v Slovenia* App no 26828/06 (ECtHR 13 July 2010) para 353.

³⁹ *Booth-Clibborn and Others v UK* (1985) 43 DR 26; *Habsburg-Lothringen v Austria* (1990) 64 DR 210; *Baskauskaite v Lithuania* App no 41090/98 (Commission Decision, 21 October 1998); *Cherepkov v Russia* ECHR 2000-I; *Boškoski v Former Yugoslav Republic of Macedonia* ECHR 2004-VI; *Guliyev v Azerbaijan* App no 35584/02 (ECtHR 27 May 2004).

⁴⁰ AC, 'Second Opinion on Slovenia', ACFC/INF/OP/II(2005)005 paras 56-60; Commission on Human Rights, 'Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' UN doc E/CN.4/Sub.2/AC.5/2005/2 para 50.

⁴¹ AC, above n 4, para 101.

⁴² J Schokkenbroek, 'Free Elections by Secret Ballot (Article 3 of Protocol No. 1)' in P van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) 920-21.

⁴³ Commission on Human Rights, above n 40, para 50; AC, above n 4, para 101; Human Rights Council, above n 21, para 37; AC, 'Opinion on Estonia' adopted on 14 September 2001 ACFC/INF/OP/I(2002)005 para 55; 'Opinion on Germany' above n 34, para 40.

citizens should also be developed, including local voting rights after a certain period of residence'.⁴⁴

The denial of citizenship to Muslims in some European States inhibits their ability to participate in the formal political process of their country of permanent residence. Therefore, the extension of voting rights, at least at the local level, to permanent or long-term residents, has the potential to enable European Muslims to participate in decisions concerning their identity to a limited extent.

While the ECtHR has interpreted article 1 Protocol 3 ECHR narrowly, the HRC, CERD, the former UN Working Group on Minorities and the AC have recognised the potential for citizenship requirements to restrict the exercise of political rights. Consequently, there appears to be no added-value to minority rights protection within the UN. In contrast, the recommendations of the AC to the FCNM have significantly exceeded the jurisprudence of the ECtHR in this respect. Thus, there appears to be an added-value to minority rights protection within the Council of Europe.

6.2.2. Minority Identity and Restrictions on the Right to Vote and Stand for Election

Although additional restrictions on the right to stand for election, as compared to the right to vote, are permitted under both the ECHR and ICCPR,⁴⁵ the Strasbourg institutions have recognised that the right to stand for election cannot be limited on the basis that the candidate has asserted a minority identity.⁴⁶ In particular, in *Aziz v Cyprus*, the ECtHR held that 'rules should not be such as to exclude some persons or groups of persons from participating in the political life of the country and, in particular, in the choice of the legislature'.⁴⁷ Therefore, measures or policies that

⁴⁴ Commission on Human Rights, above n 40, para 50.

⁴⁵ *Melnychenko v Ukraine* above n 13, para 57; *Ždanoka v Latvia* above n 12, para 105; HRC, above n 12, para 4.

⁴⁶ *Ahmet Sadik v Greece* App no 18877/91 (Commission Decision 25 October 1996) para 53; *Ahmet Sadik v Greece* ECHR 1996-V Partly Dissenting Opinion of Judge Martens, Joined by Judge Foighel paras 17-22. See also, G Gilbert, 'Expression, Assembly, Association' in M Weller (ed), *Universal Minority Rights – A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (OUP 2007) 169.

⁴⁷ *Aziz v Cyprus* ECHR 2004-V para 28.

prevent an entire group of persons, such as a minority, from voting will violate article 1 of Protocol 3 to the ECHR.⁴⁸

Similarly to the ECtHR, the AC has expressed disquiet at potentially discriminatory measures which exclude Turkish Cypriots residing in government controlled areas from the right to vote in parliamentary and presidential elections⁴⁹ as well as the express exclusion of minorities from decision-making bodies.⁵⁰ Specifically, in relation to Bosnia and Herzegovina, the AC noted 'that persons belonging to national minorities and often persons belonging to one of the constituent peoples living in the Entity of which they are not citizens, continue to be legally barred from accessing a number of political posts'.⁵¹

A divergence in practice can, however, be discerned between the HRC and AC on the one hand, and the ECtHR on the other, in relation to the permissibility of neutral measures which interfere with the exercise of political rights by persons belonging to minorities. The issue of linguistic requirements for parliamentary candidates has not arisen in relation to Muslim parliamentary candidates in the UK. Still, the approach taken by different monitoring bodies to neutral measures, in this respect, is revealing.

In *Podkolzina v Latvia* and *Ignatane v Latvia*, the ECtHR and HRC respectively considered *ad hoc* language tests leading to the disqualification of parliamentary candidates who had previously obtained official State language qualifications. The ECtHR and HRC held that such tests constituted a violation of article 1 Protocol 3 to the ECHR and article 25 ICCPR respectively.⁵² Nonetheless, while the HRC recognised that 'that article 25 secures to every citizen the right and the opportunity to be elected at genuine periodic elections without any of the distinctions mentioned in article 2, including language',⁵³ the ECtHR found it unnecessary to consider whether the restriction of the applicant's rights violated

⁴⁸ *Sejdić and Finci v Bosnia and Herzegovina* ECHR 2009, para 45-50.

⁴⁹ 'Opinion on Cyprus' above n 21, paras 5 and 40.

⁵⁰ AC, 'Opinion on Bosnia and Herzegovina' adopted on 27 May 2004 ACFC/INF/OP/I(2005)003 paras 37, 39; AC, 'Second Opinion on Bosnia and Herzegovina' adopted on 9 October 2008 ACFC/OP/II(2008)005 para 67.

⁵¹ 'Second Opinion on Bosnia and Herzegovina' above n 50, para 67.

⁵² *Ignatane v Latvia* Communication No 884/1999, UN doc CCPR/C/72/D/884/1999 para 7.4; *Podkolzina v Latvia* ECHR 2002-II paras 9-12.

⁵³ *Ignatane v Latvia* above n 52, para 7.3.

article 14 ECHR.⁵⁴ The Strasbourg institutions have consistently held that article 1 of Protocol 3 to the ECHR does not confer the right to use a particular language during elections.⁵⁵ In particular, the ECommHR had previously established that such a restriction would not violate the principle of non-discrimination 'since there is no discrimination where a difference in treatment is based on two different factual situations'.⁵⁶

In contrast, the AC has explicitly established that, '[l]anguage proficiency requirements imposed on candidates for parliamentary and local elections are not compatible with Article 15 of the Framework Convention'.⁵⁷ Therefore, although both the AC and HRC have recognised that seemingly neutral requirements placed on electoral candidates have the potential to disclose discrimination and inhibit pluralism in elected institutions, the Strasbourg institutions have not.

Significantly, once a candidate has been elected the ECtHR has consistently protected the right to exercise an electoral mandate,⁵⁸ stressing that:

[O]nce the wishes of the people have been freely and democratically expressed, no subsequent amendment to the organisation of the electoral system may call that choice into question, except in the presence of compelling grounds for the democratic order.⁵⁹

Hence, requirements that parliamentarians take an oath contrary to their religious beliefs, as considered in *Buscarini and Others v San Marino*,⁶⁰ or remove the *hijab*, as considered in *Kavakçi v Turkey*,⁶¹ in order to take up office have been held to violate article 1 Protocol 3 ECHR. Notably, in *Kavakçi v Turkey* the ECtHR

⁵⁴ *Podkolzina v Latvia* above n 52, para 42.

⁵⁵ *Fryske Nasionale Partij and Others v the Netherlands* (1985) 45 DR 240, 242-43; *Association Andecha Astur v Spain* (1997) 90-B DR 172, 177.

⁵⁶ *Association Andecha Astur v Spain* above n 55, 177.

⁵⁷ AC, above n 4, para 102.

⁵⁸ *Gaulieder v Slovakia* App no 36909/97 (Commission Decision, 10 September 1999) para 41; *Buscarini v San Marino* ECHR 1999-I para 39; *Sadak and Others (no 2) v Turkey* ECHR 2002-IV paras 33, 37-40; *Lykourazos v Greece* ECHR 2006-VIII paras 50, 52, 57; *Kavakçi v Turkey* App no 71907/01 (ECtHR, 5 April 2007) para 41, 44-7; *Mpandanjila and Others v Zaire* Communication no 138/1983, UN doc CCPR/C/27/D/138/1983 para 10.

⁵⁹ *Lykourazos v Greece* above n 58, para 52.

⁶⁰ *Buscarini and Others v San Marino* above n 58, paras 36-9. Cf. *McGuinness v United Kingdom* ECHR 1999-V.

⁶¹ *Kavakçi v Turkey* above n 58, paras 43-6.

prioritised the need to uphold the democratic will of the people above the need to uphold secular nature of State institutions. This contrasts with the headscarf cases considered under article 9 ECHR, where the restriction of the *hijab* in public institutions was considered to be necessary to uphold the principle of secularism and, thus, democracy.⁶² As a number of Western European States have restricted the wearing of religious attire in State institutions and in public,⁶³ the decision of the ECtHR in this case may prevent such measures from barring the election of European Muslim representatives.

6.2.3. Additional Measures to Increase the Participation of Persons Belonging to Minorities

In order to improve minority participation in elections, both the AC and HRC have recommended that States ensure the availability of election materials, including ballot slips, in minority languages.⁶⁴ Such permanent measures ensure that persons belonging to the minority are not prevented from exercising their political rights as a result of their minority identity.

The disenfranchisement of persons belonging to minorities also has the potential to inhibit political participation, even when political rights have been granted. Yet, only the AC and HRC have recommended that States adopt voter education programmes in order to improve voter turnout. The HRC has suggested that '[v]oter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by an informed community'.⁶⁵ More specifically in relation to minorities, the AC has recognised the value of educational measures to facilitate minority participation in the political process, noting with

⁶² *Dahlab v Switzerland* ECHR 2001-V; *Şahin v Turkey* ECHR 2005-XI; *Köse and 93 Others v Turkey* ECHR 2006-II; *Dogru v France* App no 27058/05 (ECtHR 4 December 2008); *Aktas v France* App no 43563/08 (ECtHR 30 June 2009).

⁶³ Loi no 2010-1192 interdisant la dissimulation du visage dans l'espace public of 11 October 2010, JO 12 October 2010 (France); Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage of 1 June 2011, JO Le Moniteur 13 July 2011 (Belgium).

⁶⁴ HRC, above n 12, para 12; AC, above n 4, para 77; AC, *Thematic Commentary No 3 - The Language Rights of Persons Belonging to National Minorities under the Framework Convention* adopted on 24 May 2012 ACFC/44DOC(2012)001 rev para 92.

⁶⁵ HRC, above n 12, para 11.

approval 'Operation Black Vote' in the UK.⁶⁶ Consequently, although both the AC and HRC have recognised the value of voter education programmes, the AC has recommended measures that are targeted at specific minorities. In contrast, the HRC has proposed education measures that are targeted at the electorate in general under article 25 ICCPR.

A targeted approach is more likely to result in increased Muslim participation in electoral processes, than the general education required under the ICCPR. In particular, specific attention can be paid to the wider concerns of Muslim communities. The untargeted nature of the recommended measures under the ICCPR, as a generally applicable human rights instrument, leads to the conclusion that there is an added-value to the targeted measures proposed by the AC to the FCNM.

6.2.4. Preliminary Conclusions

The right to vote and stand for election constitute minimum standards under both generally applicable human rights and minority rights standards and are prerequisites for European Muslim political participation. Notably, this right has been interpreted similarly by the monitoring bodies of generally applicable human rights instruments—the HRC, CERD and Strasbourg institutions—and minority rights bodies—particularly the AC and the former UN Working Group on Minorities. However, while membership of a minority should not preclude access to this right, the ECtHR, in contrast to the AC, has been hesitant to recognise the possibility that seemingly neutral conditions, such as language proficiency requirements, indirectly discriminate against persons belonging to national minorities and, hence, exclude them from political participation.

Onerous citizenship requirements have been considered to be problematic under both generally applicable human rights and minority rights instruments and, in reality, have limited the ability of European Muslims to exercise political rights. In this respect, the HRC, CERD and minority rights bodies have recommended the extension of voting rights in local elections to permanent or long-term residents. As

⁶⁶ AC, 'Second Opinion on the United Kingdom' adopted on 6 June 2007 ACFC/OP/II(2007)003 para 231. See also, AC, 'Opinion on Ireland' adopted on 22 May 2003 ACFC/INF/OP/I(2004)003 para 95.

the monitoring bodies of generally applicable human rights instruments within the UN—the HRC and CERD— have recognised the impact of citizenship requirements on the exercise of the right to vote and stand for elections by persons belonging to minorities, there is not an added-value to minority rights protection within the UN. In contrast, within the Council of Europe only the AC to the FCNM has recognised the impact of citizenship requirements on the exercise of political rights. Consequently, the minority rights protection offered within the Council of Europe has an added-value for European Muslims.

Furthermore, both the HRC and AC have recognised the need for voter education programmes to be adopted in order to improve participation in electoral processes. Still, given the reported voter apathy within the British Muslim population, the targeted nature of the education programmes recommended by the AC may result in an added-value to minority rights protection for European Muslims.

6.3. LEGITIMATE REPRESENTATION IN POLITICAL INSTITUTIONS

As noted in Chapter 3, the Strasbourg institutions and the HRC have recognised the importance of political opposition for effective democracy.⁶⁷ Therefore, the right to form political parties has been secured under both article 11 ECHR and article 22 ICCPR. Minority rights standards have also reiterated the right to freedom of association⁶⁸ and have, thus, highlighted that these rights are of particular significance to minorities.⁶⁹ In particular, the Lund Recommendations have acknowledged the role of both mainstream and minority political parties in facilitating the *effective* participation of persons belonging to minorities in the public

⁶⁷ *United Communist Party of Turkey and Others v Turkey* ECHR 1998-I para 25; *Refah Partisi (The Welfare Party) and Others v Turkey* ECHR 2003-II paras 87-89; *Socialist Party and Others v Turkey* ECHR 1998-III para 29; *Chiiko Bwalya v Zambia* Communication no 314/1988, UN doc CCPR/C/48/D/314/1988 para 6.6; *Womah Mukong v Cameroon* Communication no 458/1991, UN Doc CCPR/C/51/D/458/1991 para 9.7.

⁶⁸ Article 7 FCNM; article 2(4) UN Declaration on Minorities; 'The Lund Recommendations', above n 4, para 8. See also, CSCE, *Helsinki Document 1992*, The Challenges of Change, Helsinki Decisions Part VI paragraph 24; CSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* para 32.6.

⁶⁹ Council of Europe, *Framework Convention for the Protection of National Minorities and Explanatory Report* (February 1995) H(1995)010 para 51; Z Machnyikova, 'Article 7' in M Weller (ed), *The Rights of Minorities – A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP 2005) 204.

life of the State.⁷⁰ Article 7 FCNM and article 2(4) UN Declaration on Minorities have been interpreted to correspond with article 11 ECHR and article 22 ICCPR, respectively.⁷¹ Nonetheless, Machnyikova has submitted, in relation to article 7 FCNM, that:

[I]t is important to bear in mind that the provisions of the ECHR were not designed to respond to the special needs of national minorities. The ECHR's supervisory bodies have been constrained when dealing with different aspects of minority protection by the Convention's lack of specific minority provisions, and its relatively limited approach to prohibition of discrimination. Given these limitations, the standards provided by the ECHR have to be seen as a minimum standard in interpreting the scope of obligations under Article 7.⁷²

The participation of European Muslims in political parties may permit the mainstreaming of European Muslim minority concerns and the participation of Muslim minority representatives in decisions concerning their community's identity.

As noted by the ECtHR in *Young, James and Webster v United Kingdom* 'democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position'.⁷³ Accordingly, the perspective of persons belonging to minorities must be represented in the political institutions of the State. Yet, a distinction has been made between the mirror representation and the substantive representation of persons belonging to minorities in political institutions. Mirror representation, or the presence of persons belonging to minorities in decision-making bodies, serves to achieve equality. However, mirror representation does not guarantee that the perspective of persons belonging to minorities is represented. As noted by Protesyk, '[t]here is no reason to believe that politicians that come from

⁷⁰ 'The Lund Recommendations', above n 2, para 8.

⁷¹ Council of Europe, above n 69, paras 51, 92; AC, above n 4, para 75; Commission on Human Rights, above n 40, para 51.

⁷² Machnyikova, above n 69, 198-99.

⁷³ *Young, James and Webster v United Kingdom* (1981) Series A no 44 para 63. See also, *Chassagnou and Others v France* ECHR 1999-III para 112; *Gorzelik and Others v Poland* ECHR 2004-I para 90.

ethnic minority groups are less self-interested or somehow different in terms of structure of motivations from politicians of majority groups'.⁷⁴

In comparison, substantive representation ensures that the perspective of persons belonging to the minority is represented in political institutions. 'Representatives do not serve their constituents by being *like* them, but by acting in their interests'.⁷⁵ The legitimacy of minority representatives and the link of accountability between them and the minority have been stressed as preconditions of the *effective* participation of persons belonging to minorities in the decision-making process.⁷⁶ In contrast to mirror representation, substantive representation enables the preservation of minority identity, by allowing the legitimate representatives of persons belonging to minorities to participate in decision-making processes.

6.3.1. Participation in Mainstream Political Parties

Generally applicable human rights standards do not establish a right to participate in and stand for mainstream political parties, but rather, under freedom of association, establish the broader right to form political parties, as will be considered below. In contrast, the Lund Recommendations and the former UN Working Group on Minorities have recognised that minority representation can be served both by representation in mainstream political parties and through minority parties.⁷⁷ The Lund Recommendations indicate a preference for minority participation in mainstream parties; '[i]deally, parties should be open and should cut across narrow ethnic issues; thus, mainstream parties should seek to include members of minorities to reduce the need or desire for ethnic parties'.⁷⁸ This is echoed in the Commentary to the UN Declaration on Minorities, which notes that 'in a well-integrated society ... many persons belonging to minorities often prefer to be members of or vote for

⁷⁴ O Protsyk, 'Accountability within Minority Political Participation' (2007/08) 7 European Yearbook of Minority Issues 467, 467. See also, A Verstichel, 'Representation and Identity: The Rights of Persons Belonging to Minorities to Effective Participation in Public Affairs' (2007/08) 7 European Yearbook of Minority Issues 449, 456.

⁷⁵ Verstichel, above n 28, 76.

⁷⁶ HF Pitkin, *The Concept of Representation* (University of California Press 1967) 89-90; A Phillips, *The Politics of Presence* (OUP 1995) 156-57.

⁷⁷ 'The Lund Recommendations', above n 2, para 8; Commission on Human Rights, above n 40, para 44.

⁷⁸ HCNM, 'The Lund Recommendations on the Effective Participation of National Minorities in Public Life and Explanatory Note' (September 1999) 24 para 8.

parties which are not organized on ethnic lines but are sensitive to the concerns of the minorities'.⁷⁹ Hence, from the perspective of societal cohesion, it may be preferable for minority interests to be represented by mainstream political parties. It has been observed that 'ethnic representation is inconsistent ... with the ideology of a state of citizens, instead of a state of ethnic peoples'.⁸⁰

In order to ensure the representation of minorities in mainstream political parties, McDougall has suggested that '[w]here the electoral system requires parties to present a list of candidates for election, the electoral law may require that the list be ethnically mixed or have a minimum number of minority candidates'.⁸¹ Consequently, there is an added-value to minority rights protection, insofar as minority rights mechanisms have elaborated measures to facilitate the participation of persons belonging to minorities in mainstream political parties. Nonetheless, States have a margin of appreciation regarding which measures they adopt to guarantee the effective participation of persons belonging to minorities.⁸² As a significant increase in the election of number of British Muslims politicians has occurred since the 1990s, the measures proposed by McDougall to facilitate the election of British Muslims may be unnecessary. Notably, Muslim Members of Parliament (MPs) and local councillors have been elected as members of mainstream political parties, primarily the Labour Party.⁸³ This tendency has also been observed in other European countries.⁸⁴

As noted by the AC, the '[i]nclusion of minority representatives in mainstream political parties does, however, not necessarily mean the effective representation of the interests of minorities'.⁸⁵ Mainstream political parties are unlikely to prioritise minority issues on their agendas.⁸⁶ Specifically, Frowein and Bank note that:

⁷⁹ Commission on Human Rights, above n 40, para 44.

⁸⁰ M Weller, 'Effective Participation Minorities in Public Life' in M Weller (ed), *Universal Minority Rights – A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (OUP 2007) 498.

⁸¹ Human Rights Council, above n 21, para 48.

⁸² AC, above n 4, para 10; article 1(2) UN Declaration on Minorities.

⁸³ D Joly, *Britannia's Crescent: Making a Place for Muslims in British Society* (Averbury 1995) 88-95; Ansari, above n 29, 18-19; Nielsen, above n 24, 52.

⁸⁴ Choudhury, above n 36, 192.

⁸⁵ AC, above n 4, para 78; AC, 'Opinion on Moldova' adopted on 1 March 2002 ACFC/INF/OP/I(2003)002 para 49.

⁸⁶ Human Rights Council, above n 21, para 44.

[T]he accommodation of minority interests within general party structures only seems to have realistic prospect for success if the minorities form a part of the population which is substantial enough to attract the attention in the concurrence of political programmes.⁸⁷

Thus, the mirror representation of persons belonging to minorities, through election as members of mainstream political parties does not guarantee that minority concerns are represented in political institutions.

In the UK, the Labour Party, to a limited degree attempted to accommodate the concerns of British Muslims in policies at a local level,⁸⁸ and following the General Election of 1997, at the national level.⁸⁹ Notably, the engagement of the Labour Party with the policy concerns of British Muslims decreased following the decision by Muslim representative organisations not to support the 'war on terror'.⁹⁰ This is consistent with Verstichel's view that '[g]overnments tend to restrict participatory rights when "unpleasant" events occur'.⁹¹ Consequently, mainstream political parties cannot be relied upon to be consistently sympathetic to the concerns of minorities, especially when this has the potential to alienate the majority electorate.

Furthermore, minority politicians that belong to mainstream political parties may not have been elected on the basis of their minority identity. Although, in some instances, British Muslim MPs and local councillors have been returned by constituencies with a significant Muslim population to which they are politically accountable, they are elected to represent their entire constituency, rather than just the concerns of the minority to which they belong.⁹² Alignment with a majority party may also require Muslim MPs to tow the party line in relation to issues that conflict

⁸⁷ JA Frowein and R Bank, 'The Participation of Minorities in Decision-Making Process - Expert Study submitted on request of the Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN) of the Council of Europe' (November 2000) DH-MIN(2000)1, 6. [sic].

⁸⁸ Ansari, above n 29, 18; Nielsen, above n 24, 40, 48-9 53; S McLoughlin and T Abbas, 'United Kingdom' in JS Nielsen and others (eds), *Yearbook of Muslims in Europe* (Brill 2011) 548.

⁸⁹ Hussain, above n 29, 392; T Modood, *Still Not Easy Being British – Struggles for a Multicultural Citizenship* (Trentham Books 2010) 11; McLoughlin and Abbas, above n 88, 549.

⁹⁰ Modood, above n 89, 11; McLoughlin and Abbas, above n 88, 549.

⁹¹ Verstichel, above n 28, 225.

⁹² AH Sinno and E Tatari, 'Muslims in UK Institutions: Effective Representation or Tokenism?' in AH Sinno (ed), *Muslims in Western Politics* (Indiana University Press 2009) 121-24, 129.

with the interests of European Muslims.⁹³ Representatives of European Muslim communities must be able to raise issues of concern to their minority and be able to engage in dialogue and challenge the perceived 'neutral and universal' perspectives of members of the majority.⁹⁴ This is unlikely to be possible within the framework of mainstream political parties.

While minority rights standards recommend the participation of persons belonging to minorities in mainstream political parties, this only provides mirror rather than substantive representative. Accordingly, the election of European Muslims as politicians belonging to mainstream political parties is unlikely to be sufficient to guarantee that Muslim interests are consistently placed on the political agenda in Western Europe.

6.3.2. Participation in Minority Political Parties

Research has indicated that Muslims in the UK are more likely to vote along party lines than on ethnic or religious grounds.⁹⁵ Still, British Muslims have formed religious political parties including the Islamic Party of Great Britain, the Muslim Party in Birmingham and the Islam Zinda Baad Platform in Rochdale.⁹⁶ Notably, these parties have been unable to gain significant support when contesting electoral seats.⁹⁷ Nonetheless, the substantial support in areas with a significant British Muslims population for the 'Respect Party', which promoted itself as 'the Party for Muslims', indicates the potential for British Muslims to organise around their

⁹³ *Ibid.*, 121-24, 129.

⁹⁴ S Wheatley, *Democracy, Minorities and International Law* (CUP 2005) 184; Verstichel, above n 28, 60.

⁹⁵ Muslims have traditionally voted for the Labour Party, and are more likely to vote for a non-Muslim Labour candidate than a Muslim Conservative candidate. Joly, above n 83, 92; Ansari, above n 29, 18.

⁹⁶ T Peace, 'All I'm Asking, Is For a Little Respect: Assessing the Performance of Britain's Most Successful Radical Left Party' (2012) Parliamentary Affairs (Advance Access published 12 January 2012) 12.

⁹⁷ S Vertovec, 'Islamophobia and Muslim Recognition in Britain' in Y Yazbeck Haddad (ed), *Muslims in the West – From Sojourners to Citizens* (OUP 2002) 28-9; Hussain, above n 29, 391-2; Peace, above n 96, 12. Islamic Party of Britain, 'Press Statement: Islamic Party of Britain suspends activities with immediate effect' (June 2003) <<http://www.islamicparty.com/press/10062003.htm>> accessed 7 August 2012.

identity and form minority political parties.⁹⁸ Muslim minority political parties have also been formed in other Western European States.⁹⁹

By running as members of minority political parties, elected politicians are authorised to represent the concerns of the minority community, in relation to decisions that affect their identity. However, as noted above, the Lund Recommendations and the Commentary to the UN Declaration on Minorities have questioned the desirability of minority parties.¹⁰⁰ Hofmann has expressed concern at the potential for ethnic political parties, and ethnic politics generally, to inhibit the integration of minorities, in particular 'new minorities'.¹⁰¹ Specifically, there is a danger for ethnic entrepreneurs, through ethnic politics, to pursue a separatist agenda.¹⁰² The political organisation of a minority around their identity may also be undesirable as it may lead to the essentialisation of the minority identity and may not acknowledge the internal diversity of the group.¹⁰³

Nevertheless, in the event that minorities are excluded from mainstream political parties or, alternatively, are unable to mainstream issues of concern within such parties, then this is equally likely to inhibit integration. Consequently, the AC, Commentary to the UN Declaration on Minorities and Lund Recommendations have recognised that minority political parties may be necessary in order to ensure the effective participation of persons belonging to minorities.¹⁰⁴

Similarly, the HRC and Strasbourg institutions have recognised the fundamental democratic role played by political parties.¹⁰⁵ In particular, the ECtHR

⁹⁸ The Respect Party marketed itself as 'the party for Muslims' but not as a 'Muslim political party'. Peace, above n 96, 11-13.

⁹⁹ Choudhury, above n 36, 193.

¹⁰⁰ 'The Lund Recommendations and Explanatory Note' above n 78, 24 para 8; Commission on Human Rights, above n 40, para 44.

¹⁰¹ R Hofmann, 'Political Participation of Minorities' (2006/07) 6 *European Yearbook of Minority Issues* 5, 16. See also, Verstichel, above n 28, 299.

¹⁰² Hadden, above n 7, 179-80.

¹⁰³ Verstichel, above n 28, 81-2; F Palermo, 'At the Heart of Participation and of its Dilemmas – Minorities in the Executive Structures' in M Weller (ed), *Political Participation of Minorities: A Commentary on International Standards and Practice* (OUP 2010) 436.

¹⁰⁴ 'The Lund Recommendations and Explanatory Note' above n 78, 24 para 8; AC, above n 4, para 78.

¹⁰⁵ HRC, above n 12, para 26; *Chiiko Bwalya v Zambia* above n 67, para 6.6. *United Communist Party of Turkey and Others v Turkey* above n 67, paras 25, 44; *Socialist Party and Others v Turkey* above n 67, paras 29, 41, 50; *Ouranio Toxo and Others v Greece* ECHR 2005-X para 34.

has stressed the contribution made by political parties to public debate and the promotion of diversity.¹⁰⁶ Hence, the ECtHR has consistently held:

[T]here can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned.¹⁰⁷

CERD has notably expressed concern at the blanket prohibition of minority political parties.¹⁰⁸ In addition to placing an obligation upon States not to interfere with the exercise of article 11 ECHR by political parties, the ECtHR has interpreted the provision to place a positive obligation upon the State to ensure its enjoyment.¹⁰⁹ Specifically, in *Ouranio Toxo v Greece*, the ECtHR found:

[I]t is incumbent upon public authorities to guarantee the proper functioning of an association or political party, even when they annoy or give offence to persons opposed to the lawful ideas or claims that they are seeking to promote.¹¹⁰

This approach has been reiterated in the interpretation of minority rights standards.¹¹¹ Accordingly, States should not only permit the formation of minority political parties but also ensure that they are able to operate.

While limitations are permitted under the second paragraph of article 22 ICCPR and article 11 ECHR, both the HRC and Strasbourg institutions have

¹⁰⁶ *United Communist Party of Turkey and Others v Turkey* above n 67, para 44, 57; *Socialist Party and Others v Turkey* above n 67, para 45.

¹⁰⁷ See, for example, *United Communist Party of Turkey and Others v Turkey* above n 67, para 57; *Socialist Party and Others v Turkey* above n 67, para 45; *Stankov and United Macedonian Organisation Ilinden v Bulgaria* ECHR 2001-IX paras 88 and 97; *Association of Citizens Radko and Paunkovski v The Former Yugoslav Republic of Macedonia* ECHR 2009 para 76.

¹⁰⁸ CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination – Mauritania' (10 December 2004) UN doc CERD/C/65/CO/5 para 13.

¹⁰⁹ *Ouranio Toxo and Others v Greece* above n 105, para 37. See also, *Artico v Italy* (1980) Series A no 37, 15-16, para 33; *United Communist Party of Turkey and Others v Turkey* above n 67, para 33.

¹¹⁰ *Ouranio Toxo and Others v Greece* above n 105, para 37.

¹¹¹ *Machnyikova*, above n 69, 201; Council of Europe, above n 69, para 52.

determined that States only have a narrow margin of appreciation in relation to interference with the activities of political parties.¹¹² As a result of the importance of political parties for effective democracy, restrictions on their operation must be justified by reference to activities or policies contrary to human rights or democracy; or alternatively threaten the use of violence or undemocratic means to achieve their goals.¹¹³

In *MA v Italy*, the HRC found that the reorganisation of the dissolved Italian fascist party had the potential to undermine human rights and, thus, could not derive protection from the ICCPR in accordance with article 5 of the Covenant.¹¹⁴ Political parties may, however, undertake activities that seek to reform or undermine the legal or constitutional structures of the State, provided that the means to achieve such reform are not undemocratic or violent.¹¹⁵ Notably, reference to self-determination, secession, autonomy or other minority concerns are not in themselves sufficient to justify the dissolution of a political party.¹¹⁶

Nevertheless, the ECtHR's jurisprudence would appear to indicate that whereas ethnic political parties are able to derive protection under article 11 ECHR, religious political parties are not.¹¹⁷ In the *Refah Partisi* case, the ECtHR accepted that the activities of the religious political party were 'contrary to the principles of secularism'¹¹⁸ and, therefore, the interference with article 11 was justified under the

¹¹² *MA v Italy* Communication no 117/1981, UN doc CCPR/C/21/D/117/1981, para 13.3; *United Communist Party of Turkey and Others v Turkey* above n 67, para 46; *Refah Partisi (The Welfare Party) and Others v Turkey* above n 67, para 100; *Socialist Party and Others v Turkey* above n 67, para 50; HRC, above n 12, para 25.

¹¹³ Article 5 ICCPR; article 53 ECHR; *Communist Party (KPD) v Germany* App no 250/57, (Commission decision, 20 July 1957) 222; *MA v Italy* above n 112, para 13.3; *Yazar and Others v Turkey* ECHR 2002-II, para 49; *Refah Partisi (The Welfare Party) and Others v Turkey* ECHR 2003-II para 98-100; *Partidul Comunistilor (Nepeceristi) and Ungureanu v Romania* App no 46626/99 (ECtHR 3 February 2005) para 46; *Tsonev v Bulgaria* App no 45963/99 (ECtHR 13 April 2006) para 50.

¹¹⁴ *MA v Italy* above n 112, para 13.3.

¹¹⁵ See, for example, *United Communist Party of Turkey and Others v Turkey* above n 67, para 27; *Socialist Party and Others v Turkey* above n 67, para 29, 47; *Partidul Comunistilor (Nepeceristi) and Ungureanu v Romania* above n 113, para 46; *Tsonev v Bulgaria* above n 113, para 50.

¹¹⁶ *Sidiropoulos and Others v Greece* ECHR 1998-IV, para 41; *Freedom and Democracy Party (ÖZDEP) v Turkey* ECHR 1999-VIII, paras 41, 44; *Socialist Party and Others v Turkey* above n 67, para 47; *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* above n 107, para 97; *United Macedonian Organisation Ilinden – PIRIN and Others v Bulgaria* App no 59489/00 (ECtHR 20 October 2005) paras 59, 61. It is worth noting, however, that the right to advocate secession does not lead to the conclusion that there is a right to secession.

¹¹⁷ *Refah Partisi (The Welfare Party) and Others v Turkey* above n 67.

¹¹⁸ *Ibid.*, para 125.

limitations clause, in order to protect democracy.¹¹⁹ Evans has observed that 'the more general point is that if religious communities are to be welcomed as participants in the public life of the State, it is on the condition that they respect the principles of democracy and human rights; of tolerance and pluralism'.¹²⁰ However, as noted by McGoldrick, in the *Refah Partisi* case the ECtHR overlooked the fact that:

Somewhat ironically the human rights record of the government in which the Refah party took part was arguably much better than those before it. Religiously based political parties had made greater strides in improving the human rights performance of Turkey than secular parties.¹²¹

Thus, the *Refah Partisi* did not necessarily pose more of a threat to democracy and human rights than secular political parties. The ECtHR's judgment in *Refah Partisi* may imply that States have more latitude to restrict religious political parties under article 11(2) ECHR, than ethnic political parties, and has been interpreted by Boyle 'to suggest that peaceful advocacy of the tenets of Islam is unprotected under the European Convention'.¹²²

Vidmar and Wheatley have both submitted that the fact that the *Refah Partisi* was the largest party in Turkey at the time, played a significant role in the ECtHR's assessment of the pressing social need to dissolve the party.¹²³ It is unlikely that a Muslim minority party in Western Europe could be considered to pose a similarly imminent threat, as it is improbable that they would be able to implement a regime based on *sharia*.¹²⁴ Yet, the ECtHR subsequently applied similar reasoning to that

¹¹⁹ *Ibid.*, para 135.

¹²⁰ MD Evans, 'Believing in Communities, European Style' in N Ghanea (ed) *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Martinus Nijhoff 2003) 153-54. [Footnotes omitted].

¹²¹ D McGoldrick, 'Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws' (2009) 9 Human Rights Law Review 603, 617.

¹²² Boyle, above n 11, 12. See also, Evans, above n 120, 153.

¹²³ *Refah Partisi (The Welfare Party) and Others v Turkey* above n 67, para 132; J Vidmar, 'Multiparty Democracy: International and European Human Rights Law Perspectives' (2010) 23 Leiden Journal of International Law 209, 232; S Wheatley, 'Minorities, Political Participation, and Democratic Governance under the European Convention on Human Rights' in M Weller (ed), *Political Participation of Minorities: A Commentary on International Standards and Practice* (OUP 2010) 201.

¹²⁴ *Ibid.*

applied in *Refah Partisi* in the case of *Kalifatstaat v Germany*, a case concerning the proscription of a Muslim association founded with the aim of re-establishing the Caliphate in Germany.¹²⁵ Ten Napel has noted, that with one exception 'the cases in which no violation of Article 11 was established all concerned religious groupings (*Refah*, Russian All-Nation Union, and *Kalifatstaat*)'.¹²⁶

It, thus, appears that the ECtHR has permitted States a wider margin of appreciation, under article 11(2) ECHR, to restrict the freedom of association in relation to religious political parties, than in relation to ethnic political parties. This approach has also found support from PACE, which has emphasised 'that democratic standards require a separation of the state and its organs from religions and religious organisations'.¹²⁷ However, it can be observed that secularism, the basis of these decisions, is not a precondition of democracy in Western Europe. While States such as France, Germany and Switzerland have upheld the constitutional role of secularism, in particular the strict separation of religion and public life,¹²⁸ other Western European States including the UK and Denmark, are not secular and maintain links between the Church and the State. Evans has suggested that, in fact, '[t]here is no need for a rigid separation of church and state provided that the state also facilitates participation of other belief communities within the broader legal and political community in a fashion which enables them to enjoy the freedom of religion'.¹²⁹

Furthermore, secularism constitutes an ideology rather than a neutral position.¹³⁰ In *Refah Partisi* the ECtHR appears to have suggested that the ideology of the dominant majority is to be prioritised in the political institutions of the State. Therefore, those whose perspective is influenced by their religion may be excluded from the political institutions of the State. The imposition of a strict separation between Church and State may not be compatible with the requirements of Islam

¹²⁵ *Kalifatstaat v Germany* App no 13828/04 (ECtHR 11 December 2006).

¹²⁶ H-M ten Napel, 'The European Court of Human Rights and Political Rights: The Need for More Guidance' (2009) 5 *European Constitutional Law Review* 464, 475.

¹²⁷ PACE, Resolution 1743 (2010) 'Islam, Islamism and Islamophobia in Europe' para 6.

¹²⁸ *Dahlab v Switzerland* ECHR 2001-V; *Dogru v France* App no 27058/05 (ECtHR 4 December 2008); *Aktas v France* App no 43563/08 (ECtHR 30 June 2009).

¹²⁹ Evans, above n 120, 149.

¹³⁰ Wilson, above n 11, 196; Boyle, above n 11, 14-5; MD Evans, 'Neutrality In and After *Lautsi v. Italy*' in J Temperman (ed), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Martinus Nijhoff 2012) 349.

and, hence, has the potential to inhibit the participation of Muslims in the political life of the State.

The HRC has not considered the legitimacy of the restriction of religious political parties on the basis that they would interfere with secularism. Nonetheless, as considered in Chapter 5, the HRC has previously required a higher standard of proof of the threat posed by the applicant than the ECtHR, in cases concerning secularism.¹³¹ Additionally, Thornberry has suggested that the 'UN and other bodies necessarily address States with a plurality of legal systems and cultural forms in situations where sweeping judgments of incompatibility with human rights norms would not be regarded as helpful or appropriate'.¹³² Bielefeldt's analysis of the constitutional role of 'neutrality', in relation to freedom of religion equally applies to freedom of association; freedom of association is a 'first order' principle, whereas 'neutrality' is a 'second order' principle, '[t]urning the order of things upside down and pursuing a policy of enforced privatization or societal marginalization of religions in the name of "neutrality" would thus clearly amount to a violation of human rights'.¹³³ Consequently, freedom of association, as a precondition of democracy should be prioritised ahead of political ideologies that may underpin democratic regimes but are not preconditions of democracy.

In direct contrast to the ECtHR, no distinction between the rights of ethnic and religious minorities to form minority political parties has been made under minority rights standards. Specifically, the AC has recognised that '[l]egislation prohibiting the formation of political parties on an *ethnic or religious basis* can lead to undue limitations of the right to freedom of association'.¹³⁴ Similarly, in the context of the right to effective participation under article 2(4) UN Declaration on Minorities, the former UN Working Group on Minorities elaborated, '[t]hey are entitled not only to set up and make use of ethnic, cultural and religious associations and societies ... but also to establish political parties, should they so wish'.¹³⁵

¹³¹ *Singh (Bikramjit) v France* Communication no 1852/2008, UN doc CCPR/C/106/D/1852/2008 paras 8.6-8.7. Cf. *Şahin v Turkey* ECHR 2005-XI, Judge Tulkens Dissenting opinion para 5.

¹³² P Thornberry, 'A Critique of European Standards on Minority Rights' paper presented 22 April 2004, Robert Schuman Centre for Advanced Studies, Florence, 22. Cited in Verstichel, above n 28, 115.

¹³³ H Bielefeldt, 'Freedom of Religion of Belief—A Human Right under Pressure' (2012) 1 Oxford Journal of Law and Religion 15, 32.

¹³⁴ AC, above n 4, 6-7. [Emphasis added]. See also, 'The Lund Recommendations', above n 2, para 8.

¹³⁵ Commission on Human Rights, above n 40, para 44.

Although the AC and the Commentary to the UN Declaration on Minorities have also recognised that the right of minorities to form political parties may be restricted in accordance with article 11(2) ECHR and article 22(2) ICCPR, respectively, '[t]he right to form or join associations can be limited only by law and the limitations can only be those which apply to associations of majorities'.¹³⁶ The AC has also expressed concern at the blanket prohibition of minority political parties.¹³⁷ Specifically, in relation to the Russian Federation, the AC

regret[ted] the wording of Article 9, paragraph 3, of the 2001 Law on Political Parties, which prohibits the establishment of political parties established "on the grounds of professional, racial, national or religious belonging" ... the said provision could have a negative impact on freedom of association of persons belonging to national minorities.¹³⁸

The AC has also urged States to remove unjustified restrictions on the formation of minority political parties¹³⁹ and has noted the potential for such restrictions to 'limit legitimate activities aimed at the protection of national minorities by political parties'.¹⁴⁰

Further, the AC has recognised the potential for apparently neutral measures, specifically registration requirements, to indirectly discriminate against minority political parties.¹⁴¹ The requirements that political parties have branches or register in at least half of the districts or regions of the State,¹⁴² a minimum number of members,¹⁴³ or collect a minimum numbers of signatures in support of electoral lists,¹⁴⁴ have been identified as measures which have the potential to indirectly

¹³⁶ *Ibid.*, para 51.

¹³⁷ AC, above n 4, para 75.

¹³⁸ AC, 'Opinion on the Russian Federation' adopted on 13 September 2002 ACFC/INF/OP/I(2003)005 para 69.

¹³⁹ AC, 'Third Opinion on Moldova' adopted on 26 June 2009 ACFC/OP/III(2009)003 para 99.

¹⁴⁰ 'Opinion on the Russian Federation' above n 138, para 69. See also, AC, 'Second Opinion on the Russian Federation' adopted on 11 May 2006 ACFC/OP/II(2006)004 para 162.

¹⁴¹ See, for example, AC, above n 4, para 76; AC, 'Second Opinion on Ukraine' adopted on 30 May 2008 ACFC/OP/II(2008)004 para 199. See also, OSCE Office for Democratic Institutions and Human Rights, 'Guidelines to Assist National Minority Participation in the Electoral Process' ('the Warsaw Guidelines') (OSCE/ODIHR 2001) 27.

¹⁴² See, for example, 'Opinion on Moldova' above n 85, para 49; 'Third Opinion on Moldova' above n 139, para 96.

¹⁴³ 'Second Opinion on the Russian Federation' above n 140, para 261.

¹⁴⁴ AC, 'Second Opinion on Serbia' adopted on 19 March 2009 ACFC/OP/II(2009)001 para 232.

discriminate against minority political parties. Consequently, whereas generally applicable human rights instruments protect the rights of persons belonging to minorities to establish minority political parties, the AC has provided an additional layer of protection by recognising the potential for indirect interference with this right.¹⁴⁵

While it has been established that concerns about tensions within society or national security are not sufficient to justify interference with the freedom of association of ethnic minority political parties,¹⁴⁶ the right of European Muslims to form *religious* political parties appears to have been restricted by the ECtHR in *Refah Partisi*. In contrast to the approach of the ECtHR, the AC and the former UN Working Group have explicitly recognised that the right to form minority political parties extends to persons belonging to religious, as well as ethnic, minorities. Therefore, a higher standard of protection for religious political parties appears likely under minority rights standards than the ECtHR. It also seems unlikely that the HRC would find that political parties representing the views of a religious community, *per se*, undermine democracy, as the HRC has not afforded secularism the same degree of deference as the ECtHR. If the substantive representation of European Muslims in political institutions is to be guaranteed, then these communities must be able to organise around both their ethnic and religious identities, should they so wish. Any interference with the right of European Muslims to form religious political parties is, hence, likely to violate the ICCPR and minority rights standards.

Both the monitoring bodies of generally applicable human rights instruments—the HRC and ECtHR—and minority rights bodies—the AC and the former UN Working Group on Minorities—have recognised the right of persons belonging to ethnic minorities to form political parties. In contrast, in relation to the right to form religious political parties, there is an added-value to the protection offered under the FCNM, as compared to the ECHR. Furthermore, as the AC to the FCNM has recognised that apparently neutral requirements have the potential to indirectly

¹⁴⁵ M Weller, 'Creating the Conditions Necessary for the Effective Participation of Persons Belonging to National Minorities' (2004) 10 *International Journal on Minority and Group Rights* 265, 274; Machnyikova, above n 69, 222-23; Henrard, above n 6, 157.

¹⁴⁶ *Ouranio Toxo and Others v Greece* above n 105, para 41. See further *Womah Mukong v Cameroon* above n 67, para 9.7.

discriminate against minority political parties, there is an added-value to the protection available under the FCNM, as compared to other instruments.

6.3.3. Reserved Seats, Quotas and Dual Voting

The electoral system or the geographical spread of minorities may inhibit the election of politicians who are elected by and accountable to the minority that they purport to represent. Although British Muslims have been elected to the House of Commons and local authorities, they have been elected as members of mainstream political parties and not as representatives of their community, with a mandate to represent their community's concerns.

The HRC and ECtHR have not recognised the value of reserved seats and quotas in Parliaments. In contrast, the AC, the Lund Recommendations, the UN Independent Expert on Minority Issues and CERD have all expressed their approval of reserved seats and quotas in Parliaments, in order to facilitate the participation of persons belonging to minorities in elected institutions.¹⁴⁷ For example, the UN Independent Expert on Minority Issues has noted:

A common mechanism used to facilitate minority representation is the allocation of special seats in the legislature to representatives of certain minorities (reserved seats). This is usually done under majority electoral systems which otherwise cannot guarantee minority representation, but is sometimes also used in proportional representation or mixed systems.¹⁴⁸

By facilitating the election of legitimate minority representatives, reserved seats ensure the mirror and substantive representation of persons belonging to minorities. The minority rights bodies —the AC, the HCNM and the UN Independent Expert on Minority Issues— have not distinguished between the rights of ethnic and religious minorities in this respect.

¹⁴⁷ AC, above n 4, para 72; 'The Lund Recommendations', above n 2, para 6; 'The Lund Recommendations and Explanatory Note' above n 78, 22, 6; CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination – Russian Federation' (22 September 2008) UN doc CERD/C/RUS/CO/19 para 20; Human Rights Council, above n 21, para 47.

¹⁴⁸ Human Rights Council, above n 21, para 47.

Notably, the requirements of reserved seats, quotas and associated dual voting have primarily been elaborated by the AC. While the OSCE's *Guidelines to Assist National Minority Participation in the Electoral Process* ('the Warsaw Guidelines') clearly establish that reserved seats must only be contemplated as a short-term measure to improve minority representation,¹⁴⁹ the AC has indicated that reserved seats may also constitute permanent measures.¹⁵⁰ Specifically, the removal of the provision of reserved seats and quotas in the legislature has been the subject of criticism:

Whereas in 1994 the Crimean Tatars had reserved seats in the said legislature, the present legislation provides no such guarantees and as a result their presence has been drastically reduced. The Advisory Committee finds the resulting situation regrettable.¹⁵¹

Nonetheless, States are not necessarily required to adopt reserved seats and quotas, as they retain a margin of appreciation under the FCNM to select the measures most appropriate to ensure the effective participation of persons belonging to minorities.¹⁵²

Marko has observed that reserved seats may take one of two forms: 'on the one hand, a minimum representation in the sense that each minority will be represented through one seat in the elected body ... On the other hand, one can find a system of proportional representation of ethnic groups'.¹⁵³ The AC has recognised the value of both forms of representation.¹⁵⁴ Specifically, the AC has welcomed the introduction of quotas in respect of smaller minorities, which would otherwise be

¹⁴⁹ 'The Warsaw Guidelines' above n 141, 39.

¹⁵⁰ AC, above n 4, para 93.

¹⁵¹ AC, 'Opinion on Ukraine' adopted 1 March 2002 ACFC/INF/OP/I(2002)010 para 70. See also, 'Second Opinion on the Russian Federation' above n 140, para 264.

¹⁵² AC, above n 4, para 10.

¹⁵³ J Marko, 'The Council of Europe's Framework Convention on the Protection of National Minorities and the Advisory Committee's Thematic Commentary on Effective Participation' in M Weller (ed), *Political Participation of Minorities: A Commentary on International Standards and Practice* (OUP 2010) 236.

¹⁵⁴ See, for example, 'Opinion on Bosnia and Herzegovina' above n 50, para 104; AC, 'Opinion on Slovenia' adopted on 12 September 2002 ACFC/INF/OP/I(2005)002 paras 71, 75; AC, 'Third Opinion on Denmark' adopted on 31 March 2011 ACFC/OP/III(2011)002 para 117.

unable to elect a representative.¹⁵⁵ Furthermore, the use of reserved seats in the Kosovo Assembly,¹⁵⁶ in order to ensure that each community is proportionately represented has also been approved.¹⁵⁷ Such minority representatives must be elected rather than appointed by the authorities to reserved seats in order to maintain their independence and to ensure their legitimacy.¹⁵⁸ Moreover, there must be a choice of minority candidates in order to enable the representation of the diverse perspectives of the community and to avoid the essentialisation of the minority's identity.¹⁵⁹

Notably, persons belonging to minorities must be free to vote for non-minority representatives.¹⁶⁰ The AC has criticised the adoption of reserved seats which prescribe that only candidates belonging to a specific minority can stand for election in particular constituencies,¹⁶¹ as such measures violate the principle of self-identification: 'Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such'.¹⁶²

Reserved seats also raise the question of dual voting,¹⁶³ whereby persons belonging to minorities are permitted two votes in the electoral process, one for a mainstream political candidate, and one for a minority candidate to a reserved seat. Verstichel has observed that '[i]f persons belonging to minorities only have one vote, they might tend to vote for minority representatives only and remain detached from mainstream politics'.¹⁶⁴ Thus, Hadden has noted that reserved seats may undermine integration and 'contribute to greater separation'.¹⁶⁵ In contrast, in a system with reserved seats, as a seat for a minority candidate has already been assured, persons belonging to minorities may also choose to vote for a mainstream candidate who

¹⁵⁵ 'Opinion on the Russian Federation' above n 138, para 103; 'Second Opinion on the Russian Federation' above n 140, para 264.

¹⁵⁶ AC, 'Opinion on the Implementation of the Framework Convention for the Protection of National Minorities in Kosovo' adopted on 25 November 2005 ACFC/OP/I(2005)004 para 110; AC, 'Second Opinion on Kosovo' adopted on 5 November 2009 ACFC/OP/II(2009)004 para 229.

¹⁵⁷ European Centre for Minority Issues, 'Kosovo Statistics' <http://www.ecmi-map.com/map/index.php?option=com_content&view=category&layout=blog&id=27&Itemid=59&lang=en> accessed 16 August 2012.

¹⁵⁸ AC, 'Second Opinion on Armenia' adopted on 12 May 2006 ACFC/OP/II(2006)005 paras 132-33.

¹⁵⁹ AC, 'Opinion on Romania' adopted on 6 April 2001 ACFC/INF/OP/I(2002)001 para 67.

¹⁶⁰ Human Rights Council, above n 21, para 33.

¹⁶¹ 'Opinion on the Russian Federation' above n 138, para 104.

¹⁶² Article 3(1) FCNM; 'The Lund Recommendations', above n 2, para 4; article 3(2) UN Declaration on Minorities; CERD, 'General Recommendation No 32' on 'The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination' UN doc CERD/C/GC/32 para 34.

¹⁶³ AC, above n 4, para 72.

¹⁶⁴ Verstichel, above n 28, 244.

¹⁶⁵ Hadden, above n 7, 181.

represents their broader political concerns. If a large proportion of the minority community chooses to vote for a mainstream rather than a minority candidate, then the legitimacy of the minority candidate, elected to the reserved seat, may be called into question. In relation to National Minority Councils in Croatia, the AC has noted that '[o]nly a very small proportion of persons eligible to vote in the elections to the councils in 2003 and in 2007 cast their ballots which undermined the democratic legitimacy of the electoral process'.¹⁶⁶

While dual voting avoids this issue, it does raise questions in respect of equal suffrage. It has been recognised that the adoption of special measures may be necessary to achieve *de facto* equality under international law.¹⁶⁷ However, such measures must be temporary, proportionate and necessary in order to realise the aim pursued.¹⁶⁸ Consequently, the Venice Commission has suggested that dual voting should be limited to situations where it would otherwise not be possible to guarantee the representation of persons belonging to minorities in the elected political institutions of the State.¹⁶⁹

In order to ensure that reserved seats comply with the principle of 'one person, one vote', the HCNM has recommended that those minority representatives elected by a second vote should only have competence in relation to issues directly concerning the minority or alternatively should only be granted observer status in political institutions.¹⁷⁰ In direct contrast, the AC has criticised States for restricting the influence and role of minority representatives elected to reserved seats in the legislature.¹⁷¹ Specifically, the AC has stressed that 'they should have a real possibility to influence decisions taken by the elected body, *including those not*

¹⁶⁶ AC, 'Third Opinion on Croatia' adopted on 27 May 2010 ACFC/OP/III(2010)005 para 187.

¹⁶⁷ *South West Africa (Liberia and Ethiopia v South Africa)* (Second Phase, Judgment) [1966] ICJ Rep 6, Dissenting Opinion of Judge Tanaka, 305-6; HRC, 'General Comment No 18' on 'Non-discrimination' UN doc HRI/GEN/1/Rev.1 (1994) paras 8, 10, 13; *Jacobs v Belgium* Communication no 943/2000, UN doc CCPR/C/81/D/943/2000 paras 9.3-9.5; Commission on Human Rights, above n 40, para 55; Council of Europe, above n 69, para 39; CERD, above n 162, para 13.

¹⁶⁸ Commission on Human Rights, above n 40, para 83; CERD, above n 162, para 16.

¹⁶⁹ European Commission for Democracy Through Law (Venice Commission), *Report on Dual Voting for Persons Belonging to National Minorities* Study No 387/2006 (16 June 2008) CDL-AD(2008)013 para 71.

¹⁷⁰ Verstichel, above n 28, 239, 312.

¹⁷¹ 'Opinion on Cyprus' above n 21, para 41; AC, 'Second Opinion on Cyprus' adopted on 7 June 2007 ACFC/OP/II(2007)004 paras 141, 143; AC, 'Third Opinion on Cyprus' adopted on 19 March 2010 ACFC/OP/III(2010)002 para 161-63, 166.

strictly related to national minorities'.¹⁷² Accordingly, observer status, as suggested by the HCNM, would not be sufficient to satisfy the requirements of article 15 FCNM.

The AC has, nonetheless, warned that reserved seats and quotas have the potential to be counterproductive:

Measures which aim to reach a rigid, mathematical equality in the representation of various groups ... risk undermining the effective functioning of the State structure and can lead to the creation of separate structures in the society.¹⁷³

Similarly, the Warsaw Guidelines caution, 'that it may be better not to reinforce ethnic differences through reserved seats, as that may, in itself, be a potential cause of mistrust and antagonism'.¹⁷⁴ Given the potential for such measures to be counterproductive it is submitted that dual voting should only be employed when other mechanisms are inadequate to ensure the representation of persons belonging to minorities.

Reserved seats may facilitate the election of legitimate representatives by British Muslims. Nevertheless, reserved seats in the House of Commons for British Muslims would arguably constitute a disproportionate measure as British Muslims have been democratically elected to this institution, and in some instances, have been elected to represent constituencies with a significant Muslim population.¹⁷⁵ The inclusion of Muslim representatives in the House of Lords, similar to the Lords Spiritual, has been proposed as mechanism to facilitate the participation of British Muslim representatives in the political process.¹⁷⁶ Even though the Church of

¹⁷² AC, above n 4, para 93. [Emphasis added].

¹⁷³ *Ibid.*, para 123.

¹⁷⁴ 'The Warsaw Guidelines' above n 141, 39.

¹⁷⁵ M Anwar, 'Muslims in Western States: The British Experience and the Way Forward' (2008) 28 *Journal of Muslim Minority Affairs* 125, 132.

¹⁷⁶ Royal Commission on the Reform of the House of Lords, Chairman: The Rt Hon Lord Wakeham DL, 'A House for the Future' (Cm 4534, 2000) paras 15.10-15.17; House of Lords, White Paper, 'Completing the Reform' (Cm 5291, 2001) paras 83-5; General Synod, 'A Submission from the Archbishops of Canterbury and York to the Parliamentary Joint Committee on the Government's Draft Bill and White Paper' House of Lords Reform GS Misc 1004 paras 33-45 <http://www.churchofengland.org/media/1360132/gs_misc_1004_house_of_lords_reform.pdf> accessed 28 February 2012; Archbishops of Canterbury and York, Response from the

England has historically been able to influence the legislative process through the House of Lords,¹⁷⁷ the unelected nature of the body would raise concerns over the legitimacy and accountability of Muslim representatives. In particular, while 26 Bishops belonging to the Church of England sit as Lords Spiritual in the House of Lords, a lack of comparable hierarchy in Islam would prevent the identification of similarly legitimate Muslim representatives.¹⁷⁸

Minority rights bodies have recognised that reserved seats and related quotas and dual voting may enable the representation of persons belonging to minorities in elected political institutions. In contrast, with the exception of CERD, human rights bodies have not specifically addressed the question of reserved seats and quotas. As only minority rights bodies have provided detailed recommendations on reserved seats and quotas, there is an added-value to minority rights protection. However, these measures may be problematic from the perspective of equal suffrage and have the potential to be counterproductive. Given that British Muslims have been elected to political institutions in the UK, albeit not as minority representatives, the adoption of reserved seats and, in particular, dual voting, would be disproportionate and, hence, may undermine the purpose of such measures.

6.3.4. Preliminary Conclusions

The establishment of minority political parties to represent the concerns of European Muslim minorities finds support under the ICCPR, Lund Recommendations, UN Declaration on Minorities and the FCNM. Notably, the Lund Recommendations, Commentary to the UN Declaration on Minorities and the AC to the FCNM have recognised that such rights extend to persons belonging to both ethnic and religious minorities. In comparison, while the ECtHR has recognised the right of ethnic and national minorities to establish political parties, it has been willing to restrict the operation of religious political parties on the grounds that such parties have the

Archbishops of Canterbury and York, on behalf of the Church of England, to the Consultation Document "Constitutional Reform: Next Steps for the House of Lords", December 2003.

¹⁷⁷ H Ansari, 'The Legal Status of Muslims in the UK' in R Aluffi B -P and G Zincone (eds), *The Legal Treatment of Islamic Minorities in Europe* (Peeters Press 2004) 259-60.

¹⁷⁸ Royal Commission on the Reform of the House of Lords, above n 176, paras 15.10-15.17; House of Lords, above n 176, paras 83-5. See also, C Smith, 'The Place of Representatives of Religion in the Reformed Second Chamber' [2003] Public Law 674, 689.

potential to undermine secularism. The establishment of Muslim political parties would facilitate the election of legitimate and accountable representatives and would, thus, facilitate the substantive representation of European Muslims in political institutions. This in turn would enable the preservation of European Muslim identity, as such representatives would have a mandate to participate in decisions concerning their community's identity. Notably, the AC has provided an additional layer of protection by recognising the potential for indirect interference with the right to form minority political parties.¹⁷⁹ Therefore, the minority rights protection offered under the FCNM has an added-value for European Muslims.

Minority rights standards establish additional requirements in relation to the participation of persons belonging to minorities in mainstream political parties, as compared to generally applicable human rights standards. However, the recommended measures are unlikely to enable European Muslims to elect politicians with a mandate to represent community concerns. Moreover, although minority rights bodies and CERD have also recognised the value of reserved seats for persons belonging to minorities, given the potential for reserved seats and, in particular, the associated dual voting to be counterproductive, the adoption of such mechanisms for European Muslims may not be advisable. Notably, members of these communities have been elected to political institutions, albeit, not as legitimate minority representatives.

6.4. THE POLITICAL PROCESS

The Venice Commission has stressed that 'the participation of members of national minorities through elected office is more a result of the implementation and adaptation of the general rules of electoral law than of the application of rules peculiar to the minorities'.¹⁸⁰ Thus, the adoption of an electoral system that facilitates the participation of minority representatives in political institutions may enable the participation of European Muslims in decisions that concern their identity. Nonetheless, the adoption of measures such as benign gerrymandering and

¹⁷⁹ Weller, above n 145, 274; Machnyikova, above n 69, 222-23; Henrard, above n 6, 157.

¹⁸⁰ Venice Commission, *Report on Electoral Rules and Affirmative Action for National Minorities' Participation in Decision-Making Process in European Countries* Study No 307/2004 (15 March 2005) CDL-AD(2005)009 para 14. See also, Venice Commission, above n 169, paras 45 and 64.

exemptions from electoral thresholds also has the potential to improve the possibility for persons belonging to minorities to elect legitimate representation.

The United Kingdom is an interesting example as British Muslim MPs and Councillors have been returned by constituencies with a substantial Muslim population.¹⁸¹ Yet, British Muslims are not sufficiently territorially concentrated to be able to impact national elections or control the local authorities of the areas in which they reside.¹⁸² Additionally, Muslims are significantly underrepresented in the House of Commons as they constitute approximately 5 percent of population but only hold 1.2 percent of the seats.¹⁸³ This trend can also be observed in the national assemblies,¹⁸⁴ local government¹⁸⁵ as well as the unelected House of Lords.¹⁸⁶ European Muslims also remain significantly underrepresented in States that utilise more representative electoral systems, than the United Kingdom.¹⁸⁷ If the purpose of democratic political institutions is to represent the electorate, then the perspective of Muslim communities in Europe must also be represented. The underrepresentation of European Muslims in elected political institutions has the potential to impact their ability to participate in decisions directly concerning their identity.

¹⁸¹ Anwar, above n 175, 132.

¹⁸² J Dobbs, H Green and L Zealey, *Focus on Ethnicity and Religion* (Palgrave Macmillan 2006) 66; Birmingham City Council, *Ward Profiles - 2001 Population Census in Birmingham 2001 Census Ward Profiles (2004 Boundaries) Version 4 (August 2006)*; Office for National Statistics, 'Neighbourhood Statistics: Religion' <[http://www.neighbourhood.statistics.gov.uk/dissemination/viewFullDataset.do?\\$ph=60_61_62&step=4&productId=2479&instanceSelection=030603&timeId=362&containerAreaId=6274988&startColumn=1&numberOfColumns=8&viewAction=next](http://www.neighbourhood.statistics.gov.uk/dissemination/viewFullDataset.do?$ph=60_61_62&step=4&productId=2479&instanceSelection=030603&timeId=362&containerAreaId=6274988&startColumn=1&numberOfColumns=8&viewAction=next)> accessed 18 July 2013.

¹⁸³ H Chapman and AJ Versi, 'Muslim MPs double in number after UK elections – Muslim women and Muslim Tories elected for the first time' *The Muslim News* Issue 253 (28 May 2010) <<http://www.muslimnews.co.uk/paper/index.php?article=4633>> accessed 27 September 2012; Office for National Statistics, 'What does the Census tell us about religion in 2011?' <<http://www.ons.gov.uk/ons/rel/census/2011-census/detailed-characteristics-for-local-authorities-in-england-and-wales/sty-religion.html>> accessed 18 July 2013.

¹⁸⁴ I Azam, 'Two Muslims Elected in Scottish Parliament' *The Muslim News* Issue 265 (27 May 2011) <<http://www.muslimnews.co.uk/paper/index.php?article=5261>> accessed 28 February 2012; EA Buaras, 'Ashgar Remains the Only Muslim Welsh Assembly Member' *The Muslim News* Issue 265 (27 May 2011) <<http://www.muslimnews.co.uk/paper/index.php?article=5262>> accessed 28 February 2012.

¹⁸⁵ —, 'England Council Elections Newly Elected Muslim Councillors' *The Muslim News* Issue 265 (27 May 2011) <<http://www.muslimnews.co.uk/paper/index.php?article=5291>> accessed 28 February 2012; —, 'England Council Elections' *BBC News* (11 June 2011) <<http://www.bbc.co.uk/news/special/election2011/council/html/england.stm>> accessed 29 February 2012.

¹⁸⁶ Sinno and Tatari, above n 92, 125; Staff Writer, 'Islam in the United Kingdom' Euro-Islam.Info <<http://www.euro-islam.info/country-profiles/united-kingdom/>> accessed 28 February 2012.

¹⁸⁷ See, in relation to: Austria, France, Germany, Greece, Italy, Spain, Sweden, <<http://www.euro-islam.info/country-profiles/>> accessed 16 May 2012.

6.4.1. The Electoral System

Both the HRC and Strasbourg institutions have stressed that the electoral system 'must guarantee and give effect to the free expression of the will of the electors'.¹⁸⁸ Although minority rights bodies and human rights bodies have recognised that simple majoritarian decision-making may not be sufficient to satisfy international standards,¹⁸⁹ States are permitted a wide margin of appreciation regarding the design of their electoral system.¹⁹⁰ In particular, the Strasbourg institutions and AC have been willing to consider the politico-historical situation of the State when considering the adequacy of its political system.¹⁹¹ Furthermore, despite noting in *Lindsay v United Kingdom* that '[a] system of proportionate representation will lead to the minority being represented in situations where people vote generally on ethnic or religious lines and one group is in a clear minority throughout all electoral districts', the ECommHR has not required that States adopt such a system.¹⁹²

The Lund Recommendations, Commentary to the UN Declaration on Minorities, UN Independent Expert on Minorities and the AC to the FCNM have all acknowledged that various forms of electoral system may result in more effective representation of minorities in decision-making bodies, depending on the situation of the minority within the State.¹⁹³ Specifically, the Commentary to the UN Declaration on Minorities recognises that:

¹⁸⁸ HRC, above n 12, para 21; *X v United Kingdom* (1976) 7 DR 95, 96-7.

¹⁸⁹ *Young, James and Webster v United Kingdom* above n 270, para 63; Preamble Framework Convention for the Protection of National Minorities; 'The Lund Recommendations and Explanatory Note' above n 78, 22, para 6; Preamble UN Declaration on Minorities; *Chassagnou and Others v France* above n 270, para 112; *Gorzelik and Others v Poland* above n 270, para 90.

¹⁹⁰ *X v United Kingdom* above n 188, 96-7; *Mathieu-Mohin and Clerfayt v Belgium* above n 13, para 57; *Ždanoka v Latvia* above n 12, para 133; HRC, above n 12, para 21; AC, above n 4, para 10; 'The Lund Recommendations and Explanatory Note' above n 78, 23 para 7.

¹⁹¹ *Mathieu-Mohin and Clerfayt v Belgium* above n 13, para 54; *Ždanoka v Latvia* above n 12, para 133; AC, 'Opinion on Georgia' adopted on 19 March 2009 ACFC/OP/I(2009)001 para 86; 'Second Opinion on Bosnia and Herzegovina' above n 50, paras 9 and 48; AC, 'Opinion on Croatia' adopted on 6 April 2001 ACFC/INF/OP/I(2002)003 para 56.

¹⁹² *Lindsay and Others v United Kingdom* (1979) 15 DR 247, 251.

¹⁹³ 'The Lund Recommendations', above n 2, para 9; 'The Lund Recommendations and Explanatory Note' above n 78, 24 para 9; Commission on Human Rights, above n 40, para 45; AC, above n 4, para 148; Human Rights Council, above n 21, para 38.

Where minorities are concentrated territorially, single-member districts may provide sufficient minority representation. Proportional representation systems, where a political party's share in the national vote is reflected in its share of the legislative seats, may assist in the representation of minorities.¹⁹⁴

Thus, large, territorially concentrated minorities may be able to gain representation in legislative bodies through single member constituencies, such as the first-past-the-post system utilised in the United Kingdom.¹⁹⁵ In contrast, when communities are territorially dispersed, minority rights instruments have recognised that electoral systems based on proportional representation may be more effective at ensuring minority representation.¹⁹⁶

Preference voting may also enable the effective participation of persons belonging to minorities in decisions concerning their identity, insofar as it allows voters to rank candidates and encourages intercommunal cooperation.¹⁹⁷ The UN Independent Expert on Minority Issues has recognised that political parties may attempt to mainstream the policy concerns of minorities in order to court the community's vote:

Certain types of electoral systems or political structures may make it advantageous or necessary for political parties to obtain the support of a broad spectrum of voters; this can create incentives for mainstream parties to address minority interests and/or select minority candidates to broaden their appeal.¹⁹⁸

¹⁹⁴ Commission on Human Rights, above n 40, para 45.

¹⁹⁵ 'The Lund Recommendations', above n 2, para 9; 'The Lund Recommendations and Explanatory Note' above n 78, 24 para 9; Commission on Human Rights, above n 40, para 45; Human Rights Council, above n 21, para 43.

¹⁹⁶ 'The Lund Recommendations', above n 2, para 9; 'The Lund Recommendations and Explanatory Note' above n 78, 24 para 9; Commission on Human Rights, above n 40, para 45; Human Rights Council, above n 21, para 43.

¹⁹⁷ 'The Lund Recommendations', above n 2, para 9; 'The Lund Recommendations and Explanatory Note' above n 78, 24, para 9; 'The Warsaw Guidelines' above n 141, 36-7; Commission on Human Rights, above n 40, para 45.

¹⁹⁸ Human Rights Council, above n 21, para 44; Frowein and Bank, above n 87, 6.

Additionally, the Explanatory Note to the Lund Recommendations has established that, '[i]nsofar as no electoral system is neutral from the perspective of varying views and interests, States should adopt the system which would result in the most representative government in their specific system'.¹⁹⁹

Notably, however, the AC and CERD have criticised States that have failed to ensure that the legislature sufficiently reflects the ethnic composition of their population, and have encouraged states to adopt measures in order to rectify the situation.²⁰⁰ Although States have a margin of appreciation in relation to what electoral system they choose, they do not have any discretion in relation to whether they implement measures to facilitate the effective participation of persons belonging to minorities. Hence, '[a]rticle 15, like other provisions contained in the Framework Convention, implies for the State Parties *an obligation of result*'.²⁰¹

As considered in Chapter 4, British Muslim communities frequently constitute ethnic as well as religious minorities. The AC has consistently recognised, in its consideration of State reports, that 'as most Muslims in the United Kingdom are also members of minority ethnic communities, they are in practice already largely covered by the Framework Convention'.²⁰² Under article 15 FCNM, the AC has expressed concern about the underrepresentation of ethnic minorities in elected political bodies in the United Kingdom, including British Muslims,²⁰³ and has urged the British authorities,

¹⁹⁹ 'The Lund Recommendations and Explanatory Note' above n 78, 23, para 7.

²⁰⁰ See, for example, AC, 'Second Opinion on Bulgaria' adopted on 18 March 2010 FCNM/II(2012)001 para 186; AC, 'Second Opinion on Lithuania' adopted on 28 February 2008 ACFC/OP/II(2008)001 para 154; AC, 'Third Opinion on the United Kingdom' adopted on 30 June 2011 ACFC/OP/III(2011)006 para 194; CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination – Slovenia' (2 June 2003) UN doc CERD/C/62/CO/9 para 9; CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination – Netherlands' (25 March 2010) UN doc CERD/C/NLD/CO/17-18 para 12.

²⁰¹ AC, above n 4, para 10. [Emphasis added].

²⁰² 'Second Opinion on the United Kingdom' above n 66, para 34. See also, 'Second Opinion on the United Kingdom' above n 66, para 253; 'Third Opinion on the United Kingdom' above n 200, paras 189, 192.

²⁰³ AC, 'Opinion on the United Kingdom' adopted on 30 November 2001 ACFC/INF/OP/I(2002)006 para 94; 'Second Opinion on the United Kingdom' above n 66, paras 232-33; 'Third Opinion on the United Kingdom' above n 200, paras 190-92.

to examine, in close cooperation with the persons concerned, the factors that may be hindering minority ethnic representation in legislative bodies and identify further ways of encouraging greater participation of persons from minority ethnic backgrounds in electoral processes at all levels.²⁰⁴

Moreover, while the AC has not explicitly addressed the underrepresentation of religious minorities in the legislature in its Opinions on State reports, it has not distinguished between the political rights of ethnic and religious minorities under the FCNM.²⁰⁵ Accordingly, in relation to the UK, the AC has encouraged the authorities, under article 15 FCNM, 'to step up communication with a wide range of representatives of Muslim communities in order to ensure their inclusion in decision-making'.²⁰⁶

As British Muslims do not constitute a significant enough proportion of the electorate to influence the outcome of elections in the first-past-the-post system, the adoption of a system of proportional representation may be preferable at the national level. Furthermore, proportional representation may allow British Muslims to elect minority political parties, such as the former Islamic Party of Great Britain and, thus, lead to the legitimate representation of Muslim communities in the political institutions of the State.²⁰⁷ Yet, although it is possible for preference voting and proportional representation to improve the representation of persons belonging to minorities in political institutions, this may not be sufficient to enable the effective participation of European Muslims, as European Muslims remain significantly underrepresented in States that utilise more representative electoral systems than the United Kingdom.²⁰⁸

Whereas States retain discretion in respect of the design of their electoral systems,²⁰⁹ minority rights bodies and CERD have required that States identify and adopt appropriate measures to assist minority representation within their electoral systems. The specific guidance given by minority rights bodies in relation to

²⁰⁴ 'Second Opinion on the United Kingdom' above n 66, para 233.

²⁰⁵ Commission on Human Rights, above n 40, para 75.

²⁰⁶ 'Third Opinion on the United Kingdom' above n 200, para 189.

²⁰⁷ Wheatley, above n 94, 144-45.

²⁰⁸ See, in relation to: Austria, France, Germany, Greece, Italy, Spain, Sweden, <<http://www.euro-islam.info/country-profiles/>> accessed 16 May 2012.

²⁰⁹ 'The Lund Recommendations and Explanatory Note' above n 78, 23, para 6; AC, above n 4, para 81.

appropriate electoral mechanisms constitutes the clear added-value of minority rights protection. However, evidence from Western Europe indicates that the adoption of proportional representation is insufficient to guarantee the representation of persons belonging to European Muslim minorities in elected institutions. Additional measures may be required to guarantee that European Muslims are able to elect representatives and participate in decisions that directly impact their identity.

6.4.2. Additional Measures to Enable the Election of Minority Representatives

6.4.2.1. Benign Gerrymandering

On the one hand, minority rights bodies and the HRC have expressed concern at the use of gerrymandering in order to dilute the vote and influence of persons belonging to minorities.²¹⁰ On the other hand, benign gerrymandering has been recommended as a mechanism to increase minority representation in elected bodies.²¹¹ Specifically, the AC has advised that 'administrative reforms ... should aim *inter alia* to increase opportunities for minority participation'.²¹² Additionally, the Warsaw Guidelines note that electoral boundaries should be designed to ensure 'that constituents have an opportunity to elect candidates who they feel truly represent them'.²¹³

McDougall, the former UN Independent Expert on Minority Issues, has further suggested that 'the number of minority seats may also be increased by creating smaller electoral districts and thereby increasing their number'.²¹⁴ Nonetheless, as it is established under international law that the design of electoral boundaries must comply with the principle of equality of votes,²¹⁵ such measures are unlikely to be compatible with international human rights standards regardless of the overarching purpose to improve minority representation in elected bodies.²¹⁶

²¹⁰ HRC, above n 12, para 21; 'The Lund Recommendations and Explanatory Note' above n 78, 25 para 10; AC, above n 4, para 90. See also Venice Commission, above n 169, para 37.

²¹¹ Human Rights Council, above n 21, para 51.

²¹² AC, above n 4, para 90.

²¹³ 'The Warsaw Guidelines' above n 141, 43.

²¹⁴ Human Rights Council, above n 21, para 51.

²¹⁵ *Mátyus v Slovakia* Communication no 923/2000, UN doc CCPR/C/75/D/923/2000 para 9.2; HRC, above n 12, para 21; 'The Warsaw Guidelines' above n 141, 43.

²¹⁶ S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights – Cases, Materials and Commentary* (2nd edn OUP 2004) 663. Cf. Nowak, above n 32, 581.

Within the United Kingdom, measures are taken to ensure that electoral boundaries comply with the principle of equality of votes²¹⁷ and reflect local population changes or react to local issues.²¹⁸ As previously noted, British Muslims are not sufficiently concentrated to form an overall majority in any Parliamentary Constituency²¹⁹ or local authority.²²⁰ Consequently, although minority rights bodies have recommended the adoption of benign gerrymandering in order to improve minority representation in elected bodies, this is unlikely to improve the political representation of British Muslims in practice. Moreover, government guidance indicates that benign gerrymandering is unlikely to be adopted, due to the implications of 'dividing communities along ethnic, religious or cultural lines' for community cohesion.²²¹ This approach would fall within the State's margin of appreciation to select the measures most appropriate to ensure the effective participation of persons belonging to its minorities.

6.4.2.2. Exemptions from Thresholds

Within proportional representation systems, the requirement that political parties obtain a certain percentage of the vote in a particular region or across the whole State has the potential to inhibit minority political parties from entering legislative bodies. Such thresholds vary significantly, from ten percent in Turkey, to 0.67 percent in the Netherlands.²²²

Electoral thresholds have the potential to inhibit the election of Muslim representatives in Western Europe. For example, in the United Kingdom, proportional representation is utilised in elections to regional elected bodies, including the London Assembly, Northern Ireland Assembly, Scottish Parliament and the Welsh Assembly. Notably, the Respect Party was prevented from entering

²¹⁷ Parliamentary Constituencies Act 1986 s 3 and Schedule 2 as amended by Parliamentary Voting System and Constituencies Act 2011 ss 10 and 11; Department for Communities and Local Government and Local Government Boundary Commission for England, 'Guidance on Community Governance Reviews' (March 2010) para 26.

²¹⁸ Local Government and Public Involvement in Health Act 2007 s 8; Department for Communities and Local Government and Local Government Boundary Commission for England, above n 217, para 12.

²¹⁹ Dobbs, Green and Zealey, above n 182, 66; Office for National Statistics, above n 182.

²²⁰ *Ibid.*

²²¹ Department for Communities and Local Government and Local Government Boundary Commission for England, above n 217, para 95.

²²² 'The Warsaw Guidelines' above n 141, 38.

the London Assembly in 2004, after it gained 4.6 percent of the votes due to a 5 percent threshold.²²³ The Respect Party had 'outperformed all other parties in the London boroughs of Tower Hamlets and Newham, gaining more than 20% of the vote in these areas', areas with large Muslim populations.²²⁴ While the Respect Party is not a Muslim Political Party and would not have benefited from an exemption from threshold requirements for minority parties, this instance does highlight the potential for such thresholds to exclude Muslim minority parties from election to political institutions. Furthermore, exemptions from threshold requirements may be relevant in other European States, such as Belgium, where Muslims have established minority political parties.²²⁵

Despite the potential impact of thresholds on the effective participation of persons belonging to minorities,²²⁶ the ECtHR has held that the maintenance of a ten percent threshold for the entry of political parties into the Turkish legislature fell within the State's margin of appreciation.²²⁷ Gilbert has, thus, inferred that under the ECHR 'the state can so shape general rules for elections that parties representing minority groups would find it hard to get elected'.²²⁸ In contrast, the AC and Lund Recommendations have stressed that reductions in or exemptions from thresholds may enable minority participation.²²⁹ For example:

The Advisory Committee has noted that when electoral laws provide for a threshold requirement, its potentially negative impact on the participation of national minorities in the electoral process needs to be duly taken into account. Exemptions from threshold requirements have proved useful to enhance national minority participation in elected bodies.²³⁰

²²³ R Young, *2004 London Elections - Elections for the Mayor of London and London Assembly* (10 June 2004) House of Commons Library Research Paper 04/48, 20 <<http://www.parliament.uk/documents/commons/lib/research/rp2004/rp04-048.pdf>> accessed 15 August 2012.

²²⁴ Peace, above n 96, 5.

²²⁵ Choudhury, above n 36, 193.

²²⁶ *Yumak and Sadak v Turkey* ECHR 2008 Joint Dissenting Opinion of Judges Tulkens, Vajić, Jaeger and Šikuta para 1.

²²⁷ *Ibid.*, para 147.

²²⁸ Gilbert, above n 33, 617.

²²⁹ 'The Lund Recommendations', above n 2, para 9; AC, above n 4, para 82.

²³⁰ AC, above n 4, para 82.

The HCNM has, notably, expressed concern about the potential impact of the Turkish threshold on the representation of national minorities.²³¹

Although the AC did not initially take a strong stance on the exemption of political parties from threshold requirements when considering State reports,²³² in its Second Opinion on the Russian Federation, the AC applied the stand-still clause and criticised the introduction of a higher threshold into the electoral system.²³³ Specifically, it noted that 'a new 7% qualifying threshold for political parties to enter representative bodies' is 'likely to have created further barriers for persons belonging to minorities to participate in decision-making'.²³⁴ Thus, the programmatic nature of the rights contained in the FCNM has enabled the AC to elaborate the requirements of effective participation through the State reporting process. The AC has also welcomed the extension of full voting rights to minority representatives, elected as a result of exemptions from thresholds.²³⁵ Yet, the AC has noted that exemptions from thresholds may be ineffective when a small minority is particularly dispersed,²³⁶ and, therefore, may not be sufficient to ensure minority representation.

The recommendations of minority rights bodies in relation to exemptions from thresholds exceed the standards established under the ECHR. Whereas exemptions from thresholds may not be sufficient to ensure minority representation when a minority is particularly small or dispersed, there is potential for such measures to improve the political representation of European Muslims in regions with a significant Muslim population and a Muslim minority political party.

6.4.3. Preliminary Conclusions

The monitoring bodies of both generally applicable human rights standards and minority rights standards have accepted that States retain discretion in respect of the design of their electoral systems.²³⁷ Yet, minority rights monitoring bodies and CERD have established that States are required to adopt measures to ensure that the

²³¹ Verstichel, above n 28, 236.

²³² Marko, above n 153, 235.

²³³ 'Second Opinion on the Russian Federation' above n 140, para 262.

²³⁴ *Ibid.*

²³⁵ 'Second Opinion on Germany' above n 34, para 158.

²³⁶ AC, 'Second Opinion on Poland' adopted on 20 March 2009 ACFC/OP/II(2009)002 para 192.

²³⁷ 'The Lund Recommendations and Explanatory Note' above n 78, 23, para 6; AC, above n 4, para 81.

electoral system allows the representation of persons belonging to minorities in elected political institutions. States have an obligation of result, rather than an obligation to adopt particular measures.

While proportional representation and preference voting may improve the representation of European Muslims in elected institutions, evidence suggests that this is insufficient to guarantee the right to effective participation in decision-making processes, as established under article 15 FCNM and articles 2(2) and 2(3) UN Declaration on Minorities. The measures suggested by minority rights bodies, including the AC, HCNM and UN Independent Expert on Minority Issues, in order to ensure that participation is effective and, thus, to improve the representation of persons belonging to minorities in elected institutions, may be appropriate.

Given the geographical spread of British Muslims, benign gerrymandering is unlikely to facilitate the election of minority representatives to political institutions. In contrast, exemptions from thresholds, as recommended by the HCNM and AC, may increase legitimate representation in political institutions in European States where Muslims have established minority political parties. Hence, this has the potential to facilitate European Muslim participation in decisions concerning their identity. The elaboration of specific measures to improve minority representation within political institutions leads to conclusion that there is an added-value to minority rights protection for European Muslims.

6.5. PARTICIPATION AND INFLUENCE IN DECISION-MAKING PROCESSES

As considered in Chapter 3, if minority participation is to be effective, then legitimate minority representatives must be able to influence the decision-making process and be consulted on matters of concern to their community. Nonetheless, the presence of minority representatives in democratic institutions does not necessarily guarantee that participation is effective, as majority representatives can still outvote minority representatives within democratic political institutions. Consequently, in comparison to the monitoring bodies of generally applicable human rights instruments, minority rights bodies have recognised and elaborated upon additional measures that may be required if minority representatives are to be able to impact

decisions concerning the identity of their community.²³⁸ The establishment of consultative mechanisms may also be beneficial if legitimate minority representation and participation within the political institutions of the State cannot be guaranteed.

Although minority rights standards do not prescribe specific measures, States are under an obligation 'ensure that the conditions for effective participation are in place'.²³⁹ Accordingly, as a result of the programmatic nature of the rights contained in the FCNM, the AC has been able to elaborate upon measures that would enable the participation of persons belonging to national minorities in the decision-making process during the State reporting process.

6.5.1. Subsidiarity

Verstichel has suggested:

If decisions are taken as closely as possible to, and by, those most directly concerned and affected, these will feel less alienated from the central government. Particularly for minorities, it improves their possibilities to exercise authority over matters affecting them.²⁴⁰

Accordingly, the AC, the Commentary to the UN Declaration on Minorities and Lund Recommendations have recognised that amendments to the political system in the form of the decentralisation of decision-making powers, through local government arrangements, devolution and territorial or cultural autonomy, may facilitate persons belonging to minorities to participate in decisions that concern their interests.²⁴¹ However, minority rights bodies have acknowledged that a one-size-fits-all approach cannot be applied to the adoption of measures to improve the effective

²³⁸ 'The Lund Recommendations', above n 2, para 6; 'The Lund Recommendations and Explanatory Note' above n 78, 21-2 para 6; AC, above n 4, para 19; Commission on Human Rights, above n 40, para 42.

²³⁹ AC, above n 4, para 10. See also, article 1(2) UN Declaration on Minorities.

²⁴⁰ Verstichel, above n 28, 224.

²⁴¹ Council of Europe, above n 69, para 80; AC, above n 4, paras 67; 129-37; Commission on Human Rights, above n 40, para 46; 'The Lund Recommendations', above n 2, paras 14-21; 'The Lund Recommendations and Explanatory Note' above n 78, 26-30 paras 14-21. See also, 'Copenhagen Document' above n 68, para 35; European Charter of Local Self-Government CETS No 122, entered into force 1 September 1988.

participation of minorities in the decision-making process.²⁴² Therefore, the nature of European Muslim communities determines which mechanisms of subsidiarity may be appropriate to secure their effective participation.

Notably, as international law does not require that States adopt a particular political system, amendments to the political system that require the complete overhaul of the constitution of the State are unlikely to find support under international law, in particular, when other, less intrusive, mechanisms are available in order to enable the participation of European Muslims. Additionally, as previously noted, States retain a margin of appreciation to choose which measures are most appropriate to achieve effective participation. As a result, while a Federal System may allow minority participation in the decision-making process,²⁴³ European Muslims would not be able to demand the adoption of such a system under international law.

6.5.1.1. Local Government and Decentralisation

The AC has consistently stressed that minority participation in local government must be assured if persons belonging to minorities are to effectively participate in decisions that concern their identity.²⁴⁴ Furthermore, the AC and Lund Recommendations have recognised that the decentralisation of powers to local authorities, based on the principle of subsidiarity, may ensure better decision-making, when issues are of specific concern to a minority.²⁴⁵ For example, the AC has elaborated:

²⁴² 'The Lund Recommendations and Explanatory Note' above n 78, 22, para 6, 26-27 para 14; Commission on Human Rights, above n 40, para 43; AC, above n 4, para 148; Human Rights Council, above n 21, para 38.

²⁴³ H Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* Rev edn (University of Pennsylvania Press 1996) 475; Y Ghai, 'Participation as Self-Governance' in M Weller (ed), *Political Participation of Minorities: A Commentary on International Standards and Practice* (OUP 2010) 629.

²⁴⁴ See, for example, 'Opinion on Georgia' above n 191, paras 145, 150; 'Opinion on the Implementation of the Framework Convention for the Protection of National Minorities in Kosovo' above n 156, paras 112-13; 'Opinion on the United Kingdom' above n 203, para 94; AC, 'Second Opinion on Sweden' adopted on 8 November 2007 ACFC/OP/II(2007)006 para 173; 'Second Opinion on Ukraine' above n 141, para 197; 'Second Opinion on the United Kingdom' above n 66, para 232.

²⁴⁵ Council of Europe, above n 69, para 80; AC, above n 4, paras 129-30; 'The Lund Recommendations', above n 2, paras 11, 19-20; 'The Lund Recommendations and Explanatory Note' above n 78, 29-30 para 19.

Sub-national forms of government can play an important role in creating the necessary conditions for effective participation of persons belonging to national minorities in decision-making. This is particularly relevant for regions where persons belonging to national minorities live compactly.²⁴⁶

This approach also finds support in the European Charter of Local Self-Government.²⁴⁷

British Muslims do not form a majority in any local authority in the United Kingdom²⁴⁸ but members of these communities do form majorities in smaller territorial units within England.²⁴⁹ Therefore, although British Muslims have been elected to local government positions in the UK, they are not sufficient in number to control the local authorities of the areas in which they reside and remain underrepresented in local politics.²⁵⁰ These factors lead to the conclusion that the decentralisation of the decision-making process would be insufficient to allow British Muslims to influence decisions of specific concern to their community. However, it has been reported that, in practice, local authorities with a significant Muslim constituency have been willing to engage with Muslim representatives and accommodate the needs of these communities.²⁵¹

Significantly, the decentralisation of decision-making powers is unlikely to be perceived to pose the same threat to State sovereignty as regimes of autonomy.²⁵² Weller submits that while no right to territorial autonomy can be asserted in international law, 'there is no doubt that subsidiarity in decision making and an emphasis on genuinely representative local government are now to be expected'.²⁵³

²⁴⁶ AC, above n 4, para 129.

²⁴⁷ Preamble, European Charter of Local Self-Government.

²⁴⁸ Dobbs, Green and Zealey, above n 182, 66; Office for National Statistics, above n 182.

²⁴⁹ *Ibid.*; Birmingham City Council; above n 182.

²⁵⁰ *The Muslim News*, above n 185; *BBC News*, above n 185.

²⁵¹ Vertovec, above n 97, 28-9; Hussain, above n 29, 392; Nielsen, above n 24, 49, 52; S McLoughlin, 'The State, New Muslim Leaderships and Islam as a Resource for Public Engagement in Britain' in J Cesari and S McLoughlin (eds), *European Muslims and the Secular State* (Ashgate 2005) 58-61.

²⁵² Henrard, above n 6, 142.

²⁵³ M Weller, 'Article 15' in M Weller (ed), *The Rights of Minorities – A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP 2005) 459. See also, P Thornberry, 'The UN Declaration of the Rights of Persons Belonging to National or

Hence, a claim by European Muslims for the decentralisation of powers, in relation to issues of specific concern to their communities, would be less controversial than a claim for autonomy and would find direct support under international law.

It has, further, been suggested that the decentralisation of certain powers may provide a degree of self-government for persons belonging to minorities.²⁵⁴ This is dependant upon the scope of the powers transferred to the local authority and the territorial concentration of the minority in the area, as decentralisation may not be advantageous to minorities that are dispersed throughout the territory of a State or do not constitute a majority in the region in question.²⁵⁵

Additionally, in relation to the United Kingdom's Localism Bill, the AC has noted:

Decentralisation of decision-making is in principle better suited to local needs. Nevertheless, it is important to ensure that persons belonging to minority ethnic communities continue to have access to support, and that localism does not result in disproportionately less access to support for these persons than previously available under more centralised decision-making processes.²⁵⁶

Whereas decentralisation may facilitate minority participation in decisions of particular concern to the community, this does not relieve the central authorities of the responsibility to ensure minority participation in the decision-making process.²⁵⁷ Measures will still be required to enable minority participation at a national level, as central authorities are likely to retain powers in relation to defence, foreign affairs and immigration.²⁵⁸ However, the transfer of decision-making powers to local

Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update' in A Phillips and A Rosas (eds), *Universal Minority Rights* (Åbo Akademi University Institute for Human Rights/ Minority Rights Group (International) 1995) 46.

²⁵⁴ Henrard, above n 6, 142; Weller, above n 145, 272.

²⁵⁵ Verstichel, above n 28, 303-04. See also, AC, 'Second Opinion on the Czech Republic' adopted on 24 February 2005 ACFC/INF/OP/II(2005)002 para 173.

²⁵⁶ 'Third Opinion on the United Kingdom' above n 200, para 12.

²⁵⁷ AC, above n 4, para 132.

²⁵⁸ 'The Lund Recommendations', above n 2, para 15.

authorities may be a matter of good governance.²⁵⁹ Specifically, the Lund Recommendations have noted that:

Functions over which such administrations have successfully assumed primary or significant authority include education, culture, use of minority language, environment, local planning, natural resources, economic development, local policing functions, and housing, health, and other social services.²⁶⁰

Regardless of which powers are transferred to local authorities, these competencies must be clearly established in national law, and bodies must be sufficiently resourced to allow the effective exercise of these powers.²⁶¹

As a result of decentralisation, British Muslims have been able to impact decisions in relation to planning permission for mosques and calls to prayer, *halal* slaughter, education including religious education, provision of burial areas and days off for Ramadan and other festivals.²⁶² Consequently, the delegation of powers to local authorities in key areas has the potential to facilitate the *effective* participation of British Muslims in issues of concern to them. Increased powers in relation to school uniform policy, the provision of minority language education and religious education curriculum in non-denominational schools, as considered in Chapter 5, would also be of benefit. Moreover, as the benefits of decentralised forms of government for minority participation in decision-making processes have only been recognised by minority rights mechanisms, there is a clear added-value to minority rights protection for European Muslims, in this respect.

²⁵⁹ *Ibid.*, para 20; AC, 'Opinion on Montenegro' adopted on 28 February 2008 ACFC/OP/I(2008)001 para 104; AC, 'Opinion on the Netherlands' adopted on 25 June 2009 ACFC/OP/I(2009)002 paras 84-5; 'Second Opinion on Kosovo' above n 156, para 234; AC, 'Second Opinion on the Slovak Republic' adopted on 26 May 2005 ACFC/OP/II(2005)004 para 114.

²⁶⁰ 'The Lund Recommendations', above n 2, para 20.

²⁶¹ AC, above n 4, para 130.

²⁶² Joly, above n 83, 90, 103-11; Vertovec, above n 97, 18; Nielsen, above n 24, 53-61.

6.5.1.2. *Autonomy*

An express right to autonomy does not exist under international law. Nonetheless, it has been proposed that the rights contained in the ICCPR and minority rights instruments can be interpreted to suggest a right to autonomy.²⁶³ Additionally, minority rights bodies and instruments have elaborated the necessary requirements if mechanisms of autonomy are to enable the participation of persons belonging to minorities in decisions concerning their identity.²⁶⁴

Gilbert has submitted that 'autonomy is a continuum, providing an appropriate degree of control to each group within society over its own affairs'.²⁶⁵ As considered in Chapter 5, regular claims for the recognition of Muslim personal law have been made by Muslim organisations since the 1970s.²⁶⁶ This can be interpreted to constitute a claim to cultural autonomy in respect of personal law.²⁶⁷ In contrast, claims have not been made to territorial autonomy by European Muslims. Furthermore, the majority of European Muslims do not have the historical connection to the land on which they reside, usually acknowledged as a prerequisite for the establishment of a regime based on devolution or territorial autonomy.²⁶⁸ Hence, a regime of cultural autonomy appears to be the most appropriate form of autonomy for European Muslims.

The ECtHR, in the *Refah Partisi* case,²⁶⁹ concluded that 'a plurality of legal systems, as proposed by Refah, cannot be considered to be compatible with the Convention system'.²⁷⁰ Thus, the ECHR cannot be interpreted to imply a right to cultural autonomy for European Muslims. In comparison, CERD has recognised that the internal dimension of self-determination is connected to 'the right of every citizen

²⁶³ G Gilbert, 'Autonomy and Minority Groups: A Right in International Law?' (2001-2002) 35 Cornell International Law Journal 307, 319, 342.

²⁶⁴ AC, above n 4, paras 133-37; 'The Lund Recommendations', above n 2, paras 14-21.

²⁶⁵ Gilbert, above n 263, 340.

²⁶⁶ A Bradney, 'The Legal Status of Islam within the United Kingdom' in S Ferrari and A Bradney (eds), *Islam and European Legal Systems* (Ashgate 2000) 187; Ansari, above n 29, 23; G Douglas and others, *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts* Report of a Research Study funded by the AHRC (Cardiff Law School 2011) 15 <<http://www.law.cf.ac.uk/clr/research/cohesion.html>> accessed 22 March 2012.

²⁶⁷ E Nimni, 'Cultural Minority Self-Governance' in M Weller (ed), *Political Participation of Minorities: A Commentary on International Standards and Practice* (OUP 2010) 659.

²⁶⁸ Gilbert, above n 263, 333; Wheatley above n 33, 14-15.

²⁶⁹ The ECtHR's reasoning in this case has been considered in Chapter 5 in relation to *Sharia* as a system of personal law.

²⁷⁰ *Refah Partisi (The Welfare Party) and Others v Turkey* above n 67, para 119.

to take part in the conduct of public affairs at any level'.²⁷¹ Moreover, CERD has emphasised the connection between the right to internal self-determination and article 27 ICCPR:

Governments should consider, within their respective constitutional frameworks, vesting persons belonging to ethnic or linguistic groups comprised of their citizens, where appropriate, with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups.²⁷²

This interpretation of self-determination implies that a right to cultural autonomy may exist under international law for persons belonging to minorities in certain circumstances. Similarly, Gilbert has proposed that articles 25, 26 and 27 ICCPR can be interpreted in the light of article 1, the right to self-determination, to suggest a right to cultural autonomy.²⁷³

Although article 1 ICCPR, the right to self-determination is only applicable to 'peoples', the HRC appears to have adopted an expansive interpretation of this provision when utilising it as an interpretive tool.²⁷⁴ Scheinin has submitted that this approach affords the 'proper recognition of the interdependence between the various rights protected by the Covenant',²⁷⁵ whereas Verstichel has proposed that '[t]his could open a new way for minorities to make use of the concept of "self-determination", especially in its internal dimension'.²⁷⁶ Notably, the Commentary to the UN Declaration on Minorities appears to indicate that only territorial autonomy is limited to 'peoples':

²⁷¹ CERD, 'General Comment No 21' on 'the Right to Self-Determination' (27 May 2008) UN doc HRI/GEN/1/Rev.9 (Vol. II) para 4.

²⁷² *Ibid.*, para 5.

²⁷³ Gilbert, above n 263, 342.

²⁷⁴ *Diergaardt (late Captain of the Rehoboth Baster Community) and Others v Namibia* Communication no 760/1997, UN doc CCPR/C/69/D/760/1997, para 10.3; *Apirana Mahuika and Others v New Zealand* Communication no 547/1993, UN doc CCPR/C/70/D/547/1993, para 9.2; *Gillot and Others v France* above n 13, paras 13.4 and 13.16. See also, Gilbert, above n 263, 340; A Verstichel, 'Recent Developments in the UN Human Rights Committee's Approach to Minorities, with a Focus on Effective Participation' (2005) 12 *International Journal on Minority and Group Rights* 25, 27.

²⁷⁵ *Diergaardt (late Captain of the Rehoboth Baster Community) and Others v Namibia* above n 274, Scheinin dissenting opinion.

²⁷⁶ Verstichel, above n 274, 36.

If participation is denied to a minority and its members, this might in some cases give rise to a legitimate claim to self-determination. If the group claims a right to self-determination and challenges the territorial integrity of the State, it would have to claim to be a people, and that claim would have to be based on article 1 common to the Covenants and would therefore fall outside the Declaration on Minorities.²⁷⁷

Thus, the right to self-determination provides interpretative guidance for those provisions of the ICCPR relevant to the effective participation of persons belonging to minorities in decisions concerning their identity.

Gilbert, specifically, has noted that '[i]t is autonomy that spans both Articles 1 and 27 of the ICCPR; its implementation under each Article being appropriate not only to the particular rights, but, more importantly, to the nature of the group, too'.²⁷⁸ Further, Scheinin, in his dissenting opinion in *Diergaardt (late Captain of the Rehoboth Baster Community) and others v Namibia*, has argued:

In my view there are situations where article 25 calls for special arrangements for rights of participation to be enjoyed by members of minorities and, in particular, indigenous peoples. When such a situation arises, it is not sufficient under article 25 to afford individual members of such communities the individual right to vote in general elections. Some forms of local, regional or cultural autonomy may be called for in order to comply with the requirement of effective rights of participation.²⁷⁹

Accordingly, while cultural autonomy does not constitute an independent right under the ICCPR, the establishment of such mechanisms may be required in order to guarantee the rights contained in articles 25 and 27 ICCPR for persons belonging to minorities.

²⁷⁷ Commission on Human Rights, above n 40, para 19.

²⁷⁸ Gilbert, above n 263, 342.

²⁷⁹ *Diergaardt (late Captain of the Rehoboth Baster Community) and Others v Namibia* above n 274, Scheinin dissenting opinion.

Both the Council of Europe and the UN rejected the adoption of a right to autonomy for minorities during the drafting process of the FCNM and the UN Declaration on Minorities, respectively.²⁸⁰ Furthermore, the Commentary to the UN Declaration on Minorities clearly states that 'the Declaration does not make it a requirement for States to establish such autonomy',²⁸¹ whereas the AC to the FCNM has recognised that '[t]he Framework Convention does not provide for the right of persons belonging to national minorities to autonomy, whether territorial or cultural'.²⁸² The omission of such a right from the final drafts of both instruments, alongside the express exclusion of a right to autonomy from these instruments by the AC and the UN Working Group on Minorities, leads to the conclusion that a right to autonomy does not exist within minority rights standards. Nonetheless, the value of mechanisms of autonomy for minority communities have been recognised in political instruments, such as the OSCE's Lund Recommendations and Copenhagen Document;²⁸³ through State practice;²⁸⁴ and the monitoring activities of the HRC and AC.²⁸⁵

Moreover, in relation to the UN Declaration on Minorities, Gilbert has argued that 'the weak wording of Article 1 needs to be read the light of Article 2.3'.²⁸⁶ The obligation upon States to 'protect the existence and the national or ethnic, cultural, religious and linguistic identity' coupled with the right of persons belonging to minorities to 'participate *effectively* in decisions ... concerning the minority to

²⁸⁰ Article 11 PACE, Recommendation 1201 (1993) on an Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights; SC Roach, 'Minority Rights and an Emergent International Right to Autonomy: A Historical and Normative Assessment' (2004) 11 *International Journal on Minority and Group Rights* 411, 427.

²⁸¹ Commission on Human Rights, above n 40, para 20.

²⁸² AC, above n 4, para 133.

²⁸³ 'The Lund Recommendations', above n 2, paras 14-21; 'Copenhagen Document' above n 68, para 35.

²⁸⁴ Nimni, above n 267, 647-57. See generally, H Hannum and R Lillich, 'The Concept of Autonomy in International Law' (1980) 74 *American Journal of International Law* 858; R Lapidot, 'Autonomy: Potential and Limitations' (1994) 1 *International Journal on Group Rights* 269; TH Malloy, 'The Lund Recommendations and Non-Territorial Arrangements: Progressive De-territorialization of Minority Politics' (2009) 16 *International Journal on Minority and Group Rights* 665.

²⁸⁵ See, for example, AC, 'Opinion on Italy' adopted on 14 September 2001 ACFC/INF/OP/I(2002)007 paras 61-2; AC, 'Second Opinion on Hungary' adopted on 9 December 2004 ACFC/INF/OP/II(2004)003 para 115; AC, 'Second Opinion on Moldova' adopted on 9 December 2004 ACFC/INF/OP/II(2004)004 para 142. HRC, 'Concluding Observations of the Human Rights Committee – Sweden' (24 April 2002) UN doc CCPR/CO/74/SWE para 15; HRC, 'Concluding Observations of the Human Rights Committee – Sweden' (7 May 2009) UN doc CCPR/C/SWE/CO/6 para 20.

²⁸⁶ Gilbert, above n 263, 319.

which they belong' may infer a right to cultural autonomy, in the event that participation within the established political structures of the State proves to be insufficient to protect the identity of a minority.

Autonomy may be necessary if the other rights contained in the UN Declaration on Minorities are to be guaranteed. Notably, the Commentary on the UN Declaration on Minorities suggests: '[i]f participation is denied to a minority and its members, this might in some cases give rise to a legitimate claim to self-determination'.²⁸⁷ Furthermore, the former UN Independent Expert on Minority Issues has interpreted the right to effective participation to entail 'some degree of group autonomy, which is non-territorial and gives the minority the right to administer and even legislate in certain fields, such as education, cultural affairs...'.²⁸⁸ Thus, a right to cultural autonomy may constitute a corollary of the right to effective participation coupled with the right to the preservation of minority identity. It is possible to make the same observations in relation to the analogous rights in the FCNM, articles 5 and 15.

Although minority rights instruments do not establish an express right to cultural autonomy, they do elaborate upon the requirements of effective mechanisms of autonomy. Notably, the programmatic nature of the rights contained in the FCNM has allowed the AC to elaborate the requirements of mechanisms of cultural autonomy through the State reporting process when States have already established such mechanisms. Cultural or non-territorial autonomy²⁸⁹ suggests the transfer of administrative and decision-making powers, in relation to issues of direct concern to the minority's identity. The AC has, specifically, stipulated that '[w]here State Parties provide for such cultural autonomy arrangements, the corresponding constitutional and legislative provisions should clearly specify the nature and scope of the autonomy system and the competencies of the autonomous bodies'.²⁹⁰ The AC and Lund Recommendations have also stressed that cultural autonomies must comply

²⁸⁷ Commission on Human Rights, above n 40, para 19.

²⁸⁸ Human Rights Council, above n 21, para 57.

²⁸⁹ Cultural autonomy has also been referred to as personal autonomy and functional autonomy.

²⁹⁰ AC, above n 4, para 136. See also, HRC (2002), above n 285, para 15; HRC (2009), above n 285, para 20; 'The Lund Recommendations', above n 2, para 22.

with democratic principles.²⁹¹ Notably, in practice, democratically elected institutions, such as the Sami Parliament and National Minority Councils, have been awarded decision-making powers in relation to issues of concern to specific minorities.²⁹²

In comparison to territorial autonomy, cultural autonomy does not rely upon the territorial concentration of minorities and has the advantage of only applying to those members of the population who wish to be bound by such measures.²⁹³ Nonetheless, in order for mechanisms of cultural autonomy to be effective, they may require 'a certain concentration of minority members in some areas or all over the country for reasons of practical feasibility'.²⁹⁴ For example, as British Muslims do constitute majorities in some Council Wards and have been able to establish unofficial mechanisms of cultural autonomy in areas with significant Muslim populations, in the form of *Sharia* Councils, it appears that this practical requirement has been satisfied. The formalisation of *Sharia* Councils has the potential to facilitate their regulation, whilst also allowing British Muslims a degree of control over decisions that directly concern their identity.²⁹⁵

The Lund Recommendations note that '[t]he issues most susceptible to regulation by these arrangements include education, culture, use of minority language, religion, and other matters crucial to the identity and way of life of national minorities'.²⁹⁶ This list is not exhaustive,²⁹⁷ and it has been suggested that the competencies of non-territorial autonomies may be extended to matters outside the traditional understanding of culture.²⁹⁸ Furthermore, McDougall has recommended that the 'application of personal laws and the preservation of

²⁹¹ 'Third Opinion on Croatia' above n 166, paras 182, 183; AC, 'Second Opinion on Romania' adopted on 24 November 2005 ACFC/OP/II(2005)007 paras 192, 196. AC, above n 4, para 137; 'The Lund Recommendations', above n 2, para 16.

²⁹² See, for example, AC, 'Opinion on Hungary' adopted on 22 September 2000 ACFC/INF/OP/I(2001)004 para 50; 'Third Opinion on Croatia' above n 166, para 182; HRC (2009) above n 285, para 20.

²⁹³ Lapidoth, above n 284, 280-81; S Wolff and M Weller, 'Self-Determination and Autonomy - A Conceptual Introduction' in M Weller and S Wolff (eds), *Autonomy, Self-Governance and Conflict Resolution - Innovative Approaches to Institutional Design in Divided Societies* (Routledge 2005) 15.

²⁹⁴ Frowein and Bank, above n 87, 21.

²⁹⁵ See, further, M Malik, *Minority Legal Orders in the UK: Minorities, Pluralism and the Law* (The British Academy 2012) 36-9.

²⁹⁶ 'The Lund Recommendations', above n 2, para 18.

²⁹⁷ 'The Lund Recommendations and Explanatory Note' above n 78, 29, para 18.

²⁹⁸ Lapidoth, above n 284, 281; Malloy, above n 284, 666-7, 675; Wolff and Weller, above n 293, 15.

customary laws or practices, usually with exclusive jurisdiction' also fall within the competencies of cultural autonomies.²⁹⁹

British Muslims have primarily attempted to claim a right to cultural autonomy in relation to personal law; however, powers in relation to other issues of concern to these communities such as religious education and the regulation of *halal* food and Sharia-complaint finance³⁰⁰ could also be delegated to mechanisms of cultural autonomy. The form that mechanisms of cultural autonomy could take must be determined in consultation with British Muslim communities.³⁰¹ Given the diversity within British Muslim communities, not least on the basis of sects and schools of Islam, ethnic origin, class, generation and gender, the establishment of several mechanisms of cultural autonomy may be preferable to one umbrella organisation administering personal law and other elements of cultural autonomy for all British Muslims.

While international law does not establish an express right to establish mechanisms of cultural autonomy, both the HRC and minority rights bodies have recognised that such measures may be required in order to guarantee the effective participation of persons belonging to minorities. The elaboration of the requirements of effective mechanisms of autonomy and their possible competencies constitutes a clear added-value of minority rights protection. This has the potential to allow British Muslims to protect and participate in decisions directly concerning their identity.

6.5.2. Veto Rights and Parliamentary Committees

The election of European Muslim representatives to elected political institutions, through mainstream and minority political parties and reserved seats does not ensure that European Muslim are able to influence the outcome of the decision-making process, as these representatives can still be outvoted by majority politicians.³⁰² Consequently additional measures may be required in order to ensure that once

²⁹⁹ Human Rights Council, above n 21, para 57.

³⁰⁰ See, generally, J Ercanbrack, 'The Regulation of Islamic Finance in the United Kingdom' (2011) 13 Ecclesiastical Law Journal 69.

³⁰¹ Lapidoth, above n 284, 287.

³⁰² AC, 'Second Opinion on Azerbaijan' 9 November 2007 ACFC/OP/II(2007)007 para 154; 'Second Opinion on the Czech Republic' above n 255, para 172; Palermo, above n 103, 437.

elected European Muslim politicians are able to influence decisions concerning the identity of their community.

The AC has suggested that States adopt a number of measures to increase minority influence in the political institutions of State, including veto rights and qualified majorities,³⁰³ whereas both the AC and the Lund Recommendations have proposed the inclusion of minority representatives within Parliamentary Committees that consider minority issues.³⁰⁴ Notably, however, the majority of measures recommended to improve the *effective* participation of minorities in the Lund Recommendations and the UN Declaration on Minorities pertain to the representation rather than the influence of minorities in political institutions.

Minority representatives may be granted the right to veto proposed legislation that exclusively or directly concerns the interests of the minority.³⁰⁵ Alternatively, qualified majorities may be required in order to pass such legislation.³⁰⁶ When properly applied 'veto' rights may enable the effective participation of persons belonging to minorities in the decision-making process. Henrard has observed:

In a way, having veto-powers over certain issues of central concern to the community may not grant full autonomy in the matter but still provides a level of negative autonomy in that certain decisions can be prevented from taking effect. Such veto powers are hence in the grey zone between the 'representation' and the 'self-governance' sphere.³⁰⁷

Veto rights may grant persons belonging to a minority a significant measure of influence over issues of particular concern to the community, without requiring that the State grant autonomy. Yet, in order to be effective such veto rights are reliant upon the election of legitimate minority representatives to the legislature or local authority.³⁰⁸ For instance, British Muslims would first require directly elected representatives in the House of Commons or local authorities, with a mandate to

³⁰³ AC, above n 4, paras 72, 97-99.

³⁰⁴ *Ibid.*, paras 95-6; 'The Lund Recommendations and Explanatory Note' above n 78, 21-2 para 6.

³⁰⁵ AC, above n 4, para 98; Human Rights Council, above n 21, para 59.

³⁰⁶ Human Rights Council, above n 21, para 59.

³⁰⁷ Henrard, above n 6, 140.

³⁰⁸ Frowein and Bank, above n 87, 11.

represent their community's interests, if veto rights are to assist their effective participation in the decision-making process.

Vollebaek has stressed that 'neither the Lund Recommendations nor the High Commissioner seek to give minorities the final say in all decisions'.³⁰⁹ Nonetheless, the purpose of minority vetoes may be undermined if they are limited to proposed legislation that *exclusively* concerns the interests of the minority. In its Second Opinion on Slovenia, the AC noted that minority representatives had claimed that they were unable to utilise their veto in relation to legislation which impacted their concerns, as 'new provisions likely to affect their specific rights are somewhat fragmented and dispersed among various texts'.³¹⁰ Therefore, veto rights may not be sufficient to enable persons belonging to minorities to influence the outcome of the decision-making process. As these measures interfere with the functioning of democratic institutions and in particular the democratic rights of the majority, Vollebaek has stressed that they must be regarded as exceptional measures.³¹¹ Thus, the AC has not demanded that States adopt a right of veto for minority representatives, although it has recognised the value of this mechanism.³¹²

Additionally, in the context of 'measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community' the HRC has recognised 'that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community'.³¹³ As a result, article 27 ICCPR may require that persons belonging to minorities be able to exercise a veto in extremely limited circumstances, when measures have the potential to directly impact their way of life.

As a significant amount of parliamentary decision-making, drafting and negotiation takes place in committees, the participation of minority representatives in committees is necessary to ensure that they are able to influence the outcome of the decision-making process. Frowein and Bank suggest, in relation to committees of

³⁰⁹ K Vollebaek, 'Opening Address to the Tenth Anniversary Seminar of the Lund Recommendations on the Effective Participation of National Minorities in Public Life' (2009) 16 *International Journal on Minority and Group Rights* 523, 525.

³¹⁰ 'Second Opinion on Slovenia' above n 40, para 166. See also, AC, above n 4, para 98.

³¹¹ Vollebaek, above n 309, 525.

³¹² 'Opinion on Slovenia' above n 154, para 71.

³¹³ *Ángela Poma Poma v Peru* Communication no 1457/2006, UN doc CCPR/C/95/D/1457/2006, para 7.6

direct concern to minorities, that '[i]n order to reinforce the position of such committees in the legislative process hearing them could be made mandatory with a view to legislation directly or indirectly affecting minority rights'.³¹⁴ However, the guaranteed participation of minority representatives in Parliamentary Committees, which address minority issues, is also reliant upon the election of legitimate minority representatives to the legislature. Currently British Muslims politicians do not have a mandate to represent their communities. While they may wish to participate in committees relevant to minority concerns, such as the Communities and Local Government Committee and the Human Rights Committee, equally they may not have an interest in minority issues.

By recommending the adoption of veto rights and minority representation in Parliamentary Committees, the AC has recognised that additional measures may be required in order to allow minorities to influence decision-making processes in elected institutions. The HRC has also recognised the importance of 'free, prior and informed consent' but only when measures 'interfere with the culturally significant economic activities of a minority'.³¹⁵ Yet, in the absence of legitimate British Muslim representatives within political institutions, these rights are unlikely to enhance the ability of these communities to influence decisions that affect their identity. Furthermore, the exceptional and potentially undemocratic nature of veto rights means that they may not be advisable for European Muslims. In contrast, were European Muslims to elect politician affiliated with a minority political party or to a reserved seat in a political institution, participation in relevant Parliamentary Committees would enable their participation in decisions of concern to their identity.

6.5.3. Consultative Mechanisms

The potential for consultative and advisory bodies to facilitate the effective participation of minorities in the decision-making process has been emphasised by the HRC, CERD and the minority rights bodies, namely the AC, HCNM and the former UN Working Group on Minorities.³¹⁶ The AC to the FCNM has noted that

³¹⁴ Frowein and Bank, above n 87, 12.

³¹⁵ *Ángela Poma Poma v Peru* above n 313, para 7.6.

³¹⁶ See, for example, AC, above n 4, paras 16, 106-119; 'The Lund Recommendations', above n 2, para 12; Commission on Human Rights, above n 40, para 48; HRC, 'Concluding Observations of

the '[c]onsultation of persons belonging to national minorities is particularly important in countries where there are no arrangements to enable participation of persons belonging to national minorities in parliament and other elected bodies'.³¹⁷ More specifically, CERD has welcomed 'the election of a body representing the Muslim communities with a view to maintaining and developing dialogue with the public authorities in Belgium'.³¹⁸

Such mechanisms allow groups that are either too small in number or too territorially dispersed to affect democracy, to contribute to and influence policies on issues of concern to their community, and, thus, constitute permanent measures.³¹⁹ Notably, Hofmann has suggested that consultative mechanisms are the most appropriate method of enabling the effective participation of so-called 'new minorities'.³²⁰ Therefore, consultative mechanisms may be the most appropriate mechanisms to ensure the participation of European Muslims in decisions concerning their identity.

As a result of the flexibility of these mechanisms, Weller has asserted that 'consultative mechanisms often prove more effective in transmitting the interests of minority constituencies into the chain of legislative or political decision-making'.³²¹ Nonetheless, the AC has warned:

[J]ust as representation in elected bodies alone may be insufficient to ensure substantial influence of the decision-making, mere consultation does not constitute a sufficient mechanism for ensuring effective participation of persons belonging to national minorities.³²²

the Human Rights Committee – Finland' (8 April 1998) UN doc CCPR/C/79/Add.91 para 5; HRC (2002), above n 285, para 15; CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination – Belgium' (21 May 2002) UN doc CERD/C/60/CO/2 para 9; CERD, above n 26, para 13; CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination – Australia' (13 September 2010) UN doc CERD/C/AUS/CO/15-17 para 15.

³¹⁷ AC, above n 4, para 106.

³¹⁸ CERD (2002), above n 316, para 9.

³¹⁹ Wheatley, above n 94, 157; R Medda-Windischer, *Old and New Minorities: Reconciling Diversity and Cohesion – A Human Rights Model for Minority Integration* (Nomos Verlagsgesellschaft 2009) 217; M Weller, 'Minority Consultative Mechanisms – Towards Best Practice' in M Weller (ed), *Political Participation of Minorities: A Commentary on International Standards and Practice* (OUP 2010) 478.

³²⁰ Hofmann, above n 101, 16. See also, Commission on Human Rights, above n 33, 9.

³²¹ Weller, above n 319, 478-79. See also, Machnyikova and Hollo, above n 5, 97.

³²² AC, above n 4, 7.

Accordingly, the establishment of consultative mechanisms for European Muslims does not negate the requirement that European Muslim must also be represented in the formal political institutions of the State, if effective participation is to be guaranteed.

Notably, the British government has previously established permanent minority consultative mechanisms with an established mandate, in the form of the Inner Cities Religious Council (which later became the Faith Communities Consultative Council), the Race Relations Forum and the Lawrence Steering Group.³²³ However, these bodies have subsequently been discontinued, in preference for *ad hoc* consultation mechanisms.³²⁴ Muslim minority representatives have also been consulted at both a local³²⁵ and national level,³²⁶ outside of formal consultative mechanisms. A number of Western European States have established permanent consultative fora specifically for their Muslim communities.³²⁷ However, the lack of hierarchy with Islam has the potential to inhibit the identification of legitimate Muslim representatives.

Although the monitoring bodies of both generally applicable human rights and minority rights standards have recognised the value of consultative mechanisms, minority rights bodies have provided a detailed elaboration of the requirements of such mechanisms. Minority rights monitoring bodies and scholars have recognised that there cannot be a one-size-fits-all approach to minority consultative mechanisms and, consequently, have not been overly prescriptive in respect of the necessary

³²³ D Randolph-Horn, 'Challenging Religious Discrimination << The Guide for Faith Communities and their Advisers >> Drawn Up by the Inner Cities Religious Council (ICRC)' in Council of Europe, *Religion and the Integration of Immigrants* (Council of Europe 1999) 113-14; AC, 'Report Submitted by the United Kingdom Pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities' (26 July 1999) ACFC/SR(1999)013 paras 71-72; Modood, above n 89, 133.

³²⁴ 'Second Opinion on the United Kingdom' above n 66, para 252; 'Third Opinion on the United Kingdom' above n 200, para 192; HC Deb 23 June 2011, vol 530, cols 440W-441W.

³²⁵ McLoughlin, above n 251, 58-9; P Bagguley and Y Hussain, *Riotous Citizens: Ethnic Conflict in Multicultural Britain* (Ashgate 2008) 104-06, 110; T O'Toole and others, *Taking Part: Muslim Participation in Contemporary Governance* (University of Bristol 2013) 22-4.

³²⁶ Hussain, above n 29, 392; Nielsen, above n 24, 49, 52; McLoughlin, above n 251, 60-1; O'Toole and others, above n 325, 18-22.

³²⁷ See, for example, Deutsche Islam Konferenz: CERD, 'Eighteenth Periodic Reports of States Parties due in 2006 – Germany' (31 January 2008) UN doc CERD/C/DEU/18 para 6; Exécutif des Musulmans de Belgique; CERD, 'Thirteenth Periodic Reports of States Parties due in 2000 – Belgium' (9 August 2001) UN doc CERD/C/381/Add.1 para 199; Conseil Français du Culte Musulman <<http://www.lecfcm.fr/>> accessed 3 July 2012.

requirements of such mechanisms.³²⁸ In particular, '[t]he variety in the composition, needs and aspirations of different types of minority groups requires identification and adoption of the most appropriate ways to create conditions for effective participation in each case'.³²⁹ There are a variety of models of consultative mechanism,³³⁰ which can either be dedicated to one particular minority or all minorities living within a State³³¹ and established and organised by minority representatives or by government officials or departments.³³² Nonetheless, the nature and mandate of consultative mechanisms and the legitimacy of the representatives consulted have the potential to impact their success.

6.5.3.1. *The Nature and Mandate of Consultative Mechanisms*

The British authorities have primarily utilised *ad hoc* mechanisms in order to consult British Muslims.³³³ While *ad hoc* consultative mechanisms may be satisfactory,³³⁴ the AC has consistently expressed a preference for formal mechanisms, with a clear legal status³³⁵ and established terms of reference.³³⁶ Specifically, the AC has expressed concern at the inadequacy of the *ad hoc* consultation of minority representatives in the United Kingdom, and has found 'that there is a need for more structured consultative bodies in order to ensure regular communication between the authorities (especially at the level of central and devolved executives) and various interlocutors from minority ethnic communities'.³³⁷ In relation to British Muslims the AC has noted:

³²⁸ Commission on Human Rights, above n 40, para 43; 'The Lund Recommendations and Explanatory Note' above n 78, 25-6 paras 12-13; AC, above n 4, paras 113-115; Hofmann, above n 101, 17; Marko, above n 153, 241; Verstichel, above n 28, 222.

³²⁹ Commission on Human Rights, above n 40, para 43.

³³⁰ Weller, above n 319, 483.

³³¹ *Ibid.*, 484, 487-88.

³³² *Ibid.*, 484.

³³³ 'Second Opinion on the United Kingdom' above n 66, para 252; 'Third Opinion on the United Kingdom' above n 200, para 192.

³³⁴ 'The Lund Recommendations and Explanatory Note' above n 78, 25 para 12.

³³⁵ AC, above n 4, paras 107, 116.

³³⁶ *Ibid.*, para 116.

³³⁷ 'Third Opinion on the United Kingdom' above n 200, para 192.

[T]he complaints it has received from representatives of minority ethnic communities of Muslim faith regarding the difficulties they encounter in establishing a dialogue with the Government. This sense of alienation is reported to be widespread among representatives of most sections of the Muslim population in the United Kingdom, including the Muslim Council of Britain, the largest umbrella group of Muslim organisations in the country.³³⁸

Consequently, although British Muslims have consistently reiterated the wish to establish effective dialogue and consultation with the authorities,³³⁹ the *ad hoc* mechanisms utilised by the British authorities have proven insufficient. Similar requests for effective dialogue and consultation have been made by other European Muslim minorities.³⁴⁰

The AC has further stressed '[i]t is important to ensure that consultative bodies have a clear legal status, that the obligation to consult them is entrenched in law and that their involvement in decision-making processes is of a regular and permanent nature'.³⁴¹ The former UN Working Group on Minorities additionally stressed that '[s]uch bodies or round tables should be attributed political weight'.³⁴² If minority consultative mechanisms are unable to influence the decision-making process, they will be perceived by persons belonging to the minority to constitute a token gesture and, thus, lack legitimacy.³⁴³

Notably, despite being an elected and permanent body, the French Council for the Muslim Faith, has no legal standing.³⁴⁴ This, in turn, has the potential to lead

³³⁸ 'Second Opinion on the United Kingdom' above n 66, para 253. See also, 'Third Opinion on the United Kingdom' above n 200, para 192.

³³⁹ Muslim Research and Development Foundation, *Shadow Report to the Advisory Committee of Experts for the Framework Convention on National Minorities – In Response to the State Report by the United Kingdom under the 3rd Reporting Cycle of the Framework Convention on National Minorities* paras 57-60, 69, 70 <http://www.islam21c.com/books/MRDF_Shadow_Report.pdf> accessed 18 July 2013; The Change Institute, *Summary Report – Understanding Muslim Ethnic Communities* (Department for Communities and Local Government April 2009) para 47.

³⁴⁰ See, for example, S Amir-Moazami, 'Pitfalls of consensus-orientated dialogue – The German Islam Conference (Deutsche Islam Konferenz)' (May 2011) 1 Approaching Religion 2.

³⁴¹ AC, above n 4, para 107. See also, AC, 'Opinion on Sweden' adopted on 25 August 2002 ACFC/INF/OP/I(2003)006 para 63.

³⁴² Commission on Human Rights, above n 40, para 48.

³⁴³ AC, above n 4, para 19; Human Rights Council, above n 21, para 27.

³⁴⁴ —, 'France Creates Muslim Council' *BBC News* (20 December 2002) <<http://news.bbc.co.uk/1/hi/world/europe/2593623.stm>> accessed 4 July 2012; Staff Writer,

to inconsistency in consultation and hinder the effectiveness of the body. If consultative mechanisms are to facilitate the participation of European Muslims in the decision-making process, it is clear that permanent fora with legal standing are preferable, to ensure that these mechanisms are effective.

The mandates of consultative mechanism also have the potential to hinder the ability of European Muslims to participate in decisions concerning their identity. Notably, CERD welcomed,

the establishment of the Islam Conference, as a forum in which representatives of the Muslim communities living in Germany meet with representatives of German authorities with the aim of establishing continuous dialogue to address Islamophobic tendencies and discuss relevant policy responses.³⁴⁵

Yet, the German Islam Conference has been criticised for not constituting a genuine mechanism of consultation.³⁴⁶ The AC has acknowledged that in order to be effective, minority consultative mechanisms should 'try to reflect accurately the variety of views among persons belonging to their national minority'.³⁴⁷ However, it has been suggested that Muslim representatives in the German Islam Conference are unable to raise issues of particular concern to their communities and influence the outcome of consultation.³⁴⁸ Therefore, although symbolically significant, this body does not appear sufficient to facilitate the effective participation of Muslim minorities, as required by minority rights standards.³⁴⁹ Permanent and *ad hoc* consultative mechanisms in the United Kingdom have also had restricted areas of competency and insufficient influence.³⁵⁰ Notably, the National Muslim Women's

'Islam in France' Euro-Islam.Info <http://www.euro-islam.info/country-profiles/france/#identifiant_30_477> accessed 4 July 2012; Conseil Français du Culte Musulman, 'Site officiel de l'instance représentative du culte musulman en France' <http://www.lecfcm.fr/?page_id=16> accessed 4 July 2012.

³⁴⁵ CERD, above n 26, para 13.

³⁴⁶ Amir-Moazami, above n 340.

³⁴⁷ AC, above n 4, para 21.

³⁴⁸ Amir-Moazami, above n 340, 2, 8.

³⁴⁹ AC, above n 4, paras 16, 19; 'The Lund Recommendations', above n 2, para 13; Commission on Human Rights, above n 40, para 48.

³⁵⁰ 'Report Submitted by the United Kingdom', above n 323, paras 223; Randolph-Horn, above n 323, 113-14; P Vermeersch, 'Minority Associations – Issues of Representation, Internal

Advisory Group and the Young Muslims Advisory Group were established in the UK as time limited mechanisms, with restricted mandates.³⁵¹

The UN Independent Expert on Minority Issues has, notably, warned that 'if minority representatives are not empowered to make substantial and influential decisions on issues of relevance for their communities, their participation will be tantamount to tokenism and not "effective participation"'.³⁵² Consequently, the approach taken by the British and German governments has the potential to alienate Muslim communities, as the mandates of these bodies are insufficient to permit them to influence decisions that impact their concerns. In direct contrast, the elected Muslim Executive of Belgium was expected to have a wide range of competencies including 'the appointment of teachers of religion to work in the public school system, the secular administration of religious affairs (appointment of priests, recognition of local communities), prison chaplains, cemeteries and ritual slaughter'.³⁵³ Accordingly, the wide mandate of this body would allow Muslim communities to influence decisions in a number of areas, identified in Chapter 5, as of importance to the protection and promotion of Muslim identity.

6.5.3.2. *The Legitimacy of Representatives in Consultative Mechanisms*

The importance of the composition of both formal and *ad hoc* consultative mechanisms has also been recognised. In order to enable the effective political participation of persons belonging to minorities, those representatives consulted by the State must be legitimate and accountable to the community that they serve.³⁵⁴ The AC and Lund Recommendations have stressed that States must take an open and transparent approach to the appointment of minority representative organisations as

Democracy, and Legitimacy' in M Weller (ed), *Political Participation of Minorities: A Commentary on International Standards and Practice* (OUP 2010) 693.

³⁵¹ Vermeersch, above n 350, 693. See also, S Gohir, 'Muslim Women Are Not Political Pawns' *The Guardian* (9 April 2010) <<http://www.guardian.co.uk/commentisfree/2010/apr/09/government-failed-muslim-women>> accessed 3 July 2012.

³⁵² Human Rights Council, above n 21, para 27. See also, AC, above n 4, para 19.

³⁵³ CERD (2001), above n 327, para 199

³⁵⁴ AC, above n 4, 8, paras 109, 110; 'The Lund Recommendations', above n 4, para 3; 'The Lund Recommendations and Explanatory Note' above n 78, 25-6, paras 12, 13.

interlocutors, in order to maintain the confidence of both minorities and wider society.³⁵⁵

Although no instrument explicitly requires the democratic election of members of minority representative organisations, both the AC and CERD have expressed a preference for democratically elected minority representatives, and consultative mechanisms.³⁵⁶ Notably, in relation to Albania, the AC has recommended that '[t]he Albanian authorities should enable minorities to articulate their interests and co-ordinate their position by facilitating the establishment of a body along the lines of a minority council; its members would be nominated by minorities themselves'.³⁵⁷ In order to ensure that minority representatives are legitimate and accountable to their communities, Weller has suggested that '[i]t is up to the minority representative organizations to create such criteria of conduct rather than leave it to governments'.³⁵⁸ Nonetheless, if States are to engage with minority representative bodies, it is advisable that they require that such bodies 'follow genuine democratic principles of accountability and transparency'.³⁵⁹

Furthermore, the Lund Recommendations and the AC to the FCNM have recognised that the internal diversity of minorities must be represented, if consultative procedures are to be effective.³⁶⁰ While the HRC has suggested that article 25 and article 27 ICCPR cannot be interpreted so as to entail the consultation of every interested group,³⁶¹ the AC has emphasised that States should consult a variety of minority associations.³⁶² In particular, States should avoid privileging one minority representative association to the disadvantage of others³⁶³ as 'such

³⁵⁵ AC, above n 4, 8 and para 111; 'The Lund Recommendations and Explanatory Note' above n 78, 26, para 13.

³⁵⁶ See, for example, AC, 'Second Opinion on Albania' adopted on 29 May 2008 ACFC/OP/II(2008)003 para 198; 'Second Opinion on Serbia' above n 144, para 245; AC, 'Third Opinion on Estonia' adopted on 1 April 2011 ACFC/OP/III(2011)004 para 165; CERD (2002), above n 316, para 9; CERD, above n 26, para 13.

³⁵⁷ AC, 'Second Opinion on Albania' adopted on 29 May 2008 ACFC/OP/II(2008)003 para 198.

³⁵⁸ M Weller, 'Minority Consultative Mechanisms: Towards Best Practices' (2007/08) 7 European Yearbook of Minority Issues 425, 440. See also, AC, above n 4, para 110.

³⁵⁹ Machnyikova and Hollo, above n 5, 147.

³⁶⁰ 'The Lund Recommendations', above n 2, para 12; AC, above n 4, paras 110-11.

³⁶¹ *Marshall v Canada* Communication no 205/1986, UN doc CCPR/C/43/D/205/1986 para 5.5; *Apirana Mahuika and Others v New Zealand* above n 274, para 9.6.

³⁶² See, for example, 'Opinion on Montenegro' above n 259, para 103; 'Opinion on Romania' above n 159, para 67; AC, 'Opinion on Serbia and Montenegro' adopted on 27 November 2003 ACFC/INF/OP/I(2004)002 para 109.

³⁶³ AC, 'Second Opinion on Spain' adopted on 22 February 2007 ACFC/OP/II(2007)001 para 149.

differential treatment between organisations of minorities is not conducive to pluralism and internal democracy within minorities'.³⁶⁴

In direct contrast to the AC's recommendations members of formal consultative mechanisms in the United Kingdom were unelected,³⁶⁵ and 'appointed because of their personal experience and expertise not as representatives of any community or organisation'.³⁶⁶ Additionally, the legitimacy and representativeness of the Muslim Council of Britain, the former key interlocutor of the British government, has been questioned by British Muslims.³⁶⁷ The same issue has arisen at the local level, where British authorities have attempted to engage with British Muslims by consulting community elders,³⁶⁸ despite criticism that these primarily self-appointed community leaders are not accountable or representative.³⁶⁹ Accordingly, in relation to the United Kingdom, the AC has stressed that '[t]here is a clear need to step up communication and meaningful consultations with a *full spectrum of representatives of Muslim communities*, in order to ensure their inclusion in decision-making'.³⁷⁰

European Muslims are heterogeneous in nature and, thus, if consultation is to be effective it is important that the variety of opinions, practices and perspectives within Muslim communities are represented, informed not only by Islam generally, but a variety of social factors including ethnic origin, social group, gender, generation and political opinion. The failure to consult legitimate representatives, who represent the internal diversity of European Muslim communities, has the potential to undermine the purpose of consultation.

Even when democratic processes have been adopted, State interference has the potential to undermine the legitimacy of representatives. The requirement that Ministry of Justice approve the democratically elected members Muslim Executive

³⁶⁴ 'Second Opinion on Romania' above n 291, para 107.

³⁶⁵ AC, 'Comments of the Government of the United Kingdom on the Opinion of the Advisory Committee on the Implementation of the Framework Convention for the Protection of National Minorities in the United Kingdom' 18 April 2002 GVT/COM/INF/OP/I(2002)006, 35; Vermeersch, above n 350, 693.

³⁶⁶ AC, above n 365, 35.

³⁶⁷ HA Hellyer, 'British Muslims: Past, Present and Future' (2007) 97 *The Muslim World* 225, 236; Nielsen, above n 24, 49. McLoughlin, above n 251, 60.

³⁶⁸ Vertovec, above n 97, 28-9; McLoughlin, above n 251, 58-9; Bagguley and Hussain, above n 325, 104-06, 110.

³⁶⁹ McLoughlin, above n 251, 58; The Change Institute above n 339, 47. See also, Choudhury, above n 36, 208.

³⁷⁰ 'Second Opinion on the United Kingdom' above n 66, para 257. [Emphasis added].

of Belgium, has led to 'almost half of all the members of the Assembly' to be vetoed 'due to their "fundamentalist" leanings'.³⁷¹ This arguably conflicts with minority rights standards insofar as minority representatives must be appointed in an open and transparent manner³⁷² and consultative mechanisms should reflect the internal diversity of the minority.³⁷³

In order to ensure that the internal diversity of Muslim communities is represented, alternative arrangements may also need to be made for those who believe that voting in elections is *haram* (forbidden) in Islam.³⁷⁴ The AC has recommended that States continue to consult minority organisations independently of elected consultative mechanisms.³⁷⁵ Therefore, in the event that the insistence upon democratically accountable representatives excludes a Muslim community from consultative mechanisms, it may be advisable that representatives of this community are consulted on an informal basis by the State.

6.5.3.3. Preliminary Conclusions

The adoption of consultative mechanisms has been recommended by the HRC, CERD and minority rights bodies as an effective mechanism to ensure the participation of persons belonging to minorities. As States have a margin of appreciation to select the most appropriate mechanisms to facilitate the effective participation of persons belonging to minorities, they are likely to be amenable to the adoption of consultative mechanisms, as they do not require changes to be made to the democratic structure of the State. Furthermore, consultative mechanisms have been recognised by Hofmann, the former Chairperson of the AC, as the most appropriate mechanism to facilitate the effective participation of 'new minorities'.³⁷⁶

However, the mechanisms employed in Western Europe to consult Muslim minorities have been insufficient to achieve this aim as minority representatives are

³⁷¹ J Cesari, *When Islam and Democracy Meet – Muslims in Europe and in the United States* (Palgrave Macmillan 2004) 66-7; CERD, 'Fourteenth and Fifteenth Periodic Reports of States Parties due in 2004 – Belgium' (13 September 2006) UN doc CERD/C/BEL/15 paras 185-195.

³⁷² AC, above n 4, 8; 'The Lund Recommendations and Explanatory Note' above n 78, 26, para 13.

³⁷³ AC, above n 4, paras 110- 11.

³⁷⁴ Hussain, above n 29, 380; Ansari, above n 29, 20. See also, for example, BBC News, above n 29.

³⁷⁵ See, for example, 'Opinion on Montenegro' above n 259, para 103; 'Opinion on Romania' above n 159, para 67; 'Opinion on Serbia and Montenegro' above n 362 para 109; 'Second Opinion on Slovenia' above n 40, para 172.

³⁷⁶ Hofmann, above n 101, 16.

frequently not legitimate or accountable to the communities they serve and the mechanisms themselves have restricted mandates and insufficient powers. If European States were to adopt the suggestions of the AC, UN Independent Expert on Minority Issues and the Lund Recommendations, this is likely to improve the effectiveness of consultative mechanisms and would, thus, enable the effective participation of European Muslims in decisions concerning their identity. Accordingly, there is a clear added-value to minority rights protection in this respect.

6.5.4. Preliminary Conclusions

Although generally applicable human rights bodies have recognised that persons belonging to minorities must be able to vote, stand for election and establish political parties, minority rights bodies have established that if the right to political participation is to be effective, then persons belonging to minorities must be both represented in and able to influence the outcome of decision-making processes. In particular, minority rights bodies have elaborated upon the content of measures to facilitate the participation of persons belonging to minorities in decisions concerning their identity, including the delegation of powers to local authorities and mechanisms of cultural autonomy, veto rights, minority representation in Parliamentary Committees and the establishment of consultative mechanisms.

These measures all, to varying degrees, have the potential to improve European Muslim participation in the decision-making process. As noted, States have a margin of appreciation to select the most appropriate measures to facilitate the effective participation of persons belonging to minorities. The delegation of powers to local authorities or mechanisms of cultural autonomy would allow decision-making to take place closer to the effected communities. Nonetheless, such mechanisms have restricted mandates and, accordingly, it is important that European Muslims are also able to influence the decision-making process at a national level.

If European Muslims were to elect politicians affiliated with a Muslim minority political party or to a reserved seat in a political institution, then the participation of these representatives in Parliamentary Committees may improve the effective participation of European Muslims. Furthermore, the establishment of permanent consultative mechanisms, in accordance with the recommendations of the

AC and Lund Recommendations, would ensure that legitimate European Muslim representatives are consulted on issues of specific concern to the community, in the absence of elected Muslim representatives.

Therefore, the measures suggested by minority rights monitoring bodies to enable persons belonging to minorities to influence the decision-making process would be of benefit to European Muslims. In contrast, while the HRC and CERD have recognised the value of consultative mechanism, they have not elaborated upon the measures required to ensure that political participation is effective and nor have they required that persons belonging to minorities be able to influence decisions concerning their identity. The requirement that States take measures to ensure that persons belonging to minorities are able to effectively participate in and influence decisions concerning their minority, leads to the conclusion that there is a significant added-value to minority rights protection for European Muslims.

6.6. CONCLUSION: THE ADDED-VALUE OF MINORITY RIGHTS PROTECTION FOR EUROPEAN MUSLIMS?

Minority rights instruments explicitly establish that persons belonging to minorities must be able to effectively participate in decisions concerning the minority to which they belong. By allowing European Muslims to participate in decisions concerning their identity, effective participation will facilitate the preservation of European Muslim identity. The basic content of political rights have been interpreted similarly under generally applicable human rights and minority rights instruments; persons belonging to minorities have the right to vote, stand for election and form minority political parties. However, although generally applicable human rights bodies and minority rights bodies have interpreted the permissible restrictions on these rights narrowly, the ECtHR has taken a more restrictive approach to the scope of political rights than the HRC, CERD and minority rights monitoring bodies (see Annex 2).

The ECtHR has not recognised that neutral requirements may indirectly discriminate against minority political candidates. Moreover, whereas the ECtHR has not recognised the potential for onerous citizenship requirements to interfere with the exercise of political rights, minority rights bodies, CERD and the HRC have

recommended the extension of voting rights in local elections to permanent or long-term residents (see Annex 2).

Notably, the right to establish political parties extends to both ethnic and religious minorities under the FCNM, UN Declaration on Minorities and Lund Recommendations. In contrast, the ECtHR has been willing to accept restrictions on the right to form religious political parties, in order to uphold secularism. While the HRC has not expressly considered the rights of religious political parties, on the basis of its previous decisions, it is possible to deduce that the HRC is unlikely to restrict the rights of religious minorities to establish political parties (see Annex 2).

States are permitted a wide margin of appreciation in respect of the design of their electoral system. Yet, CERD and minority rights bodies have stressed that States must ensure that their political system facilitates the participation and representation of persons belonging to minorities in political institutions. Hence, generally applicable human rights bodies within the UN and minority rights bodies have interpreted the content of political rights in a similar manner. In comparison, the ECtHR has not recognised that States have such an obligation and has accepted the legitimacy of measures, such as high threshold requirements, which have the potential to exclude minority representatives from political institutions. Consequently, within the Council of Europe rights regime there is an added-value to minority rights protection for European Muslims.

UN bodies, including CERD and the HRC, and minority rights bodies have recommended the adoption of measures to improve minority participation in the decision-making process, including voter education initiatives, reserved seats in political institutions and consultative mechanisms (see Annex 2). However, minority rights bodies have significantly elaborated upon the requirements of such mechanisms and the form they should take, if the political participation of persons belonging to minorities is to be *effective*. Furthermore, minority rights bodies have recognised and elaborated upon measures to allow persons belonging to minorities to influence decision-making processes through participation in Parliamentary Committees and the delegation of powers to local authorities and mechanisms of cultural autonomy (see Annex 2). Notably, the programmatic nature of the rights contained in the FCNM has allowed the AC to provide detailed elaboration of the right to effective participation in its Opinions on State Reports and its *Commentary*

on *The Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs*. Nonetheless, States are not required to adopt all of the measures considered, provided that 'the conditions for effective participation are in place'.³⁷⁷

Obstacles to citizenship have resulted in members of European Muslim minorities being disenfranchised. Additionally, the consultative mechanisms established in Western Europe have been insufficient to facilitate the effective participation of European Muslims in decisions concerning their identity and, notably, have led to the alienation of the British Muslim community.³⁷⁸ The exclusion of European Muslims from decision-making processes has the potential to undermine their ability to preserve their identity. Therefore, it is important that additional measures are taken to ensure that European Muslims are able to exercise the right to effectively participate in public life. As considered above, the detailed measures elaborated by minority rights bodies have the potential to enable European Muslims to influence decisions concerning their identity.

Although it has been suggested that that there would be no advantage to the application of minority rights standards to religious minorities,³⁷⁹ this chapter has evidenced that minority rights do indeed establish higher standards than generally applicable human rights. In particular, the detailed elaboration of the measures needed to ensure that minority participation is *effective* constitutes a significant added-value to minority rights protection. Nonetheless, while there is an added-value to minority rights protection, it is clear that the standards demanded have not been attained in relation to European Muslims. Given the common goals of multiculturalist policies and minority rights standards and the fact that European States need to take considerable measures to ensure that these standards are achieved, it is clear that multiculturalist policies have not been sufficiently pursued in relation to the participation of European Muslims in decisions that concern their identity.

³⁷⁷ AC, above n 4, para 10.

³⁷⁸ 'Second Opinion on the United Kingdom' above n 66, para 253. See also, 'Third Opinion on the United Kingdom' above n 200, para 192.

³⁷⁹ K Henrard, 'Minority Specific Rights: A Protection of Religious Minorities Going Beyond the Freedom of Religion?' (2009) 8 *European Yearbook of Minority Issues* 5, 42.

Chapter 7:

Conclusion: The Added-Value of Minority Rights Protection for Muslims in Western Europe – Multiculturalist Approaches and International Law

The pursuit of multiculturalist policies and, specifically, the focus on the preservation of minority identity in Western European States have been blamed for the alleged failure of European Muslims to integrate and wider societal unrest.¹ In contrast, in the international arena both States and academics have argued that 'new minorities', including European Muslims, have weak or no entitlements under minority rights standards.² Furthermore, academics have suggested that minority rights standards do not have an added-value for religious minorities, as compared to generally applicable human rights standards.³

This thesis has argued that the assertion that multiculturalism has failed is premature. If it is to be asserted that multiculturalist policies have failed in respect of European Muslims then States must have already adopted policies to give effect to minority rights standards in relation to these communities. However, States have

¹ See, for example, A Mondal, 'Islam and Multiculturalism: Some Thoughts on a Difficult Relationship' Brunel University Research Archive, 6 <<http://bura.brunel.ac.uk/handle/2438/4161>> accessed 16 May 2011; C Joppke, 'The Retreat of Multiculturalism and the Liberal State: Theory and Policy (2004) 55 The British Journal of Sociology 237, 250; H Entzinger, 'The Parallel Decline of Multiculturalism and the Welfare State in the Netherlands' in K Banting and W Kymlicka (eds), *Multiculturalism and the Welfare State – Recognition and Redistribution in Contemporary Democracies* (OUP 2006) 183; S Vertovec, 'Towards Post-Multiculturalism? Changing Communities, Conditions and Contexts of Diversity' (2010) 61 International Social Science Journal 83, 86; D Cameron, 'PM's Speech at Munich Security Conference' 5 February 2011 <<http://webarchive.nationalarchives.gov.uk/20130109092234/http://number10.gov.uk/news/pms-speech-at-munich-security-conference/>> accessed 21 June 2013.

² F Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* UN doc E/CN.4/Sub.2/384/Rev.1 para 205; Commission on Human Rights, 'Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' UN doc E/CN.4/Sub.2/AC.5/2005/2 para 11; HRC, 'Fourth Periodic Reports of States parties due in 1993 – Germany' (22 February 1996) UN doc CCPR/C/84/Add.5 para 236; Council of Europe, 'List of Declarations Made With Respect to Treaty No. 157 Framework Convention for the Protection of National Minorities' <<http://conventions.coe.int/treaty/Commun/ListeDeclarations.asp?NT=157&CV=1&NA=&PO=999&CN=999&VL=1&CM=9&CL=ENG>> accessed 1 April 2013; A Eide, 'The Rights of "Old" Versus "New" Minorities' (2002/3) 2 European Yearbook of Minority Issues 365.

³ K Henrard, 'Minority Specific Rights: A Protection of Religious Minorities Going Beyond the Freedom of Religion?' (2009) 8 European Yearbook of Minority Issues 5, 42.

excluded European Muslims from the protection offered by minority rights standards under international law on the basis that they constitute 'new minorities'. Thus, this thesis has demonstrated that multiculturalist policies have not been sufficiently pursued in Western Europe in respect of European Muslims, in particular, in relation to the right to preserve and protect their identity.

Chapter 2 has established that multiculturalist theorists and international legal standards advocate a broadly similar approach to the accommodation of diversity in society. Nonetheless, although multiculturalist theorists have submitted that international legal standards do not go far enough to accommodate diversity,⁴ international legal standards provide a framework of minimum standards within which multiculturalist policies can be pursued. In order to fulfil their obligations under international law and to pursue multiculturalist policies States must take measures to secure the four tenets of minority rights protection: the preservation of minority identity; non-discrimination and equality; minority participation in the life of the State including in decision-making processes; and intercultural dialogue and tolerance.

By considering the content of rights pertaining to these four tenets, this thesis established that there is a *prima facie* added-value to minority rights protection as compared to generally applicable human rights standards.⁵ Both generally applicable human rights and minority rights standards establish cultural and religious rights that enable the preservation of minority identity, prohibit discrimination, establish political rights and recognise the value of intercultural education. Yet, minority rights standards establish targeted, positive rights; also minority rights bodies have elaborated in detail upon the measures needed to secure the achievement of these standards for persons belonging to ethnic, religious and linguistic minorities. Specifically, only article 6(1) FCNM establishes a general right to intercultural dialogue and tolerance. Additionally, the role of the media in fomenting intercultural dialogue has primarily been elaborated by minority rights bodies, namely the AC and the UN Forum on Minority Issues. As minority rights standards go further than generally applicable human rights standards, it is minority rights standards that

⁴ W Kymlicka, *Multicultural Odysseys – Navigating the New International Politics of Diversity* (OUP 2007) 212-4; W Kymlicka, 'The Internationalization of Minority Rights' (2008) 6 *International Journal of Constitutional Law* 1, 30.

⁵ Chapter 3.

establish a framework of minimum standards for the pursuit of multiculturalist policies.

This thesis has also demonstrated that the four tenets of minority rights protection are interdependent and interconnected.⁶ While intercultural dialogue and tolerance and non-discrimination and equality *indirectly* contribute to the preservation of minority identity, the measures advocated by minority rights bodies to ensure that persons belonging to minorities are able to preserve their cultural and religious identity and participate in decisions concerning their identity *directly* enable the achievement of this right. Correspondingly, if multiculturalist policies have focused too much on identity concerns to the detriment of equality and societal cohesion this would appear to be counterproductive.

In Chapter 4 this thesis argued that 'new minorities', including European Muslims, can claim the protection of minority rights standards. States have excluded European Muslims from minority rights protection, in particular the FCNM, on the grounds that they constitute 'new minorities' and do not satisfy the requirements of citizenship or 'longstanding, firm and lasting ties' with the State. Yet, these criteria are not present in the text of minority rights provisions and do not find support from minority rights monitoring bodies. Moreover, as permanent residents and citizens of Western European States, European Muslims will at some point satisfy these requirements. Thus, the exclusion of European Muslims from minority rights protection and any distinction between the rights of 'old minorities' and European Muslims has the potential to undermine the object and purpose⁷ of minority rights standards: security and justice. Therefore, minority rights standards, including the FCNM, are applicable to European Muslims.

Additionally, a wide interpretation of the protection available to European Muslim minorities to preserve their identity must be adopted to reflect the intersectional relationship between their ethnic and religious identities. The rights applicable to European Muslims should be decided against the elements of their identity that they wish to preserve rather than as a result of an arbitrary classification. Thus, this thesis has argued that as States have excluded European Muslims from the protection of the minority rights regime, this leads to the conclusion that the

⁶ *Ibid.*

⁷ Article 31(1) VCLT.

minimum standards required to facilitate the pursuit of multiculturalist accommodation have not been secured for these communities.

Although academics have suggested that there is not an added-value to minority rights protection for both 'new minorities' and religious minorities, Chapters 5 and 6 have asserted that this is not the case. As multiculturalist policies have been criticised for focusing too much on the preservation of identity to the exclusion of equality and societal cohesion, Chapters 5 and 6 have focused on the claims made by European Muslims to the preservation of their identity and the ability of European Muslims to participate in decisions concerning their identity.

By identifying the claims made, primarily by British Muslims in legal *fora*, to the accommodation of their identity, Chapter 5 established that there is an added-value to the application of minority rights standards to European Muslim minorities. The claims made by British Muslims were used as the common law system facilitates the identification of claims made in the public sphere. This thesis identified an added-value to minority rights protection within both the UN and Council of Europe's human rights regimes in relation to the right to observe Friday Prayers and religious holidays, the provision of religious education within mainstream education and the right to establish faith schools and *Sharia* Councils (see Annex 1). Furthermore, an added-value to minority rights protection within the Council of Europe has been identified in relation to claims relating to the right to wear religious attire, build places of worship and receive cultural and linguistic education in mainstream schools (see Annex 1).

The added-value of minority rights standards can be attributed to the requirement that States adopt positive measures to ensure that persons belonging to minorities are able to preserve their identity in practice. In contrast, as freedom of religion, a generally applicable human rights standard, constitutes a negative right, States are primarily required to refrain from interference with the exercise of this right. Specifically, this thesis has demonstrated that the ECtHR has construed article 9 ECHR narrowly and States have been afforded a wide margin of appreciation to restrict this right. Therefore, freedom of religion does not offer sufficient protection to the adherents of religions that constitute a way of life, such as Islam.⁸ Minority

⁸ N Ghana, 'Religious or Minority? Examining the Realisation of International Standards in Relation to Religious Minorities in the Middle East' (2008) 36 Religion, State & Society 303,

rights standards must be applied to European Muslims if they are to be able to preserve their cultural and religious identities.

Similarly, this thesis has argued that minority rights protection would enable European Muslim participation in decisions concerning their identity. European Muslims have been excluded from political rights on the basis of citizenship and lack legitimate representation in formal and informal decision-making bodies. This, in turn, has the potential to prevent European Muslims from participating in decisions that concern their identity.

Generally applicable human rights instruments only establish basic political rights, namely the right to participate in the democratic process and freedom of association. In contrast, minority rights standards recognise that if the *effective* participation of persons belonging to minorities is to be achieved, persons belonging to minorities must be present in political institutions and their legitimate representatives must be able to influence the outcome of decision-making processes, in particular decisions that concern the identity of the minority. Specifically, the elaboration of measures to facilitate the effective participation of persons belonging to minorities constitutes the added-value of minority rights protection. Such measures include the adoption of consultative mechanisms, reserved seats and the decentralisation of decision-making powers (see Annex 2).

States are not required to adopt all of the measures suggested by minority rights bodies. Instead they must adopt the measures most appropriate for their national situation and ensure that the right to effective participation is guaranteed. This thesis has submitted that by establishing an 'obligation of result'⁹ the application of minority rights standards to European Muslims has the potential to significantly improve their participation in decisions concerning their identity and, thereby, facilitate the preservation of the identity of European Muslim minorities.

A greater degree of divergence has been identified between the content of generally applicable human rights standards and minority rights standards within the Council of Europe human rights regime as compared to the UN human rights

310; M Evans, 'Human Rights and the Freedom of Religion' in M Ipgrave (ed), *Justice & Rights – Christian and Muslim Perspectives* (Georgetown University Press 2009) 115-16.

⁹ AC, *Commentary on The Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs* adopted on 27 February 2008 ACFC/31DOC(2008)001 para 10.

regime. This may be attributable to the discretion afforded to the AC to interpret the content of the programmatic rights contained in the FCNM. However, in contrast to the ECHR, both the ICCPR and CRC contain a minority rights provision.¹⁰ The ICESCR also contains a right to cultural life that has been interpreted in a similar way to the minority rights provision in the ICCPR.¹¹ It has been argued that the presence of these provisions in human rights instruments and the recognition within the UN of the interrelated and interdependent nature of human rights standards,¹² has led UN human rights bodies to interpret generally applicable human rights standards in a 'minority-friendly' manner. Thus, this thesis has submitted that there is an additional added-value to the inclusion of minority rights provisions in generally applicable human rights instruments. Moreover, the fact that UN human rights bodies are not dominated by experts drawn from any one religious or cultural background, in direct contrast to the majority of judges in the ECtHR, may also account for a more sympathetic approach being adopted within the UN to the accommodation of religious and cultural practices.

Although generally applicable human rights standards support some of the claims made by European Muslims in relation to their identity, this thesis has demonstrated that there is a clear added-value to minority rights protection in relation to the preservation of European Muslim identity and European Muslim participation in decisions concerning their identity (see Annexes 1 and 2). While European States have claimed that they have pursued multiculturalist policies in respect of their Muslim minorities, this has not been mirrored by the application of minority rights standards to these communities. Given that the minority rights regime provides a framework of minimum standards for the pursuit of multiculturalist policies, this thesis has, thus, asserted that multiculturalist policies have not been sufficiently pursued in relation to the preservation of European Muslim identity.

As there is a clear added-value to the application of minority rights standards to European Muslims and there is no good reason for the exclusion of European Muslims from their scope of application, minority rights standards, in particular the

¹⁰ Article 27 ICCPR; article 30 CRC.

¹¹ Article 15(1)(a) ICESCR.

¹² UNGA, 'Vienna Declaration and Programme of Action' UN doc A/CONF.157/24 (Part I), ch III, s I, para 5.

FCNM, should be applied to European Muslims. In order to give effect to minority rights standards, the recommendations of minority rights bodies should be applied, where relevant, to European Muslims and States must submit to international monitoring to ensure that these standards are met. Claims made to the preservation of European Muslim identity and participation in decision-making processes, that find support under minority rights standards, should be upheld. Furthermore, the consultation of the legitimate representatives of European Muslim communities should be prioritised, in order to ensure that the concerns of these communities are heard.

The denial of minority rights protection to European Muslims on the basis of an arbitrary definition has the potential to undermine the purpose of minority rights protection and to be counter-productive. The failure to take measures to facilitate the preservation of Muslim identity and ensure participation in the decision-making process has the potential to lead to resentment and inhibit integration. Minority rights standards and multiculturalist approaches aim to achieve both security and justice. These aims are not mutually exclusive. Persons belonging to minorities must be able to preserve their identity on equal terms with other minorities and the majority as a matter of justice. If persons belonging to minorities are to integrate, then their identity must be accepted as belonging within the State.¹³ Hence, if European Muslims are excluded from belonging, this has the potential to lead to the alienation and marginalisation of these communities¹⁴ and undermine the aim of security pursued by minority rights and multiculturalist accommodation.¹⁵

If the assertion is to be made that multiculturalism has failed, then States must first adopt consistent measures to facilitate the preservation of European Muslim identity, over a period of time. As minority rights standards have not been applied to European Muslims in practice, the minimum standards required for the pursuit of multiculturalist accommodation have not been attained. Thus, the multiculturalist approach to the accommodation of European Muslims has not failed;

¹³ K Henrard, 'Tracing Visions on Integration and/of Minorities: An Analysis of the Supervisory Practice of the FCNM' (2011) 13 *International Community Law Review* 333, 345.

¹⁴ G Gilbert, 'The Council of Europe and Minority Rights' (1996) 18 *Human Rights Quarterly* 160, 167.

¹⁵ W Kymlicka, *Multicultural Citizenship - A Liberal Theory of Minority Rights* (OUP 1995) 30, 111, 185; JT Levy, *The Multiculturalism of Fear* (OUP 2000) 65.

insufficient measures have been adopted to ensure its success. If a multiculturalist approach to the accommodation of diversity is to be pursued in Western Europe, States must allow Muslim minorities to benefit from the protection available under minority rights standards.

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Annex 1:
The Added-Value to Minority Rights Protection for European Muslims in Relation to Identity-Based Claims

Identity Claim	Added-value to minority rights protection for European Muslims?		
	United Nations	Council of Europe	Overall
<i>Halal</i> Meat	✗	✗	✗
Circumcision	✗	✓	✓
Planning Permission for Mosques	✗	✓	✓
Friday Prayer and Religious Holidays	✓	✓	✓
Beards and Religious Attire	✗	✓	✗
Religious Education in Mainstream Schools	✓	✓	✓
Cultural Education in Mainstream Schools	✗	✓	✗
Culturally Appropriate Education in Mainstream Schools	✗	✓	✗
Linguistic Education in Mainstream Schools	✗	✓	✗
State-Funded Religious Schools	✓	✓	✓
Religious Marriage and Divorce	✓	✗	✓
<i>Sharia</i> Councils	✓	✓	✓

Annex 2:
The Added-Value to Minority Rights Protection for European Muslims in Relation to Effective Participation in the Decision-Making Process

Issue	Added-value to minority rights protection for European Muslims?		
	United Nations	Council of Europe	Overall
The Right to Vote and Stand for Election:			
• Citizenship	✗	✓	✗
• Minority Identity	✗	✓	✗
• Additional Measures	✗	✓	✓
Legitimate Representation in Political Institutions:			
• Mainstream Political Parties	✓	✓	✓
• Ethnic Minority Political Parties	✗	✓	✓
• Religious Minority Political Parties	✗	✓	✓
• Reserved seats, Quotas and Dual voting	✗	✓	✓
The Political Process:			
• The Electoral System	✗	✓	✓
• Benign Gerrymandering	✗	✗	✗
• Exemptions from Thresholds	✗	✓	✓

Participation and Influence in Decision-Making Processes:			
• Local Government and Decentralisation	✓	✓	✓
• Autonomy	✓	✓	✓
• Veto Rights	✓	✓	✓
• Parliamentary Committees	✗	✓	✓
• Consultative Mechanisms	✓	✓	✓

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