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Minority rights and freedom of expression: a dynamic interface

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“Il faut que ça hurle par l’ensemble”¹
- Gustave Flaubert

Introduction

This chapter emphasises the overall coherence of all human rights as well as their interconnectedness. This is the interpretive context in which the interplay between the rights of persons belonging to minorities and the right to freedom of expression must be developed. It looks, in particular, at the added value of minority rights to a select number of rights with which the right to freedom of expression and minority rights enjoy a high level of valency: non-discrimination/equality, participation, education, culture, religion and language. This exploration begins, in each case, at a general level explaining their conceptual underpinnings and tracing their development under international law. It then proceeds, again in each case, to a sharper focus on minority-specific features and applications of the right(s) in question. The specific importance of each of these rights within the freedom of expression/minority rights interface will then be addressed at various stages in the remainder of the thesis, as appropriate.

3.1 Conceptual framework of human rights

3.1.1 Interdependence of human rights

The conceptual framework chosen for this thesis is set out by the Vienna Declaration.² Article 5 of the Declaration forcefully states that:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States,

¹ This phrase was used by Gustave Flaubert to describe one of the main challenges he faced in creating the famous “Comices” scene in his *magnum opus*, *Madame Bovary* (Deuxième partie, Chapitre VIII, pp. 166 *et seq.* (France, Livre de poche, 1983). The scene was meticulously constructed by Flaubert with great intensity over a prolonged period of time. Flaubert, who was famous for his perfectionism, refers to the experience in a letter to Louise Colet, dated 12 October 1853: “[...] Si jamais les effets d’une symphonie ont été reportés dans un livre, ce sera là. Il faut que ça hurle par l’ensemble, qu’on entende à la fois des beuglements de taureaux, des soupirs d’amour et des phrases d’administrateurs. Il y a du soleil sur tout cela, et des coups de vent qui font remuer les grands bonnets. [...]” – *ibid.*, “Notes”, at p. 455.

² World Conference on Human Rights – The Vienna Declaration and Programme of Action (1993).

regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

To insist on the interdependent and inter-related character of all human rights is not to deny that in practice, the exercise of various rights in certain situations can generate certain frictions, eg. the right to freedom of expression and the right to be free from racial discrimination. Rather, it is to insist on the presumptive coherence of rights.³ Such an integrated conceptualisation of human rights facilitates the exploration of how other rights relate to the right to freedom of expression and minority rights.

The great *forte* of an approach to human rights that is based on their “universal, indivisible and interdependent and interrelated” character is that it is even-textured. To approach a particular problem, eg. racism, from one or two specific angles, eg. non-discrimination and protection of human dignity, entails a risk that other harms and remedies will not be adequately considered. An integrated approach to human rights, however, reduces the risk of particularism or sectionalism and their attendant limitations. It could be argued, for example, that an integrated human-rights approach to racism would not only emphasise protection against prejudice, discrimination and violence, but also promote “voluntary identification based on shared culture” and indigenous rights.⁴ Such promotional strategies are not precluded by a sectional approach to racism (indeed they are already in evidence in ICERD, for example), but an integrated human-rights approach is *prima facie* more accommodating of such strategies because of its recognition of the continuity between negative and positive rights.

The universal character of rights implies that minority rights are part of a broader scheme and cannot be considered or developed in isolation. To translate this somewhat abstract argument into practical terms: this means that the development of minority rights is conditioned by its dialectic relationship with “majority” rights.⁵ The rights of one group in society cannot presumptively override those of another group. The promotion of rights for one group must reckon with consequences for rights of other groups. As already noted, in s. 2.4, *supra*, the European Court of Human Rights has stated:

Although individual interests must on occasion be subordinated to those of a group, 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.⁶

Another adjective frequently applied to human rights – most famously, perhaps, in the first preambular sentence of the Universal Declaration of Human Rights – but which is not mentioned in Article 5 of the Vienna Declaration, is “inalienable”. It is important to recall its meaning and relevance at this juncture. It means that as a matter of principle, human rights cannot be taken away from their holders (i.e., everyone), either by States authorities or by third parties. Limitations on particular rights can, of course, be legitimate in certain circumstances, but the importance of insisting on the inalienability of rights is to emphasise their presumptive primacy and the restricted application to be given to permissible limitations.

³ For a detailed conceptual exploration of this notion, see: Rolf Künnemann, “A Coherent Approach to Human Rights”, 17 *Human Rights Quarterly* (No. 2, 1995), pp. 323-342.

⁴ Michael Banton, *The International Politics of Race*, *op. cit.*, at p. 187.

⁵ Michael Banton, *The International Politics of Race*, *op. cit.*, at p. 170.

⁶ *Young, James & Webster v. United Kingdom*, Judgment of the European Court of Human Rights of 13 August 1981, Series A No. 44 p. 25, para. 63; *Chassagnou & Others v. France*, Judgment of the European Court of Human Rights of 29 April 1999, para. 112.

Central to this conceptualisation of human rights are the values of “pluralism, tolerance and broadmindedness”,⁷ which are prerequisites of democratic society (as consistently held by the European Court of Human Rights). These are the kind of values described by Bhikhu Parekh as “operative public values”, i.e., those values “that a society cherishes as part of its collective identity and in terms of which it regulates the relations between its members”, and which “constitute the moral structure of its public life and give it coherence and stability”.⁸ Parekh’s elaboration of the notion of “operative public values” furnishes us with an immensely helpful theoretical and practical model for our discussion of pluralistic tolerance in Chapter 2.3.1. Moreover, the model is relied upon consistently throughout the remainder of the thesis.

3.2 Added value of minority dimension to human rights

The conceptualisation of human rights as an integrated, systemic whole reinforces the recognition that “the very same values behind universal human rights require specific attention and protection in respect of members of minorities”.⁹ However, the commonality of underlying values does not imply that the strategies adopted for the protection and promotion of those values will be similarly congruent. These observations are the inevitable corollaries of the dual nature of minority rights, which comprise individual and collective aspects.

In figurative terms, minority rights can aptly be described as offshoots from individual human rights. As was seen in the previous section, provisions for minority rights in positive international law stress that they stem from central human rights principles and that they include the panoply of human rights recognised internationally. While this tendency has resulted in some redundancies in the restatement of certain rights, restatement is – of itself – not necessarily an unwelcome feature. By reiterating that a particular right also applies to minorities could be tantamount to stating that it is likely to be exercised differently by members of minorities and other individuals in society. However, stemming from, and reaching further than, individual human rights *simpliciter*, minority rights yield added value and should be regarded as human rights “plus”.¹⁰ At the very least, minority rights should serve the purpose of clarification, reaffirmation and recalibration of existing rights *vis-à-vis* persons belonging to minority groups. In some cases, they should also expand existing rights or identify new areas of application, most importantly for rights specifically requiring communal exercise. This can often imply certain affirmative obligations for States. These considerations are important when assessing whether the right to freedom of expression of persons belonging to minorities is exercised effectively.

This chapter examines the added value of a minority dimension to the following rights:

- (i) Non-discrimination/Equality
- (ii) Participation in public life
- (iii) Education

⁷ *Handyside v. United Kingdom*, Judgment of the European Court of Human Rights of 7 December 1976, Series A, No. 24, para. 49.

⁸ Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (2nd Edition) (New York, Palgrave Macmillan, 2006), p. 363.

⁹ Martin Scheinin, “Minority rights: additional rights or added protection?”, in Morten Bergsmo, Ed., *Human Rights and Criminal Justice for the Down-trodden: Essays in Honour of Asbjorn Eide* (Leiden/Boston, Martinus Nijhoff Publishers, 2003), pp. 486-504, at 493.

¹⁰ See further, John Packer, “On the Content of Minority Rights”, *op. cit.*, pp. 153 *et seq.*

- (iv) Culture
- (v) Religion
- (vi) Language

These rights¹¹ have been selected for closer examination because of their propensity for interaction with the right to freedom of expression, which is the focus of Chapter 4. The order in which the above-listed rights have been enumerated is informed by a rough distinction between process- and object-oriented rights. The former category is concerned with enablement and empowerment whereas the latter prioritises results. Rights to non-discrimination/equality and participation help to define the matrix in which cultural, religious and linguistic rights can be realised. Educational rights straddle both categories, as they are alternately a means to an end and an end in themselves, depending on accentuation.

Effective provisions of non-discrimination and equality are prerequisites for the attainment of pluralism in society, as true pluralism cannot be said to exist if (individuals belonging to) certain groups suffer from discrimination or are denied equality of opportunity, equality before the law, etc. An effective right of participation in public life for all sections of society is an important means of perpetuating equality of opportunity and safeguarding pluralism. Effective participation in all aspects of public life ensures that a plurality of views and interests necessarily inform decision-making processes.

From a functional perspective, education also has a significant role to play in guaranteeing pluralism in society. This is achieved by ensuring that the principles of neutrality and impartiality are upheld in the educational sector and by making it a sector that is receptive to and representative of all groups in society. As stated by the European Court of Human Rights, the objective of Article P1-2, ECHR (right to education) is to safeguard “the possibility of pluralism in education which possibility is essential for the preservation of the ‘democratic society’ as conceived by the Convention”.¹² This creates an obligation for States to “take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner”.¹³ The principles of non-discrimination and equality and of participation all contribute to the realisation of this goal, thereby demonstrating how the purposes and effects of all three of these process-oriented rights are closely intertwined.

3.2.1 Non-discrimination/Equality

UNITED NATIONS

The conceptual genesis of minority rights can be found in concerns for the free and full enjoyment by all individuals of the correlated rights of non-discrimination and equality. As such, these twin-rights have been identified as “the starting point of all other liberties”.¹⁴ However, non-discrimination and equality are much more than a mere point of departure, or

¹¹ The classical civil and political rights of freedom of association and freedom of expression may at first glance appear conspicuous by their absence (as separate categories). However, freedom of association is treated in a number of the above categories (eg. culture, religion, participation, etc.), and freedom of expression is the exclusive focus of the next chapter in this thesis.

¹² *Kjeldsen, Busk Madsen & Pedersen v. Denmark*, Judgment of the European Court of Human Rights of 5 November 1976, para. 50.

¹³ *Ibid.*, para. 53.

¹⁴ Hersch Lauterpacht, quoted in B.G. Ramcharan, “Equality and Nondiscrimination” in Louis Henkin, Ed., *The International Bill of Rights* (Columbia University Press, New York, 1981), pp. 246-269, at 247.

basic premise for the enjoyment of other rights. They are also an end-goal in themselves. They are alternately a road-map and a destination.

The difference between non-discrimination and equality can at times appear nuanced. Whereas the former could conceivably be passive in form, a certain activism is generally demanded by the latter. Moreover, non-discrimination is a prerequisite for the achievement of equality and could be understood as being conceptually incorporated in the principle of equality.¹⁵ On another reading, one could describe non-discrimination and equality as the negative and positive statement of the same principle, thereby emphasising their yin-and-yangish character. In any event, equality itself comprises various conceptual gradations. On the one hand, it can be superficial, nominal, legal or formal, while on the other hand, it can be (f)actual, real, effective or substantive.

The *Minority Schools in Albania* case introduced the notion of establishing “perfect equality” between members of minorities and other nationals of a State “in every respect”.¹⁶ The Court later qualified this concept of equality as “an effective, genuine equality”.¹⁷ “Equality in law”, it was held, “precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations”.¹⁸ The same court further contributed to the notion of equality in another judgment, when it held that: “There must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law”.¹⁹

Another important concept in the context of equality/non-discrimination is that of “indirect discrimination”, which can be deemed to occur “where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of that aim are appropriate and necessary”.²⁰ Although the specific term “indirect discrimination” is – surprisingly - not commonly used in UN and CoE instruments (which tend to rely instead on terms such as *de facto* (as opposed to *de jure*) discrimination), the notion itself is well-established and substantive conceptual overlap exists, notwithstanding terminological differences.

As alluded to *supra*, provisions for non-discrimination and equality in the enjoyment of human rights not only abound in international human rights law, they create the matrix in which it functions. They touch and affect all other rights and in that sense can be described as being truly tentacular.²¹ Some of the relevant provisions in international law are styled in

¹⁵ Note, however, that Ramcharan explains that the non-discrimination clauses in the UN Charter, UDHR and ICCPR were conceived of in order to supplement “the affirmative mandate of equality”, a line of thinking that implies

¹⁶ *Minority Schools in Albania*, Permanent Court of International Justice Advisory Opinion, p. 17.

¹⁷ *Ibid.*, p. 19.

¹⁸ *Minority Schools in Albania*, *op. cit.*, p. 19.

¹⁹ *Questions relating to Settlers of German Origin in Poland*, Permanent Court of International Justice Advisory Opinion No. 6 of 10 September 1923, Series B, p. 24.

²⁰ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *Official Journal of the European Communities* L 180/22 of 19 July 2000, para. 2(b). The corresponding definition of “direct discrimination” (para. 2(a)) reads: “direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin”.

²¹ This point is very clearly illustrated in the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which is dotted with explicit references to the applicability of the principle of non-discrimination (and to a lesser extent “equality”): Article 2.1, 2.5, 3.1, 4.1.

general terms,²² whereas others are specifically intended for application to given themes.²³ The level of generality or specificity of relevant provisions is frequently determined by the nature and objectives of the convention or instrument in which they are to be found. However, not only are the principles of non-discrimination and equality all-pervasive, they are now widely recognised as forming part of international customary law and it has also been argued that “it would be difficult to deny them the character of *jus cogens*, at least as regards consistent patterns of comprehensive violations”.²⁴

The UN Charter strives for the realisation of human rights for all “without distinction as to race, sex, language, or religion”.²⁵ The kern of this idea is expanded significantly in the UDHR to become “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. This formula was replicated in the sister covenants of 1966 – the ICCPR and the ICESCR, albeit with one minor terminological difference: Article 2(1), ICCPR,²⁶ repeats the term “distinction”, whereas Article 26, ICCPR,²⁷ and Article 2(2), ICESCR,²⁸ both employ “discrimination”. The difference does, however, appear to be merely semantic, and of no conceptual or substantive significance. The drafting history of the ICCPR reveals that the proponents of both terms were motivated by the conviction that their respective lexical preferences were more comprehensive than one another and would afford the highest level of protection.²⁹ Clearly, a purposive interpretation of the relevant provisions in both Covenants is therefore called for.

What is of greater significance, however, is that the UDHR provided a more muscular guarantee for the right than that provided by the Charter. The combination of the phrases, “of any kind” and “such as”, leaves no doubt as to the non-exhaustive nature of the provision. The examples given are clearly only illustrative and the list is open-ended. Further corroboration of this view can be found in an examination of relevant provisions of the CRC. Elaborated more than 20 years after the covenants of 1966, Article 2, CRC, reflects the intervening development and further consolidation of notions of discrimination. It adds “ethnic origin” and “disability” to the list of examples of impermissible grounds for discrimination contained in earlier UN conventions.

²² The United Nations Charter (Arts. 1, 55), the Universal Declaration of Human Rights (Art. 2); ICCPR (Arts. 2(1), 3, 26); ICESCR (Arts. 2(2), 3).

²³ Eg., ICERD, CEDAW, UNESCO Convention against Discrimination in Education.

²⁴ B.G. Ramcharan, “Equality and non-discrimination”, *op. cit.*, p. 269.

²⁵ Articles 1(3) and 55(c).

²⁶ Article 2(1), ICCPR reads: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

²⁷ Article 26, ICCPR reads: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

²⁸ Article 2(2), ICESCR reads: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

²⁹ The relevant discussion and drafting history are both explored in B.G. Ramcharan, “Equality and Nondiscrimination”, *op. cit.*, pp. 251 and 258-259. See also the relevant sections of Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, *op. cit.* and Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, *op. cit.*

Certain sub-groups of minorities can find themselves the victims of double discrimination. For instance, “minority women may be subjected to special forms of ‘gendered racism’”,³⁰ combining various forms of sexism with various forms of racism. This is also referred to as intersectionality – the zone or process of intersection of different types of discrimination. It can exist, *mutatis mutandis*, in respect of other (idiosyncratic) characteristics of minority groups, including religion, language and culture.³¹ When there is a concatenation of several of these characteristics and/or unfavourable circumstances, the discriminatory effect can be considerably exacerbated, amounting to more than a mere sum of its parts. The resultant multiplication of racist and other kinds of discriminatory practices lends further credence to the view that regular non-discrimination and equality provisions in law do not suffice to provide adequate protection for the rights of individual members of minority groups. In consequence, there is a real and constant need for non-discrimination and equality provisions to attain high levels of specificity in certain areas of their application.

As already demonstrated *supra*, any terminological differences between relevant provisions of the ICCPR and the ICESCR are negligible. Similarly, notwithstanding the different nature of both Covenants (in terms of their overall focus and the nature of the State obligations created under each), the non-discrimination and equality provisions of each are of imperative force. The essential difference between Article 2(1), ICCPR and Article 26, ICCPR, is that the scope of the former is limited to the rights set out in the Covenant, whereas the latter is a free-standing or non-accessory right and therefore applies even more broadly. Although the general legal obligations on States pursuant to the ICESCR are mainly obligations of conduct (as opposed to obligations of result) regarding the progressive realisation of economic, social and cultural rights, the Covenant’s non-discrimination provisions create an obligation of “immediate effect”, thereby testifying to its imperative nature.³²

Another *forte* of the non-discrimination provisions of the ICCPR is that the interpretation of very term “discrimination” is far-reaching, just like the grounds on which it can be invoked. According to the UN Human Rights Committee, the term should be understood to imply:

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.³³

Affirmative action³⁴/special measures³⁵ is/are often warranted in order to ensure real equality between members of minority and majority groups within a society. According to General Comment 23, affirmative action is countenanced by Article 27, ICCPR, notwithstanding the negative formulation of the “right” guaranteed by the article.³⁶ States parties are under

³⁰ Teun A. Van Dijk, *Racism and the Press*, p.29.

³¹ Yoram Dinstein has identified six dimensions to the interplay between religion and discrimination. See further: Yoram Dinstein, “Freedom of Religion and the Protection of Religious Minorities”, in Yoram Dinstein and Mala Tabory, Eds., *The Protection of Minorities and Human Rights*, *op. cit.*, pp. 145-169, at 165-168.

³² CESCR General Comment No. 3 – The nature of States parties obligations (Art. 2, para. 1 of the Covenant), para. 1.

³³ General Comment No. 18, para. 7.

³⁴ Also referred to, on occasion, as “reverse discrimination,” or, “the notion that a minority sometimes has to be favoured at the expense of the majority if such groups are to achieve genuine equality.” - P. Dunay, *op. cit.*, at p. 36.

³⁵ This term is used in a number of international human rights treaties, eg. ICERD (see, specifically, Article 1.4 and 2.2). Again, the term means positive measures designed to offset prior inequality.

³⁶ See General Comment No. 23, paras. 6.1, 6.2, 9.

specific obligations to introduce and give effect to the positive measures of protection which are required for the vertical and horizontal implementation of the right. Affirmative action often necessitates positive measures which may imply differential treatment, provided that the rationale for such differentiation is reasonable and objective. The legitimacy of this differentiation is also subject to the further proviso that “the modalities of the different treatment must not be disproportionate in effect or involve unfairness to other racial groups.”³⁷ Ian Brownlie continues: “even when the different treatment is not discriminatory in a legal sense, the modalities, the method of implementation may be unreasonable and hence discriminatory at the second level”.³⁸

As with other rights set forth in the ICCPR, according to the principle of equality, States Parties are sometimes required to take affirmative action “in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant”.³⁹ Specific corrective action directed at situations where “where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights”.⁴⁰ Measures adopted towards those ends - and which in practice do not go further than serving those ends - are considered as forms of “legitimate differentiation” for the purposes of the ICCPR. Indeed, it could be posited that the limits on the scope of “legitimate differentiation” mirror the inherent limits of the principle of equality itself, which does not extend to equality of result.

As submitted by B.G. Ramcharan, distinctions based on two kinds of differences are “generally considered admissible and justified” under the principle of equality: “differentiation based on character and conduct imputable to the individual for which he may be properly held responsible”, and (ii) “differentiation based on individual qualities, which in spite of not being qualities for which the individual can be held responsible, are relevant to social values and may be taken into account”.⁴¹ Among the former, Ramcharan counts industriousness, carefulness, decency, merit, lawfulness (and the opposites of each of the foregoing). Among the latter, he places physical and mental capacities and talent. The interaction of such morally-acceptable bases for distinction with equality of opportunity does not necessarily lead to equality of result. In the context of such forms of transformative interaction, it would seem immoral and also overly paternalistic to try to pursue an objective of equality of result.

ECHR

The non-discrimination provisions of the ECHR have already been considered *supra* and will not be re-assessed here.⁴²

FCNM

³⁷ Ian Brownlie, “Rights of Peoples in International Law,” in James Crawford, Ed., *The Rights of Peoples*, p. 10.

³⁸ *Ibid.*, p. 10.

³⁹ General Comment 18, para. 10. See also, B.G. Ramcharan, “Equality and Nondiscrimination”, *op. cit.*, p. 255.

⁴⁰ *Ibid.* The Human Rights Committee has further stated: “Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population”, *ibid.*

⁴¹ B.G. Ramcharan, “Equality and Nondiscrimination”, *op. cit.*, p. 253.

⁴² See further, *infra*. The analysis *supra* focuses on how the non-discrimination and equality provisions relate specifically to persons belonging to national minorities. More ample treatment of the relevant provisions would be beyond the scope of this thesis.

As with the other international conventions already considered, the veritable cornerstone of the FCNM is its non-discrimination and equality provisions, the most important of which is Article 4, although Article 6(2)⁴³ also merits mention. Article 4 reads:

1. The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.
2. The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.
3. The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.

This, too, is a cross-cutting provision,⁴⁴ and one of the Convention's guiding principles. It places particular emphasis on the notion and objective of "full and effective equality" and contemplates positive measures for the attainment of this goal. It is applicable across the entire spectrum of public life, but also remains sensitive to the rights of the majority too. It shapes – and limits – any positive measures to the specific goal of achieving equality for minorities. Article 4 therefore calls for any relevant measures to respect the principle of proportionality and requires that they "do not extend, in time or in scope, beyond what is necessary in order to achieve the aim of full and effective equality".⁴⁵

EUROPEAN UNION

The main provision of the Charter of Fundamental Rights of the European Union dealing with non-discrimination is Article 21.⁴⁶ It reads:

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Article 21 of the Charter is modeled on relevant UN and ECHR provisions, as well as the non-discrimination provisions of EU law. The Treaty of Amsterdam (1997) introduced an anti-discrimination article into the EC Treaty. The new Article 13 became:

1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
[...]⁴⁷

⁴³ Article 6(2) reads: "The Parties undertake to 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."

⁴⁴ See further, Duncan Wilson, "Report: A critical evaluation of the first results of the monitoring of the Framework Convention on the issue of minority rights in, to and through education (1998-2003)", *op. cit.*

⁴⁵ Explanatory Report to the FCNM, *op. cit.*, para. 39.

⁴⁶ See further: Linos-Alexandre Sicilianos, "Article 21 – Non-discrimination", in *The Commentary of the Charter of Fundamental Rights of the European Union*, June 2006, pp. 188-196.

It is clear that Article 13(1) does not have direct effect and merely provides a basis for “appropriate action”. Thus, after the entry into force of the Amsterdam Treaty in 1999, the European Commission introduced a package of measures designed to give effect to Article 13.⁴⁸ The package comprised two proposals for directives and a proposed action plan. Those proposals matured into, and were adopted as, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,⁴⁹ and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.⁵⁰ The stated purpose of the each is to “lay down a framework for combating discrimination”, on certain grounds, “with a view to putting into effect in the Member States the principle of equal treatment”.⁵¹ In the former Directive, the grounds in question are “of racial or ethnic origin”, whereas in the latter Directive, the grounds are “of religion or belief, disability, age or sexual orientation”. The only other difference in wording between both Directives’ first articles is the latter Directive’s stipulation that the discrimination which it targets concerns “employment and occupation”. As such, its focus is confined to particular settings. The Racial Discrimination Directive, on the other hand, has a broader application. The two Directives were conceived of as part of the same package, as already mentioned, and their drafting processes intertwined and they were ultimately adopted within a few months of one another.⁵² As a result of this conceptual, practical and temporal compression, it is not surprising that the Directives should be coherent (relying on the same understandings of basic concepts like direct and indirect discrimination) and complementary (eg. in terms of their focus on different sets of grounds of discrimination).

3.2.2 Participation in public life

UNITED NATIONS

The right to participation is another right that is process-, rather than object-oriented. It is ostensibly more concerned with means to ends than the ends themselves. While the right to participation is well-established in general international human rights law,⁵³ it is a relatively recent addition to the catalogue of rights of persons belonging to minorities. The right to

⁴⁷ Note: Article 13 has since been amended by the Treaty of Nice; the text quoted here is from the post-Nice consolidated version of the Treaty.

⁴⁸ See, by way of background, Jan Niessen and Isabelle Chopin, “The Starting Line and the Racial Equality Directive”, in Jan Niessen and Isabelle Chopin, Eds., *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (Leiden/Boston, Martinus Nijhoff Publishers, 2004), pp. 95-110.

⁴⁹ OJ L 180/22, 19 July 2000.

⁵⁰ OJ L 303/16, 2 December 2000.

⁵¹ See Article 1 of both Directives.

⁵² See further: Adam Tyson, “The Negotiation of the European Community Directive on Racial Discrimination”, in Jan Niessen and Isabelle Chopin, Eds., *The Development of Legal Instruments to Combat Racism in a Diverse Europe*, *op. cit.*, pp. 111-130.

⁵³ See, by way of example: Articles 21 (participation in the government of one’s country; equal access to the public service), 27 (participation in cultural life), UDHR; Article 5, ICERD (elections, government, public affairs and cultural activities); Article 25, ICCPR (citizens – public affairs, elections); Article 15, ICESCR (cultural life). For a more complete listing, see: Patrick Thornberry, “The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update”, *op. cit.*, at 72. See also: Henry Steiner, “Political Participation as a Human Right”, 1 *Harvard Human Rights Yearbook* (Spring 1988), pp. 77-134; Gregory Fox, “The Right to Political Participation in International Law”, 17 *Yale Journal of International Law* (1992) 539; Steven Wheatley, “Minority Rights, Power Sharing and the Modern Democratic State” in Peter Cumper & Steven Wheatley, Eds., *Minority Rights in the ‘New’ Europe*, *op. cit.*, pp. 199-216.

participation comprises numerous different ramifications, many of which have special significance for minority groups. It is, for instance, a crucial way of ensuring that “representatives of persons belonging to minorities can participate in public decisions that generate space for the maintenance and development of minority identities”.⁵⁴ Although the particular minority dimension to the right to participation has not tended to heavily inform more general considerations of the right, some bridges have nevertheless been built between the general and the specific.

By way of illustration, Article 25, ICCPR, guarantees the right (of citizens) to: (a) “take part in the conduct of public affairs, directly or through freely chosen representatives”; (b) “vote and be elected at genuine periodic elections” by “universal and equal suffrage” and by secret ballot; (c) “have access, on general terms of equality, to public service in his country”. In its General Comment 25 elaborating on the content of the right contained in Article 25, ICCPR, the UN Human Rights Committee specifically states: “Information and materials about voting should be available in minority languages”.⁵⁵ It calls for positive measures to be taken “to overcome specific difficulties, such as illiteracy, *language barriers*, poverty or impediments to freedom of movement which prevent persons entitled to vote from exercising their rights effectively”.⁵⁶ However, no mention is made of facilitative measures for minority-language use in public affairs or in the public service sector.

Further elucidation of the scope of the right to participation, particularly as regards persons belonging to minority groups, can be gleaned from relevant jurisprudence of the UN Human Rights Committee. In *Mikmaq people v. Canada*,⁵⁷ the HRC found that the Canadian Government’s failure to invite representatives of the society to constitutional conferences on aboriginal matters – in that particular instance – was not unreasonable as “[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.”⁵⁸ It held that Article 25(a) does not mean that “every citizen may determine either to take part directly in the conduct of public affairs or to leave it to freely chosen representatives”; rather “It is for the legal and constitutional system of the State party to provide for the modalities of such participation”.⁵⁹ It is disappointing that the HRC did not find a violation of Article 25 on the facts of the instant case as the theme of the constitutional conferences to which representatives of the Mikmaq tribal society were not invited was aboriginal matters – a topic which would *prima facie* have been of great relevance to members of the society. Although the right of minorities to participation has not fared much better when considered in the context of Article 27, ICCPR, the HRC has consistently attached considerable importance to efforts made by State authorities to consult with minorities when decisions liable to affect their lifestyle or livelihood are due to be taken.⁶⁰

⁵⁴ Marc Weller, “A critical evaluation of the first results of the monitoring of the Framework Convention on the issue of effective participation of persons belonging to national minorities (1998-2003)”, *op. cit.*, p. 71.

⁵⁵ Para. 12, General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Article 25), CCPR/C/21/Rev.1/Add.7, adopted on 12 July 1996.

⁵⁶ (emphasis added) *Ibid.*

⁵⁷ Communication No. 205/1986, *Mikmaq people v. Canada*, views adopted on 4 November 1991.

⁵⁸ *Ibid.*, para. 5.5.

⁵⁹ *Ibid.*, para. 5.4. The HRC further stated that to infer a right of direct participation by citizens would go “far beyond the scope of article 25(a)” – para. 5.5.

⁶⁰ Communication No. 511/1992, *Ilmari Länsman et al. v. Finland*, views adopted on 8 November 1994, para. 9.6 ; Communication No. 671/1995, *Jouni E. Länsman et al. v. Finland*, views adopted on 22 November 1996, para. 10.5; Communication No. 547/1993, *Apirana Mahuika et al. v. New Zealand*, views of 20 October 2000, paras. 9.5, 9.6, 9.8.

Nevertheless, it has been reluctant to travel the extra mile and qualitatively assess relevant consultation processes.⁶¹

The right to participation in public life was explicitly and specifically integrated into minority rights provisions in the CSCE Copenhagen Document (1990) and thereafter also in the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992).

The ground-breaking Para. 35 of the Copenhagen Document is set out in the following terms:

The participating States will respect the right of persons belonging to national minorities to effective participation in public affairs, including in the affairs relating to the protection and promotion of the identity of such minorities.

The participating States note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned.

The operative parts of Article 2, UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, read:

2.2 Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.

2.3 Persons belonging to minorities have the right to participate effectively in decisions on the national, and where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.⁶²

The right has been framed in such a way as to ensure the participation of persons belonging to minorities in the general affairs of State, as well as in those matters impacting directly on their own interests. In practice, these often prove to be qualitatively different forms of participation. As regards the former, effective participation “can serve as a means of dispute resolution and sustain diversity as a condition for condition for dynamic stability of society”.⁶³ It has been holistically read into the latter provision that “Minorities should be involved at the local, national and international level in the formulation, adoption, implementation and monitoring of standards and policies affecting them”.⁶⁴

⁶¹ It limited itself to stating “That this consultation process [with the Muotkatunturi Herdsmen’s Committee about plans for a logging project] was unsatisfactory to the authors and was capable of greater inaction does not alter the Committee’s assessment [...] that the State party’s authorities did go through the process of weighing the authors’ interests and the general economic interests in the area specified in the complaint when deciding on the most appropriate measures of forestry management [...]” –*Jouni E. Länsman et al. v. Finland, op. cit.*, para. 10.5. See also in this regard, *Apirana Mahuika et al. v. New Zealand, op. cit.*, paras. 9.6, 9.8.

⁶² These provisions are bolstered by a reaffirmation of guarantees of freedom of association for minorities, including the transfrontier/international dimension to the right: Article 2, paras. 4 and 5. All of these provisions should be read in conjunction with Article 4.5 (which emphasises once again the importance of the full participation of persons belonging to minorities in “the economic progress and development in their country”) and Article 5 (which calls for due regard to be had for the legitimate interests of persons belonging to minorities in the planning and implementation of national policies and programmes and international programmes of cooperation and assistance).

⁶³ Asbjorn Eide, “Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities”, Working paper submitted to the Working Group on Minorities, Sub-Commission on Promotion and Protection of Human Rights, Commission on Human Rights, E/CN.4/Sub.2/AC.5/2000/WP.1, 27 April 2000, p. 8.

⁶⁴ *Ibid.*, p. 7.

The Declaration does not prescribe any specific modalities for the realisation of the right (in either sense), most likely because of the huge range of possibilities to choose from. Rather, the effectiveness of modalities of participation can only be evaluated against the specific and subjective needs, interests and general circumstances of discrete minorities.⁶⁵

The term, “public life”, must be construed broadly as it goes beyond “political life” and encompasses electoral and administrative contexts as well. It involves the ability to access and exploit modalities of governance (institutes, processes, services, official information and documentation) in effective and culturally and linguistically appropriate ways. It arguably also includes participation in public communication and debate, i.e., discussions on matters of public importance and interest, where relevant via the media. Thus, the notion “public life” is not restricted to the official workings of the State and its organs, but rather conveys a more flexible understanding of civic engagement (for which freedom of expression is clearly a *sine qua non*).

Along with the other qualifying terms, “cultural, religious, social, economic”, the scope of the right would indeed appear to be far-reaching. Moreover, it has been noted that the right to effective participation is “free-standing” and that “there is no indication of limitation of purposes for which participation may be sought”.⁶⁶ It has also been considered that the achievement of progress in the realisation of economic, social and cultural rights requires “popular participation [...] at all stages, including the formulation, application and review of national policies”.⁶⁷

ECHR/FCNM

The ECHR does not countenance a right to participation, as such. However, careful extrapolation from other Convention articles could arguably imply the essence of such a right.⁶⁸ The Court’s recurrent references to democratic society are of particular importance. Nevertheless, in the absence of an express ECHR right to participation, the right is primarily assured in the CoE context by Article 15, FCNM, as well as the European Charter of Local Self-Government.⁶⁹ Article 15, FCNM, provides as follows:

The 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.

This succinctly worded article provides for a right of effective participation of persons belonging to national minorities generally, as well as a more specific right where issues affecting them are at stake. The adjectival force of “effective” in this context is considerable.

⁶⁵ *Ibid.*, p. 8 and Patrick Thornberry, “The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update”, *op. cit.*, at 43.

⁶⁶ Patrick Thornberry, “The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update”, *op. cit.*, at 43.

⁶⁷ Para. 11, Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Maastricht 2-6 June 1986.

⁶⁸ For example, the right to: freedom of expression (Article 10, ECHR); freedom of assembly and association (Article 11); education (ECHR, P1-2); free elections (ECHR, P1-3), etc.

⁶⁹ CETS No. 122, adopted on 15 October 1985; entry into force: 1 September 1988.

As with rights protected under the ECHR, this right cannot be illusory or theoretical.⁷⁰ Representation of minorities that is merely tokenistic will not pass muster. Participation must be meaningful and real.

The terse formulation of Article 15, however, offers little guidance as to the substance of the right. It certainly has enabling, enhancing and empowering properties. However, it by no account stretches to cover equal representation on public bodies (rather, the goal pursued is equitable representation); a right of veto, or a right to pre-determine results.

In the First Cycle of its Monitoring of the FCNM, the Advisory Committee addressed a number of issues arising under Article 15,⁷¹ many of which concerned the foregrounding of minority issues in the affairs of State and engagement with minorities in connection with the same. For instance, the Advisory Committee pointed out the need to give minority issues greater prominence in government affairs, through their institutionalisation in governmental structures or their incorporation into policy-making.⁷² Particular attention was also paid to the need for a framework for dialogue between governments and minorities to be established and maintained.⁷³ In this respect, the Advisory Committee tended to call for a consolidated consultation structure to facilitate such dialogue (eg. a body representing the interests of minority groups within a State), or direct and systematic liaison with various minorities, or both.

The importance of structural guarantees for the political representation of persons belonging to minorities - at national and local levels – has also been emphasised.⁷⁴ On occasion, the Advisory Committee has expressly promoted decentralised or local government (as contemplated by para. 80 of the Explanatory Report to the FCNM),⁷⁵ thereby following Article 4(3) of the European Charter of Local Self-Government which provides that “Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen”.⁷⁶ These concerns of the Advisory Committee all relate to the objective of bringing persons belonging to national minorities closer to the locus of decision-making, particularly as regards those matters of greatest relevance to them. They are complemented by

⁷⁰ See, among other authorities in the jurisprudence of the European Court of Human Rights, *Airey v. Ireland*, para. 24: “The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective [...]”.

⁷¹ See further: Marc Weller, “A critical evaluation of the first results of the monitoring of the Framework Convention on the issue of effective participation of persons belonging to national minorities (1998-2003)”, in *Filling the Frame, op. cit.*, pp. 69-94; Alan Phillips, “Commentary: Economic participation of national minorities”, in *ibid.*, pp. 98-110.

⁷² Opinions on: Albania (para. 108); Armenia (para. 110); Lithuania (para. 104); Sweden (para. 97).

⁷³ Opinions on: Albania (para. 109); Armenia (para. 111); Austria (para. 100); Azerbaijan (para. 118); Cyprus (In respect of Article 15); Czech Republic (In respect of Article 15); Estonia (In respect of Article 15); Finland (In respect of Article 15); Germany (para. 89); Hungary (In respect of Article 15); Italy (In respect of Article 15); Lithuania (para. 104); Moldova (para. 119); Norway (para. 97); Poland (para. 124); Romania (In respect of Article 15); Russian Federation (para. 160); Serbia & Montenegro (paras. 166, 167, 168); Slovakia (In respect of Article 15); Spain (In respect of Article 15); Sweden (paras. 95, 96); Switzerland (paras. 76, 77); Ukraine (para. 111).

⁷⁴ Opinions on: Albania (para. 110); Armenia (para. 109); Croatia (In respect of Article 15); Cyprus (In respect of Article 15); Czech Republic (In respect of Article 15); Hungary (In respect of Article 15); Poland (para. 123); Serbia & Montenegro (para. 164); Ukraine (para. 110).

⁷⁵ Opinions on: Azerbaijan (para. 119); Hungary (In respect of Article 15); Moldova (para. 121); Serbia & Montenegro (para. 169).

⁷⁶ Marc Weller, “A critical evaluation of the first results of the monitoring of the Framework Convention on the issue of effective participation of persons belonging to national minorities (1998-2003)”, *op. cit.*, p. 74.

the Advisory Committee's efforts to ensure effective participation of persons belonging to national minorities in elections⁷⁷ and political life generally.⁷⁸

Participation and employment in the public service sector have also come under scrutiny,⁷⁹ with certain branches occasionally being highlighted as requiring special attention, such as the judiciary, security and defence forces. The Advisory Committee has also frequently addressed issues relating to participation in/exclusion from (socio-)economic affairs.⁸⁰ Most often, this treatment focused on the problems encountered by specific minorities, especially the Roma, Gypsies, Travellers or Sinti.⁸¹ Although various aspects of socio-economic participation and exclusion have been explored in the Advisory Committee's Opinions (eg. impact of cross-border relations, land usage, lifestyle, etc.), it has nevertheless been submitted that the quality of the assessments offered would be enhanced if they were to (i) draw on comprehensive and reliable disaggregated data, and (ii) be informed by greater thematic expertise.⁸²

Marc Weller has measured the initial expectations generated by Article 15, FCNM, against actual treatment of the article in the First Monitoring Cycle:

Obviously, there does not exist one single specific model of performance that must be applied by all States Parties in all circumstances. This applies with particular force to issues of State construction and political systems design. However, even if States may dine *a la carte* when implementing Article 15, there must emerge a full and satisfying dinner at the end of the day. In other words, there may be a range of options for the achievement of the individual aspects of effective participation, but ultimately Article 15 is indeed a provision of hard law – and it is an obligation of result.⁸³

Despite being of more recent vintage than other minority rights recognised under positive international law, the right to effective participation is rapidly coming to be regarded as one of the most important. This can be attributed in large measure to the inexorable rise in contemporary political and legal discourse in Europe of the concept of good governance and the principle of subsidiarity in decision-making.⁸⁴ The right to effective participation is very closely connected to both.

⁷⁷ Opinions on: Albania (para. 111); Estonia (In respect of Article 15); Hungary (In respect of Article 15); Russian Federation (paras. 157, 159); Ukraine (para. 109).

⁷⁸ Opinions on: Ireland (para. 129); Lithuania (para. 104); Russian Federation (para. 158).

⁷⁹ Opinions on: Albania (para. 112); Azerbaijan (paras. 120, 121); Croatia (In respect of Article 15); Cyprus (In respect of Article 15); Estonia (In respect of Article 15); Italy (In respect of Article 15); Moldova (para. 120); Romania (In respect of Article 15); Serbia & Montenegro (para. 165); Slovakia (In respect of Article 15) and the United Kingdom (paras. 126, 128, 129).

⁸⁰ See the Advisory Opinions on: Albania (para. 112); Austria (para. 101); Czech Republic (In respect of Article 15); Estonia (In respect of Article 15); Finland (In respect of Article 15); Germany (para. 90); Hungary (In respect of Article 15); Ireland (para. 128); Italy (In respect of Article 15); Moldova (para. 120); Norway (para. 99); Romania (In respect of Article 15); Russia (para. 161); Serbia & Montenegro (para. 170); Slovakia (In respect of Article 15); Spain (In respect of Article 15); Switzerland (para. 75); Ukraine (para. 112) and the United Kingdom (para. 127).

⁸¹ All of the instances mentioned in the preceding footnote, with the exception of: Estonia, Norway, Russia, Serbia & Montenegro, Ukraine and the United Kingdom. None of these Advisory Opinions singled out any particular minority as regards (socio-)economic exclusion, but French and Italian speakers were specifically mentioned in this connection in the Advisory Opinion on Switzerland (para. 75).

⁸² Alan Phillips, "Commentary: Economic participation of national minorities", in *Filling the Frame, op. cit.*, pp. 98-110, at 110.

⁸³ Marc Weller, "A critical evaluation of the first results of the monitoring of the Framework Convention on the issue of effective participation of persons belonging to national minorities (1998-2003)", *op. cit.*, p. 91.

⁸⁴ See further, John Packer, "The origin and nature of the Lund Recommendations on the Effective Participation of National Minorities in Public Life", *Helsinki Monitor* (No. 4, 2000), pp. 29-61, at 38.

OSCE

That the right to participation has become “Growth Area No. 1” in the field of minority rights is attested to by the elaboration and promotion of the Lund Recommendations on the Effective Participation of National Minorities in Public Life.⁸⁵ In keeping with the UN Declaration and other relevant international instruments, the “basic conceptual division” within the Lund Recommendations “follows two prongs: participation in governance of the State as a whole, and self-governance over certain local or internal affairs”.⁸⁶ It is important to recognise and reinforce this conceptual bifurcation as the needs of minorities and the modalities of participation in both cases are very different.

The Lund Recommendations contemplate a number of special arrangements intended to enhance the effectiveness of participation by national minorities in governmental decision-making. It is anticipated that the arrangements in question would be adapted to reflect *couleur locale* in States and that they would be applied at the level of central government and also at the regional and local levels.⁸⁷ They include special parliamentary representation for national minorities, including on parliamentary committees “and other forms of guaranteed participation in the legislative process”.⁸⁸ Formal or informal understandings that aim to assure national minority representation in Cabinet, in the Courts and in other (governmental and advisory) bodies are also advocated.⁸⁹ The importance of having minority interests adequately represented and asserted within government ministries is identified, as is the need for minorities (i) to be able to participate effectively in the civil service, and (ii) to have access to public services in minority languages.⁹⁰

Very usefully, the right of persons belonging to national minorities to vote and stand for office without discrimination is reiterated,⁹¹ as is the fact that the right “to establish political parties based on communal identities as well as those not identified exclusively with the interests of a specific community”.⁹² The latter point has proved contentious in the recent jurisprudence of the European Court of Human Rights, and has led to divergent findings on the part of the Court (see *supra*). As regards electoral matters, proportional representation systems, some forms of preference voting and lower numerical thresholds for enhancing national minority representation in parliament, are all put forward.⁹³ It is also stated that the geographical boundaries of electoral districts should facilitate the equitable representation of national minorities.⁹⁴

Another recommendation is that “States should establish advisory or consultative bodies within appropriate institutional frameworks to serve as channels for dialogue between

⁸⁵ The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note, Foundation on Inter-Ethnic Relations, September 1999. See further: John Packer, “The origin and nature of the Lund Recommendations on the Effective Participation of National Minorities in Public Life”, in *Helsinki Monitor* 2000 No. 4, pp. 29-61.

⁸⁶ Introduction, the Lund Recommendations on the Effective Participation of National Minorities in Public Life, *op. cit.*

⁸⁷ Paras. 6, 11, *ibid.*

⁸⁸ Para. 6, *ibid.*

⁸⁹ Para. 6, *ibid.*

⁹⁰ Para. 6, *ibid.*

⁹¹ Para. 7, *ibid.*

⁹² Para. 8, *ibid.*

⁹³ Para. 9, *ibid.*

⁹⁴ Para. 10, *ibid.*

governmental authorities and national minorities”.⁹⁵ Such bodies would necessarily have wide-ranging functions⁹⁶ and could also include “special purpose committees for addressing such issues as housing, land, education, language, and culture”.⁹⁷ They would have to have adequate resources at their disposal.⁹⁸

According to the Explanatory Note to the Lund Recommendations, “the term ‘self-governance’ implies a measure of control by a community over matters affecting it”.⁹⁹ It is a foundational premise of the Lund Recommendations’ approach to self-governance that while certain areas of governance require uniformity and should therefore remain the preserve of central authorities, other areas benefit from diversity and are consequently better dealt with when delegated to subsidiary or regional or local authorities.¹⁰⁰ The division of functions between central authorities and institutions of self-governance need not be mutually exclusive: scope exists for certain functions to be shared.¹⁰¹ Whether the institutions of self-governance are territorial or not, they must always be democratically constituted and genuinely reflect the views of the affected population.¹⁰² Self-governance leads to minorities taking on an enhanced role in the determination of matters that are crucial to their identity and way of life.¹⁰³ In this spirit, any territorial arrangements for self-governance must go “beyond the mere decentralization of central government administration from the capital to regional or local offices”.¹⁰⁴

Finally, the Lund Recommendations examine the benefits of constitutional or legislative entrenchment for self-governance arrangements.¹⁰⁵ Various measures for the resolution of conflicts are considered, including judicial, administrative and other dispute-resolution mechanisms, of a fixed and *ad hoc* nature.¹⁰⁶ Such an emphasis confirms the understanding that the right to effective participation is concrete and not merely aspirational.

3.2.3 Education

UNITED NATIONS

Education is deemed to be “both a human right in itself and an indispensable means of realizing other human rights”.¹⁰⁷ As such, it does not fall neatly into either the category of object-oriented rights or the category of process-oriented rights: it straddles both. It is only in the specific circumstances of individual cases that it can properly be gauged whether the right is invoked for determinant or facilitative purposes. The link between the substantive and procedural strengths of the right to education is explicitly pointed out in Article 13(1), ICESCR, which sets out that States Parties “agree that education shall enable all persons to

⁹⁵ Para. 12, *ibid.*

⁹⁶ Para. 13, *ibid.*

⁹⁷ Para. 12, *ibid.*

⁹⁸ Para. 13, *ibid.*

⁹⁹ Para. 14, Explanatory Note to the Lund Recommendations, *op. cit.*

¹⁰⁰ Para. 15, the Lund Recommendations, *op. cit.*

¹⁰¹ Para. 15, *ibid.*

¹⁰² Para. 16, *ibid.*

¹⁰³ Para. 18, *ibid.*

¹⁰⁴ Para. 19, *ibid.*

¹⁰⁵ Paras. 22, 23, *ibid.*

¹⁰⁶ Para. 24, *ibid.*

¹⁰⁷ Para. 1, ICESCR General Comment No. 13.

participate effectively in a free society [...]”. Similarly, the essence of the right comprises civil-libertarian, socio-economical and cultural streaks.

As is the case with other rights, the canon of existing international human rights standards contains provisions guaranteeing educational rights generally, but also specifically concerning persons belonging to minorities.¹⁰⁸ Of the former, Article 26, UDHR, is the first which should be mentioned, owing to its germinative character:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

The Convention on the Rights of the Child (CRC) sets out a general right to education in more extensive terms than any other global treaty. The operative articles read as follows:

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
 - (a) Make primary education compulsory and available free to all;
 - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
 - (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
 - (d) Make educational and vocational information and guidance available and accessible to all children;
 - (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:
 - (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 - (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

¹⁰⁸ See generally: Patrick Thornberry & Dianne Gibbons, “Education and Minority Rights: A Short Survey of International Standards”, 4 *International Journal on Minority and Group Rights* (1997), pp. 115-152; Manfred Nowak, “The Right to Education”, in Asbjorn Eide, Catarina Krause & Allan Rosas, Eds., *Economic, Social and Cultural Rights* (2nd Edition) (Kluwer Law International, the Netherlands, 2001), pp. 245-271; Katarina Tomasevski, *Education Denied: Costs and Remedies* (Zed Books Ltd., London, 2003).

(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;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

It is clear from CRC General Comment No. 1, entitled “The Aims of Education”, that the operative understanding of “education” goes “far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society”.¹⁰⁹ The General Comment also stresses that States fail to discharge their duties under Article 29(1) if they “do no more than seek to superimpose the aims and values of the article on the existing system without encouraging deeper changes”.¹¹⁰ Rather, to effectively promote Article 29(1), what is required is: “the fundamental reworking of curricula to include the various aims of education and the systematic revision of textbooks and other teaching materials and technologies, as well as school policies”.¹¹¹ The far-reaching positive obligation on States envisaged here is of considerable potential relevance to persons belonging to minorities, as will be illustrated *infra*.

The ICCPR does not provide for the right to education; the right is assured instead by the longest article (Article 13) in the ICCPR’s sister covenant, the ICESCR. Nevertheless, various aspects of the right to education have been considered by the UN Human Rights Committee – under various substantive guarantees of the ICCPR, most notably the right to non-discrimination/equality and freedom of religion. In *Blom v. Sweden*¹¹² and *Lindgren et al. v. Sweden*,¹¹³ the Human Rights Committee emphasised that differential treatment of public and private schools in terms of the allocation of subsidies and ancillary benefits respectively was justified on the grounds of the different nature of both types of school. Key elements in this reasoning were the measure of State control exercised over each type of school and the freedom of parents to choose to send their children to either. In *Blom*, the Committee pointed out that the private school system is not subject to State supervision¹¹⁴ and in *Lindgren*, it observed that “a State party cannot be deemed to discriminate against parents who freely choose not to avail themselves of benefits which are generally open to all”.¹¹⁵ The benefits in question included free transport to and from school by bus, free textbooks and school meals, all of which were available to children attending public schools.

Differential State funding of schools was also at issue in *Waldman v. Canada*.¹¹⁶ Noting that it was not possible for religious denominations other than Roman Catholics to have their

¹⁰⁹ Para. 2, CRC General Comment No. 1, The Aims of Education: Article 29(1) (2001), adopted on 17 April 2001, Doc. No. CRC/GC/2001/1.

¹¹⁰ Para. 18, *ibid*.

¹¹¹ Para. 18, *ibid*.

¹¹² Communication No. 191/1985, *Blom v. Sweden*, Views adopted on 4 April 1988. It is interesting to note that in this case, the author of the communication also invoked Article 5(b) of the UNESCO Convention against Discrimination in Education (*infra*) and Article 13, ICESCR (*infra*).

¹¹³ Communication Nos. 298/1988 and 299/1988, *Lindgren et al. v. Sweden*, Views adopted on 9 November 1990.

¹¹⁴ *Blom v. Sweden*, *op. cit.*, para. 10.3.

¹¹⁵ *Lindgren et al. v. Sweden*, *op. cit.*, para. 10.3.

¹¹⁶ Communication No. 694/1996, *Arieh Hollis Waldman v. Canada*, Views of 3 November 1999.

schools incorporated within the (secular) public school system – and thereby entitling them to State funding, the Human Rights Committee found that such differential treatment could not be considered reasonable and objective.¹¹⁷ It held that the ICCPR does not require States to provide funding for denominational schools, but where States choose to do so, they should do make such funding available on a non-discriminatory basis.¹¹⁸

As well as considering the aforementioned structural issues concerning the right to education, the Human Rights Committee has also examined relevant substantive issues. In *Hartikainen v. Finland*,¹¹⁹ for instance, a challenge was mounted to a legislative requirement in Finland whereby children of atheist parents were obliged to attend classes on the history of religion and ethics. The author of the communication argued that such a requirement was incompatible with the right to freedom of religion, as guaranteed by the ICCPR. The subject, history of religion and ethics, was designed as an alternative to religious instruction for pupils whose parents objected to religious instruction. The Human Rights Committee took the view that such alternative instruction would not in itself be incompatible with Article 18, ICCPR (see further, *infra*), as long as the instruction would be “given in a neutral and objective way” and respectful of “the convictions of parents or guardians who do not believe in any religion”.¹²⁰ In reaching its conclusion that Article 18(4) had not been violated in the instant case, the Committee was influenced by the fact that in the relevant legislation, express provision was made for parents objecting to both religious instruction and instruction in the history of religion “to obtain exemption [for their children] therefrom by arranging for them to receive comparable instruction outside of school”.¹²¹

As intimated *supra*, the main provision for educational rights in the ICESCR is extensive. Article 13, ICESCR, reads:

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 - (a) Primary education shall be compulsory and available free to all;
 - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
 - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
 - (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
 - (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as

¹¹⁷ Para. 10.5.

¹¹⁸ Para. 10.6.

¹¹⁹ Communication No. 40/1978, *Erkki Hartikainen v. Finland*, Views of 9 April 1981.

¹²⁰ Para. 10.4.

¹²¹ Para. 10.4.

may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 13 is supplemented by Article 14 (which deals with the (progressive) realisation of compulsory primary education, free-of-charge)¹²² and the content of the right has been further elaborated by General Comment No. 13.

Its inclusion in the ICESCR as opposed to the ICCPR is significant, not least because of the implications which that has for the nature of the obligation it creates for States. The ICESCR places States Parties under a general legal obligation of conduct or performance, rather than of result (which is the general norm for rights guaranteed under the ICCPR, for instance). This is clarified by Article 2(1), ICESCR:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Alongside the general provision for the progressive realisation of most rights contained therein, the Covenant also imposes various obligations of immediate effect,¹²³ most notably to ensure that relevant rights are exercised without discrimination¹²⁴ and that States “take steps” “within a reasonably short time” that are “deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant”.¹²⁵ While the underlying rationale of the concept of “progressive realization” is that it should serve as “a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights”, it must also “be read in the light of the overall objective, indeed the *raison d’être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question”.¹²⁶ As such, it “imposes an obligation to move as expeditiously as possible towards that goal”.¹²⁷ The Human Rights Committee also interprets relevant States obligations as including “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights”.¹²⁸

Applying all of the foregoing to the specific ICESCR provisions regarding education, a number of points can be made. First, in the context of the aforementioned “minimum core

¹²² Article 14, ICESCR reads: “Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.” See also in this connection, CESCR General Comment 11 – Plans of action for primary education (Article 14), adopted on 10 May 1999.

¹²³ CESCR General Comment No. 3 – The nature of States parties obligations (Art. 2, para. 1 of the Covenant), *op. cit.*, para. 1.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, para. 2.

¹²⁶ *Ibid.*, para. 9.

¹²⁷ *Ibid.*, para. 9.

¹²⁸ *Ibid.*, para. 10.

obligations”, the Human Rights Committee has held that a State Party would be *prima facie* in breach of its ICESCR obligations if “any significant number of individuals [within its jurisdiction] is deprived of [...] the most basic forms of education”.¹²⁹ Second, the steps to be taken by States to ensure the progressive realisation of relevant rights should be by all appropriate means, especially legislative measures. In this connection, education has been expressly mentioned by the Human Rights Committee as an area in which “legislation may also be an indispensable element for many purposes”.¹³⁰ Third, the Committee considers Article 13(2)(a), (3) and (4) as being suited to “immediate application by judicial and other legal organs in many national legal systems”.¹³¹ The creation of judicial remedies for educational rights would strengthen their implementation. These specific obligations on States are repeated and considerably reinforced in the very detailed CESCR General Comment No. 13 – The right to education (Article 13 of the Covenant).¹³²

The UNESCO Convention against Discrimination in Education (1960)¹³³ singles out the issue of the educational rights of national minorities in Article 5(1):

- (c) It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language, provided however:
 - (i) That this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty;
 - (ii) That the standard of education is not lower than the general standard laid down or approved by the competent authorities; and
 - (iii) That attendance at such schools is optional.

While the UNESCO Convention on Technical and Vocational Education (1989) does not contain any provisions of direct relevance to persons belonging to minorities, some of its provisions could conceivably be of indirect benefit to them.¹³⁴

In its specific treatment of the educational rights of minorities, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities places emphasis on States taking appropriate measures to ensure that persons belonging to minorities “may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue”.¹³⁵ The Declaration also encourages two-way traffic between majority and minority sections of society in terms of the acquisition of knowledge about their respective cultures.¹³⁶

Since the establishment of the position of UN Special Rapporteur on the Right to Education in 1998, a concrete, consolidated approach to the progressive realisation of the right to education has been pursued under the auspices of the UN.¹³⁷ This approach is built around the so-called

¹²⁹ *Ibid.*, para. 10.

¹³⁰ *Ibid.*, para. 3.

¹³¹ *Ibid.*, para. 5.

¹³² Adopted on 8 December 1999. See in particular, paras. 43-57.

¹³³ UNESCO Convention against Discrimination in Education, adopted by the General Conference at its eleventh session, Paris, 14 December 1960.

¹³⁴ See, for example, Article 2(3) and Article 3(1)(a), UNESCO Convention on Technical and Vocational Education, adopted by the General Conference at its twenty-fifth session, Paris, 10 November 1989.

¹³⁵ Article 4.3, UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, *op. cit.*

¹³⁶ Article 4.4, *ibid.*

¹³⁷ The position was created by the UN Commission on Human Rights Resolution 1998/33 of 17 April 1998.

4-A (analytical) scheme which denotes “the four essential features that primary schools should exhibit, namely availability, accessibility, acceptability and adaptability”.¹³⁸ These essential features should be guaranteed in all of the States’ various roles in primary education, i.e., regulation, funding and provision.¹³⁹ The 4-A Scheme is often applied to post-primary education as well.

ECHR¹⁴⁰

At the European level, educational rights are provided for first and foremost by Article 2, Protocol No. 1 to the ECHR, which states:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

The European Court of Human Rights has repeatedly clarified the differential weighting of the various components of Article 2 (P1-2) by stating that the article “constitutes a whole that is dominated by its first sentence, the right set out in the second sentence being an adjunct of the fundamental right to education”.¹⁴¹ Thus, the primary right is that of the child to education, whereas ensuring that the religious and philosophical convictions of parents are respected in the provision of education is of secondary importance.¹⁴² As the dominant part of the article is negatively-worded, there would appear to be limited scope for reading positive State obligations into the right in question. However, as the Court has pointed out, “The verb ‘respect’ means more than ‘acknowledge’ or ‘take into account’”, meaning that “In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State”.¹⁴³

In the *Belgian Linguistic Case*,¹⁴⁴ the Court held that there was no obligation on States to “establish at their own expense, or to subsidise, education of any particular type or at any particular level”,¹⁴⁵ and this finding has consistently been followed in the subsequent jurisprudence of the Court and Commission.¹⁴⁶ Relevant State obligations can be discharged in two ways: (i) by merely permitting the establishment of private schools catering for

¹³⁸ Katarina Tomasevski, “Preliminary report of the Special Rapporteur on the right to education”, 13 January 1999, UN Doc. E/CN.4/1999/49, para. 50.

¹³⁹ *Ibid.*

¹⁴⁰ See generally: Luzius Wildhaber, “Right to Education and Parental Rights”, in R. St. J. MacDonald *et al.*, Eds., *The European System for the Protection of Human Rights* (1993), pp. 531-551; Duncan Wilson, *Minority Rights in Education: Lessons for the European Union from Estonia, Latvia, Romania and the former Yugoslav Republic of Macedonia* (Right to Education, 2002).

¹⁴¹ *Campbell & Cosans v. the United Kingdom*, Judgment of the European Court of Human Rights of 25 February 1982, Series A, No. 48, para. 40 (following and providing a more succinct formulation of the Court’s earlier observation in *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, para. 52).

¹⁴² *Jordebo v. Sweden*, Decision of the European Commission of Human Rights of 6 March 1987, Appn. No. 11533/85, para. ; *Campbell & Cosans v. the United Kingdom*, *op. cit.*, para. 40.

¹⁴³ *Efstathiou v. Greece*, Judgment of the European Court of Human Rights of 27 November 1996, para. 28, following and cosmetically refining *Campbell & Cosans v. the United Kingdom*, *op. cit.*, para. 37.

¹⁴⁴ Judgment of the European Court of Human Rights of 23 July 1968, Series A, vol. 6.

¹⁴⁵ P. 31.

¹⁴⁶ See, *inter alia*, *Jordebo v. Sweden*, *op. cit.*; *Andre Simpson v. United Kingdom*, Decision of inadmissibility of the European Commission of Human Rights of 4 December 1989; *X. & Y. v. United Kingdom*, Decision of inadmissibility of the European Commission of Human Rights of 7 December 1982, Appn. No. 9461/81; *40 mothers v. Sweden*, Decision of inadmissibility of the European Commission of Human Rights of 9 March 1977, Appn. No. 6853/74; *W. & K.L. v. Sweden*, Decision of inadmissibility of the European Commission of Human Rights of 11 December 1985, Appn. No. 10476/83.

specific religious and philosophical convictions,¹⁴⁷ and (ii) by respecting “parents’ religious and philosophical convictions within the existing and developing system of education”.¹⁴⁸

On the first point: while the right to establish and run a private school is envisaged by Article 2 (P1-2), it is not an absolute right and “[I]t must be subject to regulation by the State in order to ensure a proper educational system as a whole”.¹⁴⁹ However, “such regulation must never injure the substance of the right nor conflict with other rights enshrined in the Convention or its Protocols”.¹⁵⁰ Within these parameters, regulation could very legitimately seek to safeguard standards, values and balance in the education sector, especially in school curricula. Another important consideration concerning the lack of positive State obligations under Article 2 (P1-2) is the impact of non-discrimination and equality provisions. These provisions are by definition cross-cutting and as such, they also apply to “the exercise of each and every function [...] that they [i.e., States] undertake in the sphere of education and teaching, including that consisting of the organisation and financing of public education”.¹⁵¹ In consequence, differential treatment of public and private school systems in terms of State financing or subsidies could *prima facie* be a source of concern. However, complaints of such differential treatment to be heard by the Strasbourg adjudicatory organs have tended to be legitimised on the basis of the superior measure of State control exercised over the former.¹⁵²

Whereas attempts to ensure that the religious and philosophical preferences of parents are respected in the education sector have enjoyed measured success, similar efforts to win recognition for parents’ linguistic preferences have been routinely dismissed. The logic behind the differential treatment upheld by the European Court of Human Rights stems from the text of ECHR P1-2, which makes express reference to “religious and philosophical convictions”, but is silent on the question of linguistic characteristics. This logic is articulated in *Skender v. the Former Yugoslav Republic of Macedonia*,¹⁵³ a case in which the applicant complained about the authorities’ refusal to provide education in Turkish in a district where his daughters were to attend primary school. In that case, the Court stated that “a right to education in a particular language or a right to obtain from the State the creation of a particular kind of educational establishment cannot be derived from Article 2 of Protocol No. 1”.¹⁵⁴ In this respect, the Court followed the precedent set out in the *Belgian Linguistic Case*, viz. that ECHR P1-2:

does not require of States that they should, in the sphere of education or teaching, respect parents’ linguistic preferences, but only their religious and philosophical convictions. To interpret the terms “religious” or “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.¹⁵⁵

¹⁴⁷ *X. v. Sweden*, Decision of the European Commission of Human Rights of 7 May 1984, Appn. No. 10201/82 (unpublished); *Y. v. Sweden*, Decision of the European Commission of Human Rights of 7 May 1984, Appn. No. 10202/82 (unpublished).

¹⁴⁸ *W. & K.L. v. Sweden*, *op. cit.*; *X. & Y. v. United Kingdom*, *op. cit.*; *X. v. United Kingdom*, Decision of the European Commission of Human Rights of 2 May 1978, Appn. No. 7782/77, DR 14, p. 179.

¹⁴⁹ *Jordebo v. Sweden*, *op. cit.*

¹⁵⁰ *Campbell & Cosans v. the United Kingdom*, *op. cit.*, para. 41.

¹⁵¹ *Kjeldsen, Busk Madsen & Pedersen v. Denmark*, *op. cit.*, para. 50.

¹⁵² *X. v. United Kingdom*, Appn. No. 7782/77, *op. cit.*

¹⁵³ *Skender v. the Former Yugoslav Republic of Macedonia*, Partial admissibility decision of the European Court of Human Rights (Third Section) of 22 November 2001, Appn. No. 62059/00.

¹⁵⁴ *Ibid.*, p. 9 of judgment. The Court proceeded to point out that the drafting committee of ECHR, P-1, rejected a proposal to include a right for parents to have the education of their children carried out in a language other than that of the State in question.

¹⁵⁵ *Belgian Linguistic Case*, *op. cit.*, p. 32.

On the second point, *supra*, viz. the obligation to respect parental religious and philosophical convictions: pursuant to the second sentence of Article 2 (P1-2), “the limit that must not be exceeded” is that the State “is forbidden to pursue an aim of indoctrination that might be considered as not respecting the parents’ religious and philosophical convictions”.¹⁵⁶ Thus, “in fulfilling the functions assumed by it in regard to education and teaching”, the State “must take care that information or knowledge contained in the curriculum is conveyed in an objective, critical and pluralistic manner”.¹⁵⁷ Neither the Court nor the Commission have ever signalled that there may be a positive obligation to expressly or actively accommodate the religious or philosophical convictions of parents in the education sector.

Educational rights have also been examined through the optic of other substantive articles of the ECHR. In *Cyprus v. Turkey*, the European Court of Human Rights found a violation of Article 10, ECHR, on the grounds that the screening/vetting by TRNC officials of the contents of school-books intended for Greek Cypriot pupils, prior to their distribution amounted to “excessive measures of censorship”.¹⁵⁸ During the period under consideration, “a large number of school-books, no matter how innocuous their content, were unilaterally censored or rejected by the authorities”.¹⁵⁹ Furthermore, the Court held that “the respondent Government failed to provide any justification for this form of wide-ranging censorship, which, it must be concluded, far exceeded the limits of confidence-building methods and amounted to a denial of the right to freedom of information”.¹⁶⁰

FCNM

As regards the FCNM, guarantees of educational rights are spread over three articles (Articles 12-14), which are bolstered by more general equality provisions (Articles 4, 5, 6).¹⁶¹

Article 12

1. The Parties shall, where appropriate, take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority.
2. In this context the Parties shall *inter alia* provide adequate opportunities for teacher training and access to textbooks, and facilitate contacts among students and teachers of different communities.
3. The Parties undertake to promote equal opportunities for access to education at all levels for persons belonging to national minorities.

In the First Monitoring Cycle of the FCNM, the Advisory Committee has stressed the need to generally ensure a more multicultural or multi-ethnic character for school curricula which would be reflective of diverse ethnic identities.¹⁶² Coupled with the same is the need to

¹⁵⁶ *Kjeldsen, Busk Madsen & Pedersen v. Denmark*, *op. cit.*, para. 53.

¹⁵⁷ *Ibid.*, para. 53.

¹⁵⁸ *Cyprus v. Turkey*, para. 254.

¹⁵⁹ *Ibid.*, para. 252.

¹⁶⁰ *Ibid.*, para. 252.

¹⁶¹ For comprehensive analyses of the Advisory Committee’s treatment of Articles 12-14, FCNM, in its First Monitoring Cycle, see: Duncan Wilson, “Report: A critical evaluation of the first results of the monitoring of the Framework Convention on the issue of minority rights in, to and through education (1998-2003)”, in *Filling the Frame*, *op. cit.*, pp. 163-228; Tove Skutnabb-Kangas, “Commentary: The status of minority languages in the education process”, in *Filling the Frame*, *op. cit.*, pp. 234-254.

¹⁶² Opinions on: Albania (para. 102); Austria (para. 92); Czech Republic (In respect of Article 12); Estonia (In respect of Article 12); Finland (In respect of Article 12); Ireland (para. 125); Norway (paras. 92, 93); Poland (para. 118); Romania (In respect of Article 12); Slovakia (In respect of Article 12); Sweden (para. 86); Switzerland (para. 97); Ukraine (para. 103).

counter negative stereotyping of (certain) minorities in school curricula and textbooks.¹⁶³ The Committee has underlined the importance of minorities' right of participation in the realm of education, especially as regards policy formulation and the legislative process.¹⁶⁴ It has even been known to rebuke State authorities for failing to have an active State policy on national minority education.¹⁶⁵

The list of suggested lines of action in Article 12(2) is obviously non-exhaustive. As regards the adequacy of teacher-training opportunities, the Advisory Committee has tended to focus on teachers of minority languages and teachers in minority languages (i.e., teachers competent to teach a range of subjects in specific minority languages).¹⁶⁶ The availability of appropriate textbooks – especially in minority languages – was repeatedly addressed.¹⁶⁷ The important question of the affordability of textbooks has not escaped scrutiny either.¹⁶⁸ The facilitation of “contacts among students and teachers of different communities” has drawn comparatively less attention,¹⁶⁹ possibly because it falls squarely under the right to freedom of assembly and association which enjoys extensive protection under general international human rights instruments.

The Advisory Committee has not noticeably hierarchised the various tiers of formal education: the importance it has attached to one level or another has been determined in an *ad hoc* manner by assessments of surrounding circumstances, in particular the needs of relevant minorities. As well as examining access opportunities to different levels of education,¹⁷⁰ the Advisory Committee has also paid particular attention to the needs of specific minorities at various levels of the educational system. The Roma are a case in point because they tend to experience compounded difficulties in their access to formal education.¹⁷¹ The Advisory Committee has observed that the Roma “encounter difficulties with regard to pre-school education, absenteeism, the level of education attained, and isolation in certain schools”.¹⁷² Its detailed consideration of problems faced by the Roma has also included the itinerant nature of their culture,¹⁷³ the building of parental confidence in the school system and the simplification

¹⁶³ Opinions on: Azerbaijan (para. 112); Croatia (In respect of Article 12); Russian Federation (para. 151); Slovakia (In respect of Article 12); Switzerland (para. 97).

¹⁶⁴ Opinions on: Azerbaijan (para. 114); Finland (In respect of Article 12); Lithuania (para. 101); Moldova (paras. 116, 117); Switzerland (para. 98).

¹⁶⁵ Opinions on Armenia (para. 104).

¹⁶⁶ Albania (para. 103); Armenia (para. 105); Azerbaijan (para. 113); Estonia (In respect of Article 12); Finland (In respect of Article 12); Hungary (In respect of Article 12); Ireland (para. 127); Norway (para. 95); Romania (In respect of Article 12); Serbia & Montenegro (para. 153); Sweden (para. 88).

¹⁶⁷ Opinions on: Armenia (para. 105); Austria (para. 91); Azerbaijan (para. 113); Croatia (In respect of Article 12); Hungary (In respect of Article 12); Romania (In respect of Article 12); Russian Federation (para. 150); Serbia & Montenegro (para. 152); Sweden (para. 88); Ukraine (para. 104).

¹⁶⁸ Opinion on Serbia & Montenegro (para. 152).

¹⁶⁹ Opinion on Estonia (In respect of Article 12).

¹⁷⁰ Opinions on: Albania (para. 105 (university)); Armenia (paras. 105 (pre-school), 106); Estonia (In respect of Article 12 (pre-school and higher education)); Russian Federation (para. 152 (displaced populations), 153); Serbia & Montenegro (para. 157 (recognition of diplomas from Kosovo)); Ukraine (para. 106 (university)); United Kingdom (paras. 120, 121).

¹⁷¹ Opinions on: Albania (para. 104); Austria (para. 93); Croatia (In respect of Article 12); Czech Republic (In respect of Article 12); Finland (In respect of Article 12); Hungary (In respect of Article 12); Italy (In respect of Article 12); Moldova (para. 117); Norway (para. 94); Poland (para. 119); Romania (In respect of Article 12); Serbia & Montenegro (paras. 154-156); Slovakia (In respect of Article 12); Spain (para. 94); Ukraine (para. 105); United Kingdom (para. 122).

¹⁷² Advisory Opinion on Spain (para. 94). Similar wording is used by the Advisory Committee in respect of other countries.

¹⁷³ Opinion on Norway (para. 94).

of school registration formalities.¹⁷⁴ Special consideration has also been accorded the Traveller Community, with specific focus on exclusion, racism and bullying in schools; levels of education reached; literacy levels; lack of qualified teachers from Traveller Community; attendance levels; integration/non-segregation in schooling.¹⁷⁵

Article 13

1. Within 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.
2. The exercise of this right shall not entail any financial obligation for the Parties.

Although it does not preclude the possibility of State financing for private educational establishments run by minorities,¹⁷⁶ Article 13 is styled as a passive obligation on States Parties. The non-committal approach to the financing of private educational establishments established and/or run by minorities arguably goes against the clearly positive grain of minority rights protection generally. The reason is that in many countries, particularly in Central and Eastern Europe, “the state represents the only realistic source of funding in the short or medium-terms”.¹⁷⁷ Whether the second paragraph of the Article renders the first paragraph a regression from, *inter alia*, equivalent provisions of the ECHR, is a moot point. The answer depends, ultimately, on how readily principles of non-discrimination and equality would or could be applied to Article 13, FCNM. The all-pervasive nature of those principles in international human rights law (see further, *supra*) suggests that the implications of Article 13(2) could, in particular circumstances, lead to instances of *de facto* discrimination, or in other words, a denial of the right of persons belonging to national minorities to “full and effective equality”.

In any event, it can certainly be concluded that Article 13(2) has rendered the entire article a lame – if not dead – duck. It is little wonder, therefore, that in the First Monitoring Cycle of the FCNM, the Advisory Committee has made specific observations on Article 13 in respect of only five States. In two cases, the specific observations involved legal frameworks;¹⁷⁸ in two other cases, they involved the need for private schools for minorities¹⁷⁹ and in the fifth case, the question of funding for such schools was tackled.¹⁸⁰

Article 14

¹⁷⁴ Opinion on Romania (In respect of Article 12).

¹⁷⁵ See generally, Opinion on Ireland (paras. 122-127) and Opinion on United Kingdom (paras. 122-123).

¹⁷⁶ Para. 73, Explanatory Report to the FCNM, *op. cit.*

¹⁷⁷ Istvan Pogany, “Bilateralism versus Regionalism in the Resolution of Minorities Problems in Central and Eastern Europe and in the Post-Soviet States”, in Peter Cumper & Steven Wheatley, Eds., *Minority Rights in the ‘New’ Europe*, *op. cit.*, pp. 105-128?, at 119.

¹⁷⁸ In its Opinion on Serbia & Montenegro, the Advisory Committee took the view that relevant domestic law should better reflect the right referred to in Article 13 (para. 158). In its Opinion on Switzerland, the Advisory Committee stated that the legal provisions of Cantons should not prevent the establishment of private schools with minority languages as the medium of instruction in areas outside of which the languages in question are traditionally spoken (para. 99).

¹⁷⁹ In its Opinion on Estonia, the Advisory Committee stated that pending reform of the educational system could result in increased need (and support) for private schooling in minority languages (In respect of Article 13). In its Opinion on Sweden, the Advisory Committee underlined the central role played by private schools in the provision of teaching in minority languages and called for further initiatives of this kind to be supported (para. 89).

¹⁸⁰ In its Opinion on Austria, the Advisory Committee urged the State authorities to continue discussions with the representatives of the Czech and Slovak minorities to identify funding solutions for the only school in Vienna providing fully bilingual education from kindergarten to upper secondary level for the Czech and Slovak minorities (para. 94). It also intimated that extra subsidies for private schools catering for the educational needs of other minorities could help to meet those needs (para. 95).

1. The Parties undertake to recognise that every person belonging to a national minority has the right to learn his or her minority language.
2. In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language.
3. Paragraph 2 of this article shall be implemented without prejudice to the learning of the official language or the teaching in this language.

Patrick Thornberry has been fiercely critical of this particular Article, stating that “Despite the presumed good intentions, the provision represents a low point in drafting a minority right; there is just enough substance in the formulation to prevent it becoming completely vacuous”.¹⁸¹ Not only does Article 14 suffer from congenitally weak and conditional wording; this is compounded by the Explanatory Report to the FCNM. According to the latter, the right set out (in sheepish terms¹⁸²) in para. 1 “does not imply positive action, notably of a financial nature, on the part of the State”.¹⁸³

The Explanatory Report also dresses up the string of conditionalities introduced in Article 14(2) as a “very flexibly” worded provision that allows States “a wide measure of discretion” in their implementation of the FCNM. Notwithstanding any “*possible* financial, administrative and technical difficulties associated with instruction of or in minority languages”,¹⁸⁴ the purported flexibility alluded to here could just as easily be described as fudge! States are simply left with too many ways to wriggle their way out of honouring the commitments that should be expected of them. Instead of offering States such an easy cop-out of their obligations, it would have been much more constructive if the FCNM or its Explanatory Report had instead sought to develop the notion of appropriate indicators for measuring progress towards the realisation of the right. Reliance on indicators is standard practice under other international human rights instruments such as the ICESCR. Finally, the criterion of “sufficient demand” that must be met in order to activate the right under Article 14 has deliberately not been defined - in order to allow States “to take account of their countries’ own particular circumstances”.¹⁸⁵ This, too, invites further subjective assessments by States authorities.

It is clear from the foregoing that the inherent defects of Article 14 are considerable and that it was always going to be very difficult to compensate for those shortcomings at the monitoring stage. The Advisory Committee has undoubtedly tried hard to salvage something from a nigh-impossible situation, but its efforts have been found wanting. Duncan Wilson has pointed out that “The Advisory Committee has been particularly hesitant in defining linguistic rights in education, and legal certainty under this article is consequently weak”. He has described the Advisory Committee’s practice under Article 14 as appearing “confused in general, leading to uncertainty as to the balance to be drawn between the various elements of the article, and the

¹⁸¹ Patrick Thornberry, “Minority Rights” in Academy of European Law, Ed., *Collected Courses of the Academy of European Law* (Vol. VI, Book 2) (The Netherlands, Kluwer Law International, 1997), pp. 307-390, cited in Tove Skutnabb-Kangas, “Commentary: The status of minority languages in the education process”, *op. cit.*, at 234.

¹⁸² “undertake to recognise [...]” and not “recognise” *tout court*.

¹⁸³ Para. 74, Explanatory Report to the FCNM, *op. cit.*

¹⁸⁴ (emphasis added) Para. 75, *ibid.*

¹⁸⁵ Para. 76, *ibid.*

criteria for triggering the right laid out in paragraph two”.¹⁸⁶ Tove Skutnabb-Kangas goes so far as to suggest that:

[...] the formulation of the article (and therefore?) also some of its interpretations by the Advisory Committee may contribute to the depreciation/derogation rather than the promotion and protection of educational linguistic human rights, mainly through the omission of a principled, research-based stance on the right to mother-tongue education.¹⁸⁷

The Advisory Committee presumes the existence of a legislative framework for the implementation of Article 14, FCNM, which should set out the guarantees for learning minority languages in a clear, precise and detailed manner.¹⁸⁸ Relevant decision-making powers should also boast clarity of formulation.¹⁸⁹ Opinions have also given consideration to State policies and support for educational initiatives prioritising teaching in or of minority languages (including bilingual education).¹⁹⁰ The importance of ensuring participation of and consultation with minorities in relevant policy-formulation and decision-making has also been underscored.¹⁹¹

Although Article 14 only refers to the right to receive education in minority languages in territories inhabited by national minorities either traditionally or in substantial numbers, the Advisory Committee has sought to interpret this provision in a more expansive manner. As such, it has favoured (i) the strengthening of minority-language teaching in those areas where it is already provided, and (ii) the extension of minority-language teaching to regions other than those with dense or traditional minority populations.¹⁹² The Advisory Committee has also paid attention to the needs of dispersed and displaced minorities in this respect.¹⁹³ Needless to say, the particular needs of specific minorities have frequently been addressed by the Advisory Committee.¹⁹⁴

In practice, the Advisory Committee has shown itself to be more concerned about the availability of minority language/bilingual education during the most formative years of

¹⁸⁶ Duncan Wilson, “Report: A critical evaluation of the first results of the monitoring of the Framework Convention on the issue of minority rights in, to and through education (1998-2003)”, *op. cit.*, p. 184.

¹⁸⁷ Tove Skutnabb-Kangas, “Commentary: The status of minority languages in the education process”, *op. cit.*, p. 234.

¹⁸⁸ Opinions on: Armenia (para. 107); Azerbaijan (paras. 115, 116); Estonia (In respect of Article 14); Lithuania (paras. 102, 103); Norway (para. 96); Poland (para. 120); Russian Federation (para. 154); Serbia & Montenegro (Montenegro) (para. 162); Slovakia (In respect of Article 14); Sweden (para. 93); Ukraine (para. 97).

¹⁸⁹ See, for example, the Opinion on Lithuania (para. 103).

¹⁹⁰ Opinions on: Armenia (para. 108); Czech Republic (In respect of Article 14); Germany (para. 87); Italy (In respect of Article 14); Lithuania (para. 103); Romania (In respect of Article 14); Russian Federation (para. 155); Serbia & Montenegro (paras. 159, 162); Slovakia (In respect of Article 14); Sweden (paras. 91, 92); United Kingdom (para. 124).

¹⁹¹ Opinions on: Czech Republic (In respect of Article 14); Germany (para. 87); Poland (para. 121); Romania (In respect of Article 14); Ukraine (para. 108); United Kingdom (para. 125).

¹⁹² Opinions on: Albania (para. 106); Germany (para. 87); Norway (para. 96); Russian Federation (para. 155); Serbia & Montenegro (para. 163); Sweden (para. 90); Switzerland (para. 100); Ukraine (para. 108).

¹⁹³ Opinions on Russian Federation (para. 155) and Serbia & Montenegro (para. 163), respectively.

¹⁹⁴ Opinions on: Albania (para. 107); Armenia (para. 108); Azerbaijan (para. 117); Croatia (In respect of Article 14); Czech Republic (In respect of Article 14, *juncto* para. 66); Finland (In respect of Article 14); Germany (paras. 87, 88); Italy (In respect of Article 14); Lithuania (para. 103); Poland (para. 121); Romania (In respect of Article 14); Serbia & Montenegro (paras. 160, 163); Slovakia (In respect of Article 14); Spain (para. 95); Sweden (para. 90); United Kingdom (para. 125).

children's development,¹⁹⁵ although the Advisory Committee's observations regarding Article 12, FCNM, should also be considered in this connection. It is extremely difficult to discern any overall pattern of consistency in the Advisory Committee's approach to mother-tongue medium education. This has prompted some commentators to fault the differentiated, contextualised approach adopted, in particular because it would not appear to have been informed by "principled solutions" derived from leading research on a variety of educational models and their consequences.¹⁹⁶

In this connection, Tove Skutnabb-Kangas weighs up the competing merits of subtractive and additive language teaching and learning. In the former scheme, "a new (dominant/majority) language is learned *at the expense* of the mother tongue", whereas in the latter, "the new language is learned *in addition* to the mother tongue, which continues to be used and developed".¹⁹⁷ She is firmly of the view that the Advisory Committee should give pride of place to additive learning and teaching in its recommendations.

Examples of conceptual inconsistency have also been identified in the Advisory Committee's treatment of segregation in education. Once again, Skutnabb-Kangas has pleaded for greater conceptual clarity and the application of the findings of relevant research. She points out that the merits of advocating segregated classes for certain minorities cannot be assessed *in abstracto*; rather, regard must be had for the constituent features of the precise form of segregation involved. She posits that it is preferable to adopt instrumental segregation, i.e., segregation as a means to equality in the form of mother-tongue maintenance or language shelter models, than forms of segregation which are an end in themselves. She emphasises that segregation should be temporary, with a view to enabling students to develop the educational skills to facilitate their integration into mainstream educational structures (and society generally) at a later date. Permanent forms of segregation are often "a one-way street, both in terms of educational infrastructures and goals".¹⁹⁸ The distinction between physical and psychological segregation is also noteworthy. She cautions that early physical integration often leads to various kinds of segregation later. On the other hand, initial physical segregation can facilitate the integration of children into dominant society at a later date. The reasoning behind this is that segregated education in a mother-tongue environment allows children's educational faculties to develop optimally until such time as they have sufficiently mastered the dominant language for it not to hinder their overall educational progress in an integrated system.¹⁹⁹

In the absence of specifications such as those given above, it remains unclear precisely which forms of segregation are intended by the Advisory Committee in its Opinions. There is a

¹⁹⁵ Opinions on: Austria (Kindergarten, para. 97; fourth year of primary school, para. 98); Estonia ("basic" and secondary schools, In respect of Article 14); Germany (secondary school, para. 87; beyond primary school, para. 88); Sweden (pre-school, para. 94); Switzerland (full primary education, para. 100).

¹⁹⁶ Tove Skutnabb-Kangas, "Commentary: The status of minority languages in the education process", *op. cit.*, p.245.

¹⁹⁷ (emphasis per original) Tove Skutnabb-Kangas, "Commentary: The status of minority languages in the education process", *op. cit.*, p. 239.

¹⁹⁸ Tove Skutnabb-Kangas, "Commentary: The status of minority languages in the education process", *op. cit.*, p. 241.

¹⁹⁹ Tove Skutnabb-Kangas, "Commentary: The status of minority languages in the education process", *op. cit.*, p. 242. It is worth noting that a Russian-speaking Latvian citizen lodged a complaint with the European Court of Human Rights to the effect that a legislative provision requiring state secondary schools to use Latvian as the sole language of instruction would adversely affect his academic performance. Ultimately, the Court did not pronounce on the merits of the case as it found that all domestic remedies had not been exhausted. See further: *Grisankova & Grisankovs v. Latvia*, Decision of inadmissibility of the European Court of Human Rights [...].

danger that unqualified references to, for example “separate special classes” could be construed as an endorsement of negative segregation models. Such interpretations could have very unfortunate consequences, especially for Roma children, who are frequently the object of such segregated education.²⁰⁰ Finally, it is worth noting that in the Opinions of the Advisory Committee, references to the relationship between minority languages and the State language in the educational sphere are few and far between.²⁰¹

The Hague Recommendations Regarding the Education Rights of National Minorities, *op. cit.*, are much bolder than the guarantees for education rights provided by ECHR P1-2 and Articles 12-14, FCNM. First, the Recommendations assert that “the relevant international obligations and commitments constitute international minimum standards” and should therefore not be interpreted restrictively.²⁰² Second, they call on States to be proactive in their approach to minority education rights, and more specifically, to “actively implement minority language education rights to the maximum of their available resources [...]”.²⁰³ This arguably leaves plenty of room to develop suitable indicators for measuring State progress towards the realisation of minorities’ education rights. Indeed, the Explanatory Note to the Recommendations makes explicit reference to Article 2, ICESCR, which also provides for the progressive realisation of rights (see further, *supra*).²⁰⁴ Third, the Recommendations explore minority (language) education rights in considerably more detail than many other international instruments.

The Recommendations attach great importance to the principle of minority participation in the elaboration and implementation of policies, programmes and curricula pertaining to minority language education.²⁰⁵ Participation through representatives of minority groups and direct parental involvement²⁰⁶ are both prized. The principle of decentralised decision-making is also recognised.²⁰⁷ In keeping with prevailing international law (see further, *supra*), persons belonging to national minorities have the right to establish and maintain their own educational institutions and while the State may not unduly interfere with this right, there is no obligation on States to provide funding for private educational initiatives. The right to seek “sources of funding without any hindrance or discrimination from the State budget, international sources and the private sector”²⁰⁸ is, however, put forth.

The section of the Recommendations entitled “Minority education at primary and secondary levels”²⁰⁹ deliberately draws on relevant educational research. It emphasises the

²⁰⁰ For a more ample discussion, including concrete examples gleaned from the Advisory Committee’s Opinions, see: Tove Skutnabb-Kangas, “Commentary: The status of minority languages in the education process”, *op. cit.*, pp. 243-245; Andrzej Mirga, “Commentary: The challenges of adaptation: from segregation to inclusive education”, in *Filling the Frame*, *op. cit.*, pp. 229-233.

²⁰¹ In its Opinion on Estonia, the Advisory Committee urged that “language immersion” programmes remain voluntary and that resources allocated thereto should not hamper the availability or quality of minority language education. In its Opinion on Finland, attention turned towards the need for instruction in the Finnish-language in the public school system on the Åland Islands. In its Opinion on Moldova, the Advisory Committee rather blandly called for a balanced response to the specific language needs of all national minorities, without prejudice to learning and teaching of the State language (thereby basically only rehashing the wording of Article 14(3)).

²⁰² Para. 3.

²⁰³ Para. 4.

²⁰⁴ Section “Measures and resources”, Explanatory Note to The Hague Recommendations, *op. cit.*

²⁰⁵ Paras. 5, 20, 21.

²⁰⁶ Para. 7.

²⁰⁷ Paras. 6, 7.

²⁰⁸ Para. 10.

²⁰⁹ Paras. 11-14.

complementarity between different stages of a child's educational development and the desirability of cultural congruence between teachers and pupils. According to the Recommendations, the medium of teaching at pre-school, kindergarten and primary school should ideally be the child's own language. At primary school level, the official State language should be taught as a subject on a regular basis and towards the end of the primary cycle, some other subjects could be taught in the official State language as well. The emphasis here is clearly on additive language learning (see further, *supra*).²¹⁰ At second-level, a substantial part of the curriculum should be taught in the minority language, with a gradual increase in the number of subjects taught in the official State language. The purpose of this section is to allow full knowledge of the mother tongue to be acquired through formal education, without hindering the learning of the official State language or chances for social integration later.²¹¹ This is very much in keeping with the Recommendations' overall aim of safeguarding multiculturalism in the context of social integration.²¹²

By including a section on "Minority education in vocational schools",²¹³ the Recommendations seek to pursue practical socio-economic goals and not just the (academic?) cultural objective of linguistic conservation. It is also recommended that tertiary education be provided for minorities in their own languages "when they have demonstrated the need for it and when their numerical strength justifies it".²¹⁴ This recommendation is more weakly worded than others, apparently because (i) of the high level of resources its realisation would necessitate, and (ii) increased mindfulness of the goal of integration in third-level education.²¹⁵

3.2.4 Culture

Culture is of its nature a very diffuse concept. Unsurprisingly, then, international instruments rarely seek to pin it down definitionally. One notable exception to this reluctance is the Preamble to the UNESCO Universal Declaration on Cultural Diversity (2001),²¹⁶ which reaffirms that culture should be regarded as:

the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.

²¹⁰ See further: Guillaume Siemienski & John Packer, "Integration through Education: The Origin and Development of The Hague Recommendations", 4 *International Journal on Minority and Group Rights* (1997), 187-198, at 196.

²¹¹ See further: Section "Minority education at primary and secondary school levels", Explanatory Note to The Hague Recommendations, *op. cit.*

²¹² Paras. 1, 19. See further: Guillaume Siemienski & John Packer, "Integration through Education: The Origin and Development of The Hague Recommendations", *op. cit.*, at 189.

²¹³ Paras. 15, 16.

²¹⁴ Para. 17.

²¹⁵ See further: Section "Minority education at tertiary level", Explanatory Note to The Hague Recommendations, *op. cit.*

²¹⁶ Adopted unanimously by the UNESCO General Conference at its 31st session on 2 November 2001. For a detailed overview of UNESCO's other standard-setting and activities in the realm of culture, see generally: Yvonne Donders, "The History of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions" (forthcoming 2008, text on file with author).

Definitional approaches to “culture” matter,²¹⁷ even if they are in short supply in international instruments. They matter because they are foundational for defining and determining the scope of cultural rights. Cultural rights can, as Yvonne Donders has observed, span cultural dimensions to a range of other human rights, as well as “separate cultural rights, such as the right to culture or the right to cultural identity”.²¹⁸ The distinction between both categories of cultural rights can be of considerable practical importance, as will become apparent from the analysis of relevant case-law, *infra*.

Next to the UNESCO Declaration – with its specific focus on cultural *diversity* (discussed further in s. 7.4.1, *infra*) – other more general international human rights instruments also contain occasional references to various rights associated with the enjoyment of culture, but without attempting to provide a comprehensive definition of the concept. For instance, Article 27(1) of the Universal Declaration of Human Rights reads: “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”.²¹⁹ Pursuant to Article 27, ICCPR, persons belonging to ethnic, religious or linguistic minorities shall not be denied the right *inter alia* “to enjoy their own culture”. The overall tenor of UN HRC General Comment 23 implicitly affirms that culture is the crux of the concept of minority rights.

Article 15, ICESCR, formulates the right of everyone to participate in cultural life,²²⁰ to benefit from scientific progress and to enjoy intellectual property rights.²²¹ It reads:

1. The States Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its applications;
 - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
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.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

Article 15, ICESCR, sets out rights that are to be enjoyed by everyone, including persons belonging to minorities. The CESCR’s General Comment No. 17, which focuses on Article

²¹⁷ See generally: Adam Kuper, *Culture: The Anthropologists’ Account* (Cambridge, Massachusetts/London, England, Harvard University Press, 1999).

²¹⁸ Yvonne Donders, *Towards a Right to Cultural Identity?* (Antwerpen/Oxford/New York, Intersentia, 2002), p. 73.

²¹⁹ For commentary on Article 27, UDHR, and its drafting history, see, Albert Verdoodt, *Naissance et signification de la Déclaration des droits de l’homme*, *op. cit.*, pp. 252-257; Yvonne Donders, *Towards a Right to Cultural Identity?*, *op. cit.*, pp. 139-144; Elsa Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration and Beyond* (Leiden/Boston, Martinus Nijhoff Publishers, 2007).

²²⁰ The right to take part in cultural life is explored in detail in a series of papers produced in the context of a CESCR Day of General Discussion dedicated to the topic on 9 May 2008; see, *inter alia*, Yvonne Donders, “Cultural Life in the context of Human Rights”, UN Doc. E/C.12/40/13; Patrick Thornberry, “Cultural rights and universality of human rights”, UN Doc. E/C.12/40/15; Julie Ringelheim, “Integrating Cultural Concerns in the Interpretation of General Individual Rights – Lessons from the International Human Rights Case Law”, UN Doc. E/C.12/40/4.

²²¹ For commentary on Article 15, ICESCR, its drafting history and application, see, Yvonne Donders, *Towards a Right to Cultural Identity?*, *op. cit.*, pp. 144-162.

15(1)(c), ICESCR, stresses that States are under an obligation to protect the moral and material interests of authors belonging to ethnic, religious or linguistic minorities “through special measures to preserve the distinctive character of minority cultures”.²²² This obligation is styled as an obligation on States to “protect” the rights in question and involves, *inter alia*, a duty “to ensure the effective protection of the moral and material interests of authors against infringement by third parties”.²²³ The specific entailments of the enjoyment of these rights by persons belonging to minorities can be elucidated by reading Article 15, ICESCR, in conjunction with Article 27, ICCPR.²²⁴

As already noted, cultural dimensions to rights and cultural rights proper, comprise a complex of elements. Of central importance is what Yvonne Donders styles as the freedom of cultural identity: she describes it as a freedom and an emerging principle of international law rather than a right because in order to recognise it as a right, its content would have to be clarified, concretised and circumscribed.²²⁵ By treating it as a freedom, it retains the broadness of ambit that facilitates its further development. Within the developmental space created by the freedom, individuals can fully assume the collective dimension to their identities and due recognition can also be given to the importance of other considerations such as the right to participate in cultural life, association with land and lifestyle and organisational aspects of cultural life. These considerations will now serve as analytical axes for the forthcoming discussion of the content of cultural rights, as developed by the UN Human Rights Committee and the European Court of Human Rights.

Certain minorities have distinctive, traditional lifestyles which are defined by a special affinity with the land, or what Garth Nettheim has termed the “land-nexus”.²²⁶ Very often, that affinity stems not only from economic dependence on the land or traditional activities pursued on the land,²²⁷ but also from a sense of attachment to traditional homelands which can even have spiritual significance for some minority groups.²²⁸ The importance of this nexus for persons belonging to minorities has consistently been underscored by UN Human Rights Committee in its jurisprudence. The Committee has emphasised, for example, that economic activities are entitled to protection under Article 27, ICCPR, whenever they are “an essential element of the culture of an ethnic community”.²²⁹ This general rule holds true even when other economic activities are pursued in order to gain supplementary income²³⁰ or when traditional means of livelihood for minorities are adapted “to the modern way of life and

²²² General Comment No. 17 (2005), The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant), Committee on Economic, Social and Cultural Rights, 12 January 2006, E/C.12/GC/17, para. 33.

²²³ *Ibid.*, para. 31. See further in this connection, Chapter 5.1.3.

²²⁴ *Ibid.*, fn. 22.

²²⁵ Yvonne Donders, *Towards a Right to Cultural Identity?*, *op. cit.*, pp. 337-345.

²²⁶ Garth Nettheim, in James Crawford, Ed., *The Rights of Peoples*, *op. cit.*, pp. 107-126, at 122. See also p.117.

²²⁷ Examples of such traditional activities include: hunting, fishing, reindeer husbandry. See General Comment No. 23, *op. cit.*, para. 7; Communication No. 511/1992, *Ilmari Länsman et al. v. Finland*, 8 November 1994, para. 9.5; Communication No. 671/1995, *Jouni E. Länsman et al. v. Finland*, 22 November 1996, para. 10.4.

²²⁸ See, for example, Communication No. 511/1992, *Ilmari Länsman et al. v. Finland*, 8 November 1994 (esp. para. 9.3).

²²⁹ Communication No. 197/1985, *Ivan Kitok v. Sweden*, 27 July 1988, para. 9.2; Communication No. 511/1992, *Ilmari Länsman et al. v. Finland*, *op. cit.*, para. 9.2; Communication No. 671/1995, *Jouni E. Länsman et al. v. Finland*, *op. cit.*, para. 10.2; Communication No. 547/1993, *Apirana Mahuika et al. v. New Zealand*, 20 October 2000, para. 9.3.

²³⁰ Communication No. 671/1995, *Jouni E. Länsman et al. v. Finland*, *op. cit.*, para. 10.2.

ensuing technology”.²³¹ However, economic dependence on particular lands will not – of itself – be sufficient to ground claims for (exclusive) use of those lands. The relationship with the lands must give rise to a distinctive culture.²³²

The Committee recognises the legitimacy of State interests in economic development,²³³ a goal which, in practice, does not always coincide with traditional land usage by minority groups. In seeking to balance these potentially conflicting interests, the Committee has held that “measures that have a certain limited impact on the way of life and the livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under article 27”.²³⁴ However, measures which have an impact amounting to a denial of the right to enjoy one’s culture will be considered incompatible with State obligations under Article 27.²³⁵ The Committee has circumspectly pointed out that even when different activities may not in themselves constitute individual violations of Article 27, the cumulative or collective impact of such measures could well do so.²³⁶

Over time, the European Court of Human Rights has come to attenuate its erstwhile stance that the rights and freedoms set forth in the ECHR are guaranteed to everyone and that the Convention does not guarantee specific rights to minorities. One of the first indicators of this attenuation was the Commission’s acceptance of the principle that under Article 8, ECHR, a minority group is “entitled to claim the right to respect for the particular life style it may lead as being ‘private life’, ‘family life’ or ‘home’”. Although culture is not mentioned expressly here, it could – given the breadth of the notion – certainly be inferred.²³⁷

Noack & Others v. Germany was a case involving a legal challenge to the proposed relocation of the inhabitants of a Sorbian village to a neighbouring village in order to allow for a large-scale mining project to be realised. Following its earlier jurisprudence,²³⁸ the European Court of Human Rights reiterated the principle that a minority’s way of life is, in principle, entitled to protection under Article 8, ECHR. The applicants’ membership of the Sorbian community weighed heavily on the Court (this fact was alluded to repeatedly throughout the judgment), a fact which, in the circumstances of the instant case, entitled them to “special protection”.²³⁹ The Court ultimately found that the population transfer would not amount to a violation of Article 8, *inter alia* because “the inhabitants will continue to live in the same region and the

²³¹ Communication No. 547/1993, *Apirana Mahuika et al. v. New Zealand*, *op. cit.*, para. 9.4, refining the principle stated in Communication No. 511/1992, *Ilmari Länsman et al. v. Finland*, *op. cit.*, para. 9.3.

²³² Communication No. 760/1997, *Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, 6 September 2000, para. 10.6.

²³³ See, for example, Communication No. 511/1992, *Ilmari Länsman et al. v. Finland*, *op. cit.*, para. 9.4; Communication No. 547/1993, *Apirana Mahuika et al. v. New Zealand*, *op. cit.*, para. 9.4.

²³⁴ Communication No. 671/1995, *Jouni E. Länsman et al. v. Finland*, *op. cit.*, para. 10.3, following Communication No. 511/1992, *Ilmari Länsman et al. v. Finland*, *op. cit.*, para. 9.4. In opting for this approach, the Human Rights Committee has explicitly rejected an approach based on the margin of appreciation doctrine, as often relied upon by the European Court of Human Rights.

²³⁵ See references in preceding footnote.

²³⁶ Communication No. 671/1995, *Jouni E. Länsman et al. v. Finland*, *op. cit.*, para. 10.7.

²³⁷ This view is shared by Donders, who notes that in the absence of a specific article in the ECHR dealing with the protection of cultural identity, it tends to be “read into” the provisions guaranteeing other rights: Yvonne Donders, *Towards a Right to Cultural Identity?*, *op. cit.*, at p. 333.

²³⁸ The judgment refers specifically to *G. & E. v. Norway*, *Buckley v. UK* and *Chapman v. UK*, all *op. cit.* – p. 10 of judgment.

²³⁹ p. 12 of judgment.

same cultural environment”.²⁴⁰ The Court was satisfied that “the need to preserve and sustain the village community and the Sorbian cultural identity” had been duly taken into account by the relevant authorities.²⁴¹

As discussed *supra*,²⁴² the Court’s judgments in a batch of cases concerning Gypsies in the UK has revealed a growing awareness of, and sensitivity to, the lifestyle of a particular type of minority. The Court has been prepared to give credence to the specifics of the Gypsy lifestyle, even to the point of acknowledging “the apparent shift in habit in the gypsy population which remains nomadic in spirit if not in actual or constant practice”.²⁴³ This recognition that the traditional lifestyles of ethnic groups can and do evolve, and that such evolution needs to be properly reckoned with, is of seminal importance. It is a very positive development that the Court has been prepared to recognise this evolution and thereby confront the acute difficulties of appreciation that this may entail for relevant authorities in their policy- and decision-making processes. The Court has itself recognised the predicament facing authorities, who “are being required to give special consideration to a sector of the population which is no longer easy to define in terms of the nomadism which is the *raison d’être* of that special treatment”.²⁴⁴ Once again, given the nexus between (traditional) lifestyle and culture, this nascent sensitivity is to be welcomed as a constructive step towards greater recognition for cultural rights.

The ability of persons belonging to minorities to exercise their cultural rights is often contingent on their ability to freely assemble and associate for cultural purposes. A core value of democracy, the right to freedom of assembly and association is widely protected under international human rights law.²⁴⁵ Of those provisions, Article 11, ECHR, is the one which has generated the most case-law. By way of contrast, organisational aspects of cultural rights have infrequently come to the fore in the jurisprudence of the UN Human Rights Committee and where they have done so, they have been primarily concerned with questions of group representation or agency.²⁴⁶ Article 11, ECHR provides:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

At issue in the case of *Sidiropoulos and others v. Greece*²⁴⁷ was the refusal by the Greek courts to recognise a non-profit-making association, “The Home of Macedonian Civilisation”,

²⁴⁰ p. 13 of judgment. Importantly for the Court, the fact that the inhabitants of the village were to be relocated within the same region meant that the protection of their rights as Sorbs under Article 25 of the Constitution of the *Land* of Brandenburg would not be affected.

²⁴¹ p. 13 of judgment.

²⁴² Pp. of this chapter.

²⁴³ *Connors v. the United Kingdom, op. cit.*, para. 93.

²⁴⁴ *Ibid.*, para. 93.

²⁴⁵ Article 20, UDHR; Articles 21 & 22, ICCPR; Article 11, ECHR, etc.

²⁴⁶ See, for example, Communication No. 78/1980, *Mikmaq tribal society v. Canada*, 30 September 1980 (a case in which the Human Rights Committee refused to accept that the author of the communication was authorised to act as a representative for the Mikmaq tribal society).

²⁴⁷ Judgment of the European Court of Human Rights of 10 July 1998, paras. 37 & 38.

upon the authorities' suspicion that behind the association's stated cultural aims lay the intention to undermine the country's territorial integrity. The European Court of Human Rights rejected the respondent Government's argument that the upholding of Greece's "cultural traditions and historical and cultural symbols" constituted legitimate grounds for restricting the right to freedom of association under Article 11(2), ECHR. An important principle established by the Court in the *Sidiropoulos* case was followed in the later *Stankov* case (which formulated the principle more succinctly):

The inhabitants of a region in a country are entitled to form associations in order to promote the region's special characteristics. The fact that an association asserts a minority consciousness cannot in itself justify an interference with its rights under Article 11 of the Convention [...]²⁴⁸

The facts of the *Stankov* case were comparable to those in *Sidiropoulos*. The United Macedonian Organisation Ilinden was set up to "unite all Macedonians living in Bulgaria on a regional and cultural basis" and to achieve "the recognition of the Macedonian minority in Bulgaria".²⁴⁹ Its applications for registration as an association were turned down by the Bulgarian courts, which deemed the association's aims to be "directed against the unity of the nation"; "that it advocated national and ethnic hatred and that it was dangerous for the territorial integrity of Bulgaria".²⁵⁰ The courts reached this conclusion despite the statement in the association's statute that it would neither infringe Bulgaria's territorial integrity nor use "violent, brutal, inhuman or unlawful means" to achieve its aims.²⁵¹ In both cases, the Court took a hard line on the permissibility of restrictions under Article 11, holding in *Sidiropoulos*, for example, that: "Exceptions to freedom of association must be narrowly interpreted, such that the enumeration of them is strictly exhaustive and the definition of them necessarily restrictive".²⁵²

The principle elaborated in *Sidiropoulos* and *Stankov* would, however, appear to have been dealt a blow in *Gorzelik & Others v. Poland*. The facts of the case again involved the refusal by the competent domestic courts to accept the application for registration submitted by an association with cultural objectives - the Union of People of Silesian Nationality. Before the European Court of Human Rights, the Polish Government submitted that the denial of official registration to the Union pursued *inter alia* the legitimate aim of preventing disorder.²⁵³ It also alleged that the Union was seeking registration as an association in a bid to attain the status of a national minority. Under Polish law, the attainment of such status entitles the beneficiary group to various privileges, including in the electoral sphere.²⁵⁴ The Polish Government therefore contended that registration was sought in order to circumvent the provisions of electoral law at some future date.²⁵⁵

On this occasion, the Court let itself be swayed by speculations as to possible future activities of the association over and above those expressly set out in its programme. The Court took the view that the authorities' suspicions about the association's possible future activities could "easily" have been dispelled by the applicants, "in particular by slightly changing the name of

²⁴⁸ *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Judgment of the European Court of Human Rights (First Section) of 2 October 2001, para. 89. See also *Sidiropoulos v. Greece*, *op. cit.*, para. 44.

²⁴⁹ *Stankov & Ilinden v. Bulgaria*, *op. cit.*, para. 10.

²⁵⁰ *Ibid.*, paras. 11 & 12.

²⁵¹ *Ibid.*, para. 10.

²⁵² *Sidiropoulos v. Greece*, *op. cit.*, para. 38.

²⁵³ Para. 39.

²⁵⁴ Para. 40.

²⁵⁵ Para. 39.

their association and by sacrificing, or amending, a single provision of the memorandum of association”.²⁵⁶ Such alterations would not have harmed the existence of the association or interfered with the realisation of its goals, according to the Court. This reasoning by the Court is disappointing because it panders unnecessarily to hypothetical fears. The legal loophole could easily have been addressed by legislative initiative, thereby allowing the association the benefits flowing from registration and the resultant regularised status. This case has been referred to the Grand Chamber, but if upheld, it could – along with the *Refah Partisi* case (*supra*) – set a very negative precedent for the protection of minority rights by showing inordinate deference to potential threats to society arising from possible future activities... as alleged by State authorities.

The Court has also held that the right guaranteed by Article 11, ECHR, would be “largely theoretical and illusory if it were limited to the founding of an association, since the national authorities could immediately disband the association without having to comply with the Convention”.²⁵⁷ The Court therefore insisted that “the protection afforded by Article 11 lasts for an association’s entire life and that dissolution of an association by a country’s authorities must accordingly satisfy the requirements” of Article 11(2).²⁵⁸

EUROPEAN UNION

One of the most important legal bases for the protection of cultural heritage and diversity (including languages) is Article 151 of the Treaty establishing the European Community.²⁵⁹ Article 151(1) states: “The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore”.²⁶⁰

Article 22 of the Charter of Fundamental Rights of the European Union²⁶¹ is entitled ‘Cultural, religious and linguistic diversity’; it reads: “The Union shall respect cultural, religious and linguistic diversity”. It is based on Article 6, TEU, and Article 151(1) and (4) of the EC Treaty.²⁶² Although the explicit reference to cultural diversity is welcome, it is hard to refute the suggestion that its importance is more symbolic than real. Pending the outcome of the stalled European Constitution, the Nice Charter remains a document that is merely politically- (and not legally-) binding on EU Member States. Moreover, even that symbolic importance is questionable, because, first of all, ‘shall respect’ is a significantly weaker formulation than, for example, ‘guarantee’ or ‘secure’. As such, it involves a considerably

²⁵⁶ Para. 65.

²⁵⁷ *United Communist Party of Turkey and Others v. Turkey*, Judgment of the European Court of Human Rights of 30 January 1998, para. 33.

²⁵⁸ *Ibid.*

²⁵⁹ Consolidated version, as published in the *Official Journal of the European Communities* of 24 December 2002, C 325/1.

²⁶⁰ See also in this connection, Articles 149, 150 and the subsequent paras. of Article 151, *id.* See also: Rachael Craufurd Smith, “From heritage conservation to European identity: Article 151 EC and the multi-faceted nature of Community cultural policy”, 32 E.L. Rev. (February 2007), pp. 48-69.

²⁶¹ Charter of Fundamental Rights of the European Union, Nice, 7 December 2000, as published in the *Official Journal of the European Communities* of 18 December 2000, C 364/1.

²⁶² Note from the Praesidium, Draft Charter of Fundamental Rights of the European Union – Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50, 11 October 2000, CHARTE 4473/00, p. 23. Explanations relating to the Charter of Fundamental Rights, as prepared under the authority of the Praesidium of the Convention which drafted the Charter (and since updated under the responsibility of the Praesidium of the European Convention, which drafted the European Constitution): see OJEC of 16 December 2004, C 310/424 *et seq.*, and for Article 22 of the Charter, *ibid.*, at p. 439.

lighter commitment for States. Second, the Explanatory Note does not spell out the essence or scope of cultural diversity, which suggests a non-committal attitude to – or wariness of – its actual or potential implications.

It is also disappointing that the commentary on Article 22 provided by the EU Network of Independent Experts on Fundamental Rights should only stretch to little over two pages.²⁶³ Its brevity could not possibly do justice to such an expansive and expanding topic. Despite the fact that the substance of the Charter shall not reduce or restrict the level of human rights protection guaranteed *inter alia* by international law and other international agreements by which the EU or its member states are bound (Article 53; see also Article 52(3)), the commentary on Article 22 hardly engages with the treatment of relevant legal issues under international (human rights) treaties at all.

More pointedly, the commentary is, in effect, dismissive of the importance of European Convention on Human Rights (ECHR) jurisprudence dealing with cultural matters. It states, in a brief paragraph, that in the absence of any specific provision in the ECHR that is ‘comparable to’ Article 22 of the Charter, the relevant case law of the European Court of Human Rights is limited to Article 14, ECHR, which focuses on non-discrimination in the exercise of rights safeguarded by the Convention. It then dispenses with the relevant case law by cursorily mentioning three cases – without even giving their facts or indicating their doctrinal importance. It is regrettable, to say the least, that such short shrift should be given in such an influential document to an area of “burgeoning” jurisprudential growth within the ECHR.²⁶⁴ Cultural diversity can only be achieved when pluralism is safeguarded at societal level, meaning that groups are able to practise their distinctive cultures both in public and in private. The exercise of cultural rights therefore entails the right to lead particular lifestyles, participate in cultural life and assemble, associate and organize for cultural purposes.²⁶⁵ As such, cultural rights can be described as having a high level of valency and interdependence with other rights. For that reason, the absence in the ECHR of a specific provision comparable to Article 22 of the Charter is not a valid reason to downplay the importance of provisions and case law ostensibly dealing with other rights, but also having clear relevance for cultural rights.

The commentary makes an explicit link between cultural diversity and broadcasting. It describes the Television without Frontiers Directive as being the text that is probably the closest to Article 22 of the Charter because of the instrumentality of its quota system for European works for preserving cultural creation and therefore diversity. However, the present tense is used when stressing the importance of Article 8, Television without Frontiers Directive, for guaranteeing linguistic diversity, and the text (thereby) fails to mention that Article 8²⁶⁶ was deleted by Directive 97/36/EC (although its essence has been subsumed into

²⁶³ Florence Benoît-Rohmer, “Article 22 – Cultural, religious and linguistic diversity”, in EU Network of Independent Experts on Fundamental Rights, *The Commentary of the Charter of Fundamental Rights of the European Union* (2006), pp. 197-199.

²⁶⁴ Geoff Gilbert, “The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights”, *op. cit.*

²⁶⁵ Yvonne Donders, *Towards a Right to Cultural Identity?*, *op. cit.*

²⁶⁶ Article 8 of Directive 89/552/EEC read: “Where they consider it necessary for purposes of language policy, the Member States, whilst observing Community law, may as regards some or all programmes of television broadcasters under their jurisdiction, lay down more detailed or stricter rules in particular on the basis of language criteria”.

the reformulated Article 3, Television without Frontiers Directive).²⁶⁷ All in all, because the analysis is so brief and broadbrush, its explanatory value is rather limited.

3.2.5 Religion

UNITED NATIONS²⁶⁸

Articles 2 and 55 of the UN Charter, discussed *supra*, list religion among the impermissible grounds for discrimination, but that is the extent of the Charter's treatment of religious freedoms. The protection and promotion of the right to freedom of religion are primarily assured at the global level by specific provisions of the Universal Declaration of Human Rights and the ICCPR. The collection of key existing UN instruments aimed at safeguarding relevant religious freedoms is completed by the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,²⁶⁹ which further fleshes out the right to freedom of religion and belief (see further, *infra*). The prioritisation of the drafting of a Declaration eventually led to the (indefinite) abandonment of plans to elaborate an international Convention on the right to freedom of religion.²⁷⁰

Needless to say, a number of other instruments touch on specific aspects of the right to freedom of religion and belief.²⁷¹ As regards the specific (general) measures, Article 18, Universal Declaration of Human Rights, reads:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

The special standing of the Universal Declaration of Human Rights in international law – owing to its particular moral authority arising from the manner of its adoption - has already been discussed. The ICCPR, because of its binding legal character and its applicability throughout the world, is the true centrepiece of global protection for the right to freedom of religion. Article 18, ICCPR, elaborates on the right provided for in the Universal Declaration, as follows:

1. 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

²⁶⁷ The operative sentence reads: 'La directive 89/552/CEE du 30 juin 1987 [*sic*] sur la télévision sans frontières est sans doute le texte le plus proche de l'article 22 dans la mesure où il prévoit un système de quotas d'œuvres européennes afin de préserver la création, et donc la diversité culturelle, et où il permet aux Etats membres, dans son article 8, d'avoir des exigences plus strictes afin d'assurer la diversité linguistique.', *ibid.*, p. 199.

²⁶⁸ See generally: Bahiyyih G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Martinus Nijhoff, The Hague, 1996); John Witte, Jr., & Johan D. van der Vyver, Eds., *Religious Human Rights in Global Perspective* (Vols. I & II) (Martinus Nijhoff, The Hague, 1996); Kevin Boyle & Juliet Sheen, Eds., *Freedom of Religion and Belief: A World Report* (Routledge, London, 1997).

²⁶⁹ Proclaimed by General Assembly resolution 36/55 of 25 November 1981.

²⁷⁰ See further: Kevin Boyle, "Religious Intolerance and the Incitement of Hatred", in Sandra Coliver, Ed., *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (ARTICLE 19/Human Rights Centre, University of Essex, United Kingdom, 1992), pp. 61-71, at 63-64; Natan Lerner, "The Nature and Minimum Standards of Freedom of Religion and Belief", 2000 B.Y.U.L. Rev. 905, at 918.

²⁷¹ For example: CRC, ICERD, CEDAW, UNESCO Convention against Discrimination in Education, ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation...

- individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The parentage of the Universal Declaration and the substantive proximity between both Article 18's mean that the provisions are best considered in the same analysis. The bold assertion of the right to freedom of thought, conscience and religion in Article 18, UDHR – with its *expressis verbis* provision for the freedom to change one's religion - has never been matched in subsequent UN instruments. Despite the fact that some early drafts of the Covenant Article on freedom of religion being phrased in a negative manner (“No one shall be denied [...]”),²⁷² it quickly acquired an imperative, uncompromising tone. Aside from the controversy surrounding the freedom to “change” one's religion (see further, *infra*), there was broad agreement on its content. This broad agreement was kept intact by the triumph of diplomatic wording; as Karl Josef Partsch has speculated:

Atheists may have been satisfied to see “thought” and “conscience” precede “religion.” Liberals may have been pleased to see all three freedoms on an equal level without preference to any one of them. Strongly religious people may have regarded “thought and conscience” as corresponding not only to religion generally, but even to the only true religion, the one to which they adhere.²⁷³

Prima facie, the most striking result of the transition from the Declaration to the Covenant is that the clause, “freedom to change his religion or belief”, falls by the wayside. Nor does the clause appear in the later Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

This difference of opinion already existed at the time of the elaboration of the Universal Declaration of Human Rights, but the controversy managed to be contained at that juncture. It is widely believed that the compromise wording in the ICCPR, “to have or to adopt a religion or belief of his choice”,²⁷⁴ is sufficiently broad so as to include the right to change one's religion or belief,²⁷⁵ and indeed, this reading of Article 18, ICCPR, is confirmed by General Comment No. 22. Employing extremely cautious wording, the HRC has observed:

²⁷² Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, *op. cit.*, pp. 352-355.

²⁷³ (footnotes omitted) Karl Josef Partsch, “Freedom of Conscience and Expression, and Political Freedoms”, in Louis Henkin, Ed., *The International Bill of Rights* (Columbia University Press, New York, 1981), pp. 209-245, at 210.

²⁷⁴ Saudi Arabia had proposed that the words contained in an earlier draft, “to maintain or to change his religion or belief, and freedom [...]”, be deleted, but withdrew this proposed amendment in favour of a text submitted by Brazil and the Philippines which would have introduced the formula “to have a religion or belief of his choice” instead of “to maintain or to change his religion or belief”. The United Kingdom proposed that the words “or to adopt” be added after “to have”, and the sponsors accepted this suggestion. For further details on this particular aspect of the drafting history, see Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, *op. cit.*, pp. 355-361; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary, op. cit.*, pp.

²⁷⁵ Elizabeth Odio Benito, *Study of the Current Dimensions of the Problems of Intolerance and of Discrimination on Grounds of Religion or Belief*, UN Doc. E/CN.4/Sub.2/1987/26, p. 4.

[...] that the freedom to “have or to adopt” a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief.²⁷⁶

Bipolarisation over the freedom to change one's religion was the main reason why the drafting of the text that was to become the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief proved to be such a “protracted”²⁷⁷ and “torturous”²⁷⁸ affair. That it took almost two decades of wrangling to reach consensus on a mere eight articles²⁷⁹ in a document that would not even be legally binding,²⁸⁰ speaks volumes about the heightened political sensitivities involved.

In the 1981 Declaration, the freedom to have or adopt a religion or belief of one's choice is transmuted into the freedom to have a religion or whatever belief of his choice. Semantically, this is a considerably weaker formulation than the already attenuated wording included in Article 18, ICCPR. On its own, the adoption of such a formulation would clearly have constituted a retrograde step as regards the protection of religious freedoms under international law. However, as part of the last-minute diplomatic compromise that was brokered, a new eighth article was introduced as a kind of safety-valve to prevent any erosion of standards of protection already established elsewhere in the canon of international human rights instruments. Article 8 of the final text reads:

Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights.

Although this compromise has managed to prevent regression and preserve a certain baseline standard, there can be no doubt that it represents a significant symbolic set-back for international efforts to advance religious freedoms. This is compounded by the fact that the draft Convention on freedom of religion and belief has for all intents and purposes been shelved.

Pursuant to Article 4, ICCPR, the right to freedom of thought, conscience and religion is non-derogable – even in times of public emergency. This is a categorical affirmation of the fundamental nature of the right. The only permissible limitations to the right must be - as set out in Article 18(2), ICCPR - prescribed by law and necessary for the fulfilment of one of the enumerated aims. The relevant jurisprudence of the UN Human Rights Committee largely reflects this. In *Singh Bhinder v. Canada*,²⁸¹ for instance, the Committee found the requirement that Hindus wear hard hats instead of turbans in the work-place for safety reasons

²⁷⁶ Para. 5, General Comment No. 22: The right to freedom of thought, conscience and religion (Article 18), 30 July 1993.

²⁷⁷ Natan Lerner, “The Nature and Minimum Standards of Freedom of Religion and Belief”, *op. cit.*, at 919.

²⁷⁸ Clark, 1983, p. 23, quoted in Theodore S. Orlin, “Religious Pluralism and Freedom of Religion: Its Protection in Light of Church/State Relationships”, in Allan Rosas & Jan Helgesen, Eds. (with the collaboration of Diane Goodman), *The Strength of Diversity: Human Rights and Pluralist Democracy* (Martinus Nijhoff Publishers, The Netherlands, 1992), pp. 89-111, at 95.

²⁷⁹ The eighth article was inserted hastily at the eleventh hour in order to broker a compromise on the controversial question of the right to change one's religion.

²⁸⁰ Although, as Natan Lerner correctly points out, “like all solemn declarations of the United Nations General Assembly, [it] implies an expectation of observance”: “The Nature and Minimum Standards of Freedom of Religion and Belief”, *op. cit.*, at 918.

²⁸¹ Communication No. 208/1986, *Singh Bhinder v. Canada*, Views adopted on 9 November 1989.

to be a legitimate form of discrimination. In *Waldman v. Canada, supra*, the Committee considered the differential funding of one class of denominational school to be incompatible with Article 26 as the differential funding lacked a reasonable and objective basis.²⁸²

The United Nations Human Rights Committee has also considered and pronounced on issues relating to the regulation of religious attire (or, to be more specific, the Islamic headscarf), but not in a dispositive manner. In *Hudoyberganova v. Uzbekistan*,²⁸³ the author of the Communication claimed that (as summarised by the Human Rights Committee) “her right to freedom of thought, conscience and religion was violated as she was excluded from University because she refused to remove the headscarf that she wore in accordance with her beliefs”.²⁸⁴ As such, the material facts of the case were very similar to those in the *Şahin* case, *infra*. The following passage captures the essence of the Human Rights Committee’s examination of the merits of the case:

The Committee considers that the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion. Furthermore, it considers that to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion. As reflected in the Committee's General Comment No. 22 (para.5),²⁸⁵ policies or practices that have the same intention or effect as direct coercion, such as those restricting access to education, are inconsistent with article 18, paragraph 2. It recalls, however, that the freedom to manifest one's religion or beliefs is not absolute and may be subject to limitations, which are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others (article 18, paragraph 3, of the Covenant). In the present case, the author's exclusion took place on 15 March 1998, and was based on the provisions of the Institute's new regulations. The Committee notes that the State party has not invoked any specific ground for which the restriction imposed on the author would in its view be necessary in the meaning of article 18, paragraph 3. Instead, the State party has sought to justify the expulsion of the author from University because of her refusal to comply with the ban. Neither the author nor the State party have specified what precise kind of attire the author wore and which was referred to as "hijab" by both parties. In the particular circumstances of the present case, and without either prejudging the right of a State party to limit expressions of religion and belief in the context of article 18 of the Covenant and duly taking into account the specifics of the context, or prejudging the right of academic institutions to adopt specific regulations relating to their own functioning, the Committee is led to conclude, in the absence of any justification provided by the State party, that there has been a violation of article 18, paragraph 2.²⁸⁶

It was submitted *supra* that the Human Rights Committee’s consideration of the underlying issues in this case was not “dispositive”. That assessment is based on the inadequate factual and also contextual detail which informed the Committee’s findings. From the information before the Committee, it was not readily apparent precisely what kind of clothing the author was wearing (neither the author nor the State offered any specification in this regard).²⁸⁷ This

²⁸² In light of this finding, the Committee considered that no additional issues arose for consideration under, *inter alia*, Article 18, ICCPR: *Waldman v. Canada, op. cit.*, para. 10.7.

²⁸³ *Raihon Hudoyberganova v. Uzbekistan*, Communication No. 931/2000, 18 January 2005.

²⁸⁴ *Ibid.*, para. 6.2.

²⁸⁵ Author’s footnote: General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18), adopted by the UN Human Rights Committee at its 48th session on 30 July 1993.

²⁸⁶ *Raihon Hudoyberganova v. Uzbekistan, op. cit.*, para. 6.2.

²⁸⁷ For an overview of terminology relating to the Islamic headscarf, see: Dominic McGoldrick, *Human Rights and Religion: The Islamic headscarf Debate in Europe* (Oxford & Portland, Oregon, Hart Publishing, 2006), pp. 4-5; B.P. Vermeulen *et al.*, *Overwegingen vij een boerka verbod*, Expert Report for the Dutch Cabinet, 3 November 2006, p. 11. The latter differentiates between some of the more frequently used terms as follows: “Hidjaab” is used as a generic term, covering variants ranging from garment covering entire body to headscarf

is a crucial factual element for any examination of whether the particular circumstances of the case could constitute a breach of the author's rights under Article 18, ICCPR. Moreover, as pointed out in the individual (dissenting) opinion of Committee Member Mr. Hipólito Solari-Yrigoyen, "the exclusion of the author, according to her own statements, arose from more complex causes, and not only the religious clothing she wore or her demand to cover her face within the Institute".

Absent adequate factual detail, Committee Member Sir Nigel Rodley offers apposite qualification of the Committee's findings in his individual opinion. Although in general agreement with the Committee, he explicitly dissociates himself from its assertion "duly taking into account the specifics of the context". He explains:

The Committee is right in the implication that, in cases involving such 'clawback' clauses as those contained in articles 12, 18, 19, 21 and 22, it is necessary to take into account the context in which the restrictions contemplated by those clauses are applied. Unfortunately, in this case, the State party did not explain on what basis it was seeking to justify the restriction imposed on the author. Accordingly, the Committee was not in a position to take any context into account. To assert that it has done so, when it did not have the information on the basis of which it might have done so, enhances neither the quality nor the authority of its reasoning.

The third individual opinion in this case – that of Committee Member Ms. Ruth Wedgwood – also picks up on the factual ambiguities of the case. For her, the failure to specify whether the author was prevented from wearing a *hijab* or head scarf "covering the hair and neck" or a garment covering the face (as prohibited by Institute regulations) is of pivotal importance. Such specification could have a determinative impact on the evaluation of the circumstances in which the alleged violation of the author's rights took place. Emphasising some very pragmatic considerations, she argues: "a state may be allowed to restrict forms of dress that directly interfere with effective pedagogy, and the covering of a student's face would present a different set of facts".

It is interesting to note - by way of aside - that pragmatic considerations such as these have shaped the relevant approaches of the competent authorities in a number of States.²⁸⁸ In the Netherlands, for example, the Equal Treatment Commission (CGB) "does not easily consider the importance of communication in an employment relation to be an objective justification for indirect discrimination on the grounds of religion". It has, however, carved out an exception to this rule that recognises "the importance of good communication in the context of learning processes/education". For example, in a recent opinion, it held that:

concealing only the hair. "Boerka" is taken to mean a garment covering the entire body, including the head, with a small gauze at eye-level (typical for areas in Pakistan and Afghanistan). The Report states that it assumes this is the meaning intended by the Parliamentary Motion requesting the Cabinet to prohibit the wearing of the burka in public. The Motion was introduced by Geert Wilders (leader of Partij voor de Vrijheid) (Parliamentary doc. 29 754, no. 41; submitted on 10 October 2005 and adopted by Lower House of Dutch Parliament (Tweede Kamer) on 20 December 2005) in the context of a debate about combating terrorism (for critical commentary, see: E.J. Dommering, "Boerkaverbod is juridisch onwerkbaar", *NRC Handelsblad*, 21 November 2006). It was by way of follow-up to that Motion that the Report was commissioned by the Dutch Cabinet. The Report recognises that "boerka" can have other meanings, incl. garment worn around and covering the head, but which does have slits for eyes, and garment that hangs like a curtain before the face, leaving forehead and eyes free. The Report uses the term "nikaab" for other garments that cover face, but not eyes. It refers to "chador" as a headscarf that is worn around head without covering it. To avoid terminological confusion, the Report tends to refer to "face-covering veils" (gezichtsbedekkende sluiers), which includes "boerka" and "nikaab".

²⁸⁸ As documented in *Leyla Şahin v. Turkey*, Grand Chamber Judgment, *op. cit.*, paras. 63 & 64.

good communication in an educational setting, in combination with the importance of identification and future occupational participation, constituted an objective justification for the indirect discrimination practised by the school in that it prohibited wearing a niqaab (CGB 20 March, opinion 2003-40).²⁸⁹

ECHR²⁹⁰

Under the ECHR, freedom of thought, conscience and religion is vouchsafed by Article 9:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

It has already been demonstrated, *supra*, that the right to freedom of religion, as guaranteed by Article 9, ECHR, is firmly rooted in the principles of democracy and pluralism that underpin the entire Convention. The ambit of the right is thus wide: it accommodates the beliefs of adherents of traditional and non-traditional religions alike and “it is also a precious asset for atheists, agnostics, sceptics and the unconcerned”.²⁹¹ Moreover, the European Court of Human Rights has recognised that a huge diversity of religious affinities exists, if one includes “religions forming a very broad dogmatic and moral entity which as or may have answers to every question of a philosophical, cosmological or moral nature”.²⁹²

Whereas aims of “an idealistic nature” will not of themselves be enough to meet the requisite definitional criteria,²⁹³ specific forms of idealism could be. This was deemed to be the case for pacifism²⁹⁴ and veganism,²⁹⁵ but not for anti-abortion views.²⁹⁶ In other cases, for example concerning Druidism, the Strasbourg judicial organs did not find it necessary to pronounce on whether a belief-system could be classified as a religion for the purposes of Article 9, ECHR.²⁹⁷ In other cases still, the inability of applicants to clearly explain the content of their belief-systems meant that *inter alia* the Wicca-religion and Lichtenbeterism were not

²⁸⁹ “Advisory opinion of the Dutch Equal Treatment Commission on Employment, religion and equal treatment”, 12 August 2004, Doc. CGB advisory opinion/2004/06, p. 9. See also, *Leyla Şahin v. Turkey*, Grand Chamber Judgment, *op. cit.*, para. 64.

²⁹⁰ See generally, Malcolm D. Evans, *Religious liberty and international law in Europe* (Cambridge University Press, Cambridge, 1997).

²⁹¹ *Kokkinakis v. Greece*, Judgment of the European Court of Human Rights of 25 May 1993, Series A, No. 260-A, para. 31; *Buscarini & Others v. San Marino*, Judgment of the European Court of Human Rights (Grand Chamber) of 18 February 1999, ECHR 1999-I, para. 34; *Dahlab v. Switzerland*, Judgment of the European Court of Human Rights of ..., p. 11 of judgment; *Leyla Sahin v. Turkey*, Judgment of the European Court of Human Rights (Fourth Section) of 29 June 2004, para. 66.

²⁹² *Kjeldsen, Busk Madsen & Pedersen v. Denmark*, *op. cit.*, para. 53.

²⁹³ For example, in *VRU v. the Netherlands*, *op. cit.*, the aims of the applicant association were to provide legal advice to prisoners and look after their interests on a non-commercial basis.

²⁹⁴ *Arrowsmith v. the United Kingdom*, Report of the European Commission of Human Rights of 12 October 1978, Appn. No. 7050/75, D&R 19 (1980), para. 69.

²⁹⁵ *W. v. the United Kingdom*, Appn. No. 18187/91 (unpublished), cited in P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights (3rd Edition)* (Kluwer Law International, The Hague, 1998), at p. 548.

²⁹⁶ *Van den Dungen*, *op. cit.*

²⁹⁷ *Chappell v. the United Kingdom*, Decision of inadmissibility of the European Commission of Human Rights of 14 July 1987, Appn. No. 12587/86.

recognised as a religion or belief in the sense of Article 9.²⁹⁸ Some commentators have argued – persuasively – that a guiding principle for determining whether views can be classed as a religion or belief should be whether they “attain a certain level of cogency, seriousness, cohesion and importance”.²⁹⁹ The Court coined this formula while emphasising the distinction between beliefs and (philosophical) convictions on the one hand, and “opinions” and “ideas” (as per Article 10, ECHR), on the other hand.

It is clear from the wording of the Article that the essence of the right is the protection it affords the *forum internum* or “sphere of personal beliefs and religious creeds”.³⁰⁰ Whereas the *forum internum* may be considered to be inviolable,³⁰¹ the outward expression or “manifestation” of such beliefs and creeds is not.³⁰² Protection only extends to acts that are “intimately linked” to such beliefs and creeds, but any permissible restrictions must be in accordance with the criteria specified in Article 9(2). It has consistently been held by the judicial organs of the ECHR that Article 9 “does not protect every act motivated or inspired by a religion or belief”.³⁰³ Determining the motivational threshold required to trigger protection under Article 9 has often proven difficult, as is demonstrated by the case of *Arrowsmith v. the United Kingdom*.

The case arose out of the conviction of the applicant – a committed pacifist – for the distribution of pamphlets to British army soldiers urging them not to serve in Northern Ireland. The European Commission of Human Rights held that “when the actions of individuals do not *actually* express the belief concerned they cannot be considered to be as such protected by Article 9.1, even when they are motivated or influenced by it”.³⁰⁴ It is submitted here that *Arrowsmith* was a poor decision as it failed to take full account of the broader factual context involved. By focusing excessively on the absence of an express statement in the leaflets that they were motivated by the applicant’s pacifist convictions, the Commission failed to give due weight to the fact that the distribution of the leaflets was wholly consistent with the applicant’s other actions, all of which were inspired by her commitment to pacifism. As pointed out by Mr Opsahl in his (partly dissenting) separate opinion in the case, the applicant’s “acts were not only consistent with her belief, but genuinely and objectively expressed it when seen in their context”.³⁰⁵ Opsahl also warned against drawing the line too narrowly lest “only certain, perhaps the more traditional, types of

²⁹⁸ See generally: Peter Cumper, “The Rights of Religious Minorities: The Legal Regulation of New Religious Movements” in Peter Cumper & Steven Wheatley, Eds., *Minority Rights in the ‘New’ Europe*, *op. cit.*, pp. 165-183.

²⁹⁹ *Campbell & Cosans v. the United Kingdom*, Judgment of the European Court of Human Rights of 29 January 1982, Series A, No. 48, para. 36. See further: P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights (3rd Edition)*, *op. cit.*, p. 548.

³⁰⁰ *VRU v. the Netherlands*, Decision of inadmissibility of the European Commission of Human Rights of , Appn. No. 11308/84; *Van den Dungen v. the Netherlands*, Decision of inadmissibility of the European Commission of Human Rights of 22 February 1995, Appn. No. 22838/93.

³⁰¹ See further, P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights (3rd Edition)*, *op. cit.*, pp. 541-542.

³⁰² A variety of possible forms of manifestation are countenanced in this regard: “worship, teaching, practice and observance”.

³⁰³ *Kalac v. Turkey*, Judgment of the European Court of Human Rights of 23 June 1997, para. 27; the term “influenced” is used instead of “inspired” in *Arrowsmith v. the United Kingdom*, Report of the European Commission of Human Rights of 12 October 1978, Appn. No. 7050/75.

³⁰⁴ (emphasis added) *Ibid.*, para. 71. See also para. 75.

³⁰⁵ Para. 3 of Separate Opinion, *ibid.*

manifestation are protected, irrespective of the genuineness of the motivation”,³⁰⁶ a point of particular importance for minority groups.³⁰⁷

In any event, the Court has frequently conceded that “States enjoy a wide margin of appreciation in the particularly delicate area of their relations with religious communities”.³⁰⁸ The analysis will now proceed to examine the extent of the margin of appreciation afforded States Parties in the case-law of the Court from two perspectives: (i) Church-State relations, and (ii) restrictions on the manifestation of religion or belief.

CHURCH-STATE RELATIONS

In many countries, religious and ecclesiastical bodies are required to follow strict registration procedures. A State’s interest in maintaining such registration procedures is often explained by the assimilation of certain religious ceremonies (in particular marriage) and decisions of religious courts (eg. certain decisions on family and inheritance disputes) to civil ones.³⁰⁹ Religious leaders are therefore sometimes vested with certain (quasi-)judicial and administrative functions.³¹⁰ When this is so, there is an obvious public interest in the regulation of those functions by the State. However, the European Court of Human Rights has deemed it unnecessary “to decide *in abstracto* whether acts of formal registration of religious communities and changes in their leadership constitute an interference with the rights protected by Article 9 of the Convention”.³¹¹ This interpretation would appear to be consistent with the general principle whereby the Court is not allowed to examine legislative measures *in abstracto*.³¹²

The Court has, however, acknowledged that registration procedures for religious bodies are susceptible to abuse by administrative and ecclesiastical authorities: the application of registration criteria without due regard for principles of neutrality and equality could have the effect of restricting the activities of faiths other than an official, established or otherwise dominant Church.³¹³ In this regard, “but for very exceptional cases”, Article 9 “excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate”.³¹⁴ This principle is obviously of crucial importance for minority religions, as the inability to register as a religious body, or the State authorities’ refusal to recognise it as such, could seriously impair its ability to organise itself or operate. By way of illustration, in the case of *Manoussakis v. Greece*, the applicant – a Jehovah’s Witness - had been prosecuted and convicted by the Greek authorities for having operated a place of worship without the necessary legal authorisation.³¹⁵ The European Court of Human

³⁰⁶ *Ibid.*, para. 3.

³⁰⁷ P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd Edition), *op. cit.*, p. 550.

³⁰⁸ *Supreme Holy Council of the Muslim Community v. Bulgaria*, para. 96; *Cha’are Shalom Ve Tsedek v. France*, para. 84; *Manoussakis v. Greece*, para. 44; *Leyla Sahin v. Turkey*, para. 101.

³⁰⁹ *Serif v. Greece*, para. 50; *Agga v. Greece*, para. 57.

³¹⁰ *Serif v. Greece*, para. 52.

³¹¹ *Hasan & Chaush v. Bulgaria*, para. 77.

³¹² This is by virtue of Article 34, ECHR (ex-Article 25, ECHR: see Protocol No. 11 to the ECHR, *op. cit.*). For a more detailed consideration of the matter, see: *Klass & Others v. Germany*, Judgment of the European Court of Human Rights of 6 September 1978, Series A, No. 28, para. 33.

³¹³ *Manoussakis v. Greece*, para. 48.

³¹⁴ *Hasan & Chaush v. Bulgaria*, para. 78. See also, *Manoussakis v. Greece*, para. 47 and *Serif v. Greece*, para. 52.

³¹⁵ Similar factual circumstances formed the background to the case of *Pentidis and Others v. Greece*, Judgment of the European Court of Human Rights (struck off the list) of 2 June 1997, Appn. No. 23238/94.

Rights found that the applicant's freedom of religion had been violated, largely because of the way in which the relevant domestic authorities failed to process successive requests by the applicant for the required authorisation.

The withholding of registration from religious bodies can also impair their operation in other ways, such as the enjoyment of property rights and other benefits generally ensured by recognition of legal personality and the concomitant right of access to the courts.³¹⁶ As posited by the Court in *Metropolitan Church of Bessarabia & Others v. Moldova*:

Lacking legal personality, it [i.e., the applicant Church] cannot bring legal proceedings to protect its assets, which are indispensable for worship, while its members cannot meet to carry on religious activities without contravening the legislation on religious denominations.³¹⁷

It went on to state that it could not regard the tolerance "allegedly shown by the government towards the applicant Church and its members [...] as a substitute for recognition, since recognition alone is capable of conferring rights on those concerned".³¹⁸

In a spate of cases beginning with *Serif v. Greece*, the Court considered contestations of leadership in religious communities. Its consistent line has been that in democratic societies, the State does not need to "take measures to ensure that religious communities remain or are brought under a unified leadership".³¹⁹ *A fortiori*, "State measures favouring a particular leader or group in a divided religious community or seeking to compel the community, or part of it, to place itself under a single leadership against its will would constitute an infringement of the freedom of religion".³²⁰

The religious freedom of minorities can also be implicated in State affairs if oaths (of allegiance) to be taken upon appointment or election to public office are overtly religious in character. In *Buscarini & Others v. San Marino*, the applicants complained that at the material time in San Marino, "the exercise of a fundamental political right, such as holding parliamentary office, was subject to publicly professing a particular faith".³²¹ The European Court of Human Rights, upheld the view of the Commission that "it would be contradictory to make the exercise of a mandate intended to represent different views of society within Parliament subject to a prior declaration of commitment to a particular set of beliefs".³²² The Court consequently found the facts of the case to constitute a breach of Article 9.³²³

³¹⁶ See, in this connection, *Canea Catholic Church v. Greece*, Judgment of the European Court of Human Rights of 16 December 1997, esp. paras. 41, 42 & 47. See also, *The Holy Monasteries v. Greece*, Judgment of the European Court of Human Rights of 21 November 1994.

³¹⁷ Para. 129. See also: *Hasan & Chaush v. Bulgaria*, para. 62.

³¹⁸ *Ibid.*

³¹⁹ *Serif v. Greece*, para. 52; *Agga v. Greece*, para. 59; *Hasan & Chaush v. Bulgaria*, para. 78;

³²⁰ *Supreme Holy Council of the Muslim Community v. Bulgaria*, para. 76 and also paras. 84, 85, 96; *Hasan & Chaush v. Bulgaria*, para. 78.

³²¹ *Buscarini & Others v. San Marino*, Judgment of the European Court of Human Rights of 18 February 1999, para. 30.

³²² *Ibid.*, para. 39.

³²³ Cf. *McGuinness v. the United Kingdom*, Decision of inadmissibility of the European Court of Human Rights (Third Section) of 8 June 1999, Appn. No. 39511/98, a case in which a similar challenge was found not to be in breach of Article 9 as: (i) the oath was not overtly religious in character and the applicant would not forfeit his parliamentary seat for failing to take the oath; (ii) taking the oath would not have forced him to abandon his republican convictions or have prevented him from pursuing those convictions in Parliament. The applicant member of Sinn Féin had argued *inter alia* that to take the oath of allegiance to the British monarchy would offend his religious beliefs, pointing out that Roman Catholics are legally debarred from acceding to the British throne.

RESTRICTIONS ON THE MANIFESTATION OF RELIGION OR BELIEF

As noted *supra*, the exercise of determining whether certain acts are or are not motivated by religious convictions is highly subjective. Borderline cases abound. However, some acts, while closely linked to religion or belief, have consistently been found by the European Court of Human Rights to be beyond the pale of Article 9 protection. A pertinent example is “an expression that is, in regard to objects of veneration, gratuitously offensive to others and profanatory”.³²⁴ Another example is “improper proselytism, such as the offering of material or social advantage or the application of improper pressure with a view to gaining new members for a Church”.³²⁵ The Court has taken a particularly dim view of improper proselytism in the context of clear hierarchical structures.³²⁶ Furthermore, engagement in particular types of employment (eg. defence forces,³²⁷ public education sector,³²⁸ etc.) may imply certain restrictions on the freedom to manifest one’s belief. Invariably, when assessing the necessity of an interference with the right to manifest one’s religion, the Court will consider the effect of the impugned measure.³²⁹ When a measure is only of limited effect, for example in terms of its duration or its application to a specified, confined area,³³⁰ it will have a better chance of avoiding censure.

A current source of friction in a number of European States is the extent to which the manifestation of religious beliefs can be compatible with the secular or non-denominational ethos of the education sector. Such points of friction often concern the wearing - out of tenaciously-held religious convictions - of particular items of clothing, artefacts or insignia. In their relevant case-law, the European Court and Commission of Human Rights have paid particular attention to the impact of such symbols on relevant third parties.

In *Karaduman v. Turkey*,³³¹ the applicant student challenged her university’s refusal to issue her with a degree certificate because she had submitted an identity photo in which she was wearing an Islamic headscarf. The university authorities (and subsequently the Turkish courts) were of the view that the photo contravened university regulations prohibiting the wearing of headscarves in the name of preserving the republican/secular nature of the university. The European Commission of Human Rights found that there had not been an interference with the applicant’s freedom of religion, as protected by Article 9, ECHR. In

³²⁴ *Wingrove v. the United Kingdom*, Judgment of the European Court of Human Rights of 22 October 1996, para. 52; *Otto-Preminger-Institut v. Austria*, Judgment of the European Court of Human Rights of 20 September 1994, Series A, No. 295-A, paras. 47, 49; *Choudhury v. the United Kingdom*, Decision of inadmissibility of the European Commission of Human Rights of 5 March 1991, Appn. No. 17439/90.

³²⁵ *Larissis & Others v. Greece*, Judgment of the European Court of Human Rights of 24 February 1998, para. 45, following *Kokkinakis v. Greece*, *op. cit.*, para. 48.

³²⁶ *Larissis & Others v. Greece*, *op. cit.*, para. 51.

³²⁷ *Kalac v. Turkey*, Judgment of the European Court of Human Rights of 23 June 1997, para. 28; *Engel & Others v. the Netherlands*, Judgment of the European Court of Human Rights of 8 June 1976, Series A, No. 22, para. 57.

³²⁸ *Dahlab v. Switzerland*, *infra*; *X. v. the United Kingdom* (Muslim teacher sought to attend prayer services during school-time – firici agus tagairt iomlan); *Glaserapp v. Germany*, Judgment of the European Court of Human Rights of 28 August 1986, Series A, No. 104; *Kosiek v. Germany*, Judgment of the European Court of Human Rights of 28 August 1986, Series A, No. 105; *Vogt v. Germany*, Judgment of the European Court of Human Rights of 26 September 1995, Series A, No. 323.

³²⁹ *Cha'are Shalom Ve Tsedek v. France*, *op. cit.*, para. 87.

³³⁰ *Van den Dungen v. the Netherlands*, *op. cit.*

³³¹ Decision of inadmissibility of the European Commission of Human Rights of 3 May 1993, Appn. No. 16278/90, DR 74, p. 93.

reaching its conclusion, the Commission was swayed by two main arguments in addition to the objectives of the university dress regulations.

First, it considered that “by choosing to pursue her higher education in a secular university a student submits to those university rules, which may take the freedom of students to manifest their religion subject to restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs”.³³² The second argument was an extension of the first: “Especially in countries where the great majority of the population owe allegiance to one particular religion, manifestation of the observances and symbols of that religion, without restriction as to place and manner, may constitute pressure on students who do not practise that religion or those who adhere to another religion”.³³³ More specifically, the Commission seemed to follow the observations of the Turkish Constitutional Court, *viz.* that “the act of wearing a Muslim headscarf in Turkish universities may constitute a challenge towards those who do not wear one”.³³⁴

The case of *Dahlab v. Switzerland* focused on the prohibition of a primary-school teacher in a State school from wearing an Islamic head-scarf while carrying out her professional activities. The impressionability of the pupils weighed heavily on the Court in its finding that the interference with the applicant’s freedom of religion was justified as “necessary in a democratic society”.³³⁵ The Court described the wearing of the headscarf as “a powerful external symbol” and expressed concern about its potential proselytising effect on young children. It also followed the Swiss Federal Court by querying the compatibility of wearing the headscarf with the principle of gender equality. This reasoning prompted the Court to state that it “appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils”.³³⁶

In its assessment of restrictions on the right to freedom of religion, the Court has not always adhered to the same evidentiary standards. In some cases, it insisted – correctly, it is submitted here – that a general reference to the creation of tension (arising from divided religious communities, or the existence of more than one religious leader) was not sufficient to warrant State interference. Such a reference would necessarily have to be bolstered by an allusion to specific “disturbances that had actually been or could have been caused” by relevant circumstances.³³⁷ By way of contrast, the Court has shown itself elsewhere in its jurisprudence to be very impressionable as regards vague fears of tension or unrest arising from religious disaccord.³³⁸ In those cases, it did not hold out for compelling evidence of the likelihood that the stated fears of the respondent governments would indeed materialise in practice.

³³² *Ibid.*, p. 108.

³³³ *Ibid.*

³³⁴ *Ibid.*

³³⁵ The Court had regard “above all, to the tender age of the children for whom the applicant was responsible as a representative of the State”: p. 13 of the judgment.

³³⁶ *Ibid.*

³³⁷ *Serif v. Greece*, para. 53; *Agga v. Greece*, para. 60.

³³⁸ *Murphy v. Ireland*, Judgment of the European Court of Human Rights (Third Section) of 10 July 2003, Reports of Judgments and Decisions 2003-IX; *Refah Partisi v. Turkey*, *op. cit.* See further: (i) concerning the *Murphy* case, Tarlach McGonagle, “Commercial expression – the usefulness of an imperfect notion?” in Eoin O’Dell, Ed., *Freedom of Expression* (Dartmouth Publishing Ltd., England, forthcoming 2005), pp. ; (ii) concerning the *Refah Partisi* case, Kevin Boyle, “Human Rights, Religion and Democracy: The Refah Partisi Case”, 1 *Essex Human Rights Review* (No. 1, 2004), pp. 1-16.

The final case to be considered in this section is *Leyla Şahin v. Turkey*,³³⁹ which was ultimately heard by the Grand Chamber of the Court. It will be subjected to more detailed and rigorous analysis than the other cases discussed *supra* for three main reasons. First, the judgment contains a number of pronouncements that appear troublesome when viewed from the perspective of some of the recurrent themes of this thesis, in particular pluralism and pluralistic tolerance. Second, the judgment, having been delivered by the Grand Chamber, represents a very important jurisprudential point of reference for other international and national adjudicative bodies, and law- and policy-makers, in the context of the increasingly prevalent “Islamic headscarf debate” in Europe and the continuing elusiveness of consistency in regulatory approaches to relevant issues.³⁴⁰ Third, although the *Şahin* case provided an excellent opportunity to engage with crucial issues, in the heel of the hunt, the Court balked at the opportunity, opting instead to once again bury its head expeditiously in the sand of the margin of appreciation doctrine. In respect of this question, too, the significance of the *Şahin* judgment extends far beyond the facts of the case.

As to the facts of the case:³⁴¹ in the course of the applicant’s medical studies, a university regulation was introduced which provided, *inter alia*, that “students whose ‘heads are covered’ (who wear the Islamic headscarf) and students (including overseas students) with beards must not be admitted to lectures, courses or tutorials”.³⁴² Subsequently, the applicant, who continued to wear the headscarf, was therefore denied admission to sit a written examination; refused permission to enrol for a particular course, and denied admission to another written examination. She unsuccessfully challenged the regulation before the courts. The university instituted disciplinary proceedings against the applicant, firstly for her failure to comply with the regulations on dress, and later on account of her participation in a collective protest against those regulations. The proceedings resulted in her suspension from the university for one semester. Her legal challenge to that decision was also dismissed by the courts.

The crucial matter for assessment in the case was the necessity of the impugned measure in a democratic society. When the Grand Chamber applied the Court’s general principles relating

³³⁹ Judgment of the European Court of Human Rights (Grand Chamber) of 10 November 2005, Application No. 44774/98. See further: Tarlach McGonagle, “The Islamic headscarf dilemma: case-note on *Leyla Şahin v. Turkey*”, 1 *Irish Human Rights Review* (Donncha O’Connell, Ed., No. 1, forthcoming 2008).

³⁴⁰ For overviews and commentary, see: (generally) Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford and Portland, Oregon, Hart Publishing, 2006), Emmanuelle Bribosia & Isabelle Rorive, “Le voile à l’école: une Europe divisée”, *Revue trimestrielle des droits de l’homme*, 2004, pp. 951-983; (France, Germany and the Netherlands) Aernout Nieuwenhuis, “State and Religion, Schools and Scarves, An Analysis of the Margin of Appreciation as Used in the Case of *Leyla Sahin v. Turkey*, Decision of 29 June 2004, Application Number 44774/98.”, 1 *European Constitutional Law Review* (No. 3, 2005), pp. 495-510; (France and the United States) T. Jeremy Gunn, “Religious Freedom and Laïcité: A Comparison of the United States and France”, 2004 B.Y.U.L. Rev. 419; (France) Cécile Laborde, “Secular Philosophy and Muslim Headscarves in Schools”, 13 *The Journal of Political Philosophy* (No. 3, 2005), pp. 305-329; (Germany) Christine Langenfeld & Sarah Mohsen, “Germany: The teacher head scarf case”, 3 *Int’l. J. Con. Law*, (No. 1, 2005): pp. 86-94, Oliver Gerstenberg, “Germany: Freedom of conscience in public schools”, 3 *Int’l. J. Con. Law*, (No. 1, 2005): pp. 94-106, Matthias Mahlmann, “Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court’s Decision in the *Headscarf Case*”, 4 *German Law Journal* (No. 11, 2003), pp. 1099-1116; (United Kingdom) Gareth Davies, “Banning the Jilbab: Reflections on Restricting Religious Clothing in the Light of the Court of Appeal in *SB v. Denbigh High School*. Decision of 2 March 2005.”, 1 *European Constitutional Law Review* (No. 3, 2005), pp. 511-530, Anat Scolnicov, “A dedicate follower of (religious) fashion?”, 64 *The Cambridge Law Journal* (No. 3, 2005), pp. 527-529.

³⁴¹ Similar facts formed the background to the case of *Zeynep Tekin v. Turkey*, Decision of the European Court of Human Rights (Fourth Section) (struck off the list) of 29 June 2004, Appn. No. 41556/98.

³⁴² *Ibid.*, para. 16.

to Article 9 to the facts of the case at hand, it closely followed the reasoning of the Fourth Section of the Court in its earlier judgment in the *Şahin* case. It affirmed, for instance, the pronouncement in the *Refah Partisi* case, that “An attitude which fails to respect [the principle of secularism] 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”.³⁴³ The Grand Chamber acknowledged the importance of gender equality in the Turkish constitutional system, as the Fourth Section had done earlier, and then went on to approvingly cite the following passages from the Fourth Section’s judgment:

“... In addition, like the Constitutional Court..., the Court considers that, when examining the question of the Islamic headscarf in the Turkish context, there must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it. As has already been noted (see *Karaduman*, decision cited above; and *Refah Partisi and Others*, cited above, § 95), the issues at stake include the protection of the “rights and freedoms of others” and the “maintenance of public order” in a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhere to the Islamic faith. Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since, as the Turkish courts stated..., this religious symbol has taken on political significance in Turkey in recent years.

... The Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts... It has previously said that each Contracting State may, in accordance with the Convention provisions, take a stance against such political movements, based on its historical experience (*Refah Partisi and Others*, cited above, § 124). The regulations concerned have to be viewed in that context and constitute a measure intended to achieve the legitimate aims referred to above and thereby to preserve pluralism in the university.”³⁴⁴

Against that background, the Grand Chamber found the principle of secularism to be “the paramount consideration underlying the ban on the wearing of religious symbols in universities”.³⁴⁵ After considering the circumstances of the case, it stated that “Article 9 does not always guarantee the right to behave in a manner governed by a religious belief [...] and does not confer on people who do so the right to disregard rules that have proved to be justified”.³⁴⁶ It held, emphatically - by 16 votes to one, that no violation of Article 9 had taken place.

Although the mainstay of the applicant’s case was the claim that her rights under Article 9 had been breached, she also invoked her rights under Articles 8, 10 and 14, ECHR, and Article 2 of Protocol 1 to the ECHR (hereinafter ‘P1-2’)). The claims based on Articles 8, 10 and 14 were quickly and unanimously rejected by the Grand Chamber, but the claim based on P1-2 was subjected to lengthier scrutiny before also being denied. The applicant’s claim implicated the first sentence of P1-2: “No person shall be denied the right to education”. Relevant general principles of the Court were rehearsed (discussed broadly, *supra*) and applied to the facts of the instant case. It noted that the “obvious purpose of the restriction was to preserve the secular character of educational institutions”.³⁴⁷ The Court insisted on its finding of proportionality in respect of its analysis of Article 9 earlier in the judgment, before underscoring a number of factors. It considered, first of all, that the impugned measures

³⁴³ *Ibid.*, para. 114; *Refah Partisi* case, *op. cit.*, para. 93.

³⁴⁴ (Citation abridged by author) *Ibid.*, para. 115.

³⁴⁵ *Ibid.*, para. 116.

³⁴⁶ *Ibid.*, para. 121.

³⁴⁷ *Ibid.*, para. 158.

“manifestly did not hinder the students in performing the duties imposed by the habitual forms of religious observance”.³⁴⁸ It found that the relevant decision-making process implementing the regulations did adequately weigh up the various interests at stake, and that it contained the necessary safeguards for the protection of students’ interests (eg. conformity with legislation and judicial review). It also considered that the “university authorities judiciously sought a means whereby they could avoid having to turn away students wearing the headscarf and at the same time honour their obligation to protect the rights of others and the interests of the education system”.³⁴⁹

In her dissenting opinion, Judge Tulkens began by subscribing to the “general principles” reiterated in the Grand Chamber’s judgment.³⁵⁰ She pointed out that the role of the Court in cases concerning conflicts between religious communities is to seek to reconcile universality and diversity, and not to “express an opinion on any religious model whatsoever”.³⁵¹ Her objections to the manner in which the majority of the Court applied the margin of appreciation doctrine in the *Şahin* case were twofold. First, she argued that the considerations of comparative approaches do not point towards a lack of relevant consensus at the European level as none of the approaches surveyed extended to university education (where students are less amenable to pressure). Second, she opined that there was little evidence of the requisite level of European supervision accompanying the margin of appreciation in the instant case.³⁵² She felt that the majority relied exclusively on reasons invoked by the Turkish authorities and courts by way of justification of the ban on wearing the headscarf. She also felt that the majority put forward in general and abstract terms the two main arguments of secularism and equality. While endorsing those principles, she objected to the manner in which they were interpreted in the instant case.³⁵³

Judge Tulkens insisted that alongside secularism, “Religious freedom is, however, also a founding principle of democratic societies”.³⁵⁴ She continued, trenchantly:

Accordingly, the fact that the Grand Chamber recognised the force of the principle of secularism did not release it from its obligation to establish that the ban on wearing the Islamic headscarf to which the applicant was subject was necessary to secure compliance with that principle and, therefore, met a “pressing social need”. Only indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries or fears – are capable of satisfying that requirement and justifying interference with a right guaranteed by the Convention. Moreover, where there has been interference with a fundamental right, the Court’s case-law clearly establishes that mere affirmations do not suffice: they must be supported by concrete examples [...].³⁵⁵

She then pointed up some inconsistencies in the relevant case-law of the Court and underscored the fact that the symbolic importance of the headscarf (or other external symbols of religious practice) “may vary greatly according to the faith concerned”.³⁵⁶

Her critical scrutiny then turned to the majority’s consideration that wearing the headscarf contravenes the principle of secularism and stated that this amounts to taking a “position on

³⁴⁸ *Ibid.*, para. 159.

³⁴⁹ *Ibid.*

³⁵⁰ Dissenting opinion of Judge Tulkens, *ibid.*, para. 1.

³⁵¹ Dissenting opinion of Judge Tulkens, *ibid.*, para. 2.

³⁵² Dissenting opinion of Judge Tulkens, *ibid.*, para. 3.

³⁵³ Dissenting opinion of Judge Tulkens, *ibid.*, para. 4.

³⁵⁴ Dissenting opinion of Judge Tulkens, *ibid.*, para. 5.

³⁵⁵ Dissenting opinion of Judge Tulkens, *ibid.*, para. 5.

³⁵⁶ Dissenting opinion of Judge Tulkens, *ibid.*, para. 6.

an issue that has been the subject of much debate, namely the signification of wearing the headscarf and its relationship with the principle of secularism”.³⁵⁷ In her view, this generalised assessment overlooks the applicant’s (undisputed) submission that she had no intention of calling the principle of secularism into question. Similarly, it overlooks the absence of evidence that the applicant’s “attitude, conduct or acts” had actually contravened the principle. Furthermore, the *Dahlab* case was relied upon in the majority opinion, rather than distinguished. In that case, the applicant was a teacher, not a student like Leyla Şahin, and the role-model aspect of the teacher was accordingly emphasised by the Court. Judge Tulkens reasoned that “While the principle of secularism requires education to be provided without any manifestation of religion and while it has to be compulsory for teachers and all public servants, as they have voluntarily taken up posts in a neutral environment, the position of pupils and students” appears different”.³⁵⁸

The dissenting opinion then adverts to the need to avoid equating the wearing of the headscarf with fundamentalism, especially in the absence of any suggestion that the applicant herself held fundamentalist views. Judge Tulkens added that “it is vital to distinguish between those who wear the headscarf and ‘extremists’ who seek to impose the headscarf as they do other religious symbols”.³⁵⁹ Finally, in this connection, “The applicant’s personal interest in exercising the right to freedom of religion and to manifest her religion by an external symbol cannot be wholly absorbed by the public interest in fighting extremism”.³⁶⁰

Having dispensed with the principle of secularism, Judge Tulkens then turned her attention to the principle of equality, pointing out that the implied linkage between the ban on the headscarf and equality between men and women is never rendered explicit by the Court. She further ventured that wearing the headscarf can have various significations, and referred to such a finding by the German Constitutional Court in 2003 in support of her view.³⁶¹ She criticised the Grand Chamber’s reliance on what is for her “the most questionable part of the reasoning in [the *Dahlab*] decision, namely that wearing the headscarf represents a “powerful external symbol”, which “appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality” and that the practice could not easily be “reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society should convey to their pupils” (see paragraph 111 of the judgment, *in fine*)”.³⁶² She reasoned that:

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. The applicant, a young adult university student, said – and there is nothing to suggest that she was not telling the truth – that she wore the headscarf of her own free will. In this connection, I fail to see how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted. Equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them. [...]”³⁶³

³⁵⁷ Dissenting opinion of Judge Tulkens, *ibid.*, para. 7.

³⁵⁸ Dissenting opinion of Judge Tulkens, *ibid.*, para. 7.

³⁵⁹ Dissenting opinion of Judge Tulkens, *ibid.*, para. 10.

³⁶⁰ Dissenting opinion of Judge Tulkens, *ibid.*, para. 10.

³⁶¹ Dissenting opinion of Judge Tulkens, *ibid.*, para. 11.

³⁶² Dissenting opinion of Judge Tulkens, *ibid.*, para. 12.

³⁶³ Dissenting opinion of Judge Tulkens, *ibid.*, para. 12.

Her final argument in this connection is that if the wearing of the headscarf really was contrary to the principle of gender equality, the State would be under a positive obligation to prohibit it in all places, both in public and in private.³⁶⁴

Judge Tulkens also disagreed with the majority opinion that no violation had taken place of the applicant's right to religion. She agreed with the Grand Chamber that P1-2 is applicable to higher and university education.³⁶⁵ Where she differed from the majority was again in the assessment of the relevance and sufficiency of the reasons adduced for the interference with the applicant's right to education.³⁶⁶ Unlike the majority, Judge Tulkens argued that "no attempt was made to try measures that would have had a less drastic effect on the applicant's right to education in the instant case".³⁶⁷ She added that the Grand Chamber had not weighed up the competing interests involved, i.e., the damage sustained by the applicant on the one hand, and the overall benefit to be gained by Turkish society, on the other.³⁶⁸

Some cautionary tales

The European Court of Human Rights would do well to regard Judge Tulken's dissent in the *Şahin* case as a serious shot across its bows. Her criticisms of the reasoning applied by the majority in that judgment are well-calibrated and have a real urgency about them. A number of general criticisms will now be distilled from her specific criticisms, and fortified with further analysis.

First, the real nub of the case – the individual right of Leyla Şahin to manifest her religious beliefs by wearing the Islamic headscarf in a university setting – was largely sidelined by abstract assertions of various principles, such as secularism and equality, and assertions of public interests, such as the preservation of public order.

Secularism

In the absence of any evidence that the applicant – either in her intentions or actual conduct – sought to dispute or otherwise undermine the principle of secularism that is so cherished in the Turkish Constitutional system, it was disingenuous of the European Court to accept the primacy of that principle as a legitimate ground for upholding the impugned interference with Leyla Şahin's right to manifest her religious beliefs by sartorial means.³⁶⁹ Properly conceived, secularism should be perfectly reconcilable with the principle of (vibrant) religious pluralism. As Kevin Boyle has argued: "if pluralism is a defining value of democratic societies, as suggested by the European Court, then there must be 'pluralism of ideologies', to include spiritual as well as secular traditions".³⁷⁰ As alluded to in Judge Tulken's dissenting opinion, the preservation of a secularist ethos in the education sector can legitimately be achieved by imposing certain regulations on State employees in that sector; whether the extension of relevant regulations to the beneficiaries of education is permissible is a much more

³⁶⁴ Dissenting opinion of Judge Tulkens, *ibid.*, para. 12.

³⁶⁵ Dissenting opinion of Judge Tulkens, *ibid.*, para. 14.

³⁶⁶ Dissenting opinion of Judge Tulkens, *ibid.*, paras. 15 *et seq.*

³⁶⁷ Dissenting opinion of Judge Tulkens, *ibid.*, para. 17.

³⁶⁸ Dissenting opinion of Judge Tulkens, *ibid.*, para. 17.

³⁶⁹ See further, Dissenting opinion of Judge Tulkens in the *Şahin* case, *op. cit.*, para. 7.

³⁷⁰ Kevin Boyle, "Human Rights, Religion and Democracy: The Refah Partisi Case", *op. cit.*, p. 16. See further: Rolf Künneman, "A Coherent Approach to Human Rights", 17 *Human Rights Quarterly* (No. 2, 1995), pp. 323-342, at 340.

contentious question.³⁷¹ Secularism has a very specific and sensitive history in Turkey,³⁷² but such contextual particularities do not mean that the European scrutiny so essential to the margin of appreciation doctrine should be waived. Indeed, precisely because of the Turkish experience of secularism as an imposed ideology since the foundation of the State, the margin of appreciation doctrine should not be allowed to cordon off the principle from careful scrutiny.

Gender equality

Recurrent references in the majority opinion to the upholding of gender equality similarly fail to convince. Such assertions are premised on the presumption that the Islamic headscarf is symbolically and instrumentally repressive of women's rights and that the decision to wear the headscarf is (to some extent) coerced rather than a matter of individual choice. Certainly, this is one prevalent interpretation of the symbolism of the headscarf, but it is by no means the only one. The decision to wear the headscarf can also be entirely of an individual woman's own volition, and moreover, wearing it can have emancipatory consequences for her, by facilitating her involvement in a range of public and professional activities. Symbolism and signification, therefore, are highly subjective notions and are best determined in concrete situations – not in sweeping generalisations such as those indulged in by the majority of the Grand Chamber. Moreover, as Judge Tulkens insisted, it is not even the task of the European Court of Human Rights to pronounce on the signification of religious symbols.³⁷³

In its superficial and disjointed handling of concerns for gender equality, the Court overlooked the potentially far-reaching exclusionary impact of a ban on wearing the headscarf in educational environment.³⁷⁴ A very “prudential calculus” is involved here, and in any case one that contemplates the likely longer-term implications of such a prohibition.³⁷⁵ Jacob T. Levy has the measure of this calculus when he asks:

Would a ban mostly have the effect of getting Muslim girls in public school to leave their scarves behind, or would it mostly have the effect of keeping them out of the public schools, perhaps encouraging the growth of private schools in which they gain less exposure to a world outside their own community?³⁷⁶

Such trends can ultimately make the realisation of societal goals, such as integration and the promotion of inter-group understanding and tolerance, significantly more difficult.

Relatedly, the Court also put store by the argument that permitting the headscarf to be worn could pressurise others into also wearing the headscarf, but against their will.³⁷⁷ However, given that no evidence was adduced of any examples of such pressure, such a fear can only be regarded as theoretical. Furthermore, as suggested by Judge Tulkens, university students generally exhibit a heightened capacity to resist such peer pressure, unlike their younger

³⁷¹ Dissenting opinion of Judge Tulkens in the *Şahin* case, *op. cit.*, para. 7.

³⁷² See further, Kevin Boyle, “Human Rights, Religion and Democracy: The Refah Partisi Case”, *op. cit.*, pp. 14 *et seq.*

³⁷³ Dissenting opinion of Judge Tulkens in the *Şahin* case, *op. cit.*, para. 7.

³⁷⁴ See further: D. Christopher Decker, “Case Comment: Leyla Sahin v Turkey”, E.H.R.L.R. 2004, 6, 672-678, at p. 678; Tore Lindholm, “The Strasbourg Court Dealing with Turkey and the Human Right to Freedom of Religion or Belief: A Critical Assessment in the Light of Recent Case Law (*Leyla Sahin v. Turkey*, 29 June 2004)”, n.d., available at: <http://www.strasbourgconference.org> (visited on 29 May 2006) p. 13 of document.

³⁷⁵ Jacob T. Levy, *The Multiculturalism of Fear* (New York, Oxford University Press, 2000), p. 61.

³⁷⁶ *Ibid.*

³⁷⁷ The *Şahin* case, *op. cit.*, para. 115.

school-going counterparts.³⁷⁸ Both of the foregoing arguments bring the necessity of the impugned measures even further into question. In any event, the argument itself diverts attention away from the motivation and conduct of the wearer of the headscarf to those around her. As Gareth Davies has pointed out in respect of a different (but not entirely dissimilar) case, shifting the focus to how certain conduct is interpreted by third parties “comes dangerously close to allowing individuals to be judged by the prejudices of others”,³⁷⁹ a practice which he regards as being “entirely at odds with both reason and the law”.³⁸⁰

Public order

As with the “pressure on others” argument, the justification of the impugned measures on the grounds of maintaining public order also rings hollow.³⁸¹ Again, no evidence of the applicant causing any disruption to public order was submitted to the Court. What did weigh heavily on the Court’s reasoning, though, was the politicisation of the headscarf by extremist political movements in Turkey.³⁸² In the absence of any evidence (or even assertion) before the Court that the applicant had any connection with, or inclination towards, Islamic fundamentalism or other forms of political extremism, the Court’s reliance on this justification is misplaced.³⁸³ It could be taken as implicitly tarring the applicant and religious fundamentalists with the same brush, thereby fuelling suggestions that the Court’s approach was founded on fear and distrust of unfamiliar cultures,³⁸⁴ or the “Threatening Other”, as Tore Lindholm has put it.³⁸⁵ It could also be seen as another example of the Court’s apparent inability to see Islam other than as a monolithic religion. The reality, of course, is that Islam comprises many different strands, just like other major religions. Finally, in this connection, the *Refah Partisi* case raised very serious questions about the Court’s approach to the tenets and practices of Islam,³⁸⁶ and it is to be regretted that the Court in *Şahin* has opted to reiterate some of its more troublesome findings in the *Refah Partisi* case.³⁸⁷

Conclusion

The headscarf debate is proving polemical and divisive at national and international levels alike. There is considerable divergence across States in terms of approaches and attitudes and the reality of such divergence is unlikely to disappear in the near future. Similarly, the contestation of various approaches adopted by States is likely to continue before international bodies. The initial attempts by the European Court of Human Rights and the United Nations

³⁷⁸ Dissenting opinion of Judge Tulkens in the *Şahin* case, *op. cit.*, para. 7 [Check!].

³⁷⁹ Gareth Davies, “Banning the Jilbab”, *op. cit.*, p. 520.

³⁸⁰ *Ibid.*, p. 522.

³⁸¹ See further, Tore Lindholm, “The Strasbourg Court Dealing with Turkey and the Human Right to Freedom of Religion or Belief”, *op. cit.*, pp. 11-12 of document.

³⁸² The *Şahin* case, *op. cit.*, para. 115.

³⁸³ See further, the Dissenting opinion of Judge Tulkens in the *Şahin* case, *op. cit.*, para. 10.

³⁸⁴ For further exploration of the theoretical and practical implications of such a fear-grounded policy, see: Jacob T. Levy, *The Multiculturalism of Fear*, *op. cit.*, pp. 33 *et seq.*

³⁸⁵ Tore Lindholm, “Comments on the Case of Leyla Sahin v. Turkey: Political and Public Morality Aspects”, n.d., available at: <http://www.strasbourgconference.org> (visited on 29 May 2006), p. 3 of document.

³⁸⁶ For example, Kevin Boyle has suggested that “The Refah case can be read to suggest that peaceful advocacy of the tenets of Islam is unprotected under the European Convention” (footnote omitted): Kevin Boyle, “Human Rights, Religion and Democracy: The Refah Party Case”, *op. cit.*, p. 12.

³⁸⁷ A full exploration of the problematic aspects of the Refah Partisi case is beyond the scope of this note, but see generally, Kevin Boyle, “Human Rights, Religion and Democracy: The Refah Party Case”, *op. cit.*, and Ben Olbourne, “Refah Partisi (The Welfare Party) v Turkey”, E.H.R.L.R. 2003, 4, 437-444.

Human Rights Committee to deal with relevant matters in a decisive and convincing manner have been found wanting.

In the *Şahin* case, the Court showed rather unquestioning deference to arguments of principle advanced by the Turkish authorities and to specific contextual factors obtaining in Turkey, despite their often tenuous relevance to the facts of the instant case. Considerations of secularism and political extremism in Turkey are prime examples of this. As a result, the Court will find it difficult to refute claims that it has – not for the first time in respect of cases against Turkey – succumbed to “the insidious temptation to resort to a ‘variable geometry’ of human rights which pays undue deference to national or regional ‘sensitivities’”.³⁸⁸ Another highly problematic aspect of the *Şahin* judgment is the lack of refinement in its consideration of matters relating to Islam. In sum, it is regrettable that in this case, the Court would appear to have ascribed its own subjective significations to the Islamic headscarf (as a religious symbol) and imputed motivations to the applicant that were not supported by the evidence before the Court. It is imperative for the credibility of the Court that this emergent doctrinal blight be prevented from spreading to other stalks of the Court’s jurisprudence.³⁸⁹

It can only be hoped that the emergent jurisprudence of the European Court of Human Rights can be sensibly and sensitively consolidated, as its exposure to, and experience with, relevant issues increases. The impact of the Court’s standard-setting role in this regard is far-reaching, as evidenced, *inter alia*, by references to the *Şahin* case by the United Nations Human Rights Committee. This makes the Court’s responsibility all the greater.

FCNM

As regards the FCNM, Article 8 deals most directly with religious rights of persons belonging to national minorities. It reads:

The Parties undertake to recognise that every person belonging to a national minority has the right to manifest his or her religion or belief and to establish religious institutions, organisations and associations.

The Explanatory Report to the FCNM is laconic in its treatment of Article 8, merely stating that the Article expands on the general announcement of the guarantee for freedom of religion issued in Article 7, FCNM,³⁹⁰ and that it combines several elements from the CSCE Copenhagen Document dealing with religion in one single provision.³⁹¹ In the first cycle of monitoring of the FCNM, issues arising under Article 8 prompted comparatively few detailed specific observations on the part of the Advisory Committee. Indeed, in 16 of the 30 Advisory Opinions adopted (and published so far), the Advisory Committee found that the

³⁸⁸ Lord Lester of Herne Hill, Q.C., “The European Convention on Human Rights in the New Architecture of Europe: General Report”, 38 *Yearbook of the European Convention on Human Rights* (1995), pp. 223-236, at 226-227.

³⁸⁹ See further, Tore Lindholm, “The Strasbourg Court Dealing with Turkey and the Human Right to Freedom of Religion or Belief”, *op. cit.*, pp. 17-18 of document.

³⁹⁰ Article 7, FCNM, reads: “The Parties shall ensure respect for the right of every person belonging to a national minority to freedom of peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion.”

³⁹¹ Explanatory Report to the FCNM, *op. cit.*, para. 54.

implementation of Article 8 by States Parties did “not give rise to any specific observations”.³⁹²

The specific observations of the Advisory Committee in respect of the other 14 States have scrutinised the interlinkage between non-discrimination/equality and religion, thereby illustrating once again the cross-cutting nature of the former. The observations in question have centred on the differential treatment of various religious entities in some contexts³⁹³ and relations between the State and various religions in countries where there is an official or established church. It has been posited that although “a state church system is not in itself in contradiction with the Framework Convention and [...] the latter does not entail an obligation *per se* to fund religious activities”,³⁹⁴ sensitivity must be shown to how the resulting situation affects the rights of minority religions. This is because any scheme of public financing directed only at the state church could – depending on its terms or manner of its implementation - prove discriminatory. Issues of religious discrimination and hatred, as well as blasphemy, have been dealt with directly.³⁹⁵

The Advisory Committee has also examined matters which can loosely be classed as pertaining respectively to the administration and practice of religion. As to the former, it has concerned itself with the registration of religious entities,³⁹⁶ the restitution of church property³⁹⁷ and the preservation of religious heritage.³⁹⁸ As to the latter, it has considered religious education³⁹⁹ and literature and information of religious content,⁴⁰⁰ assuring a suitable burial place for adherents to a minority religion,⁴⁰¹ and the implications of the regulation of the circumcision of male children for a particular religious minority.⁴⁰²

In its treatment of the above issues, the Advisory Committee has sought to ensure the application of objective criteria⁴⁰³ and the balancing of various interests involved.⁴⁰⁴ It has called for attention to be paid to the application of Article 4 and other provisions of the FCNM.⁴⁰⁵ It has advocated an approach based on consultation with relevant minorities on a number of occasions.⁴⁰⁶ These tendencies are complementary and can be taken as evidence of a generally consistent overall approach on the part of the Advisory Committee.

However, the language used by the Committee is often diplomatic to the point of being non-committal or meaningless. Examples include: address the broad formulation of the law;⁴⁰⁷

³⁹² Opinions on: Armenia, Austria, Czech Republic, Germany, Hungary, Ireland, Italy, Liechtenstein, Lithuania, Malta, Romania, San Marino, Slovak Republic, Spain, Switzerland and the Ukraine.

³⁹³ Opinions on: Croatia (In respect of Article 8); Serbia & Montenegro (para. 143).

³⁹⁴ Opinions on: Denmark (In respect of Article 8) and Finland (In respect of Article 8), but see also the Opinion on Norway (para. 84), for similar wording. In the Opinion on Cyprus, the Advisory Committee noted “with satisfaction” that the State authorities had begun to provide religious officers/leaders from religions other than the Orthodox Church with remuneration on an equal footing with their Orthodox counterparts (para. 35).

³⁹⁵ Opinion on the United Kingdom (paras. 116 and 117, respectively).

³⁹⁶ Opinions on: Azerbaijan (para. 106); Estonia (In respect of Article 8); Russian Federation (para. 142).

³⁹⁷ Opinion on Albania (para. 96).

³⁹⁸ Opinion on Poland (para. 111).

³⁹⁹ Opinion on Norway (para. 85).

⁴⁰⁰ Opinion on Azerbaijan (para. 107).

⁴⁰¹ Opinion on Moldova (para. 108).

⁴⁰² Opinion on Sweden (para. 80).

⁴⁰³ Azerbaijan.

⁴⁰⁴ Albania.

⁴⁰⁵ Croatia, Norway.

⁴⁰⁶ Estonia, Moldova, Sweden.

⁴⁰⁷ Azerbaijan.

review the question⁴⁰⁸ or effect;⁴⁰⁹ ongoing review;⁴¹⁰ examine further legal measures;⁴¹¹ identify appropriate⁴¹² or pragmatic⁴¹³ solutions. The language used by the Advisory Committee creates the impression that it lacks decisiveness. Introducing some tendencies and findings by hesitant phrases such as “information exists” or “it is reported that” further undermine the credibility of the recommendations. It suggests that (i) the Committee itself might be unsure of the trustworthiness of the information at its disposal, and (ii) that it lacks the courage of its convictions, tentative and all as they may be.

On a rare occasion when the Advisory Committee actually did recommend possible courses of concrete action (i.e., the abolition of the crime of blasphemy or its extension to apply to other faiths as well as Christianity), it was much less a case of sticking its neck out than one of obediently following the European Commission of Human Rights and the findings of the national courts when seized with the same issue.⁴¹⁴ The Advisory Committee’s recommendation merely that the existence of minorities be taken into account⁴¹⁵ marks a new nadir of banality and adds absolutely nothing to efforts to raise standards of minority rights protection. Finally, at the risk of being overly pedantic, one could also criticise the insipidity of the remark that problems “merit further attention”.⁴¹⁶ If something is deemed to be a problem, then of course it demands more attention until such time as it is resolved!

3.2.6 Language

Language rights and issues are emphasised in diverse ways in relevant international human rights standards.⁴¹⁷ Attempts to categorise those emphases are therefore useful. Robert Dunbar has proposed two broad categories of language rights: those “encompassing a regime of linguistic tolerance”, including “measures which aim to protect speakers of minority languages from discrimination and procedural unfairness, among other things”⁴¹⁸ and those “encompassing a regime of linguistic promotion”, including “measures which create certain ‘positive’ rights to key public services, such as education and public media, through the medium of minority languages”.⁴¹⁹

The former category is typically protected under non-discrimination and equality provisions (see further, s. 3.2.1, *supra*). Dunbar’s reference to protection against procedural unfairness in this connection is apposite. A considerable body of international case-law exists concerning

⁴⁰⁸ Denmark.

⁴⁰⁹ Finland.

⁴¹⁰ Norway.

⁴¹¹ United Kingdom.

⁴¹² Moldova.

⁴¹³ Sweden.

⁴¹⁴ See further: *Choudhury v. United Kingdom*, Decision of inadmissibility of the European Commission of Human Rights of 5 March 1991, Appn. No. 17439/90 and *R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury*, [1991] 1 All ER 306; 1991 1 QB 429.

⁴¹⁵ Poland.

⁴¹⁶ Russian Federation.

⁴¹⁷ For a general overview, see: Fernand de Varennes, *Language, Minorities and Human Rights* (The Netherlands, Kluwer Law International, 1996); Fernand de Varennes, “Linguistic identity and language rights”, in Marc Weller, Ed., *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (New York, Oxford University Press, 2007), pp. 252-323.

⁴¹⁸ Robert Dunbar, “Minority Language Rights in International Law”, 50 *International and Comparative Law Quarterly* (January 2001), pp. 90-120, at 91.

⁴¹⁹ *Ibid.*, at 92.

linguistic rights in the context of court proceedings. Most notably among that case-law, a spate of cases have been taken by Breton speakers against France in international fora in order to assert their right to use their language in court proceedings. From the point of view of the applicants, those cases (eg. *K. v. France*,⁴²⁰ *Bideault v. France*,⁴²¹ *T.K. v. France*,⁴²² *M.K. v. France*,⁴²³ *C.L.D. v. France*,⁴²⁴ *Guesdon v. France*⁴²⁵ and *Cadoret & Le Bihan v. France*⁴²⁶) have been largely unsuccessful. It was consistently held in these cases that the coupling of freedom of expression and language rights did not give rise to a right to choose one's preferred language for court proceedings (especially in instances of demonstrable proficiency in the ordinary language of the proceedings). In minority-specific treaties, provisions on the use of minority languages in judicial proceedings do enjoy an enhanced level of recognition and protection (eg. Article 10.3, FCNM; Article 9, ECRML; Paras. 17-19, Oslo Recommendations regarding the linguistic rights of national minorities).

This category would also include the right to use one's own language in private and in public, orally and in writing (eg. Article 10.1, FCNM). As such, the right spans a range of areas, activities and it connects in important ways with other human rights. The use of languages in cultural activities and facilities (eg. Article 12, ECRML), in economic and social life (eg. Article 13, ECRML; Para. 12, Oslo Recommendations) and in community life and the NGO sector (eg. Paras. 6-7, Oslo Recommendations) is thus encouraged by various measures. In *Ballantyne, Davidson & McIntyre v. Canada*, the UN Human Rights Committee drew a number of these strands together and pronounced, importantly, that it was not necessary to prohibit commercial advertising in English in order to protect the vulnerable position of the French-speaking community in Canada.⁴²⁷ It reasoned that such protection "may be achieved in other ways that do not preclude the freedom of expression, in a language of their choice, of those engaged in such fields as trade", eg. by requiring that advertising appear in French and in English. It stated: "A State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice".

Linguistic rights belonging to Dunbar's first category also include the right to use one's name in one's own language and to have it officially recognised as such (eg. Article 11.1, FCNM, Para. 1, Oslo Recommendations). They furthermore include the right to have topographical indications displayed in minority languages in areas where minority populations attain certain levels of concentration (eg. Article 11.3, FCNM; Para. 3, Oslo Recommendations).

The latter of the two categories suggested by Dunbar tends to be recognised in tailored provisions, especially in treaties or other texts focusing specifically on minorities or language rights. The right to learn one's mother tongue and to be educated in one's mother tongue is the subject of Article 14, FCNM and Article 8, ECRML (both discussed in s. 3.2.3, *supra*). The promotion of the language rights of persons belonging to minorities via the media is dealt with in detail in Chapters 7 and 8, *infra*.

⁴²⁰ (1984) 35 DR 203.

⁴²¹ Appn. No. 11261/84, 48 DR 232. See also *Isop v Austria*, 8 Yb.ECHR 338 (1965).

⁴²² UN Doc. A/45/40 (1990).

⁴²³ Communication No. 222/1987.

⁴²⁴ Citation.

⁴²⁵ UN Doc. A/45/40 (1990).

⁴²⁶ Communication Nos. 221/1987 & 333/1988.

⁴²⁷ Communication Nos. 359/1989 & 385/1989.

Under generalist human rights treaties, there has been a traditional reluctance to embrace a right to public services in minority languages. In *Inhabitants of Leeuw-St-Pierre v Belgium*,⁴²⁸ for example, the European Commission of Human Rights ruled inadmissible a claim by a group of Belgian citizens that their freedom of expression had been infringed when their municipal authorities refused to provide them with administrative documentation in French. It held that the ECHR did not guarantee freedom of linguistic choice in respect of dealings with municipal authorities. In treaties and standards with explicit focuses on minority rights and languages, the attention to the linguistic dimension to the right to effective participation in public life is accordingly rendered more explicit as well (eg. Article 10.2, FCNM; Article 10, ECRML; Paras. 13-15, Oslo Recommendations). Nevertheless, the nature and extent of relevant State obligations in this connection tend to be shaped by considerations such as the geographical concentration of persons belonging to given minorities and whether a real demand for the provision of official and public services in minority languages exists.

Linguistic rights take on added importance in the context of political representation, given the functional importance of politics for democracy. In *Fryske Nasjonale Partij v Netherlands*,⁴²⁹ the European Commission of Human Rights was unwilling to countenance the applicants' claim that their right to freedom of expression had been violated as the submission of their registration for election was in Frisian and not in Dutch. In *Podkolzina v. Latvia*, the European Court of Human Rights found that procedural shortcomings (i.e., discretion of a single inspector) for assessing the applicant's linguistic proficiency (a precondition for standing in Parliamentary elections) amounted to a violation of Article 3 of ECHR Protocol No. 1 (eligibility to stand in elections).⁴³⁰ Similar facts were at issue in *Ignatane v. Latvia*, except that the applicant had sought to stand as a candidate in local elections.⁴³¹ The *Ignatane* case was considered by the UN Human Rights Committee and it concluded that Article 25, ICCPR (participation in public life, eligibility to vote and be elected in elections, access to public services), had been violated, on account of the *ad hoc* and discretionary manner in which the applicant's linguistic competence had been reviewed.

The importance of the freedom of transfrontier exchanges undercuts both categories and all of the different applications of linguistic rights discussed in the foregoing paragraphs. For this reason, the freedom is expressly safeguarded (eg. Article 17, FCNM; Article 14, ECRML).

It should be noted that the protection and promotion of linguistic diversity is a recurrent objective in many international legal and other instruments. While linguistic diversity does not correspond to an individual or group right, pursuance of the objective necessarily implicates a variety of rights. Linguistic diversity cannot be achieved without *a priori* securing a wide range of linguistic rights (across both of the aforementioned categories).

As regards the European Union,⁴³² Article 22 of the Charter of Fundamental Rights of the European Union (cultural, religious and linguistic diversity) is of importance for the objective

⁴²⁸ (1965), 8 Yearbook of the European Convention on Human Rights 338.

⁴²⁹ (1986) 45 DR 240.

⁴³⁰ *Podkolzina v. Latvia*, Judgment of the European Court of Human Rights (Fourth Section) of 9 April 2002.

⁴³¹ *Antonina Ignatane v. Latvia*, Communication No. 884/1999, U.N. Doc. CCPR/C/72/D/884/1999 (2001).

⁴³² Constraints of space prevent a comprehensive overview of EU law concerning language rights and issues; but see in this connection: Xabier Arzoz, Ed., *Respecting Linguistic Diversity in the European Union* (Amsterdam & Philadelphia, John Benjamins Publishing Co., 2008); Bruno de Witte, "Language Law of the European Union: Protecting or Eroding Linguistic Diversity?", in Rachael Craufurd Smith, Ed., *Culture and European Union Law*, *op. cit.*, pp. 205-241; Niamh Nic Shuibhne, *EC Law and Minority Language Policy: Culture, Citizenship and Fundamental Rights* (The Netherlands, Kluwer Law International, 2002). Relevant current developments

of furthering linguistic diversity within Europe. Its bases, emphases, strengths and weaknesses have already been considered in s. 3.2.4, *supra*, and will not be repeated here.

Conclusions

The conventional theory that all human rights constitute an inter-related and interdependent whole holds enormous explanatory power. The presumptive coherence of all human rights does not, however, preclude the possibility that their actual interplay, in specific circumstances, could involve varying degrees of friction. This explains the importance of comprehensive pluralistic tolerance as an operative public value and as a guiding interpretive principle.

No matter how exhaustive an analysis of the right to freedom of expression may be, unless it contextualises the relationship of the right with other human rights, it remains inevitably incomplete. Thus, relational aspects of the right to freedom of expression and other human rights must be identified and appreciated. In this respect, the right to freedom of expression clearly intersects with the added value of the minority dimension to a number of selected rights, especially: non-discrimination/equality, participation, education, culture, religion and language. Again, comprehensive pluralistic tolerance serves as a foil to any resistance to the recognition of the minority dimension to these rights.

The greater the level of awareness of the precise content of each of the aforementioned rights, the easier it is to identify their potential synergies with the right to freedom of expression of persons belonging to minorities. This Chapter explores in a detailed manner the general scope of each of these rights, as well as their specific minority-oriented application. A number of enquiries pursued later in this thesis draw on specific elements of the overviews provided in this Chapter in order to elucidate important frictions and synergies involving the right to freedom of expression of persons belonging to minorities. For instance, the rights to non-discrimination/equality, participation and freedom of expression converge into a powerful synergy in respect of access to media. The principles of “availability, accessibility, acceptability and adaptability”, developed in the context of primary education, retain much of their relevance for persons belonging to minorities in the context of more applied forms of education, eg. training of journalists, media literacy, etc. Another example of convergent rights involves cultural, educational, linguistic and expressive rights in the context of educational curricula and materials, or more specifically, the manner in which the lifestyles, cultures and languages of minorities are expressed therein. As the media are vital agents for the transmission of culture and language, considerations of media functionality are determinative in assessments of whether the right to freedom of expression of persons belonging to minorities is effective in practice. As the question of effectiveness is tied to the suitability of various fora or media for the satisfaction of expressive needs, the centrality of cultural and linguistic rights is obvious. Finally, as regards religion: a detailed understanding of the content of the right to freedom of religion reveals that it does not extend to a right not

can be tracked in: François Grin, Tom Moring *et al.*, *Support for Minority Languages in Europe*, Final Report on a project financed by the European Commission, Directorate Education and Culture (submitted: May 2002; published: February 2003); Michl Ebner, Rapporteur, “Report with recommendations to the Commission on European regional and lesser-used languages – the languages of minorities in the EU – in the context of enlargement and cultural diversity (2003/2057(INI))”, Committee on Culture, Youth, Education, the Media and Sport, European Parliament session document, 4 September 2003, Final A5-0271/2003.

to be offended on the basis of one's religious beliefs, thus rendering attempts to restrict the right to freedom of expression on that basis problematic.