

THE RIGHTS OF MINORITIES IN THE EUROPEAN UNION

by

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ABSTRACT

With the coming into force of the Lisbon Treaty, EU law now contains explicit references to minority rights in Article 2 TEU and Article 21 of the Charter of Fundamental Rights. Combined with other EU norms on non-discrimination on the grounds of race or ethnic origin, and policies on culture and education, these references may be regarded as providing the preconditions for an EU regime of minority protection. This thesis investigates whether the EU should take these developments any further, and play more prominent role in protecting minorities in its Member States. This research question is addressed through four case studies on various aspects of minority protection, i.e., (1) the right to political participation, (2) the freedom to manifest religion, (3) the right to mother-tongue education, and (4) the right to autonomy. The case studies, based on examples from EU Member States (namely Latvia, Belgium and the United Kingdom), highlight that the EU could undoubtedly play a greater role in minority protection. However, instead of enacting its own rules on their protection, a more practical way forward could be for the EU to support implementation of the Council of Europe's Framework Convention for the Protection of National Minorities by Member States.

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List of Abbreviations

ACFC	Advisory Committee on the Framework Convention for the Protection of National Minorities
AfrCH	African Charter on Human and Peoples' Rights
CEECs	Central and Eastern European countries
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CFR	Charter of Fundamental Rights
CoE	Council of Europe
Commission	European Commission
CoR	Committee of the Regions
CHR	Commissioner for Human Rights
CRC	Committee on the Rights of the Child
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECmHR	European Commission of Human Rights
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EP	European Parliament
EU	European Union
FCNM	Framework Convention for the Protection of National Minorities
FRA	Fundamental Rights Agency
HRC	Human Rights Committee

ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MEP	Member of the European Parliament
OSCE	Organisation for Security and Co-operation in Europe
PACE	Parliamentary Assembly of the Council of Europe
P1-2	Article 2 of Protocol 1 ECHR
P1-3	Article 3 of Protocol 1 ECHR
P4-3	Article 3 of Protocol 4 ECHR
RRA	Race Relations Act
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TCNs	Third Country Nationals
UN	United Nations
Venice Commission	European Commission for Democracy through Law

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INTRODUCTION

1. Setting the scene: research questions

In 1993, the New York Times reported a story of Reverend Zsigmond Csukas, the 75-year-old pastor of the Hungarian Reformed Church in Samorin, a town with a large Hungarian minority in Slovakia:

.... One Man, Five Nationalities.

Mr. Csukas's life story encapsulates the shifting fortunes of Hungarians living on the border of what was, before 1918, one of Europe's bigger nations. He has been a citizen of five different countries, but has never left the narrow strip of rural villages along what is now the border between Hungary and Slovakia.

He was born in 1918, during the reign of Charles, the last Emperor to rule over the territories of Austria-Hungary. A few months later he became a citizen of Czechoslovakia, when Hungary lost substantial territory as a penalty for siding with Germany in World War I. When the Nazis dismembered Czechoslovakia in 1938, they gave a piece to Hungary, and Mr. Csukas became a Hungarian again.

'We felt at home again,' he recalled. 'We could speak Hungarian.'

Once again, Hungary was on the losing side, and after World War II the territory was restored to Czechoslovakia. On Jan. 1 this year [1993], that country broke up, and Mr. Csukas took up his fifth citizenship, this time as a Slovak.¹

The story of one man, five nationalities neatly captures the challenges faced by many minority groups in Europe.² Do minorities, i.e., groups with a language, culture and/or religion distinct from that of the majority, have to give up their language,

¹ S Engelberg and J Ingram, 'Now Hungary Adds Its Voice to the Ethnic Tumult' *New York Times* (New York 25 January 1993) World <<http://www.nytimes.com/1993/01/25/world/now-hungary-adds-its-voice-to-the-ethnic-tumult.html?pagewanted=all>> accessed 12 January 2010.

² There are 300 different ethnic and national minorities in Europe. More than 90 languages are spoken in Europe: only 37 of these languages are recognised as official State languages: European Parliament, 'Minority Protection in Europe: "A Great Paradox"', 04 February 2009 <http://www.europarl.europa.eu/news/public/story_page/019-47956-033-02-06-902-20090202STO47935-2009-02-02-2009/default_en.htm> accessed 24 February 2009.

religious practices or cultural traditions every time that the upheavals of European history³ shift the borders in Europe? If such a group constituted a former, sometimes a dominant, majority, are its members allowed to have a say in the way they are governed by their new home State? If a group compactly inhabits certain territory in a State, can it require autonomous powers to self-govern matters of particular concern to its members, such as education in a mother-tongue? These are some questions that this thesis addresses in the context of the European Union (EU).

Originally, the European Community (the EU's predecessor) did not concern itself with minority rights. In 1993, in the context of the processes of democratisation in the Central and Eastern European countries (CEECs) and the dissolution of the Soviet Union,⁴ the EU made its membership conditional on respect for and protection of minorities based on the Copenhagen accession criteria.⁵ However, EU law contained no corresponding obligation for 'old' Member States.⁶ As a result, in its monitoring of

³ Framework Convention for the Protection of National Minorities CETS No 157 (FCNM), Preamble (Recital 5).

⁴ Council (EC) 'Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union' (1991) EC Bulletin 1991/12, 119.

⁵ The accession criteria, or Copenhagen criteria, were set at the Copenhagen European Council in 1993 and further clarified at the Madrid European Council in 1995. See, Copenhagen European Council, Presidency Conclusions of 21-22 June 1993 and Madrid European Council, Presidency Conclusions of 15-16 December 1995 <<http://ec.europa.eu/enlargement/the-policy/conditions-for-enlargement/index.en.htm>> accessed 1 September 2008.

⁶ These double standards in minority protection towards candidate countries and EU Member States have been consistently criticised by commentators: Gráinne de Búrca, 'Beyond the Charter: How Enlargement has Enlarged the Human Rights Policy of the European Union' (2004) *Fordham International Law Journal* 679-714, 699-702; Rainer Hofmann and Erik Friberg, 'The Enlarged EU and the Council of Europe: Transfer of Standards and the Quest for Future Cooperation in Minority Protection' in G Toggenburg (ed) *Minority Protection and the Enlarged European Union: The Way Forward* (LGI Books, Budapest 2004) 125-147, 144; Gabriel Toggenburg, 'Minority Protection in a Supranational Context: Limits and Opportunities' in G Toggenburg (ed) *Minority Protection and the Enlarged European Union: The Way Forward* (OSI/LGI, Budapest 2004) 1-36, 4; Alexandra Xanthaki, 'Hope Dies Last: An EU Directive on Roma Integration' (2005) 11(4) *European Public Law* 515-526, 525; Gaetano Pentassuglia, 'The EU and the Protection of Minorities: The Case of Eastern Europe' (2001) 12 *EJIL* 3-38, 38; Gwendolyn Sasse, 'Gone with the Wind? Minority Rights in Central and Eastern Europe before and after EU Enlargement', Paper presented at the workshop on 'Ethnic

the twelve new Member States' compliance with these criteria, the European Commission (Comission) relied on the standards developed by the United Nations (UN), the Council of Europe (CoE) and the Organisation for Security and Co-operation in Europe (OSCE). Nevertheless, external minority conditionality led the EU to create "a higher standard for itself and growing consciousness of and commitment to the need for *self*-transformation in order to better exemplify the union of values it aspires to become."⁷

The necessity of internal minority protection in the EU has finally been addressed with the coming into force of the Lisbon Treaty.⁸ Article 2 (ex-Article 6(1)) TEU now asserts that the EU is founded on *inter alia* respect for human rights, including the rights of persons belonging to minorities. In addition, Article 21(1) of the EU Charter of Fundamental Rights (CFR)⁹ provides for equality and non-discrimination based on a long list of grounds, including membership of a national minority.

Mobilization in the New Europe', Brussels, 21-22 April 2006; Gwendolyn Sasse, 'The Politics of EU Conditionality: the Norm of Minority Protection during and beyond EU accession' (2008) 15(6) *Journal of European Public Policy* 842-860, 843-844; Kyriaki Topidi, 'The Limits of EU Conditionality: Minority Rights in Slovakia' (2003) 1 *Journal on Ethnopolitics and Minority Issues in Europe* 1-35, 29; Peter Vermeersch, 'EU Enlargement and Minority Rights Policies in Central Europe: Explaining Policy Shifts in the Czech Republic, Hungary and Poland' (2003) 1 *Journal on Ethnopolitics and Minority Issues in Europe* 1-30, 25; Andrew Williams, 'EU Human Rights Policy and the Convention on the Future of Europe: A Failure of Design (2003) 28(6) *European Law Review* 794-813, 795.

⁷ Rachel Guglielmo, 'Human Rights in the Accession Process: Roma and Muslims in an Enlarging EU' in G Toggenburg (ed) *Minority protection and the enlarged European Union: the way forward* (OSI/LGI, Budapest 2004) 57 (emphasis in original).

⁸ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2010] C 83/01. For an extensive analysis of the Lisbon Treaty see, P Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (OUP, Oxford 2010); see also, J-C Piris, *The Lisbon Treaty: A Legal and Political Analysis* (CUP, Cambridge 2010).

⁹ Charter of Fundamental Rights of the European Union [2010] C 83/391. Article 6(1) TEU now accords the EU Charter of Fundamental Rights legally binding force. Even before the CFR entered into force, the EU institutions extensively relied on the Charter both in their legislative (Council (EC) Directive 2003/86 on the right to family reunification [2003] OJ L251/12; Council (EC) Directive 2003/109 concerning the status of third-country nationals who are long-term residents [2004] OJ L16/44; European Parliament, 'Resolution on regional and lesser-used European languages' [2002] OJ

Regrettably, despite their symbolic significance, on their own these provisions are unlikely to offer a meaningful protection of minorities. Thus there are no explicit EU competences and policies to support the good intentions in Article 2 TEU. As to the CFR, its usefulness is limited by its legal effects. First, Article 51(1) specifies that the provisions of the CFR are addressed to the institutions, bodies, offices and agencies of the EU with due regard to the principle of subsidiarity and to the Member States only when they are implementing EU law. As a result, the legal effects of the CFR are limited to serving as a tool in interpreting EU legislation and Member States' implementing measures and as a ground for challenging such acts. Second, Article 51(2) CFR explicitly excludes its application beyond EU powers, establishment of any new power or task for the EU, or modification of powers and tasks as defined in the Treaties. This limitation is reiterated in Article 6(1) TEU. As if these safeguard clauses were not enough, Article 52(2) emphasises that rights recognised by the CFR 'shall be exercised under the conditions and within the limits defined by those Treaties.' All these provisions¹⁰ reflect Member States' fears of creeping EU competences into areas where Member States may wish to retain their powers.¹¹

C177E 334) and judicial practice (T-177/01 *Jego-Quere* [2002] ECR II-2365; C-263/02 *Commission v Jego-Quere et Cie SA* [2004] ECR I-3425; [2004] 2 CMLR 12; C-50/00 *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677; [2002] 3 CMLR 1; Opinion of General Advocate Léger of 25 November 2005 in C-317/04 *Parliament v Council* [2006] ECR I-4721; [2006] 3 CMLR 9; C-540/03 *Parliament v Council* [2006] ECR I-5769; [2006] 3 CMLR 28). For a detailed discussion of the CFR's influential role before it became legally binding see Jacqueline Dutheil de la Rochère, 'The EU Charter of Fundamental Rights, Not Binding but Influential: the Example of Good Administration' in A Arnall, P Eeckhout and T Tridimas (eds) *Continuity and Change in EU law* (Oxford University Press, Oxford 2008) 158–159.

¹⁰ The application of the CFR is further limited through Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. See also Declaration (No 53) by the Czech Republic on the Charter of Fundamental Rights of the European Union and Declaration (No 61) by the Republic of Poland on the Charter of Fundamental Rights of the European Union.

¹¹ See generally Mark Pollack, 'The End of Creeping Competence? EU Policy-Making Since Maastricht' (2000) 38 *Journal of Common Market Studies* 519.

Given the Member States' concerns regarding EU encroachment upon their powers, as well as the controversy surrounding minority rights in some Member States, we will need to wait and see whether and how the European Court of Justice (ECJ) may use the above-discussed provisions to define the role and place of minority rights in EU law. Certainly, a combined reading of those provisions with other (indirectly relevant) EU rules¹² could lay a foundation for an EU internal regime of minority protection. The question then is how far can EU action reach to protect minority rights?

It is noteworthy from the outset that the protection of minorities has two aspects: first, non-discrimination and equality with majorities and, second, special rights to protect the elements of their distinct identity such as language, culture and religion. These additional features do not constitute separate rights under human rights law: "their purpose is merely to effectively guarantee the equal enjoyment of all human rights and to eliminate discrimination in both law and practice".¹³ For example, if the official language of the State is German, all children of the 'constituent' people are entitled to mother-tongue education. To be in the same position as majorities, i.e., with access to education in their mother-tongue, speakers of other languages, such as

¹² Although not explicitly targeted at protection of minorities, there is a range of EU action with effects on minorities, such as non-discrimination on the grounds of race or ethnic origin and religion and cultural diversity, to be respected by the EU and Member States. See for example, Article 19 TFEU (ex-Article 13 EC), Council (EC) Directive 2000/43 on equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 (Race Directive); Council (EC) Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 (Employment Directive); see also, Article 165 TFEU (ex-Article 149 EC) and Article 167 TFEU (ex-Article 151 EC), which confer on the EU limited powers in the fields of education and culture.

¹³ Gudmundur Alfredsson, 'A Frame an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures' (2000) 7 *International Journal on Minority and Group Rights* 291, 293.

Slovene, Croat or Hungarian, seem to need a special ‘privilege’.¹⁴ This seemingly ‘additional’ right, however, only aims to guarantee substantive equality, by putting majorities and minorities on an equal footing.

Theoretically, the CFR incorporates both aspects of minority protection. Article 21(1) CFR deals with equality and non-discrimination, while Article 22 CFR stipulates that the EU will ‘respect cultural, religious and linguistic diversity’. Some commentators argue that Article 22 CFR reflects the second dimension of minority protection.¹⁵ For example, Arzoz claims that, “Article 22 accords to persons belonging to minorities a level of protection equivalent to the one recognised by international human rights law”,¹⁶ in particular the one provided by Article 27 of the International Covenant on Civil and Political Rights (ICCPR) on the rights of minorities.¹⁷ Conversely, De Witte argues that Article 22 is too vague and does not “translate easily into concrete

¹⁴ Joseph Marko, ‘Constitutional Recognition of Ethnic Difference – Towards an Emerging European Minimum Standard?’ in A Verstichel et al (eds) *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* (Intersentia, Oxford 2008) 22.

¹⁵ EU Network of Independent Experts on Fundamental Rights, ‘Thematic Comment No 3: The Protection of Minorities in the European Union’ 25 April 2005 <http://ec.europa.eu/justice_home/cfr_cdf/doc/thematic_comments_2005_en.pdf> accessed 12 September 2008.

¹⁶ Xabier Arzoz, ‘Article 22 of the EU Charter’ in X Arzoz (ed) *Respecting Linguistic Diversity in the European Union* (John Benjamins Publishing Co, Amsterdam 2008) 164.

¹⁷ International Covenant on Civil and Political Rights (adopted and opened for signature, ratification and accession 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). Article 27 of the ICCPR provides:

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

For analysis see Martin Scheinin, ‘The United Nations International Covenant on Civil and Political Rights: Article 27 and Other Provisions’ in K Henrard and R Dunbar (eds) *Synergies in Minority Protection: European and International Law Perspectives* (Cambridge University Press, Cambridge 2008).

minority protection standards”.¹⁸ Indeed, based on the respect for diversity in Article 22 CFR, it might be difficult to reconcile differences in approaches to minority protection in the constitutional traditions of Member States.¹⁹ The term ‘respect’ entails negative duties, i.e., States must refrain from direct or indirect interference with the enjoyment of a right.²⁰ Therefore, the CFR is likely to entail only negative obligations. In the exercise of its competences, a minimum duty of the EU is, for example, not to interfere with the use of minority languages or jeopardise cultural diversity in the Member States.²¹

Yet the fact that EU law now contains some preconditions for a coherent system of minority protection is a significant development. Should the EU take these developments any further, and can it play more prominent role in protecting minorities in its Member States? This thesis investigates these questions through four case studies on various aspects of minority protection based on examples from EU Member States. In particular, the case studies focus on the following two questions:

1. To what extent do existing EU laws contribute to minority protection?

¹⁸ Bruno de Witte, ‘The Constitutional Resources for an EU Minority Protection Policy’ in G Toggenburg (ed) *Minority protection and the enlarged European Union: the way forward* (OSI/LGI, Budapest 2004) 115.

¹⁹ Marko, ‘Constitutional Recognition of Ethnic Difference...’ (n 14); see also Julie Ringelheim, ‘Minority Protection and Constitutional Recognition of Difference: Reflections on the Diversity of European Approaches’ in A Verstichel et al (eds) *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* (Intersentia, Oxford 2008) 33-49.

²⁰ Tawhida Ahmed, ‘A Critical Appraisal of EU Governance for the Protection of National Minorities’ in G Guliyeva & G Pentassuglia (eds) ‘Minority Groups Across Legal Settings: Global and Regional Dimensions’ (Special Issue) (2010) 17(2) *International Journal on Minority and Group Rights* 265-285, 267.

²¹ Arzoz, ‘Article 22 of the EU Charter’ (n 16) 160; see also Evangelia Psychogiopoulou, ‘Accessing Culture at the EU Level: An Indirect Contribution to Cultural Rights Protection?’ in F Francioni and M Scheinin, *Cultural Human Rights* (Martinus Nijhoff Publishers, Leiden/Boston 2008) 228.

This question is addressed through ‘testing’ relevant EU rules on issues analysed in the case-studies, i.e., the right to political participation (Chapter II), freedom to manifest religion (Chapter III), the right to mother-tongue education (Chapter IV) and the right to autonomy (Chapter V).

2. Why should the EU be involved in minority protection in its Member States?

One of the arguments supporting EU involvement is it would create consistency in EU action internally and externally. Therefore, where relevant the case studies address discrepancies between the EU’s approach to minority rights internally and externally.

The conclusions to the thesis address the final research question:

3. If findings of the case studies in Chapters II-V suggest that the EU’s involvement in minority protection is desirable, does the EU have the potential to construct a coherent system of minority protection? If not, what may be an alternative course of action?

Accordingly, the conclusions to the thesis evaluate the current contribution of the EU to the protection of minorities in its Member States and suggest how EU rules could evolve further to graduate into a coherent system of minority protection. As noted, the thesis consists of five chapters grouped in two parts. Part I includes Chapter I and Part II contains four case studies in Chapters II to V. The thesis is concluded with conclusions and recommendations. The content of the thesis is briefly overviewed below.

2. The content of the thesis: a brief overview

Part 1. Defining the Key Terms

Chapter I. Defining the key terms: ‘Rights’ and ‘Minorities’

Chapter I deals with the key terms in the title of the thesis, i.e., ‘rights’ and ‘minorities’. Due to the complexity of the issues surrounding these two notions, the scope of this chapter is inevitably broad. The reason these two key issues are covered in one chapter is mostly symbolic: Chapter I clarifies the key terms and lays a foundation for the issues to be considered in the case studies. By dealing with the key terms in one chapter, the author aims to emphasise that the focus of this thesis is about the EU’s approach to minority protection, and not minority protection *per se*. The key terms discussed in Chapter I are central to the thesis only insofar that they set the legal framework for discussion. The key research questions of the thesis are addressed in Chapters II-V.

This Chapter consists of three large sections. Sections 1 and 2 are devoted to the ‘rights’ of minorities.²² Rights are dealt with in two parts in order to reflect the duality of minority protection. The principle of non-discrimination, as an essential feature of minority protection, is investigated in Section 1, and special rights are examined in Section 2, such as those minorities may enjoy individually or in community with other members, i.e., the right to political participation, freedom to manifest religion, the

²² It could have been logical to deal with the identification of beneficiaries of rights first. However, bearing in mind that for the past fifty years, efforts to reach consensus on a definition of minorities have invariably failed (as discussed in Section 3 of Chapter I on page 128), the present author will not enter the quest to propose a definition which for various political and historical reasons States evade adopting. Instead, an existing pragmatic approach in international law is followed. Thus, the lack of the definition has not prevented the drafters of the FCNM (n 3), the first multilateral legally binding instrument on the rights of minorities in Europe, from elaborating on the rights of minorities.

right to access education, including education in a minority language and autonomy arrangements.

The approach used in Sections 1 and 2 is to focus purely on standards, i.e., relevant provisions in international treaties, as well as case law and general guidelines issued by international courts and quasi-judicial bodies. This analysis is stripped of all academic commentary, so as to present the existing rules as they are and not as they should be. Academic views are extensively discussed and critiqued in the subsequent Chapters II-V. Furthermore, the discussion focuses on three key instruments, i.e., the ICCPR,²³ the European Convention on Human Rights (ECHR)²⁴ and the Framework Convention for the Protection of National Minorities (FCNM).²⁵

For the purposes of this thesis, the main goal of studying standards of minority protection in these instruments is to assess the level of minority protection globally and regionally; that is, were the EU to engage with minority rights, what would be the minimum expectations? Secondly, this analysis is relevant to the thesis because both the ICCPR and the ECHR comprise general principles of EU law, as established in

²³ Article 27 ICCPR (n 17) is the global minimum standard on the protection of minorities.

²⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) CETS No 005.

The ECHR is the main instrument on the protection of human rights in Europe. Despite its overall significance, the ECHR has a number of limitations. First, it protects individual rights only, and not group rights. For example, where deportation of Russian-speaking non-citizens from Latvia is concerned, the ECtHR has limited its assessment to the facts of individual cases only (discussed in Chapter II) and abstained from commenting on the legitimacy of the country's exclusionary practices. Furthermore, the ECHR contains only a prohibition on discrimination based on national minority status in Article 14 ECHR and Article 1(1) of Additional Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No 177, and lacks special minority rights, such as political rights, education in a minority language, etc. Moreover, in politically sensitive matters, the ECtHR allows a wide margin of discretion to the Contracting Parties to decide on minority-related issues.

²⁵ FCNM (n 3).

the jurisprudence of the ECJ.²⁶ As a result, jurisprudence and standards of minority protection as developed by, for example, the European Court of Human Rights (ECtHR)²⁷ creep into EU law almost by default, as a part of the general principles of EU law under Article 6(3) TEU and by virtue of Article 6(1) TEU, which accords to the Charter of Fundamental Rights a legal status of EU primary law.²⁸

²⁶ The ECHR and the pronouncements of the European Court of Human Rights (ECtHR) have special status in EU law; the European Court of Justice (ECJ) relies on them in applying the general principles of respect for fundamental rights. See Case 29/69 *Stauder v City of Ulm* [1969] ECR 419; Case 4/73 *Nold v Commission* [1974] 291; Case 36/75 *Rutili v Minister of the Interior* [1975] ECR 1219; Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727; Case C-415/93 *Bosman and others* [1995] ECR I-4921; Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

For references to the ICCPR see Case 374/87 *Orkem v Commission* [1989] ECR 3283; Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763; Case T-315/01 *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-3649; Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundations v Council and Commission* [2005] ECR II-3533.

²⁷ The European Court of Justice's reliance on the ECHR, however, does not imply that the EU has jurisdiction in human rights matters: Case C-299/95 *Friedrich Kremzow v Republik Österreich* [1997] ECR I-02629. The European Commission's response to the petition of Tatjana Ždanoka, a Latvian Member of the European Parliament of Russian origin, is instructive in this respect. In 2005, she petitioned the European Parliament and complained that the Latvian authorities refused to grant citizenship to Yuri Petropavlovski, a well-known spokesman for the rights of the Russian minority in Latvia. The petitioner called on the European Parliament to ensure that Latvia complies with protection of ethnic minorities as other Member States do.

The European Parliament requested a legal assessment from the Commission. In its response the Commission acknowledged that it is not empowered to deal with this issue, because it does not have competence on fundamental rights and can intervene only if the infringed rights are within the scope of EU law. The Commission, therefore, proposed that "should anybody consider their fundamental rights to have been infringed, they may appeal to the European Court of Human Rights..." (Petitions to the European Parliament, L-11/2004, 757/2004, 1000/2004 and 0021/2005, PE 362.796v01-00, CM\581172EN.doc, 16 September 2005).

So, if a human rights complaint concerning, for example, deportation orders against Russian-speaking minorities from Latvia comes before the EU institutions, they would probably alert the complainant to the remedies available under the ECHR. However, if an infringement of fundamental rights of Russian-speaking minorities takes place in the context of EU law, for example, when these individuals move to another Member State, it is likely that the ECJ may deal with these issues indirectly. This may take place through a preliminary ruling question of a national court of the competent Member State, based on a complaint of a Russian-speaking non-citizen.

²⁸ Relevant provisions of the CFR include Article 7 on respect for private life, Article 10 on freedom of religion, Article 11 on freedom of expression and Article 12 on freedom of association.

De Witte convincingly argues that because fundamental rights both partake of the supreme legal status accorded to the treaties and remain part of the general principles of EU law, their legal status may be ambiguous: Bruno de Witte, 'Legal Instruments and Law-Making in the Lisbon Treaty' in S Griller and J Ziller (eds) *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer Wien, New York 2008) 70-106, 80.

Admittedly, the ECHR does not include minority guarantees,²⁹ and Article 27 ICCPR is only a minimum standard of minority protection. This is so because after World War II, the international community decided against including minority guarantees in international instruments. Instead, a strong emphasis was placed on individual rights and equal treatment: if everyone is treated without discrimination there should be no need for special minority rights. This decision was made based on the lessons learnt from the League of Nations' experience in protecting the rights of minorities. Despite the strong minority guarantees in bilateral treaties under the auspices of the League, the system collapsed after Nazi Germany began World War II under the pretext of protecting its kin-minorities in the neighbouring States. Nevertheless, the approach to the protection of minorities has significantly changed since the mid-1950s. Thus, not only has minority protection evolved into an integral part of general human rights guarantees,³⁰ but international courts have become a driving force behind developing standards on minority protection as well.³¹ This is mainly done through interpreting general human rights guarantees in the light of the special needs of minorities.³²

²⁹ Were a group to assert 'minority rights' before the ECtHR, the claim might be dismissed as manifestly ill-founded for reaching beyond the scope of the ECHR. Even when the ECtHR finds a violation of the ECHR, it is up to a respondent State to provide remedies beyond damages by amending a relevant piece of domestic legislation. The ECtHR's role is limited to assessment of whether a State is in compliance with the ECHR, not whether it might have adopted better policies: 'Minority Rights under the European Convention on Human Rights', Pamphlet No 7, 7 <<http://www.ohchr.org/Documents/Publications/GuideMinorities7en.pdf>> accessed 12 September 2009.

³⁰ ICCPR (n 17) Article 27; FCNM (n 3) Article 1.

³¹ *Chapman v UK* (App no 27238/95) (2001) 33 EHRR 399 (the right to an own way of life); *Lindsay and others v the United Kingdom* (App no 8364/78) (1979) 15 DR 247 (legitimacy of having different election systems within one State to protect the participation right of minorities); *Sidiropoulos and others v Greece* (App no 26695/95) (1999) 27 EHRR 633 (the freedom of association to protect separate identity of a minority group); *Cyprus v Turkey* (App no 25781/94) (2002) 35 EHRR 30 (educational rights of minorities). For discussion see, Gaetano Pentassuglia, 'Minority Issues as a Challenge in the European Court of Human Rights: A Comparison with the Case Law of the United Nations Human Rights Committee' (2003) 46 GYIL 1-52; see also, G Pentassuglia, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective* (Martinus Nijhoff Publishers, Brill 2009); Gaetano Pentassuglia, 'Evolving Protection of Minority Groups: Global Challenges and the Role of International Jurisprudence' (2009) 11 International Community Law Review 185-218,

Significantly, the more recently adopted FCNM contains a catalogue of minority rights.³³ So far, the FCNM has not been recognised as a general principle of EU law. Although the ECJ has occasionally acknowledged that protection of minorities is a legitimate aim of the State,³⁴ these “judicial remarks remain, however, still very far from a clear commitment on minority protection as a ‘general principle’ of Community law.”³⁵ Besides, not all Member States have ratified the FCNM, and, therefore, the likelihood of the ECJ relying on the FCNM is low.³⁶ However, theoretically such a development is possible, if specific legislation was adopted and it referred to the FCNM, for example, in its preamble. Arguably, it is only a matter of time before the FCNM is recognised as a part of the general principles, considering

195-215; Leto Cariolou, ‘Recent Case Law of the European Court of Human Rights Concerning the Protection of Minorities’ (2008) 7 *European Yearbook of Minority Issues*.

³² For example, in *Hopu and Bessert v France* (Communication no 549/1993) (1997) CCPR/C/51/D/549/1993, the applicants claimed that by constructing a hotel complex at a fishing lagoon and on a burial ground, France violated the minority rights of an indigenous Polynesian community in Tahiti. Because of France’s reservation as to Article 27 ICCPR, the HRC resorted to general human rights provisions and dealt with the claims under Article 17 ICCPR (the right to privacy) and Article 23 ICCPR (the right to family life). Equally, the ECtHR itself has not hesitated to read the ECHR provisions broadly to accommodate minorities in other contexts (n 31).

³³ The FCNM has significant guarantees for national minorities: it remains one of the very few “legally binding instrument[s] at the regional or the universal level”: Marc Weller, ‘Article 15’ in M Weller (ed) *The Rights of Minorities in Europe* (Oxford University Press, Oxford 2005) 460. However, its framework nature establishes only programme-type provisions which allow States wide margins of discretion in implementation. The instrument also lacks judicial supervision. In addition, States may limit the scope of provisions through interpretative reservations: because the instrument does not define the term minorities, States tend to introduce their own definitions.

³⁴ Case C-274/96 *Bickel and Franz* [1998] ECR I-7637; Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] 2 CMLR 1120.

³⁵ Rainer Hofmann and Erik Friberg, ‘The Enlarged EU and the Council of Europe: Transfer of Standards and the Quest for Future Cooperation in Minority Protection’ in G Toggenburg (ed) *Minority Protection and the Enlarged European Union: The Way Forward* (LGI Books, Budapest 2004) 125-147, 136.

³⁶ Gabriel Toggenburg, ‘The EU’s evolving policies vis-à-vis minorities: a play in four parts and an open end’, Report compiled in the frame of the FP6 project ‘Human and Minority Rights in the Life Cycle of Ethnic Conflicts’, 24.

that it has already become a significant part of EU enlargement law.³⁷ Therefore, this thesis extensively relies on this instrument, because the FCNM contains rights additional to those enshrined in the ECHR and the ICCPR;³⁸ for example, Article 11 on the use and recognition of names in a minority language and display of signs of a private nature visible to the public.³⁹

Accordingly, Sections 1 and 2 of Chapter I overview minority rights under the above-mentioned three key instruments. This thesis, however, does not explore instruments

³⁷ For instance, in response to the European Parliament's question seeking to clarify the meaning of protection of minorities in the Copenhagen criteria (Parliamentary questions, E-0620/01, 1 March 2001, question 2.), the European Commission stated that in its assessment of progress made by the candidate countries with regard to this criterion, it devotes particular attention to the FCNM (Parliamentary questions, E-0620/01, 15 May 2001, para 2). Moreover, not only did the European Commission use the FCNM as a yardstick in the accession process, but it also established its own monitoring system of States' compliance with this instrument by setting short- and medium- term priorities for each candidate country.

³⁸ Patrick Thornberry, 'Images of Autonomy and Individual and Collective Rights in International Instruments on the Rights of Minorities' in M Suksi (ed) *Autonomy: Applications and Implications* (Kluwer Law International, The Hague 1998) 116-119; see also, Sia Spiliopoulou Åkermark, 'The Added Value of the Framework Convention for the Protection of National Minorities (I)' in A Verstichel et al (eds) *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* (Intersentia, Oxford 2008) 69-90.

³⁹ Both the ICCPR and the ECHR fail to guarantee these rights due to the lack of explicit references to specific minority rights in these instruments. On the right to display signs in a minority language, see, for example, the HRC's communication in *Ballantyne, Davidson, McIntyre v Canada* (Communication no 359/1989 and 385/1989) (1993) CCPR/C/47/D/359/1989. On the recognition of names in a minority language see, *Kuharec v Latvia* (App no 71557/01) ECHR 7 December 2004 and *Mentzen v Latvia* (App no 71074/01) ECHR 7 December 2004.

The ECtHR's restrictive reading of the right to recognition of names in a minority language is in stark contrast with the ECJ's approach, which upheld the right to one's name in the context of free movement of services: Case C-168/91 *Christos Konstantinidis v Stadt Altensteig - Standesamt and Landratsamt Calw – Ordnungsamt* [1993] ECR I-1191. For discussion see Gulara Guliyeva, 'Joining Forces or Reinventing the Wheel? The EU and the protection of national minorities' in G Guliyeva & G Pentassuglia (eds) 'Minority Groups Across Legal Settings: Global and Regional Dimensions' (Special Issue 2010) 17(2) *International Journal on Minority and Group Rights* 287-305, 302-303. See also, Case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] ECR I-11613, where the ECJ emphasised that the principle of non-discrimination must be read from the perspective of substantive equality, and, therefore, rendered a homogenous system of attributing surnames unnecessary. For discussion see, Gabriel Toggenburg, 'Who is Managing Ethnic and Cultural Diversity in the European Condominium? The Moments of Entry, Integration and Preservation' (2005) 43(4) *JCMS* 717-738, 727.

adopted under the auspices of the OSCE and the UN.⁴⁰ Despite their political and symbolic significance, these instruments remain non-legally binding. Furthermore, although Sections 1 and 2 examine leading examples from the Inter-American and African systems of human rights protection, because these cases do not have legal force in EU law, the analysis is deliberately omitted from the main text and included in footnotes only.

Then, Section 3 of Chapter I deals with the concept of ‘minority’. To fully unpack the term, an approach different from that in Sections 1 and 2 is adopted. In light of the ongoing debates on the definition of ‘minority’, the author extensively draws on academic commentaries. The discussion first highlights the diversity of minority groups in EU Member States (often distinguished by various adjectives preceding the term ‘minority’, such as ‘national’, ‘religious’, ‘linguistic’, etc.) and analyses the impact of the ‘labels’ on the content of a definition. Next, the three most influential proposals on a definition of ‘minority’ are deconstructed, with the purpose of identifying the elements most appropriate for the EU context. These elements are discussed using examples from Member States’ practice. For instance, the criterion of citizenship/nationality is assessed in the context of Latvia, and the concepts of numerical threshold and non-dominant position are based on the experience of Belgium. These examples are subsequently discussed further in the context of EU law in chapters II-V.

⁴⁰ See, for example, the OSCE Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999) <http://www.osce.org/documents/hcnm/1999/09/2929_en.pdf> accessed 11 January 2007; see also, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) A/RES/47/135.

To summarise, analysis in Section 3 pursues several aims: to explain/justify relevance of certain elements of the definition of ‘minority’ in EU law or, alternatively, to show their inappropriateness; based on this assessment, to identify a working definition of ‘minority’ for the purposes of this thesis; to contribute to debates on an EU definition of ‘minority’; to critically discuss some of the challenges faced by minority groups in EU Member States; and where relevant, to introduce issues discussed in case studies in Chapters II-V.

Part 2: Case Studies

As mentioned above, Part 2 of the thesis consists of four case studies. The case studies discuss the rights of minorities as elaborated on in Sections 1 and 2 of Chapter I. Significantly, there is no separate case study on the principle of non-discrimination, because analysis reveals that this principle is a driving force behind minority protection in all case studies. Instead the focus is on political participation in the context of Latvia (Chapter II), freedom to manifest religion in publicly-funded schools in England (Chapter III), the right to access mother-tongue education in Belgium (Chapter IV), and autonomy arrangements in Scotland (Chapter V).

Chapter II. Lost in Transition: the Right to Political Participation of Russian-speaking Non-citizens in Latvia

Since 1991 Latvia has denied Latvian citizenship status to a large number of members of its Russian-speaking population, who constitute so-called non-citizens under domestic laws. To acquire Latvian citizenship, Russian-speaking non-citizens, who

were mainly Soviet-era immigrants, have to successfully undertake complex naturalisation procedures. Lack of Latvian citizenship subjects these minorities to differential treatment in the country, as they are deprived of political rights and barred from access to many professions. Latvia's accession to the EU has aggravated the situation of non-citizens. Russian-speaking non-citizens are now further disadvantaged, because they cannot benefit from EU rights, reserved to nationals of Member States only. The Chapter 'tests' EU rules, such as the Directive on equal treatment between persons irrespective of racial or ethnic origin (Race Directive),⁴¹ the Directive concerning the status of third-country nationals who are long-term residents (Long-Term Residents Directive)⁴² and the general principles of EU law to ascertain whether the EU could deal effectively with the exclusion of Russian-speaking minorities from political participation in Latvia and the EU.

Chapter III. Unveiling the Veil: Freedom to Manifest Religious Dress in Publicly-funded Schools in England

This chapter explores permissible limitations on freedom to manifest religion in publicly-funded schools. It begins with the analysis of the relevant case law of English courts. This discussion reveals that the broader freedoms granted to racial and ethnic minorities who share both a common ethnic origin and a common religion is in stark contrast with the less generous treatment of religious minorities. Having overviewed this issue in the context of England, some other Member States and the EU as a whole, the chapter applies to this problematic issue relevant EU rules such as

⁴¹ Council (EC) Directive 2000/43 on equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 (Race Directive).

⁴² Council (EC) Directive 2003/109 concerning the status of third-country nationals who are long-term residents [2004] OJ L16/44 (Long-Term Residents Directive).

Articles 10, 14(3), 21 and 22 CFR and the Directive on establishing a general framework for equal treatment in employment and occupation (Employment Directive).⁴³

Chapter IV. Recreating Babel? The Right to Access Mother-tongue Education in Belgium

Education in a minority language is essential for minorities to maintain a unique identity, transmit a culture and preserve their language. Conversely, a lack of education in a mother-tongue may have an adverse impact on a group's identity. International instruments do not assert this right forcefully, largely because of the financial implications of ensuring a wider mother-tongue education. This chapter explores this problematic issue in the context of Belgium, where French-speakers in Flanders have limited access to mother-tongue education due to a rigid application of the territoriality principle. Once the problem is outlined, the potential of the Race Directive,⁴⁴ EU Treaty provisions on education and culture, and the general principles of EU law are 'tested' on this example.

Chapter V. Bridging the Gap: Territorial Minorities and the EU

There is no right to autonomy as such in international law. However, as the experiences of many Western countries illustrate,⁴⁵ autonomy arrangements prove

⁴³ Council (EC) Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 (Employment Directive).

⁴⁴ Directive 2000/43 (Race Directive) (n 41).

especially effective in protecting minorities, because they allow the group to make decisions of particular concern to the maintenance of its identity. Furthermore, a comprehensive autonomy regime may encompass all rights discussed in the above chapters, such as political participation, manifestation of religion and mother-tongue education. Significantly, the extent and content of these rights is decided by the group itself. The example of Scotland aims to demonstrate the benefits and deficiencies of devolution as a type of autonomy arrangement. The potential of the EU to foster closer links between the supranational and sub-State level is then assessed through the analysis of relevant EU Treaty provisions on the Committee of the Regions, the principle of subsidiarity and the ECJ's jurisprudence.

Conclusions and Recommendations: Reinventing the Wheel or Joining Forces?

The conclusions and recommendations of the thesis aim to evaluate the need for more active EU involvement in minority protection. Furthermore, they assess to what extent and how existing EU laws already contribute to protecting minorities and whether a more coherent regime is needed at the EU level. Based on this assessment, the feasibility of an EU regime of minority protection is discussed.

In addition, an alternative model of minority protection in the EU is suggested through exploring the possibility of the EU joining forces with the Council of Europe through internalising, or even acceding to, the FCNM. This would have numerous

⁴⁵ In Europe many of these arrangements either date from the World War I settlements (J Barros, *The Åland islands question: its settlement by the League of Nations* (Yale University Press, New Haven 1968)), negotiated with a State (Kristian Myntti, 'The Sami Cultural Autonomies in the Nordic Countries' in K Gál, *Minority Governance in Europe* (LGI Publications, Budapest 2002) 153-170), or are a result of conflict-resolution efforts by the international community (Claus Neukirch, 'Autonomy and Conflict Transformation: The Gagauz Territorial Autonomy in the Republic of Moldova' in K Gál, *Minority Governance in Europe* (LGI Publications, Budapest 2002) 107-123).

benefits, such as providing consistent benchmarks of minority protection when applied to candidate States in the accession process to the EU and mechanisms to resolve remaining issues relating to minorities within the EU post-accession while eliminating double standards between 'new' and 'old' Member States. Yet these developments are politically sensitive and prone to create procedural difficulties. Nevertheless, it is suggested that instead of reinventing the wheel by attempting to develop a coherent system of minority protection, the EU may be better placed to encourage implementation of the FCNM by candidate countries and Member States.

PART 1. DEFINING THE KEY TERMS

CHAPTER I. DEFINING THE KEY TERMS: 'RIGHTS' AND 'MINORITIES'

Introduction

As the title of the present thesis suggests, the focus of this research is on the *rights* of *minorities*. These two central themes are discussed in three sections of this chapter. Sections 1 and 2 are devoted to two distinct dimensions of minority protection. The first is the right to non-discrimination, discussed in considerable detail in Section 1. The second dimension is special rights, i.e., the rights which aim to sustain a minority identity, analysed in Section 2. These include the right to political participation (sub-section 1), freedom to manifest religion (sub-section 2) and the right to education (sub-section 3). In addition, where a collective dimension of minority protection reaches a certain coherence, a State may grant a minority cultural⁴⁶ or territorial autonomy⁴⁷ (sub-section 4). To avoid entering into the debate as to what these rights should be as opposed to what they currently are, Sections 1 and 2 focus on the relevant provisions of the international agreements and their interpretation by international courts and quasi-judicial bodies. The analysis of case-law in these sections does not claim to be exhaustive; rather, the discussion focuses on the leading

⁴⁶ Cultural autonomy allows a minority group to decide matters of particular concern to the maintenance of a group's identity, such as the establishment of their own schools, the practice of religion and the enjoyment of their culture. It is most appropriate for dispersed groups within a State.

⁴⁷ Territorial autonomy allows a minority group to decide matters of particular concern to the group within a certain territory in a State. The degree of autonomy may vary, and may include certain administrative, legislative, executive and/or judicial powers. This type of autonomy is most appropriate for the protection of groups which densely populate certain parts of a State.

cases which help to identify main trends in the jurisprudence of courts and quasi-judicial bodies. The case law is up-to-date as of 15 June 2010. A critique of the way in which these rules are applied is supplied where relevant. Relevant academic commentaries are discussed in subsequent chapters in the context of the case studies.

The second important term in the title of the thesis which requires clarification is ‘minority.’ Despite numerous attempts to define the term, political opposition from some States prevented the international community from reaching a consensus on a definition of the term. Therefore, the discussion in Section 3 of this chapter aims to contribute to academic debates on the necessity of defining the term in the EU context, furnish a working definition of the term for the purposes of the present thesis and highlight the diversity of minority situations across EU Member States. Based on the analysis of adjectives preceding ‘minority’ and of each element of the term, a working definition of ‘minority’ is supplied in the conclusions to this chapter.

Section 1. Non-discrimination

This section focuses on the guarantee of non-discrimination as one of the most essential aspects of minority protection. First, relevant provisions of international human rights treaties and minority rights instruments are reviewed (1.1). Then, the jurisprudence of international courts and quasi-judicial bodies is analysed with the focus on direct (1.2.1) and indirect discrimination (1.2.2). This analysis is followed by

a discussion of case law on non-discrimination on the grounds of association with a national minority (1.3.1), religion (1.3.2) and race or ethnic origin (1.3.3).⁴⁸

1.1. Guarantees of non-discrimination in international and regional treaties

The principle of non-discrimination, as one of the facets of minority protection, is firmly enshrined in general human rights treaties, as well as more specific minority rights instruments. A general prohibition of discrimination on grounds such as race, religion, language and gender is well-established in international treaties on the protection of human rights. At the universal level, the International Covenant on Civil and Political Rights (ICCPR)⁴⁹ precludes discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status in two provisions: Article 2 outlaws discrimination in the enjoyment of the ICCPR's rights and Article 26 comprises an autonomous right to non-discrimination.⁵⁰ Although non-discrimination against minorities is not explicitly mentioned in Article 27 ICCPR (regarded as a global minimum standard of minority protection), the Human Rights Committee (HRC), a quasi-judicial body under the ICCPR entrusted with monitoring compliance with the instrument and offering interpretations of its provisions, established that persons belonging to minorities can benefit from the guarantees in Articles 2 and 26 ICCPR.⁵¹

⁴⁸ Less established prohibitions of discrimination in international law on the grounds of, for example, disability, age, belief and sexual orientation fall outside the scope of this thesis.

⁴⁹ ICCPR (n 17).

⁵⁰ Human Rights Committee, General Comment No 18: Non-discrimination (Art. 26) (1989) para 12 <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3888b0541f8501c9c12563ed004b8d0e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument)> accessed 17 September 2009.

At the regional level,⁵² Article 14 of the European Convention for the Protection of Human Rights (ECHR)⁵³ precludes discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status in the exercise of the ECHR rights. Similar to Article 2 ICCPR, this provision applies in conjunction with the substantive rights of the ECHR, i.e., it is not an independent provision. As of 1 April 2005, Protocol No 12 to the ECHR introduced the equivalent of Article 26 ICCPR – a general prohibition of discrimination.⁵⁴ The difference between Article 14 ECHR and Protocol 12 is that whereas Article 14 prohibits discrimination in the enjoyment of the rights and freedoms set forth in the ECHR, Article 1 of Protocol 12 extends the scope of protection to any right set forth by law and, therefore, is absolute and stand-alone.⁵⁵

⁵¹ Human Rights Committee, General Comment No 23: The rights of minorities (Art. 27) (1994) para 4 <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/fb7fb12c2fb8bb21c12563ed004df111?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/fb7fb12c2fb8bb21c12563ed004df111?Opendocument)> accessed 17 September 2009.

⁵² Similar provisions are included in other regional human rights treaties. For instance, the African Charter on Human and Peoples' Rights ((adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) forbids discrimination in Article 2; although the list of grounds of non-discrimination is open-ended, similar to Article 2 ICCPR and Article 14 ECHR, the reach of Article 2 AfrCH is limited to the enjoyment of the Charter rights.

The American Convention on Human Rights ((adopted 22 November 1969, entered into force 18 July 1978) OASTreaty Series No 36, 1144 UNTS 123) has a slightly different formulation in Article 24 on the right to equal protection: it merges equal treatment before the law with equality of treatment. Moreover, unlike the above-mentioned provisions, Article 24 ACHR does not enumerate the grounds of discrimination. Article 24 of the American Convention on Human Rights reads as follows: 'All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.'

⁵³ ECHR (n 24).

⁵⁴ Additional Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 2000, entered into force 1 April 2005) CETS No 177, Article 1(1).

⁵⁵ The ECtHR has recently confirmed this in the cases *Sejdić and Finci v Bosnia and Herzegovina* (App no 27996/06 and 34836/06) ECHR 22 December 2009, para 53 (discussed below on page 49).

In addition to general human rights guarantees, Article 4 of the Framework Convention for the Protection of National Minorities (FCNM)⁵⁶ contains a guarantee of non-discrimination specifically tailored to the needs of national minorities.⁵⁷ Article 4 FCNM requires States to guarantee full and effective equality of national minorities, which implies both the right of equality before the law and of equal protection of the law.⁵⁸

1.2. Jurisprudence of international and regional courts and bodies

1.2.1. Direct discrimination

In assessing a claim of discrimination, it is essential to differentiate between direct and indirect discrimination. Direct discrimination occurs where, based on prohibited grounds, there is a difference in treatment of persons in similar situations, which has no objective and reasonable justification. The jurisprudence of international and regional courts and quasi-judicial bodies on the prohibition of direct discrimination is

⁵⁶ FCNM (n 3).

⁵⁷ Article 4 FCNM (n 3) reads as follows:

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.

⁵⁸ Committee of Experts on Issues Relating to the Protection of National Minorities, 'The Impact of International Norms on the Protection of National Minorities in Europe: The Added Value and Essential Role of the Framework Convention for the Protection of National Minorities' (2006) DH-MIN(2006)018, 9.

rather straightforward and assessed below through examination of examples from their jurisprudence.

In General Comment No 18 on non-discrimination, the HRC maintained that the term ‘discrimination’ under Article 26 ICCPR implies

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.⁵⁹

The HRC further noted that “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”⁶⁰ Although the HRC affirmed that the prohibition of discrimination in Articles 2 and 26 ICCPR apply to minorities as well,⁶¹ regrettably, there are very few communications before the HRC where these provisions have been used in relation to minorities.⁶²

Similarly, the ECtHR famously ruled in the *Belgian Linguistics* case on access to education that “the principle of equality of treatment is violated if the distinction has no objective and reasonable justification.”⁶³ Importantly, such differential treatment

⁵⁹ General Comment 18 (n 50) para 7.

⁶⁰ General Comment 18 (n 50) para 13.

⁶¹ General Comment No 23 (n 51) para 4.

⁶² *Simunek et al v the Czech Republic* (Communication no 516/1992) (1995) CCPR/C/54/D/516/1992; *J G A Diergaardt (late Captain of the Rehoboth Baster Community) et al v Namibia* (Communication no 760/1997) (2000) CCPR/C/69/D/760/1997; *Waldman v Canada* (Communication no 694/1996) (1999) CCPR/C67/D/694/1996.

⁶³ *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Belgian Linguistics)* (App nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64) (1969-1970) 1 EHHR 252, para 10.

must pursue a legitimate aim; moreover, the means employed to achieve this aim must be proportionate.⁶⁴

Despite this clear formulation of Article 14's application, certain reluctance to apply it may be observed in the ECtHR's earlier jurisprudence. For example, in *Podkolzina v Latvia*,⁶⁵ concerning additional linguistic requirements imposed on candidates for elections in Latvia, the ECtHR refused to consider the applicant's claims of differential treatment as a member of Russian-speaking minority under Article 14 ECHR. Likewise, in *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France*,⁶⁶ an Orthodox Jewish liturgical association did not succeed in persuading the ECtHR that the refusal of authorities to allow them to carry out ritual slaughter in line with their convictions violated Article 9 together with Article 14 ECHR.

However, more recent jurisprudence of the ECtHR has been marked with significant developments and saw more confident application of Article 14 in (discussed on pages 41-49) *Thlimmenos v Greece*,⁶⁷ *Aziz v Cyprus*,⁶⁸ *Nachova v Bulgaria*,⁶⁹ *Timishev v Russia*,⁷⁰ *D H and others v the Czech Republic*,⁷¹ and *Sejdić and Finci v*

⁶⁴ *Belgian Linguistics* (n 63) para 10.

⁶⁵ *Podkolzina v Latvia* (App no 46726/99) ECHR 9 April 2002. The ECtHR, however, found a violation of Article 3 of Protocol 1 ECHR, as discussed on pages 61-62.

⁶⁶ *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (App no 27417/95) (2000) 9 BHRC 27.

⁶⁷ *Thlimmenos v Greece* (App no 34369/97) (2001) 31 EHRR 15.

⁶⁸ *Aziz v Cyprus* (App no 69949/01) (2005) 41 EHRR 11.

⁶⁹ *Nachova v Bulgaria* (App nos 43577/98 and 43579/98) (2006) (Grand Chamber) 42 EHRR 43.

⁷⁰ *Timishev v Russia* (App no 55762/00 and 55974/00) (2007) 44 EHRR 37.

⁷¹ *D H and others v the Czech Republic* (App no 57325/00) (2008) (Grand Chamber) ELR 17.

Bosnia and Herzegovina.⁷² This is not to suggest that the ECtHR now easily agrees to consider Article 14 issues. A degree of reluctance may remain because of the controversy surrounding minority rights in some States. However, compared to the earlier jurisprudence of the ECtHR, Article 14 case law is currently more progressive. It is hoped that this approach will be further strengthened with the wider application of Protocol 12 ECHR.⁷³

The significance and visibility of non-discrimination against minorities is further heightened through the FCNM and the progressive reading of the instrument by the Advisory Committee on the FCNM (ACFC),⁷⁴ the body monitoring the implementation of the FCNM. The ACFC has consistently stressed that Article 4 FCNM not only requires States to enact relevant anti-discrimination legislation, but also to have in place effective remedies against all forms of discrimination.⁷⁵

⁷² *Sejdić and Finci* (n 55).

⁷³ There are fewer cases which came before the quasi-judicial bodies in the inter-American and African contexts. Overall, the Inter-American Court's method of finding direct discrimination is similar to that of the ECtHR. For example, in its advisory opinion on the *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica* ((1984) OC-4/84 (Ser A) No 4) the Inter-American Court stated that differential treatment would not constitute discrimination when "the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review" (para 57). Furthermore, the aims must not be "unjust or unreasonable" (para 57).

Conversely, assessment of discrimination by the African Commission on Human and Peoples' Rights is less elaborate: the African Commission identifies those who have been subjected to differential treatment based on ethnic origin and finds a violation of Article 2 without elaborating on the matters of principle, such as in *Amnesty International v Zambia* ((Comm no 212/98) (1999)) and the *Organisation Mondiale Contre la Torture and others v Rwanda* ((Comm nos 27/89, 46/91, 49/91, 99/93) (1996)).

⁷⁴ The ACFC is the independent expert committee, which evaluates the implementation of the FCNM by State Parties.

⁷⁵ ACFC, 'First Opinion on Denmark' (2000) ACFC/INF/OP/I(2001)005, para 25; 'Second Opinion on Hungary' (2005) ACFC/INF/OP/II(2004)003, paras 37-39; 'First Opinion on Germany' (2002) ACFC/INF/OP/I(2002)008, para 22; 'First Opinion on Slovenia' (2005) ACFC/INF/OP/I(2005)002, paras 26-28; 'First Opinion on Croatia' (2001) ACFC/INF/OP/I(2002)003, paras 24-26.

1.2.2. Indirect discrimination

The prohibition of indirect discrimination allows targeting the impact of rules which are neutral on their face, but have disproportionate effects on members of a certain group without any objective and reasonable justification. Indirect discrimination did not feature strongly in the initial approach of international courts and quasi-judicial bodies, except in the case of the European Court of Justice (ECJ), which, as early as 1974, established that the rules regarding equality of treatment forbid not only direct discrimination based on nationality, but also all indirect discrimination which, “by the application of other criteria of differentiation, lead in fact to the same result...”⁷⁶

In contrast, the HRC was hesitant to make such a finding in its early jurisprudence. Thus, in *Ballantyne, Davidson, McIntyre v Canada*⁷⁷ the authors of the communication argued that advertising in French only in Quebec constituted discrimination against English-speakers. The HRC noted that domestic law requiring the use of French only in commercial advertising outdoors affected equally French- and English-speakers; therefore, there was no discrimination on the ground of language under Article 26 ICCPR.⁷⁸ This finding ignores the concept of indirect discrimination against minorities.

The HRC’s more recent jurisprudence reveals a notable change in approach towards indirect discrimination. In *Diergaardt v Namibia*⁷⁹ the authors, members of the

⁷⁶ Case 152/73 *Giovanni Maria Sotgiu v Deutsche Bundespost* [1974] ECR 153, para 31.

⁷⁷ *Ballantyne, Davidson, McIntyre v Canada* (n 39).

⁷⁸ *Ballantyne, Davidson, McIntyre v Canada* (n 39) para 11.5.

Rehoboth Basters community, claimed that by denying them the use of their mother-tongue in administration, justice, education and public life, Namibia violated their rights under Articles 26 and 27 ICCPR. In particular, the State instructed civil servants not to reply to the authors' written or oral communications with the authorities in the Afrikaans language; public authorities had to follow this instruction even when they were perfectly capable of speaking this language, because under Article 3 of the Constitution English was the only official language in Namibia.⁸⁰ Taking into account the effects of this practice on Afrikaans speakers and in the absence of any response from the State, the HRC found a violation of Article 26 ICCPR without elaborating on the concept of indirect discrimination.⁸¹

The HRC explicitly acknowledged indirect discrimination in its later communications, such as *Althammer v Australia*⁸² and *Derksen v the Netherlands*,⁸³ by noting that “a violation of [A]rticle 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate.”⁸⁴ The HRC also emphasised that a finding of such indirect discrimination should be based on the

⁷⁹ *Diergaardt* (n 62).

⁸⁰ *Diergaardt* (n 62) para 10.10.

⁸¹ Interestingly, the HRC did not deal with this claim under Article 27 ICCPR. The dissenting opinions of Bhagwati, Colville and Yalden nonetheless suggest that some Committee members considered that the State could legitimately insist on all communications between the authorities and minorities take place in the official language; moreover, an exclusive official language did not automatically discriminate against minority languages. Furthermore, the authors did not allege that their language rights were denied under Article 27 ICCPR and limited their submission under this provision entirely to land use; therefore, in the absence of a complaint from the authors, the HRC was not in a position to construct a case under Article 27. The latter argument suggests that were the authors to insist on the violation of language rights under Article 27 rights, the HRC could consider their claim under this provision.

⁸² *Mr Rupert Althammer et al v Australia* (Communication no 998/2001) (2003) CCPR/C/78/D/998/2001.

⁸³ *Cecilia Derksen v Netherlands* (Communication no 976/2001) (2004) CCPR/C/80/D/976/2001.

⁸⁴ *Althammer* (n 82) para 10.2.

grounds listed in Article 26 ICCPR. In addition, a measure will not be found to be indirectly discriminatory if it can be objectively and reasonably justified. Effectively, the HRC used the same test to find both direct and indirect discrimination. Nevertheless, the finding of indirect discrimination against minorities is a welcome development in anti-discrimination law as it may ensure substantive equality of minorities.

A similar initial reluctance to recognise indirect discrimination can be discerned in the jurisprudence of the ECtHR. Only in 2001 did the ECtHR explicitly recognise the principle of indirect discrimination. Thus, in *Kelly v the United Kingdom*,⁸⁵ which concerned an allegation of discriminatory treatment, the applicants claimed that between 1969 and March 1994, members of the security forces killed 357 people, the overwhelming majority of whom were young men from the Catholic or nationalist community.⁸⁶ In its assessment the ECtHR noted that

[w]here a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group.⁸⁷

The ECtHR, however, promptly added that statistics in themselves were not sufficient to determine a violation of Article 14 in this case.⁸⁸

The ECtHR's reluctance to give full effect to the concept of indirect discrimination is also evident from the Chamber's decision in *D H and others v the Czech Republic*,⁸⁹

⁸⁵ *Kelly v the United Kingdom* (App no 30054/96) (2001) ECHR 04 May 2001.

⁸⁶ *Kelly v the United Kingdom* (n 85) para 146.

⁸⁷ *Kelly v the United Kingdom* (n 85) para 148.

⁸⁸ *Kelly v the United Kingdom* (n 85) para 148.

where the Court assessed compatibility of placing Roma children in special schools with Article 14 ECHR read in conjunction with Article 2 of Protocol 1 (P1-2) ECHR on the right to education. In the Chamber's view the Government successfully established that the special schools were not created to cater for Roma children; neither did placement rules refer to a pupil's ethnic origin.⁹⁰ Therefore, special schools pursued the "legitimate aim of adapting the education system to the needs and aptitudes or disabilities of the children."⁹¹ As a result, the Chamber found no violation of Article 14 in conjunction with P1-2 ECHR.⁹² However, this finding ignored the concept of indirect discrimination. As noted above on page 32, indirect discrimination occurs where a neutral rule has a disproportionately adverse impact on members of a certain group. Intention to discriminate is irrelevant to finding indirect discrimination; it is the actual effect of a measure that matters.

On appeal, the Grand Chamber of the ECtHR rightly found a violation of Article 14 in conjunction with P1-2.⁹³ In assessing the claim of indirect discrimination, the Court first clarified that the case did not concern the Czech Republic's failure to ensure positive action to protect Roma minority in educational matters; rather, all that had to be established in the applicants' submission was that,

⁸⁹ *D H and others v the Czech Republic* (App no 57325/00) (2006) 43 EHRR 41, para 48.

⁹⁰ *D H and others v the Czech Republic* (n 89) para 49.

⁹¹ *D H and others v the Czech Republic* (n 89) para 49.

⁹² Although the applicants maintained that the effects of placing Romani children in special schools were discriminatory and statistical evidence could support this claim, the Chamber did not find indirect discrimination. Compare this finding with the House of Lords decision in *Mandla v Dowell Lee* [1983] AC 548.

⁹³ *D H and others v the Czech Republic* (n 71).

without objective and reasonable justification, they were treated less favourably than non-Roma children in a comparable situation and that this amounted in their case to indirect discrimination.⁹⁴

In the Grand Chamber's view "a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group."⁹⁵ Assessment of relevant statistics is one way of determining the existence of indirectly discriminatory effects of neutral rules. In this respect, the Grand Chamber followed the practice of the ECJ, which has relied on statistics in finding indirect discrimination in the well-established case law on gender⁹⁶ and nationality⁹⁷ discrimination. The Grand Chamber found that because the relevant legislation had a disproportionately prejudicial effect on the Roma community, "the applicants as members of that community necessarily suffered the same discriminatory treatment."⁹⁸ Therefore, by thirteen votes to four, the Grand Chamber found a violation of Article 14 read in conjunction with P1-2 ECHR.⁹⁹

⁹⁴ *D H and others v the Czech Republic* (n 71) para 183.

⁹⁵ *D H and others v the Czech Republic* (n 71) para 184.

⁹⁶ See, for example, Case 170/84 *Bilka-Kaufhaus* [1986] IRLR 317.

⁹⁷ *Sotgiu* (n 76).

⁹⁸ *D H and others v the Czech Republic* (n 71), para 209.

⁹⁹ The Government sought to justify the difference in treatment between children of Roma and non-Roma origin based on the necessity of adapting the education system to the capacity of children with special needs (*D H and others v the Czech Republic* (n 71) para 197). Moreover, according to the Government, the results of psychological tests, conducted in educational psychology centres, established the applicants' low intellectual capacity and led to their placement in special schools. Thus, the Czech Government denied that the applicants were placed in special schools due to their ethnic origin.

The Grand Chamber was not convinced by the Government's arguments. First, special schools followed more basic curriculum and constituted segregation in the education system (para 198). Furthermore, the psychological tests gave rise to controversy and continued to be the subject of scientific debate (para 199). Even though the Court accepted that its role did not extend to assessing the validity of the psychological tests, it concluded that the results of such tests were not sufficient to constitute an objective and reasonable justification for the purposes of Article 14 ECHR, because there was a danger that the tests were biased and their results did not reflect the particularities and special characteristics of the Roma children who sat them (para 201).

Accordingly, the recent jurisprudence of the HRC and the ECtHR illustrate the importance of finding indirect discrimination against minorities. The ACFC, too, can be highly commended for consistent interpretation of Article 4 FCNM to include not only direct, but also indirect discrimination and its focus on whether discrimination against minorities exists *in fact*.¹⁰⁰

1.3. Grounds of discrimination: association with a national minority, religion and race or ethnic origin

Having established general trends in the assessment of claims of discrimination, we now turn to the cases where the specific claimed grounds of discrimination comprised association with a national minority (1.3.1), religion (1.3.2) and race or ethnic origin (1.3.3).

1.3.1. Association with a national minority

There are very few cases where the ECtHR has dealt specifically with non-discrimination based on membership in a national minority.¹⁰¹ The leading case where this ground was forcefully invoked by a minority group remains *Görzelik v Poland*.¹⁰² *Görzelik* concerns freedom of association under Article 11 ECHR of 190 persons who declared themselves ‘Silesians’ and formed an association called ‘Union

¹⁰⁰ Committee of Experts on Issues Relating to the Protection of National Minorities, ‘The Impact of International Norms on the Protection of National Minorities in Europe...’ (n 58) 13.

¹⁰¹ *Mathieu-Mohin and Clerfayt v Belgium* (App no 9267/81) (1988) 10 EHRR 1.

¹⁰² *Görzelik and others v Poland* (App no 44158/98) (2005) 40 EHRR 4.

of People of Silesian Nationality.’ In 1996 the management committee of the Union applied for registration to the Katowice Regional Court. Pursuant to the Law on Associations, the Katowice Regional Court served a copy of the application on the Governor of Katowice. The Governor’s comments suggested that because there was no Silesian national minority, the association could be registered only if it was re-named and paragraph 30 of the memorandum of the association which declared that ‘The Union is an organisation of the Silesian national minority’ was deleted.¹⁰³ The Regional Court nevertheless registered the association and left the memorandum unaltered. This decision was subsequently annulled by the Court of Appeal, which was later re-confirmed by the Supreme Court, on the ground that there was no Silesian national minority in Poland. In particular, the higher Courts decided that the recognition of Silesians as a national minority may also result in further claims of electoral rights that are granted to registered minority associations.

When the case came before the ECtHR, the Court refused to get involved in the debates as to whether this group was indeed a ‘national minority’, because the concept is not defined in any international treaty and there is no consistent State practice regarding the official recognition of minorities¹⁰⁴ (as discussed in Section 3 of this Chapter on pages 127-186). The lack of a definition of ‘national minority’ was compounded in this case by the fact that the Polish electoral legislation granted special benefits to registered minority associations. Therefore, the Government argued that the applicants had attempted to acquire the status of a minority group in order to claim the benefits under the domestic laws. The ECtHR observed that the memorandum of the association gave the impression that in the future “the members

¹⁰³ *Görzelik* (n 102) para 24.

¹⁰⁴ *Görzelik* (n 102) para 67.

of the association might ... aspire to stand in elections.”¹⁰⁵ The Court, therefore, concluded that the applicants were not precluded from forming an association “to express and promote distinctive features of a minority;”¹⁰⁶ rather it was the creation of a legal entity with the possibility of a subsequent claim of special status under national law which appeared to be objectionable. Therefore, the refusal to register the applicants’ association was justified under Article 11(2) ECHR.

This case is in stark contrast with other similar cases, such as *the United Macedonian Organisation Ilinden-Pirin and others v Bulgaria*¹⁰⁷ on the dissolution of a political party established to protect the rights of the ‘Macedonian’ minority (discussed on page 114). The difference in the outcome of these cases can be explained by the fact that in *Görzelik* under domestic law the group had a possibility to acquire additional electoral rights, while this was not an issue in cases involving freedom of association of the Macedonian minority in Bulgaria. Also, the lack of a uniform State practice defining the term ‘national minority’ and introducing procedures for their official recognition¹⁰⁸ prompted the ECtHR to grant the State a broad margin of discretion. Overall, the ECtHR’s jurisprudence on non-discrimination based on membership of a national minority needs further strengthening through examination of the complaints under Article 14 and Protocol 12 ECHR.

¹⁰⁵ *Görzelik* (n 102) paras 64-65.

¹⁰⁶ *Görzelik* (n 102) para 106.

¹⁰⁷ *The United Macedonian Organisation Ilinden-Pirin and others v Bulgaria* (App no 59489/00) ECHR 20 October 2005.

¹⁰⁸ *Görzelik* (n 102) para 67.

1.3.2. Religion

As to non-discrimination against persons belonging to a minority based on religion, the jurisprudence of international courts and quasi-judicial bodies is similarly limited.¹⁰⁹ The HRC's leading communication on discrimination based on religion remains *Waldman v Canada*.¹¹⁰ The author of the communication, a member of the Jewish faith, complained that in the province of Ontario, Canada provided full and direct public funding to Roman Catholic schools only. In the HRC's view, the authorities' decision not to fund other religious schools violated Article 26 ICCPR, because if a State decides to provide public funding to religious schools, "it should make this funding available without discrimination."¹¹¹ Canada attempted to justify differential treatment of religious schools in the light of its historic protection of the protestant minority in the province of Ontario, enshrined in the Canadian Constitution since 1867. However, even this Constitutional guarantee did not persuade the HRC that there was a need to maintain such a differential treatment between religious minorities:

[t]he material before the Committee does not show that members of the Roman Catholic community or any identifiable section of that community are now in a disadvantaged position compared to those members of the Jewish community that wish to secure the education of their children in religious schools.¹¹²

¹⁰⁹ In contrast, the jurisprudence on freedom of association of religious organisations is more supportive of minority groups' claims. See, for example, the ECtHR's decisions in *Serif v Greece* (App no 38178/97) (1999) 31 EHRR 561; *Hassan and Chaush v Bulgaria* (App no 30985/96) (2000) 24 EHRR 55; *Case of Metropolitan Church of Bessarabia and others v Moldova* (App no 45701/99) ECHR 13 December 2001; *Case of Supreme Holy Council of the Muslim Community v Bulgaria* (App no 39023/97) ECHR 16 December 2004; *Case of the Moscow Branch of the Salvation Army v Russia* (App no 72881/01) ECHR 5 October 2006; *Religionsgemeinschaft der Zeugen Jehovas and others v Austria* (App no 40825/98) ECHR 31 July 2008.

¹¹⁰ *Waldman v Canada* (n 62).

¹¹¹ *Waldman v Canada* (n 62) para 10(6).

¹¹² *Waldman v Canada* (n 62) para 10.4.

Accordingly, such differential treatment was not justified, and, hence, Article 26 ICCPR was breached.

Although the ECtHR's case law on prohibition of discrimination against persons belonging to a minority based on religion is not particularly strong either, the Court can be commended for expanding the scope of the principle of non-discrimination in the case of *Thlimmenos v Greece*.¹¹³ The applicant, a Jehovah's Witness, was convicted for insubordination as a result of his refusal to wear a military uniform during a general mobilisation. Subsequently, he was refused a post as a chartered accountant, because national law excluded convicted persons from such appointments. The applicant relied on Article 14 ECHR in conjunction with Article 9 ECHR and complained that in the "application of the relevant law no distinction is made between persons convicted of offences committed exclusively because of their religious beliefs and persons convicted of other offences."¹¹⁴

The ECtHR noted that its past case-law focused on differential treatment of persons in analogous situations without any objective and reasonable justification; however,

this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when [S]tates without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.¹¹⁵

Therefore, the failure of Greece to ensure such differentiated treatment amounted to a violation of Article 14 ECHR in conjunction with Article 9 ECHR.

¹¹³ *Thlimmenos v Greece* (n 67).

¹¹⁴ *Thlimmenos v Greece* (n 67) para 42.

¹¹⁵ *Thlimmenos v Greece* (n 67) para 44.

Despite the positive outcome of the above-discussed cases for the applicants, the jurisprudence of international courts on non-discrimination against persons belonging to a minority based on religion needs further expansion, mainly through more confident application of Article 14 ECHR, Protocol 12 ECHR and Articles 2 and 26 ICCPR.

1.3.3. Race and ethnicity

Unlike the above discussed two grounds, the right of non-discrimination based on race and ethnicity has recently acquired a significantly higher level of protection. In particular, in its case law the ECtHR has clarified rules on the burden of proof in anti-discrimination law cases and reaffirmed the duty of the authorities to investigate possible racist motives against persons belonging to a minority, such as in *Nachova v Bulgaria*¹¹⁶ concerning the death of two persons of Roma origin killed by military police in violation of Article 2 ECHR.¹¹⁷ Significantly, in deciding this case, the Chamber and the Grand Chamber arrived at different conclusions: the Chamber concluded that there was a violation of Article 14 read in conjunction with Article 2 ECHR in its substantive aspect, while the Grand Chamber found that there was a violation of these provisions in their procedural aspect.

¹¹⁶ *Nachova v Bulgaria* (App nos 43577/98 and 43579/98) (2004) 39 EHRR 37.

¹¹⁷ Both the Chamber and the Grand Chamber of the ECtHR established that Article 2 ECHR precludes the use of firearms to arrest persons “who, like Mr Angelov and Mr Petkov, were suspected of having committed non-violent offences, were not armed and did not pose any threat to the arresting officers or others” (*Nachova v Bulgaria*, Grand Chamber (n 69) para 89, see also Chamber’s decision in *Nachova v Bulgaria* (n 116) para 105). Due to the use of grossly excessive force and the lack of an effective investigation of the deprivation of life, there had been a violation of Article 2.

Thus, the Chamber maintained that Articles 2 and 14 ECHR together impose a duty on State authorities to conduct an effective investigation irrespective of the victim's racial or ethnic origin; moreover, where there is "suspicion that racial attitudes induced a violent act it is particularly important that the official investigation is pursued with vigour and impartiality..."¹¹⁸ Having established that the authorities failed to conduct a meaningful investigation into racist statements made by law enforcement officers,¹¹⁹ the Chamber shifted the burden of proof on the respondent State, i.e., it was up to Bulgaria to provide a plausible explanation regarding the lack of investigation.¹²⁰ Because the State did not offer any further explanation, and taking into consideration other cases where "[Bulgarian] law enforcement officers had subjected Roma to violence resulting in death"¹²¹, the Chamber found a violation of Article 14 taken together with Article 2 ECHR in its substantive aspect.

Unlike the Chamber, the Grand Chamber considered that the alleged failure of the authorities to carry out an effective investigation into the supposedly racist motive for the killings should not shift the burden of proof to the government with regard to the breach of Article 14 taken together with the substantive aspect of Article 2 ECHR. The Grand Chamber reiterated that in certain circumstances, where events leading to a death of a person were within the exclusive knowledge of the authorities, the burden of proof may rest on the authorities. It may also be possible that a government may be required to disprove an alleged discrimination. However, in the present case, "such an approach would amount to requiring the respondent Government to prove the absence

¹¹⁸ *Nachova v Bulgaria* (n 116) para 157.

¹¹⁹ *Nachova v Bulgaria* (n 116) para 170.

¹²⁰ *Nachova v Bulgaria* (n 116) para 171.

¹²¹ *Nachova v Bulgaria* (n 116) para 172-3.

of a particular subjective attitude on the part of the person concerned.”¹²² In explaining its approach, the Grand Chamber drew a distinction between violent and non-violent acts. While the burden of proof may shift onto the government in cases alleging discrimination in the course of non-violent acts, for example, employment, “that approach is difficult to transpose to a case where it is alleged that an act of violence was racially motivated.”¹²³

Considering all the circumstances of the case, the Grand Chamber departed from the Chamber’s approach and ruled that racist attitudes did not play a role in Mr Angelov’s and Mr Petkov’s deaths.¹²⁴ Nevertheless, where the procedural aspect of Article 14 in conjunction with Article 2 ECHR is concerned, the Grand Chamber considered that

... any evidence of racist verbal abuse being uttered by law enforcement agents in connection with an operation involving the use of force against persons from an ethnic or other minority is highly relevant to the question whether or not unlawful, hatred-induced violence has taken place¹²⁵

and renders necessary a careful examination. Therefore, failure of the authorities to take all possible steps to investigate whether or not discrimination may have played a role in the events breached Article 14 ECHR taken in conjunction with Article 2 in its procedural aspect.

The Grand Chamber’s finding of a procedural violation as opposed to a substantive one demonstrates that the ECtHR was cautious in its approach in *Nachova*.

¹²² *Nachova v Bulgaria* (n 69) para 157.

¹²³ *Nachova v Bulgaria* (n 69) para 157.

¹²⁴ *Nachova v Bulgaria* (n 69) para 158.

¹²⁵ *Nachova v Bulgaria* (n 69) para 164.

Nevertheless, even though this finding is less forceful than the Chamber's decision, it strongly affirmed the duty of authorities to investigate possible cases of discrimination against the Roma. Furthermore, the Grand Chamber accepted that in certain situations the burden of proof may, in principle, shift on the authorities. In addition, the case laid the foundation for the ECtHR's case law on non-discriminatory treatment of Roma in subsequent case law.¹²⁶

The ECtHR has further strengthened this strong emphasis on prohibition of discrimination based on racial and ethnic origin in *Timishev v Russia*,¹²⁷ where the applicant claimed that his right to liberty of movement was restricted based on his Chechen ethnic origin¹²⁸ contrary to Article 14 read together with Article 2 of Protocol 4 ECHR. In its assessment, the ECtHR emphasised that “[d]iscrimination on account of one's actual or perceived ethnicity is a form of racial discrimination”¹²⁹ and it is the duty of the authorities to investigate such cases with special vigilance.

¹²⁶ Thus, in the case of *Moldovan and others v Romania* ((App nos 41138/98 and 64320/01) (2007) 44 EHRR 16), the applicants claimed that they had been discriminated against based on their ethnicity as Roma by State officials and judicial bodies contrary to Article 14 ECHR in conjunction with Articles 6 and 8 ECHR. Based on the facts of the case, the ECtHR established that the applicants' Roma ethnicity appeared to have been “decisive for the length and the result of the domestic proceedings...” (para 139). Moreover, the applicants were repeatedly subjected to discriminatory remarks made by the authorities while their claims were being considered by domestic authorities. Accordingly, there was a violation of Article 14 together with Articles 6 and 8 ECHR.

Likewise, in *D H and others v the Czech Republic* (n 71), the Grand Chamber took into account that the applicants, who were placed in special schools, were subjected to differential treatment based on their Roma ethnic origin. The placement in special schools was based on parental consent. However, because it appeared that parents of Romani children were not fully informed and often signed a pre-completed form, the Grand Chamber was not persuaded that “members of a disadvantaged community and often poorly educated, [Romani parents] were capable of weighting up all the aspects of the situation and the consequences of giving their consent” (para 203). The Grand Chamber concluded that even assuming that Romani parents gave their ‘informed consent’ for their children to be placed in special schools, “no waiver of the right not to be subjected to racial discrimination can be accepted” (para 204).

¹²⁷ *Timishev v Russia* (n 70).

¹²⁸ The authorities who refused to allow him to pass through the checkpoint on the administrative border between Ingushetia and Kabardino-Balkaria referred to an oral instruction from the Ministry of the Interior of Kabardino-Balkaria not to admit persons of Chechen ethnic origin.

¹²⁹ *Timishev v Russia* (n 70), para 56.

Noting that the respondent State failed to present a plausible explanation for the differential treatment based on ethnic origin, the ECtHR stated that

[i]n any event, the Court considers that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.¹³⁰

In this passage, the ECtHR effectively indicated that in a democratic society justification of a difference in treatment on the basis of race may not be acceptable. Such an approach indicates that the ECtHR is likely to adopt a high level of scrutiny in cases involving racial discrimination.

This is not to say that special measures¹³¹ based on race and ethnicity, specifically designed to ensure substantive equality of a racial or ethnic group, could not lead to differential treatment.¹³² The ECtHR has long established that not every differential treatment results in discrimination.¹³³ In addition, there may be a State duty to differentiate in order to protect minorities.¹³⁴

¹³⁰ *Timishev v Russia* (n 70), para 58.

¹³¹ The Committee on the Elimination of Racial Discrimination (CERD), a quasi-judicial body under the International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD), has recently clarified the meaning and scope of special measures in its General Recommendation No 32. The Committee suggested that special measures should be “appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary.” Committee on the Elimination of Racial Discrimination, ‘General Recommendation No 32: The meaning and scope of special measure in the International Convention on the Elimination of Racial Discrimination’ (2009) CERD/C/GC/32, para 16.

¹³² Such measures should be designed and implemented on the basis of need and a minority group's current situation: CERD (n 131).

¹³³ *Belgian Linguistics* (n 63).

¹³⁴ *Belgian Linguistics* (n 63) para 44.

The ECtHR's strong stance in cases involving discrimination on the grounds of race or ethnicity under Article 14 ECHR is now extended to assessment of claims under Protocol 12 ECHR. This is well exemplified in the Grand Chamber's recent decision in the cases of *Sejdić and Finci v Bosnia and Herzegovina*.¹³⁵ The cases concern the compatibility of the domestic legislation of Bosnia and Herzegovina, which prevents persons not belonging to one of the three constituent peoples (Bosnians, Serbs and Croats) from standing for election to the House of Peoples of the Parliamentary Assembly and the Presidency, with Articles 14 ECHR read together with Article 3 of Protocol 1 (P1-3) and Article 1 of Protocol 12 to the ECHR. To stand for elections, individuals had to affiliate with one of the constituent peoples; as a result, the applicants, who are of Roma and Jewish origin, respectively, were excluded from political participation.

The applicants complained that eligibility to stand for election to the House of Peoples of Bosnia and Herzegovina was based on ethnic origin and constituted unjustified differential treatment under Article 14 ECHR read together with P1-3. Moreover, they alleged that their ineligibility to stand for election to the Presidency of Bosnia and Herzegovina was contrary to the principle of non-discrimination in Protocol 12.

In assessing the State's compliance with Article 14 read in conjunction with P1-3, the ECtHR reiterated that discrimination means treating differently persons in similar situations, without an objective and reasonable justification. 'No objective and reasonable justification', in the Court's view,

¹³⁵ *Sejdić and Finci* (n 55).

means that the distinction in question does not pursue a ‘legitimate aim’ or that there is not a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’.¹³⁶

Furthermore, depending on the circumstances, the subject matter and the background, States may have varying degrees of the margin of discretion.

As to the ground for discrimination, the ECtHR reaffirmed that discrimination based on a person’s ethnic origin is a form of a racial discrimination. As a particularly egregious kind of discrimination, racial discrimination requires from the authorities special vigilance and a vigorous reaction. In view of its perilous consequences, in cases involving a difference in treatment based on race or ethnicity, the concept of any ‘objective and reasonable justification’ must be construed as strictly as possible. Moreover, no difference in treatment exclusively or primarily based on a person’s ethnic origin can be objectively justified in a contemporary democratic society based on the principles of pluralism and cultural diversity. That being said, Article 14 does not preclude States from treating groups differently to correct ‘factual inequalities’ between them. In addition, in some situations a failure to attempt to correct inequality through a difference in treatment without an objective and reasonable justification may violate this provision.

Accordingly, the ECtHR has not deviated from its previous jurisprudence on Article 14 and has reaffirmed the principles established in its case law. In applying these principles to the present case, the ECtHR found a violation of Article 14 ECHR read in conjunction with P1-3 in relation to the applicants’ right to stand for election to the House of Peoples of the Parliamentary Assembly. Where eligibility to stand for

¹³⁶ *Sejdić and Finci* (n 55) para 42.

election to the Presidency of Bosnia and Herzegovina is concerned, the ECtHR established that irrespective of whether elections to the Presidency fell within the ambit of P1-3, Article 1 of Protocol 12 applied to the case, because this was a right set out in law. Relying on the same reasoning as under Article 14 ECHR, the ECtHR ruled that there was no pertinent distinction between the House of Peoples and the Presidency of Bosnia and Herzegovina and concluded that there was also a violation of Article 1 of Protocol 12.¹³⁷

In his partly concurring and partly dissenting opinion, Judge Mijovic expressed disappointment with the ECtHR's brief reasoning in assessing alleged discrimination under Protocol 12, considering the huge expectations that the Court would

use this case, as the very first of its kind, to lay down specific first principles, standards or tests that might be considered universal and applicable to future cases concerning general discrimination.¹³⁸

Nonetheless, by finding a violation of Protocol 12 in the first case where the instrument was invoked by persons belonging to minorities suffering discrimination as to political participation, the ECtHR confirmed that this instrument may further enhance the protection of minorities under the ECHR. Furthermore, as this case demonstrates, the added value of Protocol 12 is in its application to any 'right set forth by law'.¹³⁹

¹³⁷ So far, we have overviewed the general principles in the ECtHR's assessment of non-discrimination. The ECtHR's reasoning on non-discrimination in political participation in the context of the present case is discussed in more detail on pages 65-66.

¹³⁸ *Sejdić and Finci* (n 55) Partly concurring and partly dissenting opinion of Judge Mijovic, joined by Judge Hajiyev.

¹³⁹ Some developments in the area of non-discrimination based on racial or ethnic origin took place in the African and Inter-American contexts as well. Thus, the African Commission on Human and Peoples' Rights (ACHPR) found a violation of Article 2 on non-discrimination of the African Charter (n 52) based on the ground of ethnic origin in the cases such as *Amnesty International v Zambia* (Comm no 212/98 (1999)) and the *Organisation Mondiale Contre la Torture and others v Rwanda* (Comm nos 27/89, 46/91, 49/91, 99/93 (1996)).

In *Amnesty International v Zambia*, Zambia deported two prominent political figures, which in the view of the applicants constituted discrimination and violated *inter alia* Article 2 of the African Charter. The ACHPR noted that Article 2 imposes an obligation on Zambia to guarantee the rights protected under this instrument to all persons within its jurisdiction irrespective of political or any other opinion. This obligation not to discriminate against persons within its jurisdiction was reaffirmed by the ACHPR against Zambia in another case concerning deportations of West Africans in *Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia* (Comm no 71/92) (1996). Without much ado, the ACHPR concluded that the arbitrary removal of one's citizenship cannot be justified and hence there was a violation of Article 2.

Similarly, in *Organisation Mondiale Contre la Torture and others v Rwanda*, the African Commission did not specify any particular test for applying the principle of non-discrimination. The case concerned the expulsion from Rwanda of Burundi nationals (who had been refugees in Rwanda for many years), and arbitrary arrests and detentions made on the basis of ethnic origin, including membership in the Tutsi ethnic group, in various parts of the country by the Rwandan security forces. In para 22 of the communication, the ACHPR held that

[t]here is considerable evidence, undisputed by the government, that the violations of the rights of individuals have occurred on the basis of their being Burundian nationals or members of the Tutsi ethnic group. The denial of numerous rights to individuals on account of their nationality or membership of a particular ethnic group clearly violates Article 2.

Such a brief reasoning may be explained by the fact that despite the numerous notifications of the communications sent by the ACHPR, the Government of Rwanda did not supply any substantive response. Thus, because the applicants' claims remained uncontested by the Government, the ACHPR had to decide based on the facts provided (para 20).

The ACHPR has slightly expanded on its interpretation of the principle of non-discrimination in *Malawi African Association and others v Mauritania*, concerning discriminatory treatment of many Black Mauritians, who because of the colour of their skin were forced to flee, or were detained, tortured or killed. The ACHPR interpreted Article 2 AfrCH as essential to the spirit of the instrument, which *inter alia* pursues the goal of the elimination of all forms of discrimination and aims to ensure equality among all human beings. The ACHPR then relied on Article 1(1) of the UN Declaration of the Rights of People Belonging to National, Ethnic, Religious or Linguistic Minorities and maintained that international human rights law and the international community accord significance to the eradication of discrimination in all its forms. Therefore, a State's discriminatory treatment of its own indigenes based on the colour of their skin was an unacceptable discriminatory attitude in violation of Article 2.

Thus, the ACHPR accorded a heightened scrutiny to cases of discrimination based on ethnic origin or race. In all three cases, discriminatory treatment of minority groups was blatantly obvious. Nevertheless, in the future, it is desirable for the ACHPR to provide an explicit analysis of its review mechanism, comparable to the jurisprudence of the ECtHR and the HRC, to clearly indicate which State acts may contravene Article 2.

In this regard, the Inter-American Court of Human Rights' decision in *The Yean and Bosico Children v Dominican Republic* case ((Ser C) no 130 (2005)) is highly commendable for its thorough assessment of discriminatory denial of birth certificates to children of Haitian origin. The Yean and Bosico children of Haitian origin were born in the Dominican Republic. Article 11 of the Constitution of the Dominican Republic stipulated that all those born on its territory are Dominicans (*ius soli*) (para 109(12)), except for the children of foreign diplomats resident in the country or *the children of those in transit*.

Around 500,000 undocumented Haitian workers live in the Dominican Republic; many of them have been born on Dominican territory and lived there for up to 40 years (para 153). Most of them "face a situation of permanent illegality, which they transmit to their children, who cannot obtain Dominican nationality because, according to the restrictive interpretation that Dominican Authorities give to article 11 of the Constitution, they are children of 'foreigners in transit'" (para 153). As a result, there are significant obstacles for these children to receive a birth certificate, which entitles them to attend a public school, and have access to healthcare and social assistance services. Furthermore, because of their precarious economic conditions and fear of deportation, many families of Haitian origin use the late declaration of birth procedure to declare their children born in the Dominican Republic (para 109(10)). To make the late declaration of birth procedure for children under 13, parents should produce 3 pieces of evidence; for the registration of children over 13 years, there is a list of 11 requirements (para 109(14), 109(17), 109(18) and 109(20)). When the Yean and Bosico children's parents made the late declaration of birth, both children were under the age of 13. However, the registrar refused their

1.4. Conclusions

The principle of non-discrimination is an essential requirement of an effective regime of minority protection. As noted in the introduction to the thesis and illustrated in subsequent chapters, this principle is the driving force behind minority protection. Despite its importance, the jurisprudence of international courts and quasi-judicial bodies reveals that this principle has not been developed to its full potential. In particular, provisions in international and regional treaties on non-discrimination were mainly applied to cases concerning direct discrimination and it is only relatively recently that the jurisprudence of courts has begun to differentiate between cases involving direct and indirect discrimination. It is hoped that the free-standing provision on non-discrimination in Protocol 12 will strengthen further the ECtHR's jurisprudence.

Where direct discrimination against minorities is concerned, only a limited number of cases has been considered before international courts and quasi-judicial bodies. The

registration, because the documents presented were insufficient for late registration, based on the list of 11 requirements.

The Inter-American Court observed in this regard that the State “adopted different positions regarding the requirements the children had to fulfil” and that “there are no standard criteria for demanding and applying the requirements for late birth registration of children under 13 years of age in the Dominican Republic” (para 109(16)). The Inter-American Court further noted that although the determination of who has a right to be a national falls within a State's domestic jurisdiction, this discretionary authority may be restricted in order to protect individuals against arbitrary acts of States (para 140). Thus, there are two State obligations in this respect: to provide individuals with the equal and effective protection of the law and to reduce statelessness (para 140). In particular, “the peremptory legal principle of the equal and effective protection of the law and non-discrimination determines that, when regulating mechanisms for granting nationality, States must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of population when exercising their rights” (para 141). Moreover, the obligation to respect and ensure the principle of the right to equal protection and non-discrimination applies irrespective of a person's migratory status in a State. Consequently, States have the “obligation to ensure this fundamental principle to its citizens and to any foreigner who is on its territory, without any discrimination based on regular or irregular residence, nationality, race, gender or any other cause” (para 155). Therefore, the Dominican Republic was obliged to adopt all necessary positive measures for Yean and Bosico children to access the late registration procedure in conditions of equality and non-discrimination and to fully exercise and enjoy their right to Dominican nationality (para 177). The implications of this ruling are very powerful: the Inter-American Court strongly condemned racial discrimination in access to nationality and upheld equality of treatment to all individuals on the State's territory.

ECtHR, for example, was often reluctant to consider the claims of minorities under Article 14 ECHR, partly due to political sensitivity surrounding the ‘minority question’ in Europe, and partly due to the accessory nature of this provision applied together with other ECHR rights. As a result, in the past, once the ECtHR found a violation of a substantive provision of the ECHR, it tended to omit assessment of claims under Article 14 ECHR. The ECtHR’s recent case law, however, can be commended for its willingness to assess anti-discrimination claims brought forward by minorities.

As to findings of indirect discrimination against minorities, although developments in the HRC and the ECtHR’s jurisprudence have been slow, they can be evaluated as positive advancements in anti-discrimination law, because they may open the way for greater protection of minority groups. In this respect, a major shift can be observed in the ECtHR’s jurisprudence, which accepted statistical evidence and agreed that in certain situations the burden of proof may be shifted onto the authorities.

Where the grounds for discrimination are concerned, international and regional courts and quasi-judicial bodies seem to accord a high level of scrutiny in cases concerning discrimination on the grounds of race or ethnicity. For example, *Timishev v Russia* and *Sejdić and Finci v Bosnia and Herzegovina* constitute a welcome development in anti-discrimination law. In contrast, the case law on discrimination based on membership of a national minority and religion is limited and requires broader application. Although it is commendable that racial discrimination is strongly condemned, the differentiation between the grounds of non-discrimination may lead

to an undesirable hierarchy, with racial and ethnic minority groups receiving a higher level of protection than national and religious minorities.

Overall, it is hoped that recent advancements in the jurisprudence of the ECtHR, coupled with legislative developments such as Protocol 12 ECHR, may serve as a major impetus for strengthening anti-discrimination law. However, a wider ratification of Protocol 12, particularly by western European countries, is essential to strengthen anti-discrimination law under the ECHR. Furthermore, the application of the FCNM in line with the ACFC's broad construal of the provisions on non-discrimination may significantly enhance the rights of minorities in Europe.

Section 2. Special rights of minorities

As noted in the introduction to the thesis on page 8, minority protection has two main dimensions. The above-discussed right of minorities to non-discriminatory treatment is only one side of the coin. The other, equally important, aspect of minority protection is the need for special rights requiring positive action from States that actively guarantee, for example, the right to political participation and the right to education specifically tailored to the needs of minorities. In a sense, special rights are the second side of the same coin, because they aim to ensure substantive equality between majorities and minorities.

One of the earliest authorities clarifying the dual aspect of minority protection is the advisory opinion of the Permanent Court of International Justice (PCIJ) in *Minority*

Schools in Albania.¹⁴⁰ The PCIJ was asked to rule on the compatibility of amendments to the Constitution of Albania which abolished private schools with Article 5(1) of the Albanian Declaration¹⁴¹ made upon its accession to the League of Nations. The Albanian Government argued that, the abolition of private schools was not discriminatory because it equally affected majorities and minorities.¹⁴² Moreover, in the Government's view, maintaining minority schools would privilege minorities over majorities; consequently, the provision should be construed "in the manner most favourable to the sovereignty of the Albanian State."¹⁴³

The PCIJ ruled that to ensure protection for minorities States should both place minorities on an equal footing with other nationals (non-discrimination) and guarantee to minorities the means to preserve their characteristics (positive action).¹⁴⁴ These two requirements are equally significant, because "there would be no true equality between a majority and minority if the latter were deprived of its own institutions."¹⁴⁵ The PCIJ concluded that the intention of the Declaration was to "grant to the minority an unconditional right to maintain and create their own charitable institutions and

¹⁴⁰ *Greece v Albania* (1935) PCIJ Series A/B no 64.

¹⁴¹ Article 5(1) of the Albanian Declaration stated:

Albanian nationals who belong to racial, religious or linguistic minorities will enjoy the same treatment and security in law and in fact as other Albanian nationals. In particular they shall have an equal right to maintain, manage and control at their own expense or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.

¹⁴² *Greece v Albania* (n 140) 9.

¹⁴³ *Greece v Albania* (n 140) 12.

¹⁴⁴ *Greece v Albania* (n 140) 14.

¹⁴⁵ *Greece v Albania* (n 140) 14.

schools”,¹⁴⁶ because any lesser treatment would result in inequality in fact. Therefore, under the Declaration,¹⁴⁷ Albania had to preserve private minority schools.

Accordingly, creating of conditions favourable to the preservation of a minority identity constitutes an essential feature of minority protection. In its General Comment on Article 27 ICCPR, the HRC confirmed that there is a State duty to adopt positive measures “necessary to protect the identity of a minority and the rights of its members.”¹⁴⁸ Similarly, Article 5 FCNM requires States to ensure the substantive equality of minorities, by adopting positive measures to promote the

conditions necessary for persons belonging to national minorities to maintain and develop their culture and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.

Significantly, ‘special rights’ should be differentiated from ‘special measures.’ A ‘special measure’ is a temporary preferential treatment of certain groups with the aim of leveling the playing field between majorities and minorities. These include, for example, affirmative action and quotas. This thesis deals mainly with special rights of minorities, which have a general application, and does not elaborate on context-specific temporary special measures.

Consequently, Section 2 of Chapter I is devoted to the special rights of minorities. First, the right of minorities to political participation with an emphasis on the rights to vote and stand for elections is discussed (sub-section 1). Then the freedom of

¹⁴⁶ *Greece v Albania* (n 140) 25.

¹⁴⁷ For the text of the Declaration, see (n 141).

¹⁴⁸ General Comment No 23 (n 51) paras 6(1) and 6(2).

minorities to manifest a religion with the focus on religious dress is analysed (sub-section 2). Another significant special right of minorities, i.e., the right to education, with an emphasis on access to education is assessed next (sub-section 3). Finally, conditions for granting and withdrawing autonomy by States are evaluated. Even though there is no right to autonomy as such, where the collective aspect of minority protection is prominent, autonomy arrangements are indispensable to create effective protection of minorities, because they allow a group to decide on matters of special concern (sub-section 4).

1. The Right to Political Participation

It is generally recognised that minority rights are better protected when a group enjoys an effective right to political participation. This is so because a group may express its views in relation to the choice of its representatives in the legislature and other offices. This right may take different forms, including the right to direct representation at the institutional level and the right to participate in decision-making processes that may affect a minority group.

1.1. Relevant provisions on the right to political participation

The right to political participation is recognised under the main international and regional human rights instruments. Examples include Article 25 ICCPR and P1-3 ECHR.¹⁴⁹ These general human rights guarantees also apply to members of

¹⁴⁹ See also, International Convention on the Elimination of All Forms of Racial Discrimination (n 131) Article 5(c); American Convention on Human Rights (n 52) Article 23 and African Charter on Human and Peoples' Rights (n 52) Article 13.

minorities. In addition, a number of provisions are specifically applicable to persons belonging to minorities. Among these, Article 27 ICCPR and Article 15 FCNM are particularly significant. While Article 15 FCNM explicitly requires States to create the conditions necessary for effective participation of persons belonging to national minorities in all aspects of a country's life, including in public affairs, and in particular those affecting them, Article 27 ICCPR does not include such references. Nevertheless, in interpreting the rights of minorities under Article 27 ICCPR the HRC maintained that the exercise of cultural rights may include a particular way of life in relation to land resources, especially in the case of indigenous peoples; therefore, States need to ensure that members of minority communities can effectively participate in decisions which affect them.¹⁵⁰ The following focuses on recent jurisprudential developments relating to the rights to vote and to stand for elections.

¹⁵⁰ General Comment No 23 (n 51) para 7.

Indeed, the HRC's jurisprudence affirms the right of minorities to participate in matters affecting their interests, such as in *Ilmari Länsman et al v Finland* (Communication no 511/1992) (1994) CCPR/C/52/D/511/1992), *Jouni Länsman et al v Finland* (Communication no 671/1995) (1996) CCPR/C/58/D/671/1995) and *Apirana Mahuika et al v New Zealand* (Communication no 547/1993) (2000) CCPR/C/70/D/547/1993). In these cases, the authors of communications complained that the States' commercial exploitation of natural resources had a disruptive effect on their traditional way of life. In assessing whether Finland and New Zealand had violated their obligations under Article 27 ICCPR, the HRC focused on evaluating State measures taken to ensure the effective participation of members of the minority communities concerned in decisions which affected them. For example, in *Apirana Mahuika et al v New Zealand*, the HRC emphasised that two criteria are essential to evaluate the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority: "whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy" (para 9.5). In all three communications, the HRC found that because the States consulted the groups concerned before they adopted relevant domestic legislation and took into specific consideration the sustainability of the minority groups' traditional activities, there was no violation of Article 27 ICCPR. Thus, in *Apirana Mahuika et al v New Zealand*, the HRC concluded that "by engaging itself in the process of broad consultation before proceeding to legislate, and by paying specific attention to the sustainability of Maori fishing activities," New Zealand took the necessary steps to comply with Article 27 ICCPR (para 9.8). Accordingly, Article 27 ICCPR also includes the right to effective participation of minorities in matters affecting their interests.

1.2. *The right to Vote*

In its General Comment on Article 25 ICCPR, the HRC emphasised that a democratic government, based on the consent of the people and in conformity with the principles of the ICCPR, comprises the core of Article 25.¹⁵¹ States must report to the HRC on the conditions for access to public service positions, including dismissal or removal from office, so that any irregularities could be timely detected.¹⁵² Where voting rights are concerned, States must respect and implement the results of genuine elections.¹⁵³

Moreover, States are obliged to adopt legislative and other measures¹⁵⁴ to ensure that minorities enjoy political rights and are not excluded from the electoral process. Thus,

¹⁵¹ Human Rights Committee, General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) (1996) CCPR/C/21/Rev.1/Add.7, para 1.

¹⁵² General Comment No 25 (n 151) para 24.

¹⁵³ General Comment No 25 (n 151) para 19.

Similar trends can be observed in the jurisprudence of regional courts and quasi-judicial bodies. Thus, in *Walter Humberto Vasques Vejarano v Peru* (Case No 11.166, Report No 48/00), the Inter-American Commission on Human Rights (IACtHR) established that by removing the applicant from the post of justice of Peru's Supreme Court of Justice, the President of the Republic of Peru, violated, *inter alia*, his right to participate in Government under Article 23 of the American Convention on Human Rights (n 52). Although the right to political participation does not prescribe a form of government or separation of powers within government, "a democratic structure is an essential element for the establishment of a political society where human rights can be fully realized" (para 93). The IACtHR emphasised that the right to govern rests with the people, "who alone are empowered to decide their own and immediate destiny and to designate their legitimate representatives" (para 93).

Likewise, in *Constitutional Rights Project and Civil Liberties Organisation v Nigeria* (Communication no 102/93) (1998), the African Commission on Human and People's Rights (ACHPR) emphasised the relevance of democracy and respect for the voters' choice in the exercise of political rights. The ACHPR ruled that Nigeria violated Article 13 of the African Charter (n 52) by annulling the results of elections from several districts during the 1993 presidential elections. The African Commission emphasised that under international human rights law, certain standards must be applied uniformly across national borders. Governments must be liable to meet these standards. It is the duty of international observers to ascertain whether elections were free and fair; otherwise, it would be contrary to "the logic of international law if a national government with a vested interest in the outcome of an election, were the final arbiter of whether the election took place in accordance with international standards" (para 47). Furthermore, the right to participate freely in government entails the right to vote for a representative of one's choice; accordingly, government must respect the results of the free expression of the will of the voters (para 50).

¹⁵⁴ General Comment No 25 (n 151) para 1.

in *Aziz v Cyprus*¹⁵⁵ the ECtHR established that by failing to introduce any legislative changes to its constitution ensuing from the occupation of northern Cyprus by Turkey, Cyprus violated P1-3. As a result, Cyprus did not ensure the right of Turkish-Cypriots to political participation.¹⁵⁶ This failure to introduce necessary legislative provisions completely deprived the applicant of any opportunity to express his opinion in the choice of the legislature of the country of his nationality and permanent residence,¹⁵⁷ thus impairing the very essence of the applicant's right to vote.

However, not every differential treatment in the electoral system of a State amounts to discrimination. Indeed, States may choose to introduce a regime which through differential treatment would ensure respect for minorities' rights. Thus, in *Lindsay and others v the United Kingdom*,¹⁵⁸ the European Commission of Human Rights (ECmHR) decided that the application of a proportional representation system in Northern Ireland, as opposed to a 'first past the post' system in the rest of the United Kingdom, was compatible with P1-3. The reason for applying different systems was protection of the rights of a minority, and was, hence, justified. The ECmHR developed this approach further in *Moureaux v Belgium*¹⁵⁹ by emphasising that States may be obliged to take account of the special position of minorities when electors choose candidates based on their belonging to an ethnic or linguistic group.

¹⁵⁵ *Aziz v Cyprus* (n 68).

¹⁵⁶ *Aziz v Cyprus* (n 68) para 30.

¹⁵⁷ *Aziz v Cyprus* (n 68) para 29.

¹⁵⁸ *Lindsay and others v the United Kingdom* (n 31).

¹⁵⁹ *Moureaux v Belgium* (App 9267/81) (1983) 33 DR 114.

1.3. The right to stand for elections

International instruments do not impose on States any particular electoral system. However, they require States to guarantee the free expression of the electorate. In particular, the drawing of electoral boundaries and allocation of votes “should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.”¹⁶⁰ Moreover, States should avoid disadvantaging minorities by introducing changes to the administrative structures of a country.¹⁶¹

Thus, in *Istvan Matyus v Slovakia*,¹⁶² the applicant complained that the number of residents per representative in five voting districts in the town of RoňÁava was not proportional to the number of inhabitants in the various districts. As a result, there was

one representative per 1,000 residents in district number one; one per 800 residents in district number two; one per 1,400 residents in district number three; one per 200 residents in district number four; and one per 200 residents in district number five.¹⁶³

As a candidate in voting district number three, the applicant claimed that his right to political participation was violated because he was not given an equal opportunity to exercise his right to be elected to posts in the town council. In its decision, the Constitutional Court of Slovakia established that by drawing election districts for the

¹⁶⁰ General Comment No 25 (n 151) para 21.

¹⁶¹ In addition, States must refrain from measures which may alter the proportions of the population in areas inhabited by national minorities, aimed at restricting their rights and freedom under the FCNM: see FCNM (n 3) Article 16.

¹⁶² *Mátyus v Slovakia* (Communication no 923/2000) (2002) CCPR/C/75/D/923/2000.

¹⁶³ *Mátyus v Slovakia* (n 162) para 2.2.

same municipal council with substantial differences between the number of inhabitants per elected representative, Slovakia acted contrary to the election law specifically requiring proportional representation of inhabitants in voting districts and the constitutional provision on equality of voting rights. However, the Constitutional Court dismissed the complaint of Mr Matyus because he complained after the election; declaring the election invalid could have interfered with the rights of elected representatives who acquired their positions in good faith.¹⁶⁴ In assessing this claim under Article 25 ICCPR, the HRC, taking note of the Constitutional Court's pronouncement and the fact that Slovakia failed to explain the differences in the number of representatives per district, found a violation of Article 25 (a) and (c) ICCPR.¹⁶⁵

Generally, when minorities' access to standing for elections was barred without sufficient procedural guarantees, international courts do not hesitate to find a violation. For example, in *Antonina Ignatane v Latvia*¹⁶⁶ and *Podkolzina v Latvia*¹⁶⁷ both the HRC and the ECtHR respectively found that Latvia breached the applicants' right to stand for election. In both cases, although the applicants successfully passed language aptitude tests as required by electoral legislation, they were subjected to additional verification of language skills without sufficient procedural safeguards. Thus, the full responsibility for assessment of the applicants' language proficiency

¹⁶⁴ *Mátyus v Slovakia* (n 162) para 4.5.

¹⁶⁵ Similarly, the ACFC condemned changes introduced to electoral constituencies which negatively impacted the political participation of minorities: 'Second Opinion on the Slovak Republic' (2006) ACFC/OP/II(2005)004, para 115; see also 'First Opinion on Ukraine' (2002) ACFC/INF/OP/I(2002)010, para 69.

¹⁶⁶ *Antonina Ignatane v Latvia* (Communication no 884/1999) (2001) CCPR/C/72/D/884/1999.

¹⁶⁷ *Podkolzina v Latvia* (n 65).

was “left to a single civil servant, who had exorbitant power in the matter.”¹⁶⁸ This procedural aspect of the cases was decisive in finding a violation.¹⁶⁹

Despite international courts’ strong stance on procedural guarantees, where the access of minorities to standing in elections was barred due to linguistic restrictions, their interpretation has been less generous. By way of example, in the inadmissibility decision in *Fryske Nasjonale Partij and others v the Netherlands*,¹⁷⁰ the ECmHR established that the applicants, whose names had been struck off a list of candidates for appearing in a minority language, could not claim a violation of P1-3. In the ECmHR’s view the applicants were not as such prevented from standing as candidates; it was rather due to problems related to the language in which the registration took place. The candidates could simply submit translation of their names to the authorities.

¹⁶⁸ *Podkolzina v Latvia* (n 65) para 36.

¹⁶⁹ In addition to procedural guarantees, States must ensure judicial review of acts which may limit the right to stand for elections. In *Susana Higuchi Miyagawa v Peru* ((Case 11.428) (1999) Report no 119/99), the IACtHR found that Peru violated Article 23 of the American Convention on Human Rights (n 52). The applicant was prevented from standing for election, because the National Electoral Board invalidated the applicant’s registration due to typographical errors detected in the list (para 37). Significantly, the decisions of the National Electoral Board were not subject to review. The IACtHR found that Peru was obliged to guarantee effective remedies to review its acts which may violate political rights as protected under Article 23 ACHR (para 56).

Moreover, States should not unreasonably limit the right of persons to stand for election by requiring candidates to be members of parties or of specific parties (General Comment No 25 (n 151) para 17). The IACtHR recently admitted a case of *Nasry Javier Ictech Guifarro v Honduras* ((Case 2570-02) (2007) Report no 30/06) challenging the refusal of Honduras to register the applicant’s independent candidacy in the local elections. In its submission, Honduras indicated that the applicant failed to submit all necessary documents required by the Electoral and Political Organizations Law; besides the law did not permit the registration of independent candidates. Thus, it is to be determined whether the IACtHR will consider a State’s refusal to register independent candidates in local elections as a violation of the right to political participation.

¹⁷⁰ *Fryske Nasjonale Partij and others v the Netherlands* (App 11100/84) (1985) 45 DR 240.

The ECtHR took a similar approach in *Mathieu-Mohin and Clerfayt v Belgium*,¹⁷¹ by declaring that Belgium did not violate the political rights of the members of the French-speaking minority, who became ineligible for membership in the Flemish Community Council because they took their Parliamentary oaths in French. The ECtHR ruled that the principle of territoriality was essential to preserve a balance between different regions in Belgium, and, therefore, there was no discrimination against the applicants; the essence of their right to stand for election and to be elected was not violated.¹⁷²

Belonging to a State's polity is another argument which States used to justify excluding minorities from standing for election. For example, in *Ždanoka v Latvia*¹⁷³ the applicant was permanently disqualified from standing for election because of her work for the Communist Party of Latvia (CPL) during Latvia's transition to independence between January and September 1991. The First Section of the ECtHR reviewed the proportionality of the applicant's permanent disqualification from standing for election under P1-3 and found that it impaired the essence of the applicant's rights. However, the Grand Chamber of the ECtHR reversed this decision and ruled that States may impose stricter requirements on eligibility to stand for election to Parliament than on the exercise of voting rights.¹⁷⁴ Therefore, the ECtHR's review was limited to checking for the absence of arbitrariness in domestic procedures

¹⁷¹ *Mathieu-Mohin and Clerfayt* (n 101).

¹⁷² It is noteworthy that the Advisory Committee for the Protection of National Minorities called on States to adopt a narrow approach to language proficiency requirements. See, for example, ACFC, 'First Opinion on Estonia' (2001) ACFC/INF/OP/I(2002)005, paras 55-60; 'Second Opinion on Estonia' (2005) ACFC/INF/OP/II(2005)001, paras 163-166.

¹⁷³ *Ždanoka v Latvia* (App no 58278/00) (2005) 41 EHRR 31.

¹⁷⁴ *Ždanoka v Latvia* (App no 58278/00) (2007) 45 EHRR 17.

to disqualify possible candidates.¹⁷⁵ In the view of most of the judges, the applicant's active participation in the CPL rendered logical and proportionate her exclusion from standing for a seat in the national Parliament.¹⁷⁶

Significantly, the ECtHR's recent jurisprudence on political participation of minorities has been strengthened through more confident application of the principle of non-discrimination. This trend has started in *Aziz v Cyprus*.¹⁷⁷ In addition to claiming a violation of P1-3 discussed above on page 59, the applicant in *Aziz* also complained that he had been discriminated against in the exercise of his voting rights on account of his national origin and association with a national minority, in breach of Article 14 ECHR read together with P1-3.¹⁷⁸ Since 1964, the Cypriot Government had adopted laws which benefited the Greek Cypriots only, without safeguarding the rights of Turkish Cypriots. As a result, the applicant and thousands of other Turkish Cypriots were deprived of their right to vote or stand for election.¹⁷⁹ The Government rejected these claims on the ground that the applicant was not in a comparable situation to voters who belonged to the Greek Cypriot community.¹⁸⁰ The ECtHR concluded that there was no reasonable and objective justification for the differential treatment of Turkish Cypriots and found a separate breach of Article 14 in conjunction with P1-3.

¹⁷⁵ *Ždanoka v Latvia* (n 174) para 115 (e).

¹⁷⁶ *Ždanoka v Latvia* (n 174) para 132.

¹⁷⁷ *Aziz v Cyprus* (n 68).

¹⁷⁸ *Aziz v Cyprus* (n 68) para 31.

¹⁷⁹ *Aziz v Cyprus* (n 68) para 32.

¹⁸⁰ *Aziz v Cyprus* (n 68) para 33.

Even more far-reaching conclusions regarding political participation of minorities stem from the recent cases of *Sejdić and Finci v Bosnia and Herzegovina*,¹⁸¹ which allowed the ECtHR to crystallise its case law on non-discrimination under Article 14 ECHR read in conjunction with P1-3. The cases concern the compatibility with the ECHR rights of the domestic legislation of Bosnia and Herzegovina, which prevents persons not belonging to one of the three constituent peoples (Bosnians, Serbs and Croats) from standing for election to the Presidency and the House of Peoples of the Parliamentary Assembly.

In its assessment, the ECtHR observed that eligibility to stand for election for the House of Peoples of Bosnia and Herzegovina is based on affiliation with one of the ‘constituent people’. Even though the exclusion pursued a legitimate aim of restoring peace in line with the preamble to the ECHR, the maintenance of the system did not satisfy the requirement of proportionality, based on the following reasons. First, the situation in Bosnia and Herzegovina has significantly improved since the Dayton Peace Agreement and the aim of restoring peace was not as pressing anymore.¹⁸² Second, even though the ECHR does not prescribe a particular electoral system, there exist mechanisms of power-sharing which would not automatically lead to the total exclusion of persons belonging to the 23 legally recognised national minorities or of a person who does not want to identify himself as exclusively Bosnian, Croat or Serb, or refuses to so identify himself or herself for whatever reason.¹⁸³ Accordingly, there

¹⁸¹ *Sejdić and Finci v Bosnia and Herzegovina* (n 55).

¹⁸² The State joined NATO’s Partnership for Peace in 2006, signed and ratified a Stabilisation and Association Agreement with the European Union in 2008, successfully amended its Constitution in 2009 and was recently elected as a member of the UN Security Council for a two-year term. Furthermore, preparations are under way for the closure of an international administration as an enforcement measure under Chapter VII of the UN Charter.

was the possibility of achieving the same end by using alternative means. Finally, as a member of the Council of Europe and a candidate for EU membership, Bosnia and Herzegovina has voluntarily assumed certain obligations, including revision of its electoral legislation.¹⁸⁴ Based on these considerations, the ECtHR concluded that the applicants' continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacked an objective and reasonable justification and constituted a breach of Article 14 taken together with P1-3. In addition, the ECtHR found that an identical constitutional pre-condition concerning eligibility to stand for election to the Presidency violated Article 1 of Protocol 12.

The case advances the right of minorities to political participation in several respects. First, as discussed in the section on non-discrimination on pages 27 and 49, Article 1 of Protocol 12 widens the application of the principle of non-discrimination. In this case it condemns discrimination against minorities in political participation not only in the elected legislature, i.e., the right protected under P1-3, but also in other offices, such as the Presidency.¹⁸⁵ Moreover, the ECtHR granted the State only a narrow margin of discretion, despite the Government's suggestion that the ECtHR should follow *Ždanoka v Latvia* in order to reaffirm States' considerable latitude in

¹⁸³ *Sejdić and Finci v Bosnia and Herzegovina* (n 55) para 22. This point is well illustrated in the opinion of the Opinions of the European Commission for Democracy through Law (Venice Commission). The Venice Commission is the Council of Europe's advisory body on constitutional matters.

¹⁸⁴ *Sejdić and Finci v Bosnia and Herzegovina* (n 55) para 49. Thus, by ratifying the ECHR and its Protocols, the State agreed to meet the relevant standards. Moreover, Bosnia and Herzegovina committed itself to review (with the assistance of the Venice Commission) its electoral legislation and revise it where necessary to comply with the Council of Europe standards within one year of its accession. This commitment is reaffirmed in the 2008 Stabilization and Association Agreement with the EU.

¹⁸⁵ Judge Mijovic has even questioned the application of Article 3 of Protocol 1 to elections to the House of Peoples, because in his view, members of this House are not elected, but designated/selected by the entity Parliaments: *Sejdić and Finci v Bosnia and Herzegovina* (n 55) Partly concurring and partly dissenting opinion of Judge Mijovic, joined by Judge Hajiyev.

establishing electoral systems within their constitutional order and distinguish the case from *Aziz v Cyprus*, because minorities in Bosnia and Herzegovina have not been prevented from standing for election in all bodies. Furthermore, despite Judge Bonello's strong criticism,¹⁸⁶ the ECtHR was not influenced by the historic and political circumstances leading to the establishment of the current electoral system in Bosnia and Herzegovina; instead, it focused on the State's firm commitments to review its electoral legislation and guarantee political participation of minorities in line with Council of Europe standards.

Accordingly, the potential of the principle of non-discrimination to guarantee political participation of minorities is becoming increasingly significant. These developments may bring the ECtHR's case law in line with the jurisprudence of other international and regional quasi-judicial bodies. Thus, the HRC has been more generous in its interpretation of the right to stand for election by requiring States to avoid excluding persons who are otherwise eligible to stand for election using unreasonable or discriminatory requirements such as descent, or by reason of political affiliation.¹⁸⁷

Similarly, the ACFC has attached a high significance to non-discrimination in connection with political participation by regarding Articles 15, 4 and 5 "as the three corners of a triangle which together form the main foundations of the Framework

¹⁸⁶ *Sejdić and Finci v Bosnia and Herzegovina* (n 55) Dissenting opinion of Judge Bonello.

¹⁸⁷ General Comment No 25 (n 151) para 15. Likewise, in *Legal Resources Foundation v Zambia* (Communication no 211/98) (2001), the African Commission was less forgiving of Zambia's exclusion of 35% of the population from standing for the office of the president by imposing the requirement of Zambian descent. The African Commission found a violation of Article 13 of the African Charter (n 52), because not only did the Government violate the right of individuals to stand for election, but also it breached the right of citizens to freely choose political representatives of their choice (para 72).

Convention.”¹⁸⁸ This is so because equal treatment of minorities in political participation may ensure that their concerns about preservation and development of their identity can be heard and considered.¹⁸⁹ In addition, Article 15 FCNM requires States to create *conditions* conducive to minorities’ political participation, in particular on those issues that affect them. Therefore, representation of minorities in consultative and decision-making processes is essential to guarantee that they have a say in matters of particular concern connected with preservation of their identity. In this regard, the ACFC assesses the ‘effectiveness’ of minority participation by examining not only the means adopted by States to ensure political participation, but also “their impact on the situation of the persons concerned and on the society as a whole.”¹⁹⁰ Accordingly, to comply with the FCNM, States have to ensure effective participation of national minorities under Article 15 FCNM by enacting relevant legislation and allowing minorities to have a substantial influence on the decisions made, including, where relevant, shared ownership of adopted decisions.¹⁹¹

1.4. Conclusions

The right to vote and stand for elections is essential for political participation of minorities. International and regional courts and quasi-judicial bodies have enhanced the protection of this right by condemning legislative gaps depriving minorities of opportunities (or limiting their ability) to express their opinion in the choice of a

¹⁸⁸ ACFC, ‘Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs’ (2008) ACFC/31DOC(2008)001, para 13.

¹⁸⁹ ACFC, ‘Commentary on the Effective Participation...’ (n 188) para 15.

¹⁹⁰ ACFC, ‘Commentary on the Effective Participation...’ (n 188) para 18.

¹⁹¹ ACFC, ‘Commentary on the Effective Participation...’ (n 188) para 19.

legislature or to have an effective say in matters of particular concern to the group, such as in *Aziz v Cyprus*. The jurisprudence of international courts and quasi-judicial bodies suggests that cases challenging procedural irregularities, such as the number of representatives per district or a requirement of additional verification of language skills without sufficient procedural safeguards, proved to be successful in protecting the rights of members of minority groups to stand for election.

Regrettably, courts have not attached similarly high importance to the use of minority languages in the exercise of political rights. Furthermore, there is no requirement to accommodate the political participation of minorities through a specific electoral system. In this regard, the FCNM is highly commendable for demanding States to ensure *conditions* necessary for *effective* participation of minorities.

Currently, the main tool to advance the rights of minorities to political participation is more effective use of the principle of non-discrimination. As exemplified by *Sejdić and Finci*, Protocol 12 ECHR may prove a useful tool to ensure equal treatment of minorities in the exercise of political rights. However, on its own the principle of non-discrimination is not sufficient to fully guarantee political participation of minorities and some positive State action is essential for the meaningful exercise of this right, as required by Article 15 FCNM.

2. Freedom to manifest religion: religious dress

This section is devoted to the right of minorities to manifest their religion, with the focus on religious dress. First, relevant provisions in international treaties on freedom to manifest religion are discussed (2.1). Second, the term ‘manifestation of religion’ is

analysed in the context of international courts' case law (3.2). We will then turn to the ECtHR and the HRC's specific headscarf-cases in educational establishments (3.3). The section concludes with parental rights in education, to determine whether parents may request schools to permit their children to wear religious dress (3.4).

2.1. Relevant provisions on freedom to manifest religion

International instruments differentiate between freedom of religion or belief and the right to manifest religious beliefs. Thus, Article 9(1) ECHR stipulates the right of everyone to freedom of thought, conscience and religion, which includes freedom to change his/her religion or belief, and freedom, either alone or in community with others and in public or private, to manifest one's religion or belief, in worship, teaching, practice and observance. The passive aspect of freedom of religion, referred as *forum internum*, is protected in its entirety. Article 9(2) then clarifies that manifesting a religion or belief, i.e., an active aspect of freedom of religion also referred as *forum externum*, may be subject to limitations. Freedom to manifest one's religion or belief can be limited in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others. These limitations must be prescribed by law and necessary in a democratic society.

Article 18 ICCPR largely replicates Article 9 ECHR. Thus, paragraph 1 of the provision outlines freedom of religion, whereas paragraph 3 stipulates that limitations must be prescribed by law and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. Significantly, paragraph 2

specifies that '[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.'¹⁹²

As to freedom of religion as specifically a minority right, Article 27 ICCPR stipulates that minorities will not be denied the right, in community with the other members of their group, to profess and practise their own religion. In the light of Article 18 ICCPR, it may be questioned whether Article 27 ICCPR really adds anything to the protection of religious minorities. The answer to this question should be in the affirmative in order not to render Article 27 meaningless. Article 27 ICCPR establishes the basic standard in the field of minority rights and implies a requirement of positive State action¹⁹³ to allow a minority group to profess and practice its religion without discrimination. Another question that may arise in this regard is whether, in the absence of a limitation clause in Article 27 ICCPR, the manifestation of a minority religion may be limited in line with Article 18(3) ICCPR. Although some practices, such as human sacrifices and genital mutilation, can be legitimately restricted in a democratic society as violating other fundamental rights, such as the right to life¹⁹⁴ and freedom from inhuman or degrading treatment,¹⁹⁵ religious dress of minorities should not be subject to such limitations.

¹⁹² Freedom of religion is also guaranteed in a non-legally binding UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) A/RES/36/55, Articles 1 and 8; Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) Article 18. In the Inter-American contexts, American Convention on Human Rights (n 52) largely repeats Article 18 ICCPR in its Article 12. Furthermore, Article 8 of the African Charter (n 52) guarantees freedom of conscience, and the profession and free practice of religion; the exercise of these freedoms must be subject to law and order.

¹⁹³ General Comment No 23 (n 51) para 4.

¹⁹⁴ Article 6 ICCPR (n 17).

¹⁹⁵ Article 7 ICCPR (n 17).

Similarly, Article 7 FCNM guarantees national minorities freedom of religion. In addition, to emphasise the significance of *forum externum* in the exercise of religious rights, Article 8 FCNM is specifically devoted to the right of national minorities to manifest religion. Like Article 27 ICCPR, Article 8 FCNM does not contain any limitations on manifestation of religion. However, the *travaux préparatoires* of the FCNM suggests that Articles 7 and 8 FCNM were phrased as principles and hence did not include specific details. As a result, Article 19 FCNM and the explanatory note to the FCNM clarify that the same limitations as in Article 9(2) ECHR apply to freedom of religion under this instrument.¹⁹⁶ The explanatory note to the FCNM also specifies that everyone is entitled to manifest his or her religion, and national minorities should be able to enjoy this right without discrimination under Article 4 FCNM. In its practice, the ACFC insisted on the exercise of this right without discrimination.¹⁹⁷ Once again, the principle of non-discrimination is central to the enjoyment of minority rights, including freedom to manifest religion.

2.2. Defining ‘Manifestation of religion’

Before we overview the jurisprudence of international courts on religious dress, it may be useful to define the term ‘manifestation’. The freedom to manifest religion or belief takes place in worship, observance, practice and teaching, which encompasses a broad range of acts. Thus, ‘worship’ extends to

ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places

¹⁹⁶ Framework Convention for the Protection of National Minorities and Explanatory report, H(1995)010, 18 <[http://www.coe.int/t/e/human_rights/minorities/2._framework_convention_%28monitoring%29/1._texts/PDF_H\(1995\)010%20FCNM_ExplanatoryReport_en.pdf](http://www.coe.int/t/e/human_rights/minorities/2._framework_convention_%28monitoring%29/1._texts/PDF_H(1995)010%20FCNM_ExplanatoryReport_en.pdf)> accessed 30 June 2008.

¹⁹⁷ ACFC, ‘First Opinion on Armenia’ (2002) ACFC/OP/I(2003)003, para 43.

of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest.¹⁹⁸

The term ‘observance’ has not been clearly defined in the jurisprudence of courts and quasi-judicial bodies. For example in *Jewish Liturgical Association Cha’are Shalom Ve Tsedek v France*,¹⁹⁹ the applicant argued that by refusing to authorise the performance of ritual slaughter by this association and by granting such a permit to the Jewish Consistorial Association of Paris only, France infringed in a discriminatory way its right to manifest religion through observance of the rites of the Jewish religion. In dealing with the term ‘observance’, the ECtHR simply noted that

[i]t is not contested that ritual slaughter, as indeed its name indicates, constitutes a rite or “rite” (the word in the French text of the Convention corresponding to “observance” in the English)...²⁰⁰

Furthermore, in *Manoussakis and others v Greece*,²⁰¹ the ECtHR included the term ‘observance’ in the notion of ‘worship’. It found that Greece interfered with the applicants’ freedom to manifest their religion in worship and observance by prosecuting several Jehovah’s Witnesses who set up a place of worship without a governmental permit.

In a similar vein, the HRC deals with the practice and teaching of religion or belief together. In the HRC’s view these include

acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and

¹⁹⁸ Human Rights Committee, General Comment No 22: The right to freedom of thought, conscience and religion (Article 18) (1993) CCPR/C/21/Rev.1/Add.4, para 4. See also *Kuznetsov and others v Russia* (App no 184/02) ECHR 11 January 2007.

¹⁹⁹ *Jewish Liturgical Association* (n 66).

²⁰⁰ *Jewish Liturgical Association* (n 66) para 73.

²⁰¹ *Manoussakis and others v Greece* (App no 18748/91) ECHR 26 September 1996.

teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.²⁰²

The ECtHR dealt with the term ‘teaching’ in *Kokkinakis v Greece*,²⁰³ where the applicant claimed that by convicting him for proselytism, Greece violated his freedom to manifest religion through teaching. The ECtHR stated that Article 9

includes in principle the right to try to convince one’s neighbour, for example through ‘teaching’, failing which, moreover, ‘freedom to change [one’s] religion or belief’, enshrined in Article 9 ..., would be likely to remain a dead letter.²⁰⁴

Due to its wide scope, the term most difficult to define under Article 9 ECHR has proved to be ‘practice’. Thus, in *Arrowsmith v the United Kingdom*²⁰⁵ concerning a pacifist handing leaflets to soldiers urging them not to go to Northern Ireland, the ECmHR attempted to differentiate between ‘practice’ in the sense of Article 9 ECHR and a broad range of acts simply inspired or motivated by a religion. As a result, the Convention bodies have developed an additional limitation to the freedom to manifest religion by insisting that Article 9 does not protect “every act motivated or inspired by a religion or belief and does not in all cases guarantee the right to behave in the public sphere in a way which is dictated by a belief.”²⁰⁶ Thus, a ‘practice’ under Article 9 ECHR requires a direct link between the belief and the action. For example, in *Valsamis v Greece*,²⁰⁷ punishment of a schoolgirl’s refusal, influenced by her

²⁰² General Comment No 22 (n 198) para 4.

²⁰³ *Kokkinakis v Greece* (App no 14307/88) (1994) 17 EHRR 397.

²⁰⁴ *Kokkinakis v Greece* (n 203) para 31.

²⁰⁵ *Arrowsmith v the United Kingdom* (App no 7050/75) (1978) 19 DR 5.

²⁰⁶ *Arrowsmith* (n 205); *Kalaç v Turkey* (1997) 27 EHRR 552, para 27; *Tepeli and others v Turkey* (App no 31876/96) ECHR 11 September 2001.

²⁰⁷ *Valsamis v Greece* (App no 21787/93) (1997) 24 EHRR 294; *Efstratiou v Greece* (App no 24095/94) (1997) 24 EHRR 294.

religious beliefs as a Jehovah's Witness, to attend a school parade was not sufficient to constitute a violation of Article 9(1), because such behaviour was not required, but merely encouraged by her religion.²⁰⁸ In its case law, the ECtHR has read a further limitation in relation to manifestation of religion, referred as the 'specific situation' rule. Thus, according to the ECtHR, individuals' freedom to manifest their religion is not limited if they can alter their circumstances, for example, by quitting a job which does not accommodate their religious practices.²⁰⁹ Moreover, an alternative means of exercising freedom of religion must be impossible before the ECtHR would find a violation.²¹⁰

In the ECtHR's view these restrictions on freedom to manifest one's religion may be necessary in a democratic society where several religions coexist within one and the same population.²¹¹ In this respect, the ECtHR has often emphasised the role of a State as the neutral and impartial organiser of the exercise of various religions and the guarantor of public order, religious harmony and tolerance in a democratic society. A State, however, does not have any power to assess the legitimacy of religious beliefs or the ways in which they are expressed.²¹² Thus, the role of a State is to ensure mutual tolerance of various groups and not to remove the cause of tension between

²⁰⁸ *Valsamis v Greece* (n 207) para 22; *Efstratiou v Greece* (n 207) para 23.

²⁰⁹ *X v Denmark* (App no 7374/76) (1976) 5 DR 157; *Ahmad v United Kingdom* (App no 8160/78) (1981) 4 EHRR 126; *Karlsson v Sweden* (App no 12356/86) (1988) 57 DR 172; *Knudsen v Norway* (App no 11045/84) (1986) 8 EHRR 48; *Kontinen v Finland* (App no 24949/94) (1996) 87-A DR 68; *Stedman v the United Kingdom* (App no 29107/95) (1997) 23 EHRR CD 168; cf, *Darby v Sweden* (App no 11581/85) (1990) EHRR 774.

²¹⁰ *Jewish Liturgical Association* (n 66): "alternative means of accommodating religious beliefs had ... to be 'impossible' before a claim of interference under Article 9 could succeed."

²¹¹ *Kokkinakis v Greece* (n 203) para 33.

²¹² *Manoussakis and others v Greece* (n 201) para 47; see also, *Case of Refah Partisi (the Welfare Party) and others v Turkey* (App nos 41340/98, 41342/98, 41343/98 and 41344/98) ECHR 31 July 2001, para 91.

the groups by eliminating pluralism.²¹³ Although these principles suggest that individual interests may 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 people from minorities and avoids any abuse of a dominant position.²¹⁴

The ECtHR in its supervisory capacity determines whether national measures were justified in principle and proportionate. Such assessment usually includes three considerations, i.e., whether the interference 1. was prescribed by law; 2. pursued a legitimate aim; and 3. was necessary in a democratic society. As to the last criterion, considering that there is no uniform conception of religion and its significance in society throughout Europe,²¹⁵ and the meaning or impact of manifesting religion in public may differ according to time and context,²¹⁶ the ECtHR grants a wide margin of discretion to States in the choice of the extent and form of regulating manifestation of religion in the specific domestic situation.²¹⁷

2.3. Head-scarf case-law

To date, one of the most prominent headscarf-cases remains *Şahin v Turkey*.²¹⁸ The case concerns a Turkish University student excluded from attending classes and

²¹³ *United Communist Party of Turkey (TBKP) v Turkey* (App no 19392/92) (1998) 26 EHRR 121, para 57; *Serif v Greece* (App no 38178/97) (1999) 31 EHRR 561, para 53.

²¹⁴ *Young, James and Webster v the United Kingdom* (App no 7601/76 and 7806/77) (1981) 4 EHRR 38, para 63, and *Chassagnou v France* (App nos 25088/94, 28331/95, 28443/95) (2000) 29 EHRR 615, para 112.

²¹⁵ *Otto-Preminger-Institut v Austria* (App no 13470/87) (1994) 19 ENRR 34, para 50.

²¹⁶ *Dahlab v Switzerland* (App no 42393/98) ECHR 15 January 2001.

²¹⁷ *Murphy v Ireland* (App no 44179/98) ECHR 10 July 2003, para 73.

taking exams for wearing a headscarf. In deciding this case, first the Chamber (unanimously) and then the Grand Chamber of the ECtHR (16 votes to 1) found that the applicant's right to manifest her religion was violated under Article 9(1) ECHR. However, the interference with her right was justified under Article 9(2), because it was in accordance with law, pursued the legitimate aim of protecting the rights of others and public order and was necessary in a democratic society where several religions coexist within one society; hence, restrictions may be placed on "freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected."²¹⁹ The rationale behind this conclusion was that in the secular Muslim-majority Turkey, the mere wearing of a headscarf was capable of having a proselytising effect. The Court accepted Turkey's justifications based on the principles of secularism and gender equality, and found that the interference with the applicant's freedom to wear religious dress in a public space was justified.

Only Judge Tulkens dissented from the majority decision in the Grand Chamber. She argued that the interference could not be justified under Article 9(2) ECHR, because it was not necessary in a democratic society. In particular, she emphasised the need to harmonise the 'principles of secularism, equality and liberty, not to weigh one against the other.' Where secularism is concerned, she maintained that the fact that the Grand Chamber recognised the force of this principle

did not release it from its obligation to establish that the ban on wearing the Islamic headscarf to which the applicant was subject was

²¹⁸ *Şahin v Turkey* (App no 44774/98) (Grand Chamber) (2007) 44 EHRR 5.

²¹⁹ *Şahin v Turkey* (Application No 44774/98) (2005) 41 EHRR 8, para 97.

necessary to secure compliance with that principle and, therefore, met a 'pressing social need'.²²⁰

As to gender equality, she was unable 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.' Moreover, in her view, the ECtHR granted too wide margin of discretion to Turkey. This matter was not a local matter anymore, because similar disputes, contesting the right to manifest a religion, had come before the courts in several European States. Therefore, there was a need for European supervision.

In its reasoning in *Şahin*, the majority of judges heavily relied on *Karaduman v Turkey*²²¹ and *Dahlab v Switzerland*.²²² *Karaduman* concerned a Muslim student who did not receive her degree certificate for two years because she refused to supply an identity photograph showing her bare-headed, which she claimed was contrary to her religious beliefs. The ECmHR found that there was no interference with Article 9(1) ECHR, because the purpose of the photograph was to identify the person concerned and it could not be used by an individual to manifest her religious beliefs. Hence, Article 9(1) ECHR did not apply to this situation.²²³

Dahlab concerned a school teacher's complaint that the State interfered with her freedom of religion by dismissing her from the job for wearing a headscarf, even

²²⁰ Dissenting opinion of Judge Tulkens in *Şahin v Turkey* (n 218).

²²¹ *Karaduman v Turkey* (App no 16278/90) (1993) 74 DR 93.

²²² *Dahlab v Switzerland* (n 216).

²²³ The applicant further complained that the authorities discriminated between females of foreign and Turkish nationality, because the restriction did not affect female foreign nationals who had total freedom as to how to dress in Turkish Universities. The ECmHR refused to deal with the applicant's claim under Article 14 ECHR, because she had not exhausted domestic remedies.

though there were no complaints from children or their parents. The ECtHR found the application inadmissible, because this interference was necessary in a democratic society and was justified under Article 9(2) on the grounds of protecting the rights and freedoms of others, public order and public safety,²²⁴ because Ms Dahlab taught very young children who could be easily influenced by such a manifestation.²²⁵ Arguably, because as a teacher Ms Dahlab represented the State and was in the position of authority towards the very young children, aged four to eight, that she taught, this case should be distinguished from *Karaduman* and *Şahin*,

Indeed, holding a position of authority has proved to be of crucial significance in international courts' jurisprudence. For example, in *Lariss v Greece*,²²⁶ the ECtHR did not find a violation of Article 9 ECHR, because the applicant was an officer in the Greek army, who sought to proselytise his subordinates. Similarly, in *Delgado Paez*,²²⁷ the HRC found that dismissal of a teacher of religion and ethics for advocating his own views on religion among pupils did not violate Article 18 ICCPR, because he used his superior position to influence children's religious views. In contrast, lack of a superior position on the part of a proselytiser led the ECtHR to find

²²⁴ Cf the German headscarf case in Bundesverfassungsgericht (2 BverfGE 1436/02) (2003) discussed on page 242.

²²⁵ Furthermore, she alleged that the prohibition imposed by the Swiss authorities amounted to discrimination on the ground of sex under Article 14 read in conjunction with Article 9 ECHR, 'in that a man belonging to the Muslim faith could teach at a State school without being subject to any form of prohibition.' The Court did not consider the applicant's claims of discrimination based on the ground of sex under Article 14 read in conjunction with Article 9 ECHR. The ECtHR merely noted that the measure by which the applicant was prohibited,

purely in the context of her professional duties, from wearing an Islamic headscarf was not directed at her as a member of the female sex but pursued the legitimate aim of ensuring the neutrality of the State primary-education system. Such a measure could also be applied to a man who, in similar circumstances, wore clothing that clearly identified him as a member of a different faith.

²²⁶ *Lariss v Greece* (1998) EHRR 329.

²²⁷ *Delgado Paez v Colombia* (Communication no 195/1985) (1990) CCPR/C/39/D/195/1985.

a violation of Article 9, such as in *Kokkinakis v Greece*,²²⁸ where the applicant's conviction for proselytising others was found to infringe his rights under Article 9 ECHR.

Accordingly, even if the ECtHR could find an element of superior position in *Dahlab* (if not of indoctrination), and, hence, accept Switzerland's justifications under Article 9(2), this factor was not present in *Karaduman* and *Şahin* which concerned university students; clearly, the applicants were not in a position of authority towards their peers and did not represent a State. Regrettably, the arguments drawing on a distinction between the secularity as a constitutional principle requiring the government to be neutral towards religions, and an individual's wearing a particular dress to take part in a religious practice which does not infringe upon the State's secularity,²²⁹ fell on deaf ears in the case of the Convention institutions.

Consequently, the ECtHR's approach to manifestation of religion in educational establishments is rather restrictive. The Court continues to apply the same line of reasoning as in *Şahin* in its latest case law, without any hint at a change of direction. In 2006, the ECtHR declared inadmissible three 'headscarf' cases against Turkey. *Emine Araç v Turkey*²³⁰ concerned rejection of an application for university because the applicant was in her headscarf in the accompanying photo. In *Şefika Köse and 93 others v Turkey*,²³¹ the ECtHR found that a headscarf ban in a second level school

²²⁸ *Kokkinakis v Greece* (n 203).

²²⁹ *Karaduman v Turkey* (n 221).

²³⁰ *Emine Araç v Turkey* (App no 9907/02) ECHR 19 September 2006.

²³¹ *Şefika Köse and 93 others v Turkey* (App no 26625/02) ECHR 24 January 2006. See also PACE, 'State of human rights and democracy in Europe' (2007) Doc 11217, para 62.

providing theological training did not violate Article 9 ECHR; nor did the ECtHR accept the arguments of a university lecturer in *Kurtulmuş v Turkey*,²³² who lost her job after refusing to remove her headscarf.

Moreover, the ECtHR has recently affirmed the principles established in *Şahin* in the context of secular France in its identical judgments in *Dogru v France*²³³ and *Kervanci v France*.²³⁴ *Dogru* concerned the case of a Muslim girl, expelled from school for her failure to comply with teachers' instructions to remove her headscarf whilst at school.²³⁵ The applicant's parents appealed against the school's decision; however, French national courts repeatedly rejected their application, explaining that by not complying with instructions, Ms Dogru "overstepped the limits of the right to express and manifest her religious beliefs on the school premises."²³⁶ The applicant claimed violation of her rights under Article 9 ECHR before the ECtHR.

In its assessment, the ECtHR established that the ban on wearing a headscarf during sports classes and the expulsion of Ms Dogru from school for refusing to remove it constituted interference with her freedom of religion under Article 9(1). It then proceeded to determine whether such interference was justified under Article 9(2). First, the ECtHR found that the criterion of 'prescribed by law' was satisfied. Because the facts of the case took place in 1999, the Court considered that case law of the *Conseil d'État* comprised the relevant legal framework. In this way, the ECtHR

²³² *Kurtulmuş v Turkey* (App no 65500/01) ECHR 24 January 2006.

²³³ *Dogru v France* (App no 27058/05) ECHR 4 December 2008.

²³⁴ *Kervanci v France* (App no 31645/04) ECHR 4 December 2008.

²³⁵ *Dogru v France* (n 233) para 8.

²³⁶ *Dogru v France* (n 233) para 14.

avoided dealing with the highly controversial and widely criticised 2004 French ban on religious symbols in public schools. The ECtHR further noted that the interference pursued the legitimate aim of protecting the rights and freedoms of others and public order. Where the criterion of necessity in a democratic society is concerned, the ECtHR recapitulated its case law²³⁷ to reiterate that to protect the rights of others States may impose limitations on the exercise of freedom of religion. Furthermore, the Court repeatedly emphasised the role of national decision-making bodies and States' wide margin of appreciation in regulating the wearing of religious dress in educational establishments.²³⁸ The ECtHR also observed that as in Turkey and Switzerland, secularism is a constitutional principle in France and an attitude which "fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention."²³⁹ Consequently, the interference with the applicant's right was justified under Article 9(2).

The ECtHR has recently dealt with the 2004 French law banning wearing of conspicuous religious symbols in public schools. In 2009, the ECtHR declared inadmissible several cases against France, which concerned the expulsion of pupils from school for wearing religious dress. Thus, in *Aktas v France*,²⁴⁰ *Bayrak v*

²³⁷ *Şahin v Turkey* (n 218); *Refah Partisi (the Welfare Party) and others v Turkey* (n 212); *X v the United Kingdom* (App no 7992/77) (1978) 14 DR 234; *Phull v France* (App no 35753/03) ECHR 11 January 2005; *El Morsli v France* (App no 15585/06) ECHR 4 March 2008; *Karaduman v Turkey* (n 221); *Dahlab v Switzerland* (n 216); *Şefika Köse and 93 others v Turkey* (n 231).

²³⁸ *Dogru v France* (n 233) paras 63, 71, 72, 75 and 77.

²³⁹ *Dogru v France* (n 233) para 72.

²⁴⁰ *Aktas v France* (App no 43563/08) ECHR 17 July 2009.

France,²⁴¹ *Gamaleddyn v France*,²⁴² and *Ghazal v France*²⁴³, the girls, who were Muslims and wore headscarves, were banned from public schools for wearing conspicuous religious dress.²⁴⁴ The ECtHR found that there was no violation of Article 9 ECHR, because the restriction was provided by the law of 15 March 2004 and restated in Article L.141-5-1 of the Education Code, which pursued the legitimate aim of protecting the rights and freedoms of others and public order. The ECtHR emphasised the importance of the State's role as the neutral and impartial organiser of exercise of various religions. Furthermore, the ban on all conspicuous religious dress was based on the constitutional principle of secularism, which was, in the Court's view, consistent with the values protected under the ECHR and its case law. Since the interference by the authorities with the pupils' freedom to manifest their religion was justified and proportionate, the applications were rejected as manifestly ill-founded. The ECtHR also rejected the claims of discrimination under Article 14 in conjunction with Article 9 ECHR as manifestly ill-founded, because French law applied to all conspicuous religious symbols.

The above overview of the ECtHR's case law reveals that individuals practicing minority religions may suffer adverse treatment in education because they may be excluded from educational activities for dressing in accordance with their religious beliefs. Furthermore, the ECtHR's approach in the headscarf cases seems to disregard the notion of indirect discrimination, as the Court fails to assess the disproportionate

²⁴¹ *Bayrak v France* (App no 14308/08) ECHR 17 July 2009.

²⁴² *Gamaleddyn v France* (App no 18527/08) ECHR 17 July 2009.

²⁴³ *Ghazal v France* (App no 29134/08) ECHR 17 July 2009.

²⁴⁴ See also inadmissibility decisions in *J Singh v France* (App no 25463/08) ECHR 17 July 2009 and *R Singh v France* (App no 27561/08) ECHR 17 July 2009, where boys were banned from a school for wearing a 'keski', an under-turban worn by Sikhs.

effect of neutral rules on religious minorities. Overall, the ECtHR's headscarf case law is disappointing, because the Court deals with these cases under Article 9 ECHR only and has refused to consider the applicants' claims under Article 14 ECHR on non-discrimination read in conjunction with Article 9 ECHR, or has dealt with these claims inadequately. Although the ECHR does not contain special minority rights, the ECtHR has consistently taken into consideration the needs of minorities in other contexts.²⁴⁵ It is essential that the Court adopts a similar approach to the right of minorities to manifest their religious dress. This could be done through granting States a narrower margin of discretion in such cases, because these matters cannot be considered domestic any longer, and have a clear trans-European dimension.

The ECtHR's case law contrasts starkly with the HRC's decision in *Hudoyberganova v Uzbekistan*.²⁴⁶ The applicant, a university student was stopped from wearing a headscarf to a public university. She was first excluded from attending the university and subsequently expelled pursuant to Article 14 of Law on Liberty of Conscience and Religious Organisations, explicitly banning wearing religious dress in public places. She brought a claim before the HRC and alleged that Uzbekistan violated her freedom of religion under Article 18 ICCPR.

In its assessment, the HRC first emphasised that the freedom to manifest a religion encompasses wearing religious dress in public. Furthermore, it considered 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

²⁴⁵ For examples, see (n 31).

²⁴⁶ *Hudoyberganova v Uzbekistan* (Communication no 931/2000) (2005) 19 BHRC 581.

the individual's freedom to have or adopt a religion."²⁴⁷ The HRC has already affirmed this approach in its General Comment on freedom of religion: policies or practices intended to coerce individuals based on their beliefs, such as restricting access to education, are inconsistent with Article 18(2).²⁴⁸

The HRC found that by imposing such limitation, Uzbekistan violated Article 18(2) ICCPR on freedom of religion, because the State failed to justify this ban on the permitted grounds under Article 18(3). The HRC emphasised that this finding is

without either prejudging the right of a State party to limit expressions of religion and belief in the context of [A]rticle 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.²⁴⁹

In her individual opinion, Ruth Wedgwood drew attention to the fact that some States allow any type of religious dress, including covering of one's face, while others ban such attire based on the principle of secularism. She further emphasised that covering the face may prevent a university instructor from seeing students' reaction to a lecture or seminar. Therefore, States may be permitted to 'restrict forms of dress that directly interfere with effective pedagogy.' However, the State had not advanced this argument and the individual opinion should not make a case for the State.

Furthermore, dissenting committee member, Hipolito Solari-Yrigoyen argued that Uzbekistan did not violate the applicant's rights because the ban was imposed on all students. A state university is not a place of worship, and, therefore, imposing of

²⁴⁷ *Hudoyberganova v Uzbekistan* (n 246) para 6.2.

²⁴⁸ General Comment No 22 (n 198) para 5.

²⁴⁹ *Hudoyberganova v Uzbekistan* (n 246) para 6.2.

limitations on the manifestation of religion was legitimate. In Solari-Yrigoyen's view, 'academic institutions have the right to adopt specific rules to govern their own premises.' He also emphasised that the applicant failed to rebut the assertion by the Committee of Religious Affairs (Cabinet of Ministers), who "informed [her] that Islam does not prescribe a specific cult dress."²⁵⁰

It is hard to agree with the dissenting opinion for several reasons. First, the case concerned an individual wishing to wear religious dress, not the right of an academic institution to govern its premises. The fact that individuals may manifest their religions does not mean that the university automatically subscribes to their beliefs.²⁵¹ Second, individuals should be free to interpret their beliefs and dress in accordance with the dictates of their faith. It is not up to a government representative to have an authoritative say in this matter.

Despite the overall positive outcome of the case for the applicant, this dissent indicates that most likely the outcome of the case would be similar to that in *Şahin* were the government to provide justification under Article 18(3). Nevertheless, this case demonstrates that the HRC's interpretation of Article 18(2) ICCPR could preclude coercion based on religion, for example, through denial of access to education. It is hoped that the HRC may use this provision to its fullest potential to safeguard the right of religious minorities to wear in educational establishments dress dictated by their religious beliefs. As the case law of the ECtHR on religious dress revealed, individuals practicing minority religions may often be subjected to

²⁵⁰ *Hudoyberganova v Uzbekistan* (n 246) para 2.8.

²⁵¹ See the arguments of the German Constitutional Court in *Bundesverfassungsgericht* (n 224).

exclusion from educational activities for dressing in accordance with their religious beliefs.

The next sub-section overviews parental rights in education to establish whether these rights add anything to the protection of minority children's right to manifest their religion by dressing in educational establishments in clothes required by their faith.

2.4. Parental rights in education

The parental right to choose education for their children in line with their religious and philosophical convictions is protected under Article 2 of Protocol 1 to the ECHR (P1-2) and Article 18(4) ICCPR.²⁵² Generally, according to the jurisprudence of international and quasi-judicial bodies, matters concerning teaching or curricula are within States' margin of discretion.²⁵³ In the *Danish Sex Education* case, the ECtHR ruled that "the setting and planning of the curriculum fall in principle within the competence of the Contracting States."²⁵⁴ This, the Court said, was necessary for the purposes of expediency and may vary depending on the country and the era. Moreover, States may impart knowledge that directly or indirectly may be of religious

²⁵² See also International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNGA Res 2200A (XXI) (ICESC), Article 13(3); UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (n 192) Article 5; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNGA Res 44/25 (CRC) Article 14; Convention against Discrimination in Education (adopted 14 December 1960, entered into force 22 May 1962) 429 UNTS 93 (CDE) Articles 2(b) and 5(1)(b); and EU Charter of Fundamental Rights (n 9) Article 14(3). Although some of the instruments refer to the children's freedom of thought and conscience (for example, the CRC, Article 14(1)), these provisions are relevant to parental rights in education, because parents have a right to influence their children's upbringing.

²⁵³ *X, Y and Z v Germany* (App no 9411/81) (1982) 29 DR 224.

²⁵⁴ *Kjeldsen, Busk Madsen and Pedersen v Denmark* (App no 5095/71, 5920/72, 5926/72) (1976) 1 EHRR 711, para 53.

or philosophical nature. Furthermore, parents are precluded from objecting to integration of such subjects into the school curricula; “otherwise all institutionalised teaching would run the risk of proving impracticable.”²⁵⁵ Therefore, the ECtHR did not find a violation of P1-2 in this case.

The ECtHR’s main restriction on State activity concerns prohibition of unwanted indoctrination by States in matters of the curriculum;²⁵⁶ for example, in *Folgerø v Norway*²⁵⁷ and *Hasan and Eylem Zengin v Turkey*²⁵⁸ the ECtHR found a violation of P1-2, because the educational curricula of the States concerned accorded a greater weight to teaching the mainstream religions. Likewise, in *Delgado Paez*,²⁵⁹ the HRC found no violation of the author’s rights under Article 18 ICCPR. The author of the communication was dismissed from his job because he advocated progressive religious views different from the traditional Roman Catholic religion. As a teacher of religion he should have respected parental wishes to educate their children in line with their religious views.

In the light of the above-discussed jurisprudence, it is likely that if parents’ religious beliefs differ from those taught in public schools, upon parental request, children are

²⁵⁵ *Kjeldsen, Busk Madsen and Pedersen v Denmark* (n 254) para 53.

²⁵⁶ *Kjeldsen, Busk Madsen and Pedersen v Denmark* (n 254). For decisions on freedom from coercion by a State see also the African Commission on Human Rights and Peoples’ Rights, *Amnesty International, Comite Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan* (Communication nos 48/90, 50/91, 52/91, 89/93) (1999) paras 74 and 76; and *Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interafricaine des Droits de L’Homme, Les Temoins de Jehovah v Zaire* (Communication no 25/89, 47/90, 56/91, 100/93) (2005) para 45.

²⁵⁷ *Folgerø v Norway* (App no 15472/02) ECHR 29 June 2007.

²⁵⁸ *Hasan and Eylem Zengin v Turkey* (App no 1448/04) ECHR 9 October 2007.

²⁵⁹ *Delgado Paez v Colombia* (n 227).

likely to be exempt from religious education, although not all their wishes may be satisfied. For example, children may be required to attend classes on the general history of religion and ethics provided that they are taught in an “unbiased and objective way, respectful of the freedoms of opinion, conscience and expression.”²⁶⁰

Also, to be exempt from certain school activities there should be a direct link between the act and a belief. Thus, in *Efstratiou v Greece* and *Valsamis v Greece*²⁶¹ the applicants’ children were Jehovah’s Witnesses who refused to associate themselves with any kind of violence, even indirectly. Therefore, upon their parents’ request the children were exempt from attending the school’s religious-education lessons and Orthodox Mass. This exemption, however, did not apply to the requirement of taking part in the celebration of the National Day, which commemorated the outbreak of war between Greece and Fascist Italy with school and military parades. Having failed to attend the parade, the children of the applicants were punished with suspension from school for a period of 1-2 days. The parents alleged a violation of P1-2, because their children should not be subjected to attending “events extolling patriotic ideals to which they did not subscribe.”²⁶² The ECtHR ruled that States were not precluded from including in the school curriculum the requirement to parade. Moreover, although parents could exempt their children from certain religious activities, P1-2 did not require the State to guarantee all their wishes. Noting States’ wide margin of discretion in designing the curriculum and the mild punishment of the children, the

²⁶⁰ Committee on Economic, Social and Cultural Rights (CESCR), ‘General Comment on the Right to education (Art. 13)’ (1999) E/C.12/1999/10, para 28. See also *Hartikainen v Finland* (Communication no 40/1978) (1981) CCPR/C/OP/1.

²⁶¹ *Valsamis v Greece* (n 207); *Efstratiou v Greece* (n 207).

²⁶² *Valsamis v Greece* (n 207) para 22, *Efstratiou v Greece* (n 207) para 23.

Court did not find a violation of P1-2.²⁶³ Accordingly, States have a wide margin of discretion in matters concerning education.

Where a school uniform is concerned, in *Stevens v the United Kingdom*,²⁶⁴ the ECmHR declared inadmissible the application of a mother who claimed that punishment of her son for failing to wear a school tie interfered with their right to family life under Article 8 ECHR. It is likely that a similar approach would be adopted by the ECtHR were a claim brought by parents wishing their children to dress in religious clothes under P1-2 or Article 9.

Thus, analysis of the jurisprudence of international courts and bodies on freedom of religion and the parental right to ensure education in line with their religious beliefs reveals that any claim by parents that their children should dress in accordance with a family's religious beliefs is unlikely to succeed.

2.5. Conclusions

Freedom of religion has two aspects – internal and external. Whilst internal beliefs are protected without limitations, external manifestation of religion is subject to limitations as set out in Articles 9(2) ECHR and 18(3) ICCPR. In addition, the ECtHR

²⁶³ The ECtHR expressed its surprise that 'pupils can be required on pain of suspension from school – even if only for two days – to parade outside the school precincts on a holiday.' The Court, however, refused to 'rule on the Greek State's decisions as regards the setting and planning of the school curriculum.' This approach may be explained by the voluntary nature of CoE membership: the ECtHR abstains from interfering with matters of political significance for a country. This approach may be contrasted to that taken by the Supreme Court of the Philippines that exempted children who are Jehovah's Witnesses from participating in the flag ceremony. *Ebralinag v The Division Superintendent of Schools of Cebu* (G.R.Nos 95770 and 95887) 1 March 1993 and 29 December 1995.

²⁶⁴ *Stevens v UK* (App no 11674/85) (1986) 46 DR 245.

has read implied limitations into the assessment of claims under Article 9, insisting that there must be a direct link between the belief and its manifestation. This, in turn, has the potential of excluding minority religions or minority-in-minority situations.

The ECtHR's stance on limiting manifestations of religion has been particularly strong in the headscarf-cases. The Court uncritically accepted the relevant governments' arguments on secularism and gender equality at face value. In the context of Turkey, the ECtHR took into account the political atmosphere and the impact that wearing a headscarf may have in a Muslim-majority country. Subsequently, the Court mechanically applied the same restrictive approach in the context of France.

Nor do parental rights to influence the upbringing of their children add anything to the ability of minority children to manifest their religion in educational establishments. To make the organisation of education practical, States are granted a wide margin of discretion; moreover, States may enact rules that may limit the manifestation of religion to protect the rights of other believers. Overall, the ECtHR's jurisprudence on religious dress in educational establishments is unsatisfactory.

In contrast, the ICCPR has more potential in this respect. This is not only because of the positive outcome in *Hudoyberganova v Uzbekistan*, but also because of the HRC's interpretation of Article 18(2), which specifically precludes coercion of believers in educational establishments. The consistent and minority-friendly jurisprudence of the HRC based on Articles 18(2) and 27 ICCPR may provide a higher standard of protection for religious minorities at the universal level.

3. The Right to Education

The right to education is a right essential to everyone. For minorities, however, “it is also instrumental as a precondition for the full enjoyment of many other rights, such as the right to participation, expression, association, etc.”²⁶⁵ In its General Comment on the right to education, the Committee on Economic, Social and Cultural Rights (CESCR) detailed the essential features of education: availability, accessibility, acceptability and adaptability (the so-called 4As).²⁶⁶ The CESCR explained that *availability* requires functioning educational institutions and programmes; *accessibility* entails open access to education without discrimination, i.e., education should be accessible within physical or technological reach, economically affordable and equal without any discrimination; *acceptability* concerns the form and substance of education; finally, *adaptability* requires flexible education that can be adjusted according to changing social needs. This section reviews international guarantees and the jurisprudence of international and regional courts on the right to education, with the main focus on access to education, including education in a minority language.

3.1. *The right to education in international and regional treaties*

The ICCPR does not contain a provision on the right to education; instead, the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises everyone’s right to education in a very detailed Article 13.²⁶⁷ At the

²⁶⁵ ACFC, ‘Commentary on Education under the Framework Convention for the Protection of National Minorities’ (2006) ACFC/25DOC(2006)002, 7.

²⁶⁶ CESCR, ‘General Comment on the Right to education (Art.13)’ (n 260).

regional level,²⁶⁸ P1-2 ECHR also establishes that ‘[n]o person shall be denied the right to education.’

As to the right of minorities to education, although Article 27 ICCPR does not specifically refer to education, the educational needs of minorities are central to protection of their identity and equal treatment. Furthermore, the FCNM requires States to guarantee access to education in Article 12, to recognise the right of national minorities to set up and to manage their own private educational and training establishments in Article 13 and to provide education in and of minority languages in Article 14.²⁶⁹

The following section overviews the jurisprudence of international and regional courts to highlight the application of some of these standards.

²⁶⁷ International Covenant on Economic, Social and Cultural Rights (n 252) Article 13. See also, Universal Declaration of Human Rights (n 192) Article 26; Convention against Discrimination in Education (n 252) Article 1(1).

²⁶⁸ In the African context, the African Charter (n 52) includes the right to education as a matter of principle in Article 17(1). In the inter-American context, the Inter-American Declaration of the Rights and Duties of Man addresses the right to education in Article XII, as well as Article 13 of Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (entered into force 16 November 1999) OAS Treaty Series No 69 (1988) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82Doc 6 Rev 1 at 67 (1992).

²⁶⁹ Another important instrument which has an extensive provision on education is the European Charter for Minority Languages (1992) ETS No 148 (Languages Charter): Article 8 offers a long list of possibilities for education in regional or minority languages: the higher the number of members of a linguistic minority, the higher protection they may claim from a State. However, States can pick and choose from the Charter’s provisions, taking into consideration their national circumstances: it is sufficient to accede to 35 out of 68 Articles of the instrument. The Languages Charter, however, aims to protect neither human rights, nor minority rights. The main purpose of the instrument is to promote linguistic diversity.

3.2. Access to education

Equality in access to education can be denied directly or indirectly through imposition of additional conditions, which may disadvantage members of a particular group. Therefore, the right to equal access to education requires it to be non-discriminatory; in addition, education should be physically and economically accessible. These aspects of the right to access education have featured in the jurisprudence of international courts.

The ECtHR's first decision on access to education in *Belgian Linguistics*²⁷⁰ has been one of the most influential judgements in this area. The case was brought up by a large number of French-speaking parents living in Dutch-speaking districts of Belgium. The applicants complained that French-speaking children whose parents' place of residence was in the Dutch-speaking region were denied access to schools in bilingual communes on the outskirts of Brussels which enjoyed 'special status'. Access to these bilingual schools was limited to four categories of children: (1) children who had attended classes in 1962-1963, (2) children and family members of university employees, students and teaching staff, (3) children of foreign nationality, and (4) children of French-speaking Belgians living *outside* the Dutch-speaking region.²⁷¹ Thus, children of French-speaking parents who lived in the unilingual Flemish region were denied access to schools in these communes. In contrast, in the same communes Dutch classes were open to all children irrespective of their language or place of residence of their parents.²⁷²

²⁷⁰ *Belgian Linguistics* (n 63).

²⁷¹ *Belgian Linguistics* (n 63) para 27.

In its analysis, the ECtHR first established that P1-2 did not impose any linguistic requirements. Therefore, the right to education under this provision was not violated in Belgium because irrespective of their language children had access to public or subsidised education in Dutch-language schools. Moreover, the ECHR did not guarantee the right to be educated in the language of parents by the public authorities or with their financial support.²⁷³

Nevertheless, the ECtHR indirectly recognised general group-oriented language/education policies and the need to secure protection of certain individuals or groups against discrimination as a part of this process. Thus, the Court ruled that denial of access to existing schools was discriminatory because it stemmed solely from considerations relating to residence; accordingly it found a breach of P1-2 in conjunction with Article 14 ECHR. This finding is very cautious though. The ECtHR did not require Belgium to guarantee the access of French-speaking children to minority schools. Instead, the Court found that the requirement of residence was disproportional to the aims pursued.

²⁷² *Belgian Linguistics* (n 63) para 32.

²⁷³ *Belgian Linguistics* (n 63) para 7.

Similar conclusions were reached by the Permanent Court of International Justice in 1928 in *Rights of Minorities in Upper Silesia (Minority Schools) (Germany v Poland)* (1928) PCIJ Series A No 15. The case addressed the question whether the parental right to choose a school for one's children guaranteed automatic access to such a school. This right was included in the Bilateral Convention between Germany and Poland concerning Upper Silesia and allowed persons legally responsible for a child's education to "choose the language of instruction and the corresponding school for pupil or child, subject to no verification, dispute, pressure or hindrance on the part of the authorities" (*Minority Schools*, 27). The Convention did not contain a requirement to verify parents' declarations; Germany argued that the lack of verification should be interpreted broadly. The PCIJ did not, in fact, agree with the German construal of the Convention. In its view the Convention implied only the right of parents to make a "declaration of intention or of a wish that the instruction of a child or pupil should be given in the minority language" (*Minority Schools*, 30 (emphasis added)). It was only the question of whether a person belongs to a minority that was not subject to verification. However, this did not confer on parents an unlimited right to choose the language of instruction.

Whilst in *Belgian Linguistics* the ECtHR condemned the requirement of residence as hindering access to education, the case of *D H and others v the Czech Republic*²⁷⁴ (discussed on pages 34-36) concerned non-discriminatory access of Roma children to education. The Grand Chamber established that indirect discrimination in access to education based on racial or ethnic origin is prohibited. This finding informed the ECtHR's subsequent case-law. Thus, in *Affaire Sampanis et Autres c Grèce*,²⁷⁵ the ECtHR found that the placement of Roma children in separate classes in a mainstream primary school in a Greek municipality constituted indirect discrimination. Furthermore, in the case of *Oršuš and others v Croatia*²⁷⁶ Roma children were placed in Roma-only classes within certain local primary schools. Croatia maintained that the measure was adopted based on the fact that Romani children did not have adequate command of the Croatian language. The First Section of the ECtHR accepted the government's justification for differential treatment and found no violation of Article 14 ECHR. However, the applicants' request to refer the case to the Grand Chamber succeeded. Relying on *D H and others* and *Sampanis*, the applicants claimed indirect discrimination, and even direct discrimination based on race and ethnicity. In 2010, the Grand Chamber reversed the Chamber's decision and found a violation of Article 14 ECHR taken together with P1-2. The ECtHR distinguished the present case from *D H and others* and *Sampanis*, because the statistics submitted to the Court did not suffice as *prima facie* evidence that access to schools was discriminatory.²⁷⁷ However, in the ECtHR's view, indirect discrimination may be proved without

²⁷⁴ *D H and others v the Czech Republic* (n 71).

²⁷⁵ *Affaire Sampanis et Autres c Grèce* (App no 32526/05) ECHR 5 June 2008, para 96 (in French).

²⁷⁶ *Oršuš and others v Croatia* (App no 15766/03) ECHR 17 July 2008.

²⁷⁷ *Oršuš and others v Croatia* (App no 15766/03) ECHR 16 March 2010, para 152.

statistical evidence.²⁷⁸ The placement of Roma children in separate classes on the basis of their insufficient command of the Croatian language clearly constituted a difference in treatment. Even though such placement may not automatically violate Article 14 ECHR, “when such a measure disproportionately or even, as in the present case, exclusively, affects members of a specific ethnic group, then appropriate safeguards have to be put in place.”²⁷⁹ The ECtHR assessed the conditions of Romani children’s placement in separate classes and found that the lack of specific language aptitude tests,²⁸⁰ as well as an adapted curriculum of a lower standard²⁸¹ indicated that there were not adequate safeguards capable of ensuring a reasonable relationship of proportionality between the means used and the legitimate aim to be pursued. Because the placement of the applicants in Roma-only classes lacked an objective and reasonable justification, the Grand Chamber held that the difference in treatment of Roma children constituted indirect discrimination.

The ACFC took a similarly strong stance in its opinions based on Article 12(3) FCNM, which protects access to education and obliges States to promote ‘equal opportunities for access to education at all levels for persons belonging to national minorities.’ The clear wording of the provision allows the ACFC to set a higher threshold for implementation of Article 12. Thus, in its opinions on Bosnia and Herzegovina,²⁸² Italy,²⁸³ Slovakia,²⁸⁴ etc., the ACFC expressed its concern about the

²⁷⁸ *Oršuš and others v Croatia* (n 277) para 153.

²⁷⁹ *Oršuš and others v Croatia* (n 277) para 157.

²⁸⁰ *Oršuš and others v Croatia* (n 277) para 160.

²⁸¹ *Oršuš and others v Croatia* (n 277) para 163.

²⁸² ACFC, ‘First Opinion on Bosnia and Herzegovina’ (2004) ACFC/INF/OP/I(2005)003, paras 88 and 89.

high level of absenteeism of Roma children; moreover, the ACFC criticised the practice of placing Roma children in special schools.²⁸⁵ In the ACFC's view, "[s]egregated education, often of lower standard than that offered to other students, is one of the most extreme examples of the precarious position of Roma parents and pupils."²⁸⁶ Indeed, even though the establishment and maintenance of separate educational systems for linguistic reasons is allowed, for example, under the UNESCO Convention against Discrimination in Education,²⁸⁷ such permission is conditional on optional attendance and high quality education that conforms to state standards.²⁸⁸ Otherwise, segregation of minorities would constitute discrimination. Accordingly, access to education must be non-discriminatory.²⁸⁹

²⁸³ ACFC, 'First Opinion on Italy' (2001) ACFC/INF/OP/I(2002)007, para 55; 'Second Opinion on Italy' (2005) ACFC/INF/OP/II(2005)003, para 114.

²⁸⁴ ACFC, 'Second Opinion on the Slovak Republic' (2005) ACFC/OP/II(2005)004, para 98.

²⁸⁵ ACFC, 'First Opinion on the Czech Republic' (2001) ACFC/INF/OP/I(2002)002, paras 61-63; 'Second opinion on the Czech Republic' (2005) ACFC/INF/OP/II(2005)002, paras 145-149; 'First Opinion on Bulgaria' (2004) ACFC/OP/I(2006)001, para 97, etc.

²⁸⁶ ACFC, 'Commentary on Education...' (n 265) 21.

²⁸⁷ UNESCO Convention against Discrimination in Education (n 252).

²⁸⁸ UNESCO Convention against Discrimination in Education (n 252) Article 2(b).

²⁸⁹ Generally, there are fewer cases on the right to education in the inter-American and African contexts, because this right is perceived more as a matter of principle, with the countries striving to guarantee to individuals more pressing rights, such as the right to food, health, water, safe environment, such as in *Social and Economic Rights Action Centre and the Centre for Economic (SERAC) and Social Rights (CESR) v Nigeria* (Communication no 155/96) (2001).

In the inter-American context, the Inter-American Court of Human Rights considered a discriminatory denial of access to education in *The Yean and Bosico Children v Dominican Republic* (n 139). In the Dominican Republic, children who did not possess a birth certificate could not access day schools; this limitation adversely affected children of Haitian origin, who often struggled to acquire an identity document. Violeta Bosico, a child of Haitian origin, was denied her birth certificate, and, hence, access to education in day schools. She was initially admitted to day school without a birth certificate and studied up until third grade (para 109(34)). However, when she tried to enrol for the fourth grade in day school, she was denied access because she did not have a birth certificate (para 109(35)). Therefore, she enrolled in evening school for adults over 18 years of age where she attended fourth and fifth grades. The purpose of evening school was to teach adults to read and write only, with pupils doing two grades in one year. The compressed type of education adopted in this school made fewer demands than day school (para 109(36)). The IACHR strongly condemned this denial of access to education in the Dominican Republic. In 2001, as a part of a friendly settlement the State granted Violeta Bosico her

Furthermore, access to education should be physically accessible as exemplified in the ECtHR's judgment in *Cyprus v Turkey*.²⁹⁰ Significantly, the ECtHR's interpretation of access to education in this case also had a linguistic component. The case concerned the compatibility with the terms of P1-2 of a total ban on the use of Greek in secondary schools in Turkish-occupied Northern Cyprus. From the facts of the case, it appears that secondary education in Greek was formerly available to children of Greek Cypriots, but was subsequently abolished by the Turkish-Cypriot authorities. Primary education in Greek was still available to children in Northern Cyprus. However, if parents of these children wished them to continue their education in Greek they had to send them to schools in Southern Cyprus. Alternatively, children could attend English or Turkish schools available in the north. The vast majority of families chose the first option, and many schoolchildren received their secondary education in the south.²⁹¹ However, significant restrictions existed on their return to the north upon completion of their studies. Until 1998 male students who attained the age of 16 and female students who attained the age of 18 were not allowed to return to the north permanently.²⁹² This restriction resulted in the separation of many families upon children's completion of their studies.

In its assessment, the ECtHR first applied the principles established in *Belgian Linguistics*²⁹³ and established that in the strict sense there was no denial of the right to

birth certificate and she returned to day school. Moreover, the IACHR awarded non-pecuniary damages to the applicant and her parents for the violation of her right to education by the Dominican Republic.

²⁹⁰ *Cyprus v Turkey* (App no 25781/94) (2002) 35 EHRR 30.

²⁹¹ *Cyprus v Turkey* (n 290) para 44.

²⁹² *Cyprus v Turkey* (n 290) para 43.

education because children had access to a Turkish or English-language school in the north. However, taking into consideration that the authorities assumed responsibility for providing primary education in Greek, their failure to “make continuing provision for it at the secondary-level must be considered in effect to be a denial of the substance of the right at issue.”²⁹⁴ Children’s attendance of Greek schools in the south could not be considered as a viable alternative due to its impact on the family life in light of limitations imposed on their return to Northern Cyprus. In addition, the Court emphasised that “[t]he authorities must no doubt be aware that it is the wish of Greek-Cypriot parents that the schooling of their children be completed through the medium of the Greek Language.”²⁹⁵ Therefore, by 16 votes to 1 the ECtHR found that there was a breach of P1-2.

Overall, *Cyprus v Turkey* is a significant advancement in the ECtHR’s jurisprudence regarding minority education. It affirms that access to education should not negatively impact family life of minorities. Moreover, the ECtHR established that where the State offers primary education in a minority language, it may also be responsible for provision of secondary education in a minority language.

Can the ECtHR depart from the principles in *Belgian Linguistic* and move from the case-by-case exceptions found in *Cyprus v Turkey* to a general right to mother-tongue education? Even though such a development is possible, it is unlikely. First, the wording of P1-2 does not allow the ECtHR to read in a general right to mother-tongue education; the Court is not to be blamed for the limited wording of this provision.

²⁹³ *Cyprus v Turkey* (n 290) para 277.

²⁹⁴ *Cyprus v Turkey* (n 290) para 278.

²⁹⁵ *Cyprus v Turkey* (n 290) para 278.

Second, the ECHR does not contain an equivalent of Article 27 ICCPR. Although general human rights provisions can be read in a minority-friendly fashion,²⁹⁶ they do not always allow the establishment of generally applicable principles. Therefore, the Court's approach in *Cyprus v Turkey* is more realistic.

Where economic accessibility is concerned, States are free to adopt an educational policy as they see fit: there is no State obligation to fund private minority schools.²⁹⁷ However, even though States are not obliged to financially support private schools, the question of public funding may arise if a State chooses to subsidise education of some minority groups, and refuses funding to others. Such treatment may be challenged as discriminatory, although it will not necessarily require positive State action. Thus, the decision of the HRC in *Waldman v Canada*²⁹⁸ (discussed on page 40) suggests that although there is no requirement for States to fund private minority schools, if they choose to assist private schools, minority schools must be treated in an equal manner. Furthermore, as Scheinin argued in his individual (concurring) opinion in *Waldman v Canada*, Article 27 ICCPR imposes positive State obligations to promote religious instruction in minority religions; to this end, an optional arrangement within the public education system is one permissible arrangement.²⁹⁹ To avoid discrimination in funding religious (or linguistic) education, in some cases States may legitimately make decisions regarding public funding based on whether

²⁹⁶ *Hopu and Bessert v France* (n 32).

²⁹⁷ Although minorities have the right to establish their own schools, for example, under Article 13 FCNM, as the Advisory Committee noted, this provision does not give rise to any observations of State compliance, simply because minorities do not have the financial resources to establish their own educational institutions. ACFC, 'Commentary on Education...' (n 265) 22.

²⁹⁸ *Waldman v Canada* (n 62).

²⁹⁹ *Waldman v Canada* (n 62) Individual opinion by member Martin Scheinin (concurring), para 5.

there is a constant demand from minorities for such education; another legitimate criterion in making such decisions is whether there is a sufficient number of children to attend such a school to ensure viability of providing religious (or linguistic) education.³⁰⁰

3.3. Conclusions

Access to education is essential to guarantee the right of minorities to education, as well as to ensure that they have equal opportunities with majorities to enjoy other fundamental rights, such as the right to effective participation in the political, economic, social and cultural life of a country, and freedom of speech and assembly. States should ensure that access of minorities to education is non-discriminatory, physically accessible and economically affordable.

Where non-discriminatory treatment in access to education is concerned, recent jurisprudence of international courts and quasi-judicial bodies shows notable development, such as in *D H and others v the Czech Republic* and *Oršuš and others v Croatia*. These cases strengthen the requirement of non-discrimination against minorities in access to education.

With regard to access of minorities to education in a minority language, the establishment of a general right to a mother-tongue education might be difficult, particularly under P1-2 ECHR. Therefore, justifying *ex post* minority-friendly policies on the basis of equality and minority clauses, as well as finding exceptions on a case-

³⁰⁰ *Waldman v Canada* (n 62) Individual opinion by member Martin Scheinin (concurring), para 5.

by-case basis, may constitute more realistic developments, such as in *Cyprus v Turkey*. That case is a significant development in ensuring access of minorities to education in a minority language. It imposed an obligation on States to provide secondary education in a minority language where it has assumed the responsibility for primary education. However, the precedential value of *Cyprus v Turkey* may be limited, as the context of this case should be taken into consideration. Yet it provides a clear indication that, although the ECtHR is unlikely to recognise a free-standing right to mother-tongue education, there exist situations where the Court can hardly ignore the group dimension of minority protection. In addition, in *Cyprus v Turkey* education was not physically accessible; thus, the case sets a clear standard on physical accessibility of education to minorities and may serve as a benchmark in future cases to substantiate demands for education in a minority language where, for example, existing schools in a minority language may not be physically accessible, and this lack may have a negative impact on family life.

One solution to minorities' demand for public schooling in a minority language is freedom for minorities to establish their own schools. This freedom, however, is intimately linked with the requirement of economic affordability of education. Provisions in domestic legislation on freedom of minorities to establish educational establishments are redundant, if a minority group does not have adequate resources to organise such education. So far, in the context of non-discriminatory treatment of various minority schools, Canada was required to provide public funding to religious minority schools in a non-discriminatory manner. Significantly, as discussed above, Article 27 ICCPR may be interpreted broadly and used to impose positive duties on a State to promote education of religious and linguistic minorities. In making decisions

regarding public funding, States should take into account whether (1) there is sufficient demand from minorities for religious or mother-tongue education and (2) whether there is a sufficient number of children to attend such schools. To conclude, while judicial or quasi-judicial findings of a general minority right to mother-tongue education might be difficult to obtain, particularly under P1-2 ECHR, justifying *ex post* minority-friendly policies on the basis of equality and minority clauses, as well as finding exceptions to the lack of a general entitlement on a case-by-case basis appear to be realistic developments.

4. Autonomy as a legal mechanism of minority protection

This sub-section deals with the benefits of autonomy for protection of minority identity. International agreements are silent on the right of minorities to autonomy, largely because their rights are protected on an individual, not collective basis. Nevertheless, some collective dimension of minority protection is present, for example, in Article 27 ICCPR, which notes that a group may enjoy its culture, religion and language *in community* with other members of a group. Even though this wording does not amount to protection of collective rights, it implies some form of collective exercise of minority rights. The ACFC has interpreted the FCNM in the same manner.³⁰¹ Below, there is an overview of the jurisprudence of international courts and quasi-judicial bodies supporting collective enjoyment of minority rights (4.1). Then, specific provisions relevant to minority protection, such as Articles 27 and 1 ICCPR and Articles 15 and 16 FCNM are discussed in more detail (4.2).

³⁰¹ ACFC, ‘Commentary on the Effective Participation...’ (n 188) para 6.

4.1. Gleaning relevant standards from human rights law

Both the ICCPR and the ECHR are silent on the right of minorities to autonomy. As a result, a minority group cannot rely on these instruments in order to demand special arrangements for protection of their identity. For example, in *Marshall et al v Canada*,³⁰² the authors of the complaint claimed that the State's refusal to grant a seat at the constitutional conferences on aboriginal matters to representatives of the Mikmaq tribal society violated their right to take part in the conduct of public affairs under Article 25(a) ICCPR.³⁰³ The HRC first maintained that Article 25(a) ICCPR may not mean that every citizen is entitled to determine the modes of participation in the conduct of public affairs. The HRC further noted that Article 25(a) ICCPR "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."³⁰⁴ Accordingly, Canada's failure to invite representatives of the Mikmaq tribal society did not infringe their rights under Article 25(a) ICCPR because it is "for the legal and constitutional system of the State party to provide for the modalities of such participation."³⁰⁵

³⁰² *Marshall et al v Canada* (Communication no 205/1986) (1991) CCPR/C/43/D/205/19861.

³⁰³ Article 25 ICCPR (n 17) stipulates:
every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
(a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
...

³⁰⁴ *Marshall et al v Canada* (n 302) para 5.5.

³⁰⁵ *Marshall et al v Canada* (n 302) para 5.4.

Likewise, the ECmHR and the ECtHR have left the question of linguistic and territorial group accommodation within States' margin of discretion. Thus, in *Moureaux v Belgium*³⁰⁶ and *Mathieu-Mohin and Clerfayt v Belgium*,³⁰⁷ the applicants complained that the lack of French-speakers' representation in the councils of the Dutch-speaking regions of Belgium constituted a violation of P1-3 on the right to free elections, read in conjunction with Article 14 ECHR on non-discrimination on the grounds of language and membership in a national minority. In both cases, the Convention institutions found that there was no violation of the ECHR rights.

The ECmHR' reasoning in *Moureaux v Belgium* is indicative of the Convention institutions' approach to autonomy:

... in principle every High Contracting Party organises its national territory, from the administrative point of view, according to political and institutional criteria, which the organs of the Convention are not competent to supervise. Thus, the organisation of territorial entities such as Regions, or the States which compose a federation, is entirely a matter for the discretionary power of the State bodies of each Contracting Party. It also follows that the organisation of legislative power, when apportioned between parliament and the different territorial entities, is exclusively a matter for those same organs.³⁰⁸

Accordingly, States are free to decide on how they organise their territory and what type of accommodation they may grant to a minority group.

However, a notable support of international courts and quasi-judicial bodies for autonomy is apparent where States choose to introduce a regime which through differential treatment aims to ensure respect for minorities' rights, such as in *Lindsay*

³⁰⁶ *Moureaux v Belgim* (n 159).

³⁰⁷ *Mathieu-Mohin and Clerfayt* (n 101).

³⁰⁸ *Moureaux v Belgim* (n 159) para 64.

and others v the United Kingdom,³⁰⁹ on the application of a proportional representation system in the Northern Ireland as opposed to a ‘first past the post’ system in the rest of the United Kingdom.

Another way to protect minority groups may be through the introduction of a residence requirement that may exclude some individuals not belonging to a minority from voting in elections. In *Marie-Helene Gillot v France*³¹⁰ and *Py v France*,³¹¹ both the HRC and the ECtHR found that the ten year period of residence requirement to qualify for voting in New Caledonia was compatible with the right to vote under the ICCPR and the ECHR. Given that the residence requirement was introduced in the context of self-determination of New Caledonia’s population, it was not unreasonable to limit participation in local referendums and elections to individuals who have sufficiently strong ties with the territory and are directly concerned by the future of New Caledonia.³¹²

Similarly, in *Nicoletta Polacco and Alessandro Garofalo v Italy*³¹³ the ECmHR found that a four year residence requirement to vote in elections in Trento was legitimate, because Italy introduced this condition to protect the rights of the German and Ladin minorities in the Region of Trentino Alto-Adige. The requirement aimed to ensure that individuals taking part in elections are reasonably aware of the social, political and economic context of the Region. This, in the ECmHR’s view, was necessary in

³⁰⁹ *Lindsay and others v the United Kingdom* (n 31).

³¹⁰ *Marie-Helene Gillot v France* (Communication no 932/2000) (2002) UN Doc A/57/40, 270.

³¹¹ *Py v France* (App no 66289/01) ECHR 6 June 2005.

³¹² *Marie-Helene Gillot v France* (n 310) para 13.16; *Py v France* (n 311) paras 61, 62 and 64.

³¹³ *Nicoletta Polacco and Alessandro Garofalo v Italy* (App no 23450/94) ECmHR 15 September 1997.

order “for the elector to have a thorough understanding of the regional context, so that his vote in the local elections can reflect the concern for the protection of the linguistic minorities.”³¹⁴ Hence, the measure was proportionate.

In view of these cases, autonomy is not a State duty. Rather, it is a privilege granted at a State’s discretion. States may choose to bestow territorial or cultural autonomy to accommodate religious, linguistic and ethnic minorities. However, even though there is no State duty to grant autonomy, there is a clear obligation not to withdraw this privilege unilaterally against a group’s will.

This State obligation not to worsen or abolish autonomous arrangements without the consent of the inhabitants is evident from the ECtHR jurisprudence strongly condemning abolition of cultural autonomy as exercised by religious minorities, such as in *Serif v Greece*,³¹⁵ concerning limitations on religious and judicial autonomy of the Muslim minority in Greece. This autonomy originated from the 1913 Treaty of Peace of Athens between Turkey and Greece, whereby the Muslim community in Greece had the right to elect their ‘mufti’, entrusted with the exercise of some judicial functions. The facts of the case were as follows: after the Mufti of Rodopi died in 1985, the government appointed a Mufti; five years later, two Muslim MPs requested the government to organise election of a new Mufti. Having received no reply, they organised the election of a Mufti themselves. Serif, a theological graduate, was elected as a Mufti. Subsequently, he was convicted for usurping a position of a minister of a ‘known religion’ and publicly wearing the dress of such a minister. Serif

³¹⁴ *Nicoletta Polacco and Alessandro Garofalo v Italy* (n 313).

³¹⁵ *Serif v Greece* (App no 38178/97) (1999) 31 EHRR 561.

argued before the ECtHR that his conviction violated Article 9 ECHR on freedom of religion, because under the bilateral Treaty of 1913, the Muslim community was entitled to elect their Mufti. The government, however, maintained that Muftis perform judicial functions; as judges are not elected in Greece, the appointment of the Mufti by the government could not raise an issue under Article 9 ECHR.³¹⁶ Moreover, Greece claimed that it intervened in this matter to avoid a split within the Muslim community, and, therefore, the measure pursued a legitimate aim of protecting public order.

In assessing whether such interference was necessary in a democratic society, the ECtHR recognised that it is possible that tension is created where a religious or any other community becomes divided; however, this is “one of the unavoidable consequences of pluralism.”³¹⁷ In such circumstances, the role of the government is “not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.”³¹⁸ Because the government failed to demonstrate any eminent danger to public order, the ECtHR found that the interference was not necessary in a democratic society and violated Article 9 ECHR.

Similarly, in *Hassan and Chaush v Bulgaria*³¹⁹ concerning the forced replacement of the leadership of the Muslim religious community (Mufti) in Bulgaria in 1995, the ECtHR emphasised the significance of the cultural autonomy of religious

³¹⁶ *Serif v Greece* (n 315) para 53.

³¹⁷ *Serif v Greece* (n 315) para 46.

³¹⁸ *Serif v Greece* (n 315) para 46.

³¹⁹ *Hassan and Chaush v Bulgaria* (App no 30985/96) (2000) 24 EHRR 55.

communities and found a violation of Article 9 ECHR. In particular, the Court noted that

religious communities traditionally and universally exist in the form of organised structures. They abide by rules which are often seen by followers as being of a divine origin. Religious ceremonies have their meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules. The personality of the religious ministers is undoubtedly of importance to every member of the community. Participation in the life of the community is thus a manifestation of one's religion, protected by Article 9 of the Convention.³²⁰

Likewise, Bulgaria's interference in elections of a Mufti in the *Case of Supreme Holy Council of the Muslim Community v Bulgaria*³²¹ was strongly condemned by the ECtHR as undermining the autonomy of the Muslim religious community. The applicants complained that the Bulgarian authorities arbitrarily interfered with the affairs of the Muslim community by organising and manipulating the October 1997 Muslim conference with the aim of favouring one of the rival leaderships and removing Mr Gendzhev, who was supported by the community. Having assessed the facts of the case, the ECtHR reiterated that

... in democratic societies the State does not need in principle to take measures to ensure that religious communities remain or are brought under a unified leadership. ... State measures favouring a particular leader of 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.³²²

³²⁰ *Hassan and Chaush v Bulgaria* (n 319) para 62.

³²¹ *Case of Supreme Holy Council of the Muslim Community v Bulgaria* (App no 39023/97) ECHR 16 December 2004.

³²² *Case of Supreme Holy Council of the Muslim Community v Bulgaria* (n 321) para 96.

Accordingly, the autonomous existence of religious communities is central to respect for pluralism in a democratic society. The ECtHR afforded equally high protection of the cultural autonomy of religious minorities in other contexts as well. Two cases concerning State authorities' refusal to register a religious group are noteworthy.

Thus, in the case of *Metropolitan Church of Bessarabia and others v Moldova*,³²³ the applicants alleged that the authorities' refusal to recognise the Metropolitan church of Bessarabia violated their freedom of religion under Article 9 ECHR, because only State-recognised religions could be practiced in Moldova. In particular, the applicants were prohibited from gathering together for religious purposes and lacked any judicial protection of their assets. Similarly, in the case of *the Moscow Branch of the Salvation Army v Russia*,³²⁴ the Russian authorities refused to permit the applicant association to re-register. The applicant association complained that the refusal to grant it the status of a legal entity had severely curtailed its ability to manifest its religion in worship and practice under Articles 9 and 11 ECHR on freedom of association.

In its assessment of these cases, the ECtHR emphasised that since religious communities traditionally exist in the form of organised structures, Article 9 ECHR had to be interpreted in the light of Article 11 ECHR. Such interpretation affords believers free association for manifestation of their religion in community with others without arbitrary State intervention.

Indeed, the *autonomous existence of religious communities* is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords...

³²³ *Case of Metropolitan Church of Bessarabia and others v Moldova* (App no 45701/99) ECHR 13 December 2001.

³²⁴ *Case of the Moscow Branch of the Salvation Army v Russia* (App no 72881/01) ECHR 5 October 2006.

In addition, one of the means of exercising the right to manifest one's religion, especially for a religious community, in its *collective dimension*, is the possibility of ensuring judicial protection of the community, its members and its assets...³²⁵

In conclusion, the ECtHR ruled that Moldova's refusal to recognise the applicant Church and Russia's denial of re-registration of the applicant association were disproportionate measures, which violated the Convention rights to freedom of religion and association.

These cases demonstrate that the ECtHR accords a high level of scrutiny in cases concerning the exercise of cultural autonomy by religious communities. Not only does the Court recognise the autonomous existence of religious communities, but it also emphasises the collective dimension of exercising cultural autonomy. Thus, States are not permitted to unilaterally abolish or deny the exercise of autonomy by religious communities.

Another duty imposed on States is the obligation to tolerate peaceful calls by a minority group for autonomy and recognition of its identity. This obligation was consistently upheld, for example, in a number of cases to protect the rights of the Kurdish minority in Turkey³²⁶ and the Macedonian minority in Bulgaria³²⁷ freely to associate and promote minority identity.

³²⁵ *Case of Metropolitan Church of Bessarabia and others v Moldova* (n 323) para 118; see also *Case of the Moscow Branch of the Salvation Army v Russia* (n 324) para 58 (emphasis added).

³²⁶ *Case of Freedom and Democracy Party (ÖZDEP) v Turkey* (App no 23885/94) ECHR 8 December 1999; *United Communist Party of Turkey (TBKP) v Turkey* (App no 19392/92) (1998) 26 EHRR 121; *Socialist Party and others v Turkey* (App no 21237/93) ECHR 25 May 1998.

³²⁷ *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* (App nos 29221/95 and 29225/95) (1998) 26 EHRR 103; *the United Macedonian Organisation Ilinden and Ivanov v Bulgaria*

Thus, in the case of *Freedom and Democracy Party (ÖZDEP) v Turkey*,³²⁸ the applicants complained that the fact that the ÖZDEP party was dissolved and its leaders banned from holding similar office in any other party infringed their right to freedom of association under Article 11 ECHR. They have been subjected to such harsh measures for their decision to “press for a just, democratic and peaceful solution to the Kurdish problem.”³²⁹ In its decision, the ECtHR ruled that

... the fact that such a political project is considered incompatible with the current principles and structures of the Turkish State does not mean that it infringes democratic rules. It is of the essence of democracy to allow diverse political projects to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.³³⁰

In this passage, the ECtHR implicitly established that neither international law nor domestic law must prohibit peaceful calls for autonomy. The ECtHR repeated the same line of reasoning in *United Communist Party of Turkey (TBKP) v Turkey*³³¹ and *Socialist Party v Turkey*³³² also concerning dissolution of political parties propagating the rights of the Kurdish minority in Turkey, and found a violation of Article 11 ECHR in all three cases.

(App no 44079/98) ECHR 20 October 2005; *the United Macedonian Organisation Ilinden-Pirin* (n 107).

³²⁸ *Case of Freedom and Democracy Party (ÖZDEP) v Turkey* (n 326).

³²⁹ *Case of Freedom and Democracy Party (ÖZDEP) v Turkey* (n 326) para 34.

³³⁰ *Case of Freedom and Democracy Party (ÖZDEP) v Turkey* (n 326) para 41.

³³¹ *United Communist Party of Turkey (TBKP) v Turkey* (n 326) para 146.

³³² *Socialist Party and others v Turkey* (n 326).

The ECtHR took these arguments a step further in the Case of *the United Macedonian Organisation Ilinden-Pirin and others v Bulgaria*,³³³ where a political party established to protect the rights of the ‘Macedonian’ minority was registered, but subsequently declared unconstitutional and dissolved. The grounds for dissolution of the party were separatist ideas and a threat to the territorial integrity of the country.³³⁴ The ECtHR accepted that certain leaders of the party might have a political agenda on the autonomy of the region of Pirin. However, the Court asserted that the “*mere fact that a political party calls for autonomy or even requests secession of part of the country’s territory* is not a sufficient basis to justify its dissolution on national security grounds.”³³⁵ The incompatibility of the political party’s programme with “the current principles and structures of the Bulgarian State does not make it incompatible with the rules and principles of democracy.”³³⁶ Thus, the Court established that minorities are entitled to claim autonomy, provided that the means and proposed changes are compatible with democratic principles.

Although there is no explicit right to autonomy in the ICCPR or the ECHR, as the above overview demonstrates, there is a significant contribution of human rights norms to the right of minorities to enjoy autonomy. The HRC and the ECtHR have implicitly upheld this right through the protection of the cultural autonomy of religious communities and activities of political parties. Even though States are the ultimate decision-makers on whether to grant autonomy to a minority, in a democratic society, a minority group has the right to demand peacefully arrangements for a

³³³ *The United Macedonian Organisation Ilinden-Pirin* (n 107).

³³⁴ *The United Macedonian Organisation Ilinden-Pirin* (n 107) para 27.

³³⁵ *The United Macedonian Organisation Ilinden-Pirin* (n 107) para 61 (emphasis added).

³³⁶ *The United Macedonian Organisation Ilinden-Pirin* (n 107).

group's accommodation. Furthermore, once granted, an autonomy regime may not be abolished or worsened without the consent of the minority group. However, the protection offered by general human rights instruments does not require positive State action. The next section assesses whether specific minority rights instruments fill this gap.

4.2. A minority right to autonomy?

Even though there is no explicit right to autonomy in the ICCPR, two provisions may be of some relevance to minorities: Article 27 on minority rights and Article 1 on self-determination of peoples. This is so because in order to achieve effective enjoyment of minority rights, a group should be able to determine freely matters pertinent for the protection of their identity.

Article 27 ICCPR suggests that minorities may enjoy their culture, language and religion in community with other members of their group. Can this wording then be read to confer collective rights on a minority? Indeed, the HRC implicitly acknowledged a collective dimension of Article 27's protection by establishing that a

restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole.³³⁷

Nevertheless, the lack of an explicit acknowledgement of the right to autonomy in Article 27 ICCPR decreases the potential of this provision. Moreover, Article 27

³³⁷ *Sandra Lovelace v Canada* (Communication no R 6/24) (1981) UN Doc Supp no 40 (A/36/40) 166, para 15; see also *Ivan Kitok v Sweden* (Communication no 197/1985) (1988) CCPR/C/33/D/197/1985; *Lubicon Lake Band v Canada* (Communication no 167/1984) (1990) UN Doc Supp no 40 (A/45/40) 1.

ICCPR is limited in its scope and aims to protect persons belonging to a minority. Furthermore, in the General Comment No 23 on Article 27,³³⁸ the HRC differentiated between Articles 27 and 1 ICCPR, by emphasising that the enjoyment of minority rights does not prejudice the territorial integrity and sovereignty of a State.³³⁹

Can minorities then claim autonomy under Article 1 ICCPR? This is a rather controversial issue because the wording of this provision refers to ‘peoples’. The ICCPR itself defines neither the term ‘peoples’ nor ‘minority’. Nor does the HRC elucidate the distinction between minorities and peoples in its General Comment No 12 on the right to self-determination of peoples.³⁴⁰ Until recently States preferred the application of the term ‘peoples’ mainly to the entire population of a State. For example, in *Apirana Mahuika*, where the Maori people invoked their right to self-determination under Article 1 ICCPR, New Zealand argued that the “rights in Article 1 attach to ‘peoples’ of a state in their entirety, not to minorities, whether indigenous or not, within the borders of an independent and democratic state.”³⁴¹ As a result, minorities can benefit from ‘internal’ self-determination, i.e., the right to participate in the government of a State. In contrast, the application of external self-determination was mainly limited to the colonial contexts and allowed former colonies to acquire an independent statehood. In this context, the right is uncontested and receives strong support of international community as exemplified by the International Court of

³³⁸ General Comment No 23 (n 51).

³³⁹ General Comment No 23 (n 51) para 3.2.

³⁴⁰ Human Rights Committee, General Comment No 12: The right to self-determination of peoples (Art. 1) (1984) <[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/f3c99406d528f37fc12563ed004960b4?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/f3c99406d528f37fc12563ed004960b4?Opendocument)> accessed 2 February 2009.

³⁴¹ *Apirana Mahuika* (n 150) para 7.6.

Justice (ICJ)'s advisory opinions in the *Western Sahara*,³⁴² *Namibia*³⁴³ and *East Timor* cases.³⁴⁴

The ICJ's recent case law suggests, however, that self-determination applies beyond colonialism; moreover, its application may benefit groups who do not necessarily comprise the population of a whole State. Judge Higgins has advocated this view in a separate opinion in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* case.³⁴⁵ The facts of the case are as follows. In 2002, Israel began the construction of a wall described as a 'security fence' in three areas of the West Bank.³⁴⁶ The first part of constructing this wall, which extends for a distance of 150 kilometres, was completed in 2003 and resulted in encompassing 56,000 Palestinians in enclaves.³⁴⁷ Further construction of the wall was about to begin and would have resulted in 160,000 Palestinians being resident in almost completely encircled communities.³⁴⁸ The ICJ ruled that by constructing the wall Israel interfered with the right of the Palestinian people to self-determination.³⁴⁹ Accordingly, the ICJ

³⁴² *Western Sahara* [1975] ICJ Reports 68, para 162.

³⁴³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* [1971] ICJ Reports 31, paras 52-53.

³⁴⁴ *East Timor (Portugal v Australia)* [1995] ICJ Reports 102, para 29.

³⁴⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (Advisory Opinion) 2004 <<http://www.icj-cij.org/docket/files/131/1671.pdf?PHPSESSID=06ca67aacce8eb2e02c14b6de2cb0813>> accessed 12 January 2009.

³⁴⁶ *Legal Consequences of the Construction of a Wall...* (n 345) para 80.

³⁴⁷ *Legal Consequences of the Construction of a Wall...* (n 345) para 81.

³⁴⁸ *Legal Consequences of the Construction of a Wall...* (n 345) para 84, 85 and 119.

³⁴⁹ *Legal Consequences of the Construction of a Wall...* (n 345) para 122.

recognised a right of self-determination of a people who are occupied by another nation.

Recently, the principle of self-determination has been also invoked by States to claim protection of an ethnic majority where part of the territory seceded or is under the *de facto* control of separatist authorities.³⁵⁰ Thus, in *Georgia v Russia*,³⁵¹ following ethnic conflict in August 2008, Georgia brought before the ICJ a case against Russia claiming that the latter violated the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).³⁵² In particular, Georgia asserted that by providing unprecedented and far-reaching support to the *de facto* separatist authorities of South Ossetia and Abkhazia in the implementation of discriminatory policies against the ethnic Georgian population, the Russian Federation denies the “*right of self-determination* to the ethnic Georgians remaining in South Ossetia and Abkhazia...”³⁵³ In its turn, Russia argued that this dispute relates to the use of force, principles of non-intervention and self-determination and violations of humanitarian law; therefore, the ICJ lacked jurisdiction to deal with the matter under Article 22 CERD.³⁵⁴ The case is still pending before the ICJ. It is, however, unlikely that the ICJ

³⁵⁰ In the *Punishment of the Crime of Genocide Case (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* [1996] ICJ Reports 595), Bosnia and Herzegovina claimed that by committing the crime of genocide in respect of Bosnian Muslims in 1995, the Former Republic of Yugoslavia (FRY) violated the Convention on the Prevention and Punishment of the Crime of Genocide. In its third preliminary objection, the FRY argued that Bosnia is not an independent State because in establishing its statehood it did not respect the principle of equal rights and self-determination of peoples, i.e., of the Serb population. Therefore, in the FRY’s view, this entity was not qualified to become a party to the Genocide Convention. The ICJ did not discuss the matter of self-determination in any detail, but simply noted that Bosnia and Herzegovina was a member of the UN, which was sufficient to join the Convention.

³⁵¹ *Georgia v Russia* (2008) ICJ Order <<http://www.justice.gov.ge/haaga/Decision.pdf>> accessed 12 March 2009.

³⁵² International Convention on the Elimination of All Forms of Racial Discrimination (n 131).

³⁵³ *Georgia v Russia* (n 351) para 13 (emphasis added).

would address the issue of self-determination in this case because its jurisdiction under the CERD is limited to elimination of racial discrimination. Nevertheless, the case signals that the principle of self-determination can be invoked in post-colonial contexts, as well as be used for the protection of ‘minority-in-minority’, i.e., a recently dominant majority, which are now trapped in areas claiming independence or having achieved it. Significantly, external self-determination may apply to minorities only in extreme situations.³⁵⁵ It is the right to internal self-determination that is intimately linked with the right of minorities to autonomy.³⁵⁶ Thus, in *Apirana Mahuika*, the HRC acknowledged that “the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular [A]rticle 27.”³⁵⁷

A link between internal self-determination and autonomy is also exemplified by the (non-legally binding) Declaration on the Rights of Indigenous Peoples,³⁵⁸ which in Article 3 establishes that indigenous peoples have the right to self-determination. By virtue of this right they can “freely determine their political status and freely pursue

³⁵⁴ *Georgia v Russia* (n 351) paras 95 and 110.

³⁵⁵ The relevance of external self-determination to minorities resurfaced with full force after Kosovo’s unilateral declaration of independence on 17 February 2008. The matter of the legality of Kosovo’s secession is currently pending before the International Court of Justice (ICJ). On 8 October 2008, the UN General Assembly requested the ICJ to issue an advisory opinion on the following question: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?” (2008) UNGA Resolution 63/3 (A/63/L 2).

³⁵⁶ In the *Reference re Secession of Quebec* ((1998) 2 SCR 217), the Supreme Court of Canada was asked whether there is the right under international law whereby Quebec could self-determine and unilaterally secede from Canada. The Court ruled that a sub-state unit may externally self-determine where ‘a people’ is governed as part of a colonial empire; where ‘a people’ is subject to alien subjugation, domination or exploitation; and possibly where ‘a people’ is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. *In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state* (7 (emphasis added)).

³⁵⁷ *Apirana Mahuika* (n 150) para 9.2.

³⁵⁸ Adopted by the UN General Assembly on 13 September 2007 after 20 years of negotiation.

their economic, social and cultural development”, i.e., self-determine within a State.

More significantly, Article 4 of the Declaration specifies that indigenous peoples,

in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Accordingly, these two provisions of the Declaration establish a firm link between internal self-determination and the right to autonomy. Its scope, however, is limited to indigenous peoples. The distinction between indigenous people and minorities is discussed in Section 3 of this Chapter on pages 134-136.

In conclusion, Article 27 in conjunction with Article 1 ICCPR may accord minorities the right to autonomy. Currently, an explicit acknowledgment in the Declaration on the Rights of Indigenous Peoples applies only to indigenous people; its extension to minorities based on clear procedural guidelines is highly desirable, but unlikely. In granting autonomy, the central considerations should be the needs of a minority group to preserve its identity. States should employ the most appropriate means to achieve this aim.

Another leading instrument on the rights of minorities, the FCNM, is similarly silent on the right of minorities to autonomy. This may be explained by the failed attempt of the Parliamentary Assembly of the Council of Europe (PACE)³⁵⁹ to insert an explicit provision on autonomy or special status in Article 11 of the PACE Recommendation 1201 (1993) on an additional protocol on the rights of national minorities to the

³⁵⁹ The PACE is composed of parliamentarians from 47 Member States of the Council of Europe. Elected by domestic voters, the parliamentarians represent the views of 800 million Europeans. The PACE meetings take place four times a year; any topical issue may be discussed during these meetings. The PACE may address its recommendations to European governments, which have to report back.

European Convention on Human Rights.³⁶⁰ The attempt, which caused significant controversy, is highly commendable:

[i]n the regions where they are in a majority the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation of the State.

The PACE has long been supportive of autonomy and self-governance. For example, the 1985 European Charter of Local Self-Government³⁶¹ contained important provisions in respect of the right to autonomy. In particular, Article 3(1) of the Charter specified that local authorities must be capable of “regulating and managing a substantial share of public affairs under their own responsibility and in the interest of the local population.”³⁶² Furthermore, the PACE has recently adopted an Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority (Local Self-Government Protocol).³⁶³ The 2009 Local Self-Government Protocol elaborates on the right of everyone to participate in the affairs of a local authority; furthermore, it suggests procedures a State could follow to implement measures supporting the right to participate. Given the PACE’s support for self-governance, Recommendation 1201 naturally contained a specific right of minorities to claim autonomy.

³⁶⁰ PACE, ‘Recommendation 1201 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights’ <<http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta93/EREC1201.htm>> accessed 14 September 2009.

³⁶¹ European Charter of Local Self-Government (1985) CETS No 122.

³⁶² In addition, Articles 3.2, 4.2, 4.3, 6, 8 and 11 of the European Charter of Local Self-Government (n 361) stipulate that local authorities will have legislative and executive powers, exercise public responsibilities within their competences, decide on their administrative structure and have recourse to a judicial remedy to secure free exercise of their powers.

³⁶³ Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority (2009) CETS No 207.

Bearing in mind the controversy surrounding the right to autonomy, it is not surprising that Article 11 contains several hedges that refer to the regions where a minority group constitutes a local majority, to arrangements matching the specific historical and territorial situation and to the domestic legislation of the State. These qualifications prevent the CoE from insisting that a State must adopt a particular form of autonomy to accommodate its minorities. Indeed, this provision created a great deal of uneasiness among the Contracting Parties of the CoE and was subsequently interpreted by the European Commission for Democracy through Law (Venice Commission), the CoE's advisory body on constitutional matters.³⁶⁴

The Venice Commission noted that interpretation of Article 11 should be cautious and in the light of the present state of international law,

a broad approach to the right of minorities to have local or autonomous authorities at their disposal is possible only in the presence of a binding instrument of international law, which is not the case in this instance.³⁶⁵

In the Venice Commission's view, although concentrated minorities within unitary States strive to have local or autonomous authorities,

the right in question does not imply for States either its acceptance of an organised ethnic entity within their territories, or adherence to the concept of ethnic pluralism as a component of the people or the nation, a concept which might affect any unitarity of the State.³⁶⁶

The Venice Commission acknowledged that many States seem to be afraid to grant autonomy rights so as not to encourage secessionist tendencies; even States which "have

³⁶⁴ Venice Commission, 'Opinion on the interpretation of Article 11 of the draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly' (1996) CDL-MIN(1996)004.

³⁶⁵ Venice Commission, 'Opinion on the interpretation of Article 11...' (n 364).

³⁶⁶ Venice Commission, 'Opinion on the interpretation of Article 11...' (n 364).

granted a large degree of regional autonomy hesitate to accept binding international instruments on the rights of minorities to a certain autonomy.”³⁶⁷ Unsurprisingly, Recommendation 1201 was not accepted and, hence, has not acquired legal force; it remains a soft-law instrument. Moreover, the controversy surrounding the matter discouraged the drafters of the FCNM from including an explicit provision guaranteeing the right of minorities to autonomy.

Nevertheless, some indications of such a right are scattered across the FCNM. It may be useful to overview relevant provisions. For example, Article 15 FCNM stipulates that

[t]he Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.

Clearly, the participation of minorities in public affairs may not necessarily be effective in a simple majoritarian system and may require further accommodation through autonomy. However, in the Venice Commission’s view, under the FCNM, “participation in public affairs is above all a question of personal autonomy, not of local autonomy.”³⁶⁸ This interpretation is rather narrow and does not sufficiently appreciate that the wording of the provision requires States to create conditions favourable for effective participation. The ACFC’s acknowledgement that the “enjoyment of certain rights, including the right to effective participation, has a collective dimension”³⁶⁹ is preferable. Indeed, the ACFC has examined the impact of territorial and cultural

³⁶⁷ Venice Commission, ‘Opinion on the interpretation of Article 11...’ (n 364).

³⁶⁸ Venice Commission, ‘Opinion on the interpretation of Article 11...’ (n 364).

³⁶⁹ ACFC, ‘Commentary on the Effective Participation...’ (n 188) para 6.

autonomy in State Parties to the FCNM and found that such arrangements can foster more effective participation of minorities in various areas of life.³⁷⁰

Furthermore, Article 16 prohibits States to adopt

measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present framework Convention.

The Explanatory Report on the FCNM gives examples of such prohibited measures as “expropriation, evictions and expulsions or redrawing administrative borders with a view to restricting the enjoyment of such rights and freedoms.”³⁷¹ So, if a minority group constitutes a local majority, a State may not forcefully alter the proportions of the population.

There are also other FCNM provisions which hint at autonomous arrangements. These are Article 10(2) on the use of a minority language in relations between members of a minority group and the administrative authorities; Article 11 on the use and recognition of names in a minority language and display of signs of a private nature visible to the public; and Article 14(2) on education in and of a minority language. However, although these provisions do refer to areas in which a minority group constitute a majority, their link to autonomy is weak.

³⁷⁰ ACFC, ‘Commentary on the Effective Participation...’ (n 188) paras 133-137. The ACFC emphasised the significance of territorial autonomy for the protection of minority autonomy in a number of opinions, such as ‘First Opinion on Denmark’ (n 75) para 36; ‘First Opinion on Finland’ (2000) ACFC/INF/OP/I (2001) 002, para 47; ‘First Opinion on Spain’ (2003) ACFC/INF/OP/I(2004)004, para 75; ‘First Opinion on Switzerland’ (2003) ACFC/INF/OP/I(2003)007, para 74; ‘First opinion on Italy’ (n 283) paras 61-62; ‘First Opinion on Serbia and Montenegro’ (2003) ACFC/INF/OP/I(2004)002, paras 111-112; ‘First Opinion on Moldova’ (2002) ACFC/INF/OP/I(2003)002, para 91.

³⁷¹ FCNM and Explanatory Report (n 196) para 81.

In its practice, the ACFC has addressed the issue of autonomy in several circumstances; for example, where autonomy has historically existed as a result of inter-state agreements.³⁷² There are also recently negotiated autonomy arrangements such as Gagauz autonomy in Moldova.³⁷³ The issue of the cultural autonomy of the Roma also features strongly in the ACFC's opinions, which insist that States should not only protect their culture,³⁷⁴ but also ensure their effective participation in the economic and social life of the country. Despite these positive developments, the lack of explicit provision on autonomy in the FCNM may prevent the ACFC from requiring a State to grant new autonomy arrangements.

Accordingly, even though autonomy arrangements are used by some States to protect the rights of minorities, the instruments on minority protection do not contain this right explicitly. Nevertheless, the right to autonomy can be linked to the right of minorities to internal self-determination, and possibly to external self-determination in extreme situations where a minority group is deprived of the possibility to participate effectively in the political, economic and cultural affairs of a State, as well as where there is a gross violation of fundamental rights of members of a group by a State. However, even such a link between self-determination and autonomy is implicit, and highly contested in international law. This is because States are reluctant to grant an explicit right to autonomy out of fear of secessionist trends, as the fate of Recommendation 1201 and the lack of explicit acknowledgement in the FCNM

³⁷² Italy State Report (1999) ACFC/SR(1999)007; Moldova State Report (2000) ACFC/SR(2000)2, 82-3; Russian Federation State Report (1999) ACFC/SR(1999)15, para 44; Slovenia State Report (2000) ACFC/SR(2000)4, para 108.

³⁷³ ACFC, 'First Opinion on Moldova' (n 370) para 92.

³⁷⁴ ACFC, 'First Opinion on Slovakia' (2000) ACFC/INF/OP/I(2001)001, paras 22-25, 40.

demonstrate. However, as references to territory in the FCNM suggest, the enjoyment of minority rights cannot be artificially divorced from the right to autonomy. It might be more beneficial for both States and minorities to have an explicit right to autonomy accompanied by clear guidelines for granting and withdrawing such arrangements.

4.3. Conclusion

Autonomy, whether territorial or cultural, is indispensable to the protection of minority rights, because it allows a minority to decide on matters of particular concern to the group. Regrettably, there is no explicit right to autonomy in international law, nor under human rights, or minority rights instruments. Rather, autonomy is a privilege, granted by States at their discretion.

Yet, as the jurisprudence of international courts suggests, once States have granted autonomy, they are not at liberty to withdraw such arrangements unilaterally. Furthermore, States are obliged not to worsen autonomy arrangements established to protect the rights of minorities. Nor should States prevent minorities from peaceful calls for autonomy and other means of democratic dialogue between a minority group and the majority.

Nevertheless, as the above discussion of Article 11 of the PACE Recommendation 1201 suggests, States are reluctant to recognise the right to autonomy out of fear that minorities may then secede. However, autonomy arrangements may reconcile differences between various ethnic, linguistic and religious groups in a State and ensure the territorial integrity of these States. Therefore, it may be better for

international peace and security to have some clear guidelines as to when the right to autonomy can be claimed.

Some of the criteria used to determine the legitimacy of such claims could be proportionality and the reasonableness of protecting a minority group's identity. Moreover, if provided, the right to autonomy should be granted in accordance with the needs of a group. For example, territorial autonomy would be inappropriate to accommodate the rights of a dispersed group, while cultural autonomy may not be sufficient for a group that compactly lives in a certain territory, unless the group considers otherwise.

Section 3. Who are 'minorities' in the context of EU law?

The preceding two sections elaborated on two dimensions of minority protection. We now turn to the assessment of who may benefit from the rights overviewed above. As it stands, EU law does not contain a definition of 'minority'.³⁷⁵ More importantly, nor

³⁷⁵ The fact that references to minority rights have found their way into EU primary law, will (sooner or later) make it necessary to define the term. This is, however, not an easy task because for the past fifty years attempts to define the concept of 'minority' have invariably failed, mainly due to States' political resistance and their divergent practices in relation to minorities. As a result, some commentators question the need to define 'minority', claiming that leaving the term undefined may allow a broader understanding as opposed to a rigid definition, produced as a minimum common denominator inevitably capable of excluding some groups. Some authors argue that because of the lack of a definition, it was possible for monitoring bodies of minority provisions within the United Nations (UN), Council of Europe (CoE) and Organisation for Security and Cooperation in Europe (OSCE) to adopt more "comprehensive, progressively expanding [approach] to new minorities under the influence of international law": Ioana Tanase, 'Defining National Minorities: Old Criteria and New Minorities', Presentation for Seminar Series 'Citizenship and National Minorities in Europe', St Antony's College, University of Oxford <<http://www.sant.ox.ac.uk/esc/esc-lectures/Tanase.htm>> accessed 16 September 2009.

On the other hand, a lack of a definition in international law may lead to a narrow domestic concept designed to "exclude groups 'making trouble'" (A Åkermark, *Justifications of Minority Protection in International Law* (Kluwer Law International, The Hague 1997) 86). Åkermark argues that "the lack of a definition gives States an excuse to refuse the existence of minorities in their own territory" (ibid. 87). By maintaining the matter within the domestic margin of discretion, States are free to decide which individuals belonging to certain groups may benefit from minority rights mechanisms.

does the EU have a clear legal basis or a competence in minority rights.³⁷⁶ Given that, despite numerous attempts, the international community has failed to reach a consensus on a definition of ‘minority’, this discussion does not aim enter into yet another quest to define the term. Instead, the focus is on highlighting the diversity of minority situations across the EU, and identifying a working definition of ‘minority’ for this thesis.

Moreover, as the assessment of minority protection mechanisms demonstrates, it is more difficult to adopt an inclusive approach by the monitoring bodies where States have a wide margin of appreciation over the definition (R Letschert, *The Impact of minority rights mechanisms* (TMCAsser, The Hague 2005) 425). Furthermore, the consideration of legal certainty, clarity, reliability and foreseeability are of particular importance. Identification of bearers of rights and duties is essential for successful operation of a legal regime in practice (John Packer, ‘On the Definition of Minorities’ in J Parker and K Myntti (eds) *The Protection of Ethnic and Linguistic Minorities in Europe* (Åbo Akademi University, Åbo 1993) 23-65, 26). Indeed, the lack of a definition “inevitably gives rise to a broad range of interpretations” (Jelena Pejic, ‘Minority Rights in International Law’ (1997) 19 *Human Rights Quarterly* 666-685). Therefore, for the purposes of an effective minority protection regime, a “precise definition may serve to minimize controversy by drawing the bounds in a clear fashion”: Malcolm Shaw, ‘The Definition of Minorities in International Law’ in Y Dinstein and M Tabory (eds.) *The Protection of Minorities and Human Rights* (Martinus Nijhoff Publishers, Dordrecht 1992) 1.

However, it may be difficult to define the term in the context of EU law. Indeed, the supranational nature of EU legal system adds to the confusion over the definition of minorities. De Witte argues that because there is “no European nation-state, then there can be no ‘national minorities’ in the Community framework” (Bruno de Witte ‘The European Communities and its Minorities’ in C Brolmann, R Lefeber and M Zieck (eds) *People and Minorities in International Law* (Kluwer Academic Publishers, The Hague 1993) 168). This section argues that the possibility of an EU definition should not be excluded automatically.

³⁷⁶ Unlike national legal systems, the EU can legislate only in those areas where Treaty provisions allow it to act. The legal bases for EU legislation are based on the principle of conferred powers (Article 5(1) TEU). Competences not conferred upon the Union in the Treaties remain with the Member States (Article 4(1) and 5(2) TEU). Even where there is an EU competence, the breadth of measures may vary depending on whether these competences are exclusive (Articles 2 and 3 TFEU), shared (Article 4 TFEU) or designed to support Member States’ action (Article 5 TFEU) See also Declaration No 18 in relation to the delimitation of competences. See generally, Armin von Bogdandy and Jürgen Bast, ‘The Federal Order of Competences’ in A von Bogdandy and J Bast (eds) *Principles of European constitutional law* (Hart, Oxford 2010) 275-308; see also Paul Craig, ‘Competence and Member State Autonomy: Causality, Consequence and Legitimacy’ (2009) 57 *Oxford Legal Studies Research Paper* 1-38.

So far, competence on minority protection remains with States. Moreover, the approach of Member States ranges from an advanced level of minority protection, such as in Finland and Sweden, to the outright denial of the existence of minorities in France and Greece. Therefore, Member State consensus to transfer their competences on minority protection to the EU may prove difficult to achieve in practice. Given ‘warnings’ issued by some Constitutional Courts of EU Member States to discourage EU encroachment upon their competences, it is unlikely that the ECJ may develop a strong jurisprudence on minority rights. See, for example, the decision of the German Constitutional Court on the Lisbon Treaty, BVerfG, 2BvE 2/08 vom 30 June 2009, Absatz-Nr. (1-421) <http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html> accessed 12 March 2010. For analysis see Lars Hoffmann, ‘Don’t Let the Sun Go Down on Me: The German Constitutional Court and Its Lisbon Judgement’ (2009) 5(3) *Journal of Contemporary European Research* 482-490.

Before the term is defined, however, it may be useful to enquire whether various adjectives preceding the term ‘minority’ may impact the content of this term. Therefore sub-section 3.1 overviews some aspects of defining ‘national’, ‘indigenous’, ‘new’, ‘racial’, ‘ethnic’, ‘religious’, ‘linguistic’ and ‘territorial’ minorities. The discussion aims to establish how these labels affect the content and scope of the definition.

Section 3.2 then deconstructs three influential definitions of ‘minority’ proposed by Capotorti,³⁷⁷ Deschenes³⁷⁸ and the PACE.³⁷⁹ Each of the common elements in these definitions, including both objective and subjective criteria, is discussed in detail. Moreover, the practical implications of some elements in the definition of ‘minority’ are demonstrated on the basis of examples from EU Member States’ experience. In particular, sub-section 3.2.1 discusses the objective existence of a group as a central element of the definition. Sub-section 3.2.2 analyses the requirement of numerical minority and non-dominant position, exemplified by the experience of Belgium, where numerical majorities at the State level constitute a minority at the regional level. Furthermore, sub-section 3.2.3 assesses the necessity of the criterion of citizenship. The situation of Russian-speaking non-citizens in Latvia illustrates how this requirement may limit the rights of minorities in practice. Finally, sub-section 3.2.4 studies the subjective element, namely the collective will of a group to preserve its cultural identity. In conclusion, a working EU definition of ‘minority’ is proposed.

³⁷⁷ Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (United Nations, New York 1979) 96.

³⁷⁸ Jules Deschenes, ‘Proposal concerning a definition of the term “minority”’ (1985) E/CN4/Sub2/1985/31, 30.

³⁷⁹ Recommendation 1201 (1993) (n 360) Article 1.

3.1. Do labels matter?

The lack of an agreed definition of ‘minority’ in international and European law is further complicated by various adjectives preceding the term. In the context of EU law it is possible to identify some of these ‘labels’. For example, Article 21 CFR refers to ‘national’ minorities. Article 2 TEU follows the wording of Article 27 ICCPR and uses ‘persons belonging to minorities’. Furthermore, under the Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Directive)³⁸⁰ ‘racial’ and ‘ethnic’ minorities may benefit from rules on non-discrimination in the public and private spheres, while the Directive on establishing a general framework for equal treatment in employment and occupation (Employment Directive)³⁸¹ protects ‘religious’ minorities from discrimination in employment and vocational training. In addition, the European Parliament (EP)’s early resolutions referred to ‘cultural’ and ‘linguistic’ minorities; more recently, the EP proposed two motions for resolutions: one concerned traditional ‘old’ minorities and another referred to ‘new’ minorities.³⁸²

The question is then, do these labels really matter? This sub-section begins with an assessment of the term ‘national minority’ (3.1.1); it then compares and contrasts ‘indigenous people’ with ‘minority’ (3.1.2). ‘New minorities’ are discussed next. Given the significance of migration in EU law, this section outlines several types of ‘new minorities’, such as migrants within the EU, or third country nationals (TCNs),

³⁸⁰ Directive 2000/43 (Race Directive) (n 41) 22-26.

³⁸¹ Directive 2000/78/EC (Employment Directive) (n 43).

³⁸² European Parliament, Motion for a ‘Resolution on the protection of traditional national and ethnic minorities within the framework of the European Union’, 02 October 2008; Motion for a ‘Resolution on the new, migrant minorities in the European Union’, 02 October 2008.

who could benefit from a broad definition of ‘minority’ in the context of EU law (3.1.3). Next, the discussion turns to assessing which term is broader: ‘ethnic minority’, ‘racial minority’ or ‘national minority’. This assessment draws on examples from the jurisprudence of English courts, which defined the concept of ‘race’ broadly. This in turn may have implications for the application of the EU Race Directive modelled on the 1976 UK Race Relations Act³⁸³ (3.1.4). We then consider the notions of ‘religious’ and ‘linguistic’ minorities (3.1.5). The last category is ‘territorial minorities’ (3.1.6). On the basis of the overall analysis, an assessment is made as to which groups should be included in an EU definition of ‘minority.’

3.1.1. ‘National’ minority

It appears that the concept ‘national minority’ is a “peculiarly European term”.³⁸⁴ The term ‘national’ was chosen as a compromise between international and Eastern European terminology.³⁸⁵ In Eastern Europe, to avoid a negative connotation of the term, the concept of ‘minority’ was substituted for by the term ‘nationality’.³⁸⁶ The term is widely used in CoE,³⁸⁷ OSCE³⁸⁸ and EU instruments.³⁸⁹ This practice may be

³⁸³ UK Race Relations Act 1976 (c. 74) as amended in 2000 (the Race Relations Amendment Act) and in 2003 (to give effect to Directive 2004/43 (Race Directive) (n 41)).

³⁸⁴ John Valentine ‘Toward a Definition of National Minority’ (2004) 32 *Denver Journal of International Law and Policy* 445.

³⁸⁵ Mala Tabory, ‘Minority Rights in the CSCE Context’ in Y Dinstein and M Tabory (eds) *The protection of minorities and Human Rights* (Kluwer Academic Publishers, The Hague 1992) 196.

³⁸⁶ Tabory, ‘Minority Rights in the CSCE Context’ (n 385) 198.

³⁸⁷ FCNM (n 3).

³⁸⁸ Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990 <<http://www.osce.org/docs/english/1990-1999/hd/cope90e.htm>> accessed 23 August 2009.

³⁸⁹ Charter of Fundamental Rights of the European Union (n 9) Article 21.

explained by the emergence of the concept in Europe. The broader description of ‘national minorities’ identifies them as the *historic minorities* that emerged as a result of the territorial divisions after the world wars. Kymlicka characterises national minorities as groups created as a result of the incorporation of territories into a larger State; usually these communities wish to maintain their distinctness within new States.³⁹⁰ A more restrictive view of national minorities requires also an external kin-State element, i.e., a State with similar ethnic roots. National minorities are only those groups which were separated from their kin States as a result of the re-drawing of boundaries.³⁹¹

Another distinct feature of national minority protection is their entitlement to political participation – “a right historically attached to *national* minority regimes.”³⁹² Tomuschat, for example, emphasises a strong political connotation of the term by describing ‘national minorities’ as “groups which have become conscious of their own identity to such an extent that they seek to become masters of their own fate at least partially.”³⁹³ The author supports the view that this strong political element is the reason for States’ opposition to the inclusion of this concept in international instruments. Lerner expresses similar views and explains the absence of the concept ‘national minorities’ from the text of Article 27 ICCPR by the fear of multinational

³⁹⁰ Will Kymlicka, ‘The Internationalization of Minority Rights’ (2008) 6 *International Journal of Constitutional Law* 1.

³⁹¹ Tove Malloy ‘Title and the Preamble’ in M Weller (ed) *The Rights of Minorities in Europe* (Oxford University Press, Oxford 2005) 51.

³⁹² Rachel Guglielmo and Tim Waters ‘Shifting European Policy Towards Roma’ (2005) 43(4) *JCMS* 763-786, 769 (emphasis in original).

³⁹³ Nathan Lerner, ‘The Evolution of Minority Rights in International Law’ in C Brolmann, R Lefebber, M Zieck (eds) *People and Minorities in International Law* (Kluwer Academic Publishers, The Hague 1993) 89.

States of allowing secessionist trends.³⁹⁴ Accordingly, the term ‘national minorities’ has “an extra dimension, ... namely a certain political aspiration for a degree of autonomy or even independence.”³⁹⁵

Furthermore, Thornberry clarifies that the term ‘national’ relates to

personal rather than legal characteristics, in line with ‘ethnic, religious and linguistic’ ones, and does not necessarily mean that the standards are confined to those having the nationality or citizenship of a State.³⁹⁶

Thus, the concept ‘national’ does not refer to citizenship; rather, the concept ought to refer to ethnicity. Furthermore, Helgesen argues that the concept ‘national’ corresponds to the wording of Article 27 ICCPR and substitutes for the concept ‘ethnic, religious or linguistic minorities’.³⁹⁷

Thus, although all minority groups may be entitled to preserve their distinct culture, language and/or religion, the requirement of political participation in matters of direct concern to them differentiates national minorities from racial, ethnic, linguistic and religious groups. In the EU context, the reference to ‘national minorities’ in Article 21 CFR is in line with Article 14 ECHR and suggests a similar use of the term.

³⁹⁴ Lerner ‘The Evolution of Minority Rights in International Law’ (n 393) 89.

³⁹⁵ Annelies Verstichel, ‘Personal Scope of Application: An Open, Inclusive and Dynamic Approach – the FCNM as a Living Instrument’ in A Verstichel et al (eds) *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* (Intersentia, Oxford 2008) 140.

³⁹⁶ 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’ in A Phillips and A Rosas (eds) *Universal Minority Rights* (Abo Akademis tryckeri, Turku and London 1995) 30.

³⁹⁷ Jan Helgesen ‘Protecting Minorities in the Conference on Security and Co-operation in Europe (CSCE) Process’ in A Rosas and J Helgesen (eds) *The Strength of Diversity: Human rights and Pluralist Democracy* (Martinus Nijhoff Publishers, Dordrecht/Boston/London 1992) 164.

3.1.2. *'Indigenous people' v 'minority'*

As with the term 'minority', the concept of 'indigenous peoples' remains undefined. Is there a difference between 'indigenous peoples' and 'minorities'? In addressing this question, Kymlicka notes that

the term 'indigenous peoples' arose primarily in the context of New World settler states and refers to the descendants of the original non-European inhabitants of lands colonized and settled by European powers. ... 'National minorities,' by contrast, is a term invented in Europe to refer to the European groups that lost out in the tumultuous process of European state formation over the past five centuries, and whose homelands were incorporated (in whole or in part) into larger states dominated by a neighboring European people.³⁹⁸

In explaining the difference in the degree of protection granted to indigenous peoples (who have, for example, an explicit right to autonomy)³⁹⁹ and national minorities, Kymlicka observes that, because the subjugation of indigenous peoples was more disruptive to those societies compared to the treatment of national minorities in Europe, the international community gave priority to the protection of the former group.⁴⁰⁰ As a result, in the context of UN standard-setting, a dual track has emerged to deal with these two groups.⁴⁰¹ It is generally perceived that the approach adopted for minority rights has been influenced by European experiences, while rules on indigenous rights have formed in the light of developments in the Americas and in the Pacific region.⁴⁰² Furthermore, persons belonging to minorities

³⁹⁸ Kymlicka, 'The Internationalization of Minority Rights' (n 390) 8.

³⁹⁹ Declaration on the Rights of Indigenous Peoples (2007) UNGA Resolution 61/295, Article 4. For discussion see pages 119-120.

⁴⁰⁰ Kymlicka, 'The Internationalization of Minority Rights' (n 390) 10.

⁴⁰¹ Asbjørn Eide, 'Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples' (2000) E/CN.4/Sub.2/2000/10, para 22.

⁴⁰² Eide, 'Working paper on the relationship and distinction ...' (n 401) para 25.

often have several identities and participate actively in the common domain. Indigenous rights, on the other hand, tend to consolidate and strengthen the separateness of these peoples from other groups in society.⁴⁰³

Despite the different contexts and needs of these groups, it is debatable whether a clear cut distinction between indigenous people and minorities is useful.⁴⁰⁴ For example, if persons of indigenous origin migrate to urban areas they might be better protected under the regime of minority protection, while minorities who live compactly together in a certain region of a country may benefit from the degree of self-government usually accorded to indigenous people.⁴⁰⁵ This distinction is even less pertinent in the context of European minorities and indigenous peoples protected under the umbrella concept of ‘national minorities’. For example, the ACFC confirmed that indigenous groups, such as the Sami in Norway, can benefit from protection under the FCNM,⁴⁰⁶ in addition to other instruments that specifically apply to indigenous people. Consequently, an EU definition of ‘minority’ should not draw a distinction between indigenous people and minorities. The degree of protection accorded should depend, not on a label, but on the needs and specific circumstances of a group.

⁴⁰³ Eide, ‘Working paper on the relationship and distinction ...’ (n 401) para 23.

⁴⁰⁴ After considering the defining elements of the terms ‘minority’ and ‘indigenous people’, Daes concludes that the main legal distinction between these two groups is in the degree of internal self-determination granted to the latter group: Erica-Irene Daes, ‘Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples’ (2000) E/CN.4/Sub.2/2000/10, para 43.

⁴⁰⁵ Eide, ‘Working paper on the relationship and distinction ...’ (n 401) para 26.

⁴⁰⁶ ACFC, ‘First opinion on Norway’ (2002) ACFC/INF/OP/I(2003)003, para 19.

3.1.3. 'New' minorities

One of the stumbling blocks in defining the concept 'minority' is whether the so-called 'new' minorities should be included. Given the controversy surrounding this matter, this sub-section assesses whether a definition of 'minority' in EU law should cover 'new' minorities as well. A useful starting point for such assessment is a working distinction drawn between 'old' and 'new' minorities. Thus,

[o]ld minorities are composed of persons who lived, or whose ancestors lived, in the country or a part of it before the state became independent or before the boundaries were drawn in the way they are now. New minorities are composed of persons who have come in after the state became independent.⁴⁰⁷

This latter category includes migrant workers, as well as new groups of minorities that appeared in the process of State dissolution and succession. As to migrant workers, there is a "broad assumption that since they have decided to immigrate of their own free will, they should generally accept the cultural and linguistic make-up of the country in which they now want to settle."⁴⁰⁸ However, the fact that someone left behind their country for economic or political reasons, does not mean that they can easily give up their identity.⁴⁰⁹ Besides, even though migrants are protected under other international rules,⁴¹⁰ they may still benefit from the protection accorded to

⁴⁰⁷ Asbjørn Eide, 'The Rights of 'Old' versus 'New' Minorities' (2002/2003) 2 European Yearbook of Minority Issues 365-379, 365.

⁴⁰⁸ Eide, 'The Rights of 'Old' versus 'New' Minorities' (n 407) 366.

⁴⁰⁹ Verstichel, 'Personal Scope of Application...' (n 395) 148.

⁴¹⁰ For example, the right to education of migrant workers is protected under the International Convention on the Elimination of All Forms of Discrimination (adopted 21 December 1965, entered into force 4 January 1969) UNGA Resolution 2106 (XX), Article 5; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990) A/RES/45/158, Article 30 (children's education), Articles 43(1)(a) and 45(1)(a) (adult education); ILO Convention no 97 on Migration for Employment (adopted 1 July 1949, entered into force 22 January 1952) 120 UNTS 70, Article 6; ILO Convention no 143 on Migrant Workers (adopted 24 June 1975, entered into force

traditional minorities. Indeed, a certain parallel can be drawn here with indigenous people, protected both under the FCNM and other specialised instruments. As the ACFC emphasises, “it is not because certain groups can enjoy the protection of other legal regimes, that they cannot enjoy the protection of the FCNM.”⁴¹¹ In addition, international instruments on the protection of migrant workers place increasingly strong emphasis on the protection of their cultural identity.⁴¹² Therefore, groups that constitute a ‘new’ minority and wish to preserve their distinct cultural identity should be afforded the protection available under relevant international and regional instruments.⁴¹³

In addition, States often rely on the term ‘new’ minority to avoid granting protection to unwanted groups. For example, Slovenia refuses to offer protection equivalent to that available to the traditional Italian and Hungarian minorities to ‘new’ minorities originating from other parts of the former Yugoslavia, such as ethnic Serbs, Croats, Bosnians, Kosovo Albanians and Roma from Kosovo and Albania.⁴¹⁴ The ACFC has strongly criticised such a restrictive interpretation and encouraged Slovenia to adopt a “more inclusive approach in order to better respond to the established reality on the

09 December 1978) Article 8(2); European Convention on Establishment (1955) ETS No 19, Article 20 (the right to education of migrants’ children); European Convention on the Legal Status of Migrant Workers (1977) ETS No 93, Article 14 (adult education); and Council (EEC) Regulation No 1612/68 on freedom of movement for workers within the Community [1968] OJ L 257/2, Article 12.

For discussion see Marianne Van Den Bosch and Willem Van Genugten, ‘International Legal Protection of Migrant Workers, National Minorities and Indigenous Peoples – Comparing Underlying Concepts’ (2002) 9 *International Journal on Minority and Group Rights* 195-233.

⁴¹¹ Verstichel, ‘Personal Scope of Application...’ (n 395) 149.

⁴¹² International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990) UN Doc A/Res/45/158, Article 12 on freedom of religion and Article 31 on respect for cultural identity.

⁴¹³ Rudiger Wolfrum, ‘The Emergence of “New Minorities” as a result of Migration’ in C Brolmann, R Lefeber and M Zieck (eds) *Peoples and Minorities in International Law* (Martinus Nijhoff Publishers, Dordrecht 1993) 165.

⁴¹⁴ Ringelheim, ‘Minority Protection and Constitutional Recognition of Difference...’ (n 19) 42.

ground.”⁴¹⁵ In general, the ACFC adopts a so-called article-by-article approach, where some provisions (for example, Article 11(3) FCNM) apply to ‘old’ minorities, while ‘new’ minorities could benefit from others (Articles 3, 5, 6, 7 and 8 FCNM).⁴¹⁶

In the EU context, there are two possible groups that may fall into this category: migrant workers within the EU and Third Country Nationals (TCNs). In EU law, freedom of movement and freedom of establishment encourage EU citizens to reside in Member States other than their State of origin. May these groups of migrants, which are numerically fewer than the majority population, be classified then as possible EU minorities? As discussed above, some commentators argue that migrant workers should benefit from the regime of minority protection.⁴¹⁷ Furthermore, it is suggested that these groups would comprise a minority in a host Member State because of their cultural differences from the majority of the population.⁴¹⁸

However, it is important to note some differences between migration within the EU and from third countries. Often EU migrants are not disadvantaged in comparison with the majority of the population in a host State, as EU citizenship offers them considerable legal safeguards in access to, for example, social rights and education.

⁴¹⁵ ACFC, ‘Second opinion on Slovenia’ (2005) ACFC/INF/OP/II(2005)005, para 39.

⁴¹⁶ Rianne Letschert, ‘Successful Integration while Respecting Diversity; ‘Old’ Minorities versus ‘New Minorities’ (2007) 1 Helsinki Monitor: Security and Human Rights 46-56, 50.

⁴¹⁷ Wolfrum, ‘The Emergence of “New Minorities” as a result of Migration’ (n 413); Gwendolyn Sasse ‘Policies towards Minorities and Migrants in Europe’ (2005) 43(4) JCMS 673-693; Ryszard Cholewinski ‘Migrants as Minorities: Integration and Inclusion in the Enlarged European Union’ (2005) 43(4) JCMS 695-716.

⁴¹⁸ Gabriel Toggenburg, ‘Minorities ‘...’ the European Union: is the Missing Link an ‘of’ or a ‘within’?’ (2003) 25 (3) Journal of European Integration 273-284, 276; see also, Bruno de Witte ‘The European Communities and its Minorities’ in C Brölmann, R Lefeber, M Zieck (eds) *People and Minorities in International Law* (Kluwer Academic Publishers, The Hague 1993) 167-185.

Moreover, these groups should not suffer discrimination based on their nationality,⁴¹⁹ although they may encounter linguistic barriers as ‘traditional’ minorities sometimes do.⁴²⁰ Their European citizenship also gives them limited political rights, such as the ability to vote in elections for the European Parliament.

In addition, the EU has offered some protection to preserve migrant workers’ cultures by, for example, enacting the Directive on the education of the children of migrant workers.⁴²¹ According to the Directive, Member States are required both to integrate the children of migrant workers into the educational environment and facilities of the host State, and to facilitate their learning of their parents’ mother-tongue and culture. However, it has proved difficult to put this Directive into practice and the instrument remains amongst the most under-implemented of EU instruments.⁴²² This shows that Member States prefer migrants to be assimilated. Even though EU law provides significant guarantees for migrants within the EU, it is desirable that migrant workers, whose needs genuinely shifted from a mere economic activity to the preservation of the cultural, religious and linguistic identity of their groups, should not be denied minority status.⁴²³

⁴¹⁹ Article 18 TFEU (ex-Article 12 TEC).

⁴²⁰ Case C-379/87 *Anita Gröener v Minister for Education and City of Dublin Vocational Education Committee* [1989] ECR 3967.

⁴²¹ Council (EEC) Directive 77/486 on the education of the children of migrant workers [1977] OJ L199/32.

⁴²² de Witte, ‘The European Communities and its Minorities’ (n 418) 182.

⁴²³ Wolfrum argues that immigrant workers may benefit from the protection of Article 27 ICCPR if they can demonstrate that they have preserved their identity on the territory of a host State for a certain time: Wolfrum, ‘The Emergence of “New Minorities” as a result of Migration’ (n 413) 163.

Another trend in the literature is to identify TCNs as EU minorities,⁴²⁴ because they are numerically fewer than the citizens of the EU. It is argued that because of their underprivileged situation, the most logical group to qualify as an EU minority is TCNs.⁴²⁵ Staples defines TCNs as

nationals from non-Member State countries who have been authorised to take up residence and pursue an economic activity in one of the Member States of the European Union in accordance with that Member State's immigration legislation and who have benefited from these rights over a period of time.⁴²⁶

Thus, unlike migrant workers who come from other EU Member States, TCNs, predominantly immigrants and refugees, come from outside of the EU, and thus do not hold EU citizenship. Because under Article 8 TFEU (ex-Article 17(1) TEC) EU citizenship is additional to national citizenship and does not replace it, the legal status of TCNs depends on national legislation, international arrangements between their country of origin and the EU Member States and the Schengen measures.⁴²⁷ Interestingly, Article 8 TFEU changed a reference to EU citizenship in Article 17(1) TEC from complimentary to additional to a Member State's citizenship. Even though this wording may prove potent in the ECJ's future case law, it may still be difficult to offer protection to TCNs, as this fragmented group lacks a united identity.

⁴²⁴ Steve Peers, "'New' Minorities: What Status for Third Country Nationals in the EU system?" in G Toggenburg (ed) *Minority protection and the enlarged European Union: the way forward* (OSI/LGI, Budapest 2004).

⁴²⁵ Toggenburg, 'Minorities '...' the European Union: is the Missing Link an 'of' or a 'within'?' (n 418) 277; see also, de Witte, 'The European Communities and its Minorities' (n 418) 185.

⁴²⁶ H Staples, *The Legal Status of Third Country Nationals Resident in the European Union* (Kluwer law International, The Hague 1999) 12.

⁴²⁷ Protocol (No 19) on the Schengen *acquis* integrated into the framework of the European Union [2010] OJ C 83/290.

Nevertheless, an effort was made to link TCNs with the EU level. The 1999 European Council in Tampere recommended conferring on legally-residing TCNs, who hold long-term residence permits, “a set of uniform rights which are as near as possible to those enjoyed by EU citizens.”⁴²⁸ These rights would include the rights to residence, education and employment, as well as the right not to be discriminated against *vis-à-vis* the citizens of a host State. Based on these recommendations, in 2003, the Long-Term Residents Directive was adopted to address the rights of TCNs.⁴²⁹ One striking feature of the Directive is the requirement for TCNs to comply with integration conditions set by Member States in their national legislation.⁴³⁰ Such requirements may often aim to assimilate newcomers through demanding knowledge of national language and culture, while recent approaches to minority rights have been mainly perceived as protection from forced “state-imposed assimilation”.⁴³¹ Therefore, the Directive may not be appropriate for the protection of minority rights.

Another instrument that may indirectly prevent discrimination against TCNs is the Race Directive.⁴³² However, TCNs may only invoke the Race Directive if they can demonstrate that they were discriminated against based on their racial or ethnic origin, not their nationality or immigration status.⁴³³ Thus, Article 3(2) of the Race Directive

⁴²⁸ European Council, Tampere Summit Conclusions, 15-16 October 1999 <<http://www.statewatch.org/news/2003/sep/tamp.htm>> accessed 12 September 2008. For criticism see Louise Halleskov, ‘The Long-Term Residents Directive: A Fulfilment of the Tampere Objective of Near-Equality?’ (2005) 7 *European Journal of Migration and Law* 181-201.

⁴²⁹ Directive 2003/109 (Long-Term Residents Directive) (n 42).

⁴³⁰ Directive 2003/109 (Long-Term Residents Directive) (n 42) Article 5(2).

⁴³¹ Mária Kovács, ‘Standards of self-determination and standards of minority-rights in the post-communist era: a historical perspective’ (2003) 9(3) *Nations and Nationalism* 433-450, 437.

⁴³² Directive 2000/43 (Race Directive) (n 41).

⁴³³ Peers, “‘New’ Minorities: What Status for Third Country Nationals in the EU system?” (n 424) 158.

stipulates that the instrument does not cover differences in treatment on the basis of nationality. Moreover, it is without prejudice to provisions and conditions relating to the entry into and residence of TCNs and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the TCNs and stateless persons concerned. Because race and nationality are often intertwined, arguably, the Race Directive may perpetuate double standards in relation to TCNs.⁴³⁴

Despite some similar problems that both TCNs and minorities may face, such as language, citizenship and enjoyment of political rights, it is sometimes argued that the regimes for their protection should be kept separate. For example, the EP emphasised that, although migrants and overseas minorities may share the disadvantages of linguistic minorities, “their specific problems deserve detailed and separate treatment.”⁴³⁵ However, in some ways such a distinction is artificial. In 2008, the EP adopted two motions for resolution: one concerned traditional ‘old’ minorities, and the other, ‘new’ minorities. Yet, on closer inspection, similarities can be found in the preamble and some provisions of the resolutions.⁴³⁶ This is not surprising because in many respects these two groups may have to tackle similar issues. For example, Van Den Bosch and Van Genugten compared the regimes of migrant and minority groups’ protection with an emphasis on citizenship, access to education in mother tongue, and

⁴³⁴ Fernne Brennan, ‘The Race Directive, Institutional Racism and Third Country Nationals’ in T Takis and P Nebbia (eds) *European Union Law for the Twenty-First Century (Vol 2)* (Hart, Oxford 2004) 371, 380; see also, Daniela Caruso, ‘Limits of the Classic Method: Positive Action in the European Union after the New Equality Directives’ (2003) 44 *Harvard International Law Journal* 331-386, 352.

⁴³⁵ European Parliament, ‘Resolution on the Languages and Cultures of Regional and Ethnic Minorities in the European Community’ [1987] Doc A 2-150/87, para 16.

⁴³⁶ For example, the preambles of both resolutions have regards to Articles 13 TEC (now Article 19 TFEU) and 192(2) TEC (now Article 225 TFEU), Article 21(1) of the Charter of Fundamental Rights, the ECHR and the FCNM.

voting rights.⁴³⁷ They conclude that both groups face similar problems.⁴³⁸ For example, the right to vote is tied to citizenship, the acquisition of which may be lengthy and equally difficult for both migrants and minorities.

Admittedly, before a ‘new’ minority is firmly established in a State it may have different needs, such as non-discrimination in education and employment. This, however, should not affect the definition of ‘minority’. After all, the labels ‘new’ and ‘old’ are “expressions of a rather relative and arbitrary parameter, namely the lapse of time.”⁴³⁹ Therefore, positive State action to protect a group’s identity may be afforded based on a sliding scale, depending on the needs of a group.

With the process of European integration, which encourages migration and leads to a higher degree of inter-ethnic mixture among Europeans, it is argued that any distinction between ‘new’ (migrant workers and non-citizens) and ‘old’ (traditional) minorities should be eliminated.⁴⁴⁰ This is so because not only may long-term migrants gradually become ‘old’ minorities, but also members of ‘old’ minorities may exercise their right to free movement in the EU and become part of a ‘new’

⁴³⁷ Van Den Bosch and Van Genugten, ‘International Legal Protection...’ (n 410).

⁴³⁸ Van Den Bosch and Van Genugten, ‘International Legal Protection...’ (n 410).

⁴³⁹ Gabriel Toggenburg, ‘Who is Managing Ethnic and Cultural Diversity in the European Condominium? The Moments of Entry, Integration and Preservation’ (2005) 43(4) *JCMS* 717-738, 720.

⁴⁴⁰ Manfred Nowak, ‘The Evolution of Minority Rights in International Law, Comments’ in C Brolmann, R Lefeber, M Zieck (eds) *People and Minorities in International Law* (Kluwer Academic Publishers, The Hague 1993) 118; see also, John Packer, ‘Problems in Defining Minorities’ in D Fottrell and B Bowring (eds) *Minority and Group Rights in the New Millennium* (Martinus Nijhoff Publishers, The Hague 1999) 264.

minority.⁴⁴¹ Furthermore, in Nowak's view in such multicultural society it will be "difficult to justify why only long-established 'old minorities' should enjoy special protection"⁴⁴². Similarly, Arzoz argues that undeniably "it is politically very advantageous that the European Union, in the twenty-first century, commits itself to a basic common standard applicable to every kind of minority, be it 'old' or 'new'."⁴⁴³ Ultimately, this distinction "drawn between minorities and immigrants", as Kurban maintains, "rests upon an unjustified and arbitrary categorisation, legally explicable as it may be."⁴⁴⁴ Indeed, 'new' minorities may also wish not to be assimilated in their host States, but to preserve and cultivate their cultural, linguistic and religious characteristics. Therefore, an EU definition should not contain the distinction between 'new' and 'old' minorities. Ideally, rights granted to a minority, whether 'new' or 'old', should be tailored to the specific needs of a group.

3.1.4. 'Ethnic' v 'racial' v 'national' minorities

This sub-section aims to clarify which of the terms 'ethnic', 'racial' or 'national' is the broadest. In this respect, a generous interpretation of the term 'ethnic' minority in the UN context is contrasted to the equally broad use of 'racial' in the UK. Because the EU Race Directive uses both terms, with an emphasis on 'race', the experience of British courts in defining this term is briefly overviewed.

⁴⁴¹ Gwendolyn Sasse, 'Securitization or Securing Rights? Exploring the Conceptual Foundations of Policies towards Minorities and Migrants in Europe' (2005) 43(4) *JCMS* 673-493, 676.

⁴⁴² Nowak, 'The Evolution of Minority Rights in International Law, Comments' (n 440) 118.

⁴⁴³ Arzoz, 'Article 22 of the EU Charter' (n 16) 164.

⁴⁴⁴ Dilek Kurban, 'Substantive Challenges to the Protection of Religious Freedom under the Framework Convention' in A Verstichel et al (eds) *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* (Intersentia, Oxford 2008) 121.

Until the 1950s, the UN mainly used the term ‘racial’ minorities, with a subsequent focus on ‘ethnic’ minorities, because the latter term is “wider in referring to all biological, cultural and historical characteristics, whereas the former term seem[s] to be restricted to inherited physical characteristics.”⁴⁴⁵ Because in the UN context the term ‘ethnic’ is the broadest term available,⁴⁴⁶ other terms, such as ‘racial’ and ‘national’, are subsumed under this umbrella term,⁴⁴⁷ without affecting the defining features of ‘minority.’ Thus, “we witness different uses of terms and not different meanings.”⁴⁴⁸

In the EU context, the use of ‘racial’ and ‘ethnic’ is combined under the Race Directive, which is preferable, as it may “prevent potentially undesirable gaps regarding the field of application.”⁴⁴⁹ However, it is not yet clear whether these terms also include ‘national minorities’, because none of these terms are defined in the Race Directive. It is probably only a matter of time before the ECJ is asked to clarify the scope of the instrument’s application. Furthermore, the presence of the term ‘national minorities’ in the CFR may suggest that a different use of the terms might have been

⁴⁴⁵ Malcolm Shaw, ‘The Definition of Minorities in International Law’ in Y Dinstein and M Tabory (eds) *The Protection of Minorities and Human Rights* (Martinus Nijhoff Publishers, Dordrecht 1992) 17.

⁴⁴⁶ For various recommendations concerning a definition of ‘minority’ see the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities (SCPDP) (1950) UN Doc E/CN.4/Sub.2/119, para 31 and 32; see also (1951) UN Doc E/CN.4/Sub.2/140/Annex I/ Draft res 11 and (1952) UN Doc E/CN.4/Sub.2/149, para 26.

⁴⁴⁷ P Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, Oxford 1991) 161.

⁴⁴⁸ G Pentassuglia, *Minorities in International Law: an Introductory Study* (Council of Europe Publishing, London 2002) 63.

⁴⁴⁹ K Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights, and the Right to Self-determination* (Martinus Nijhoff Publishers, The Hague 2000) 49; Shaw, ‘The Definition of Minorities in International Law’ (n 445) 17.

intended. Nonetheless, there is nothing to prevent a national minority that shares a common ethnic origin from relying on the provisions of the Race Directive.

Given that the EU Race Directive was modelled on the UK Race Relations Act (RRA)⁴⁵⁰ it may be useful to overview briefly the UK's approach to the definition of minorities. In interpreting the concept of 'national' minority under the FCNM, the UK adopted a broad reading of the concept 'racial group' under the RRA, which allowed the inclusion of 'national minorities' in the scope of this instrument.⁴⁵¹ Such a definition is in line with the defining criteria established in *Mandla v Dowell Lee*.⁴⁵² A Sikh boy was refused admission to a school because he did not comply with the school's rules regarding a uniform. In accordance with the Sikh tradition, his father insisted that his son should wear a turban over uncut hair, which was contrary to the school uniform rules. The headmaster refused to make an exception, and the applicants claimed indirect discrimination under the RRA. For the RRA to apply, it was essential to establish that Sikhs are a distinct ethnic group. Lord Fraser suggested a test on how to define the concept of 'ethnic origins.' His test consisted of two essential and five relevant characteristics.

The essential characteristics are the following:

- a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which keeps it alive;
- a cultural tradition of its own, including family and social customs and manners, often, but not necessarily, associated with religious observance;

⁴⁵⁰ Race Relations Act (n 383).

⁴⁵¹ The UK signed the FCNM on 01 February 1995 and ratified it on 15 January 1998. The FCNM entered into force on 01 May 1998.

⁴⁵² *Mandla v Dowell Lee* (n 92).

Relevant characteristics are:

- either a common geographical origin, or descent from a small number of common ancestors;
- a common language, not necessarily peculiar to a group;
- a common literature peculiar to the group;
- a common religion different from that of neighbouring groups or from the general community surrounding it;
- being a minority, or being an oppressed or dominant group within a larger community.

It was established that under this test the Sikhs are a distinct ethnic group, because they are a self-conscious community with a common history dating back to the 15th century, with a common language, and a common religion. Based on this test, members of the ‘traveller’ community were also recognised as an ethnic group because they share a common history, geographical origin, customs and folk tales and music.⁴⁵³

Accordingly, in interpreting the concepts ‘race’ and ‘ethnic origin’, the EU may draw on the experience of the British courts, which have interpreted these terms broadly, and even included the concept of ‘national’ minority under the FCNM. However, the British experience reveals that this definition has certain deficiencies. For example, it may inevitably exclude religious minorities, as discussed below.

⁴⁵³ *CRE v Dutton* [1989] QB 783.

3.1.5. *'Religious' and 'linguistic' minorities*

This sub-section sheds light on difficulties in defining religious and linguistic minorities. In particular, we draw on the experience of British courts in defining 'racial' groups, which exclude some groups with a common religion from the scope of the RRA. Given that the EU Race Directive was modelled on the RRA, we assess the implications of the EU following this practice. The sub-section is concluded with a brief overview of problems in identifying linguistic groups.

At first sight, it may seem easy to identify a 'religious' minority. A 'religious' minority is a group "the members of which are united by a common belief."⁴⁵⁴ However, on closer inspection it appears that the lack of a clear dividing line between 'religion' and other spiritual practices causes problems in identifying relevant groups. Furthermore, different denominations may emerge within the main belief system which may cause further controversy.⁴⁵⁵

Moreover, religious minorities "do not fit strictly into the characteristics of spontaneity and permanency. One's religion can be changed by a voluntary act, which is not the case with race, color, language – relatively – and culture."⁴⁵⁶ If an individual opts out of belonging to a religious minority, his/her individual freedom of religion is protected under Article 18 ICCPR. In contrast, Article 27 addresses the problems of minority religious communities, i.e., the "establishment and maintenance

⁴⁵⁴ Henrard, *Devising an Adequate System of Minority Protection...* (n 449) 51.

⁴⁵⁵ Henrard, *Devising an Adequate System of Minority Protection...* (n 449) 51.

⁴⁵⁶ N Lerner, *Group Rights and Discrimination in International Law* (Kluwer Academic Publishers, Dordrecht 1991) 32.

of religious institutions and schools and the protection of religious rites and holy places...”⁴⁵⁷ Furthermore, there is

nothing to suggest that the religious rights that are recognized, e.g. under article 27 of the CCPR, are contingent on the prior existence of the religion. The focal point is the existence of persons wishing to profess their religion rather than the types of religions that are professed.⁴⁵⁸

Where the EU Race Directive is concerned, it appears that groups that share a common ethnic origin and a common religion, such as the Sikhs, may benefit from the extensive provisions of this instrument, while groups that share only a common belief may be excluded. Let us turn to another example from the jurisprudence of English courts. In *Crown Suppliers v Dawkins*,⁴⁵⁹ a Rastafarian who wore his hair in dreadlocks was refused employment by a government agency when he did not cut his hair. To establish whether the applicant was discriminated against based on his race, it was essential to decide whether Rastafarians comprise a distinct ethnic group. An industrial tribunal applied the test in the *Mandla* case and concluded that Rastafarians who shared common history only for sixty years did not form a distinct ethnic group. The length of the period was relevant here because although Rastafarians could be regarded as a separate group, they were not identified as distinct by reference to their ethnic origin.⁴⁶⁰ Similarly Muslims do not comprise an ethnic group because they have different nationalities, colour and languages.⁴⁶¹

⁴⁵⁷ Shaw, ‘The Definition of Minorities in International Law’ (n 445) 19; Thornberry, *International Law and the Rights of Minorities* (n 447) 192.

⁴⁵⁸ E Gayim, *The Concept of Minority in International Law: a Critical Study of the Vital Elements* (University of Lapland, Rovaniemi 2001) 49.

⁴⁵⁹ *Crown Suppliers (Property Services Agency) v Dawkins* [1993] ICR 517.

⁴⁶⁰ *Crown Suppliers v Dawkins* (n 459).

⁴⁶¹ *J H Walker Ltd v Hussain* [1996] IRLR 11.

Even where a religious group is protected under the Employment Directive, the scope of such protection is limited to employment only. Recent reforms proposed by the Commission to expand the scope of the Employment Directive in order to match the Race Directive are significant developments in this respect and may ensure equal treatment of religious minorities who do not share a common ethnic origin, not only in employment, but also in education. Religious minorities are often in a vulnerable position in Europe, because they are also ‘new’ minorities. To prevent discrimination against these groups, it is important to follow the practice of the ACFC, which confirmed that, for the purposes of the FCNM, ‘religious’ minorities are also ‘national’ minorities.⁴⁶²

As to linguistic minorities, they are easily identifiable by a common language. However, problems may arise in identifying and protecting such groups “where multiple languages are spoken and where a variety of dialects exist.”⁴⁶³ In States with multiple languages, if groups satisfy other defining criteria of ‘minority’ (discussed below in sub-section 3.2 on pages 155-182), all of these languages may require protection. However, if one of them develops into a *lingua franca* in the public domain, it may lose the status of a ‘linguistic’ minority.⁴⁶⁴ As to dialects, a pragmatic approach is necessary depending on the particular circumstances of a group and the principle of proportionality.⁴⁶⁵

⁴⁶² Kurban, ‘Substantive Challenges to the Protection of Religious Freedom...’ (n 444) 120; see also ACFC, ‘First Opinion on Cyprus’ (2002) ACFC/INF/OP/I.

⁴⁶³ Shaw, ‘The Definition of Minorities in International Law’ (n 445) 19.

⁴⁶⁴ Henrard, *Devising an Adequate System of Minority Protection...* (n 449) 53.

⁴⁶⁵ Henrard, *Devising an Adequate System of Minority Protection...* (n 449) 52.

Accordingly, an EU definition of ‘minority’ should not be based on differences between racial, ethnic, religious and linguistic minorities. Rather their protection should be tailored to their needs based on the rights discussed in Sections 1 and 2 of this chapter.

3.1.6. ‘Territorial’ minorities

Various terms are used to denote situations where States accord collective rights to a minority group through granting varying degrees of autonomy, such as ‘stateless nations’, ‘nations without states’ or ‘minority nations’, i.e., groups that, “in spite of having their territories included within the boundaries of one or more States, by and large do not identify with them.”⁴⁶⁶ This thesis will use the term ‘territorial’ minorities to include not only these groups, but also groups which acquired or strive to receive various degrees of autonomy.

Catalans are a good example of a ‘territorial’ minority. Catalonia became one of 17 autonomous regions of Spain under the 1978 Spanish Constitution. Under the Spanish Constitution decentralisation of powers to Autonomous Communities may be characterised as a “right and not an obligation, political in content, limited in its scope, gradual in its exercise and not necessarily homogeneous in its final result, to be exercised by equally heterogeneous subjects.”⁴⁶⁷ Thus, decentralisation takes place

⁴⁶⁶ Montserrat Guibernau, ‘Nations without States: Political Communities in the Global Age’ (2004) 25 Michigan Journal of International Law 1251, 1254; see also, Pau Puig i Scotoni, ‘Exercising Self-Determination without Jeopardising the Rights of the Others: the Catalan Model’ (2001) 14 Saint Thomas Law Review 395-409, 397.

where a State delegates limited powers from the centre to the periphery, “subject to the control and overriding responsibility of the centre.”⁴⁶⁸

By decentralising the State, Spain met the increasing demands of its territorial minorities, i.e., those residing in Catalonia, the Basque Country and Galicia, for autonomy. However, in addition to granting regional autonomy to its “historically distinct peoples with long-standing aspirations to autonomy,”⁴⁶⁹ Spain created other administrative units which lacked such identity, for example, Madrid. Although the degree of powers conferred on various Autonomous Communities varies depending on their history and demands, the effects of this universal Spanish devolution⁴⁷⁰ dilutes the significance of regional autonomy granted to territorial minorities. Moreover, Article 2 of the 1978 Constitution asserts ‘the indivisible unity of the Spanish Nation’, while acknowledging “the right to autonomy of the nationalities and regions which form it and the solidarity among them.”⁴⁷¹ Such a formulation, indicative of Spain’s centrist historic past and quasi-federalist present, denies formal recognition of territorial minorities’ identities.

⁴⁶⁷ Carlos Flores Juberias, ‘Regionalization and Autonomy in Spain: The Making of the “Estado de las Autonomias”’ in M Suksi (ed) *Autonomy: Applications and Implications* (Kluwer Law International, The Hague 1998) 198-9.

⁴⁶⁸ Ruth Lapidot, ‘Autonomy: Potential and Limitations’ (1994) 1 *International Journal on Group Rights* 269-290, 284.

⁴⁶⁹ Naomi Roht-Arriaza, ‘The Committee on the Regions and the Role of Regional Governments in the European Union’ (1997) 20 *Hastings International and Comparative Law Review* 413-465, 416.

⁴⁷⁰ Michael Keating, ‘Regions and the Convention on the Future of Europe’ (2004) 9(1) *South European Society and Politics* 192-207, 194.

⁴⁷¹ Daniele Conversi, ‘The Smooth Transition: Spain’s 1978 Constitution and the Nationalities Question’ (2002) 4(3) *National Identities* 223-244, 228.

Moreover, in the mid-1990s, a trend emerged in other autonomous regions which amended their statutes to declare themselves ‘nationalities’, despite the fact that this term clearly referred only to the historic three nations, i.e., Catalan, Basque and Galician.⁴⁷² This resulted in Catalonia’s demands for recognition as a ‘nation’.⁴⁷³ By insisting on ‘national autonomy’ as opposed to ‘regional autonomy’, Catalonia tries to emphasise that it remains a “cultural nation if not a sovereign state.”⁴⁷⁴

If, under this pressure, Spain recognises Catalonia, the Basque Country and Galicia as nations, it would have to re-conceptualise the notion of ‘nation’ under Article 2 of the 1978 Spanish Constitution. This, in turn, could lead to acceptance of the idea that Spain is a “nation of nations”⁴⁷⁵, which could impact on its approach to minority protection. Currently, Spain denies that there are minorities within its territory, except for the ethnic Roma population.⁴⁷⁶ As a result, there are no policies to protect minority cultures and languages at the central level.

This, however, is partially compensated for by the Autonomous Communities’ powers over matters such as culture and education. For example, Catalonia has developed

⁴⁷² Michael Keating, ‘Federalism and the Balance of Power in European States’ (OECD, Sigma 2007) 21.

⁴⁷³ Keating, ‘Federalism and the Balance of Power in European States’ (n 472) 21.

⁴⁷⁴ Michael Kelly, ‘Political Downsizing: the Re-emergence of Self-Determination, and the Movement Towards Smaller, Ethnically Homogenous States’ (1998-1999) 47 *Drake Law Review* 209-278, 232.

⁴⁷⁵ Montserrat Guibernau, ‘Between autonomy and secession: the accommodation of Catalonia within the new democratic Spain’ (2002) ESRC “One Europe or Several?” Working Paper 48/02, 17.

⁴⁷⁶ Eduardo Ruiz Vieyetz ‘Federalism, Subnational Constitutional Arrangements, and the Protection of Minorities in Spain’ in A Tarr, R Williams and J Marko (eds) *Federalism, Subnational Constitutions, and Minority Rights* (Praeger, London 2004).

policies to protect autochthonous languages and cultures.⁴⁷⁷ Moreover, within Catalonia, the language of education is Catalan, as part of an effort to assert the national identity of the region.⁴⁷⁸ Accordingly, by permitting a group to govern matters of special concern to them, such as culture, language and education, decentralisation allows protection of minority rights through a combination of individual and collective rights.

To conclude, as the above overview of various types of minorities illustrates, there are different groups that may be protected under the umbrella concept of ‘minority’. Although not all of them may need an identical level of protection, this should not lead to different categories of minorities, which may create further confusion in this complicated area of law. In addition, such a categorisation of minorities may allow States to evade “their obligations by using different designations for groups that could be considered minorities, such as ‘aboriginal’, ‘immigrant’ or whatever.”⁴⁷⁹ Even the ACFC emphasises that applicability of the FCNM “does not necessarily mean that the authorities should in their domestic legislation and practice use the term ‘national minority’ to describe the group concerned.”⁴⁸⁰ However, the protection accorded to such groups under the regime of minority protection (discussed in Sections 1 and 2 of this Chapter) is based on a sliding scale of rights, including the “origin of their

⁴⁷⁷ Vieyetz ‘Federalism, Subnational Constitutional Arrangements...’ (n 476) 150; see also, Giovanni Poggeschi, ‘Linguistic Rights in Spain’ in S Trifunovska and F de Varennes (eds) *Minority Rights in Europe: European Minorities and Languages* (TMC Asser Press, The Hague 2001) 85-101.

⁴⁷⁸ Keating, ‘Federalism and the Balance of Power in European States’ (n 472).

⁴⁷⁹ Jennifer Preece, ‘National minority rights vs. state sovereignty in Europe: changing norms in international relations?’ (1997) 3(3) *Nations and Nationalism* 345-364, 348; see also the ACFC’s criticism of State practice of narrowing personal and territorial scope of the FCNM’s application: ‘First Opinion on Denmark’ (n 75); ‘Second Opinion on Denmark’ (2004) ACFC/INF/OP/II(2004)005; PACE, ‘Minority Protection in Europe: Best Practices and Deficiencies in Implementation of Common Standards’ (2010) Doc 12109, paras 69-72.

⁴⁸⁰ ACFC, ‘First Opinion on Norway’ (n 406) para 19.

situation, length of stay in a particular country, and the reasonableness of a minority preserving and protecting its own culture.”⁴⁸¹ Accordingly, the present thesis aims to look beyond labels and focus on the essence of the definition of ‘minority’.

3.2. What are the defining elements of the term ‘minority’?

What constitutes a ‘minority’ for the purposes of EU law? To address this question, the sub-section, first, outlines the three most-quoted proposals on the definition of ‘minority’.⁴⁸² These definitions are then deconstructed and the common elements in all three proposals are discussed in detail with the aim of defining the term in the EU context.

⁴⁸¹ Working Group on Minorities (1996) UN Doc E/CN.4/Sub.2/1996/28, 26.

⁴⁸² In the thematic comment on the rights of minorities, the EU Network of Independent Experts on Fundamental Rights (‘Thematic Comment No 3 (n 15)’) emphasised that even though they are not legally binding, the definitions proposed by Mr Francesco Capotorti (*Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (n 377)), and Mr Jules Deschenes ‘Proposal concerning a definition of the term “minority”’ (n 378) under Article 27 ICCPR for the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities are very influential. Similarly, a definition suggested by the PACE in Article 1 of the 1993 Recommendation 1201 (n 360) is used as a reference to determine the meaning of the notion of a ‘minority’.

Placing the definition in the EU context, the Network acknowledged that the concept of a ‘minority’ may be subject to diverse interpretations in different Member States; therefore, it did not offer its own definition. Nevertheless, even though the approaches of Member States differ, this does not exclude the possibility of identifying a meaning of the term on the basis of a consensus between the Member States, “insofar as it is based on the *acquis* of international and European human rights law” (Thematic Comment No 3, 11). The main instrument constituting such an *acquis* is the FCNM. Even though the FCNM does not define the concept of a ‘minority’, the Network considered that a clear message by the EU and its institutions, committing themselves to comply with the FCNM would affirm their willingness to respect, protect and promote the rights of minorities. Regrettably, the Network did not specify how such compliance can take place without relevant EU competences to protect minorities, and limited itself to suggesting that such a clarification could take the form of an inter-institutional declaration or a communication by the Commission. Overall, even though the Network did not define the term ‘minority’ in the context of EU law, it is commendable that it advocated the need for its clarification.

The most widely quoted definition in the literature⁴⁸³ was proposed by Capotorti:

A group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.⁴⁸⁴

A less successful, yet quite influential definition,⁴⁸⁵ strongly resembling Capotorti's proposal, was suggested by Deschenes:

A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that state, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and law.⁴⁸⁶

At the European level, the PACE's non-legally binding proposal in Recommendation 1201 has been widely cited by commentators:⁴⁸⁷

... the expression 'national minority' refers to a group of persons in a state who:

- reside on the territory of that state and are citizens thereof;
- maintain longstanding, firm and lasting ties with that state;

⁴⁸³ Philip Vuciri Ramaga, 'The Bases of Minority Identity' (1992) 14(3) *Human Rights Quarterly* 409-428, 410; Patrick Thornberry, 'Self-Determination, Minorities, Human Rights: A Review of International Instruments' (1989) 38 *International and Comparative Law Quarterly* 867-889, 878; Geoff Gilbert, 'The Council of Europe and Minority Rights' (1996) 18(1) *Human Rights Quarterly* 160-189, 164; Thomas Simon, 'Minorities in International Law' (1997) 2 *Canadian Journal of Law and Jurisprudence* 507-519, 512.

⁴⁸⁴ Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (n 377) 96.

⁴⁸⁵ Michael Geroe and Thomas Gump, 'Hungary and a New Paradigm for the Protection of Ethnic Minorities in Central and Eastern Europe' (1995) 32 *Columbia Journal of Transnational Law* 673-705, 674; Jean-Paul Schreuder, 'Minority Protection Within the Concept of Self-Determination' (1995) 8 *Leiden Journal of International Law* 53-80, 55; Adina Preda, 'The Principle of Self-Determination and National Minorities' (2003) 27 *Dialectical Anthropology* 205-226, 213.

⁴⁸⁶ Deschenes, 'Proposal concerning a definition of the term "minority"' (n 378) 30.

⁴⁸⁷ Stephen Deets, 'Reconsidering East European Minority Policy: Liberal Theory and European Norms' (2002) 16 *East European Politics and Societies* 30-53, 44; Martin Alexanderson, 'The Need for a Generalised Application of the Minorities Regime in Europe' (1997) 8 *Helsinki Monitor* 47-58, 55; Stephen Deets, 'Liberal Pluralism: Does the West Have Any to Export?' (2002) 4 *Journal on Ethnopolitics and Minority Issues in Europe* 1-12, 2.

- display distinctive ethnic, cultural, religious or linguistic characteristics;
- are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state;
- are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language.⁴⁸⁸

There are certain common features present in all three definitions. These features may be divided into objective (identified externally) and subjective characteristics (intrinsic to a group).

Objective elements include:

- A group
- Non-dominant position
- Numerical minority
- Citizenship/nationality of a State, as well as the requirement of maintaining long-standing, firm and lasting ties with the State.

The subjective element is:

- a sense of solidarity to preserve a minority identity.

The following discussion will analyse each element in turn and evaluate its appropriateness for inclusion in an EU definition of ‘minority’.

⁴⁸⁸ Recommendation 1201 (1993) (n 360) Article 1.

3.2.1. *The existence of a distinct group*

This sub-section deals with the existence of a group as a central element of the definition. In international law, the “notion of group requires the presence of ... unifying, spontaneous (as opposed to artificial or planned) and permanent factors that are, as a rule, beyond the control of the members of the group.”⁴⁸⁹ Accordingly, a minority group can be characterised “by common descent and kinship. It follows that no person can become a member of an ethnic community just by declaring his sympathy or personal liking for that group.”⁴⁹⁰ At the same time, if group members do not wish to be regarded as a minority, their treatment as a distinct group would be a violation of the individual rights of its members.⁴⁹¹ As Article 3(1) FCNM states,

[e]very person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice.

Moreover, the existence of a minority is a matter of fact, and is not determined by law, as established by the PCIJ in 1930.⁴⁹² The HRC confirmed this rule in its General Comment on Article 27 ICCPR.⁴⁹³ Even though in practice an official act of recognition of a minority group may significantly facilitate its protection, such an act is not decisive to determine a minority’s existence in a State. Otherwise, States could

⁴⁸⁹ Lerner, *Group Rights and Discrimination in International Law* (n 456) 107.

⁴⁹⁰ Kay Hailbronner, ‘The Legal Status of Population Groups in a Multinational State under Public International Law’ in Y Dinstein and M Tabory (eds) *The Protection of Minorities and Human Rights* (Martinus Nijhoff Publishers, Dordrecht 1992) 135.

⁴⁹¹ H O’Nions, *Minority Rights Protection in International Law: The Roma of Europe* (Ashgate, Aldershot 2007) 60.

⁴⁹² *Advisory Opinion on the Greco-Bulgarian Community* [1930] PCIJ Ser B No 17, 22.

⁴⁹³ General Comment No 23 (n 51) para 5.2.

easily undermine provisions of international treaties by “simple legislative inaction.”⁴⁹⁴

Accordingly, for the purposes of the present thesis, a proposed definition of ‘minority’ should take into consideration the concept that a minority is a group unified on the basis of spontaneous and permanent features. Its existence is determined by fact, not law, although official State recognition may be beneficial for a group’s protection.

3.2.2. Numerical minority and non-dominant position

Where a numerical criterion is concerned, the above-discussed definitions by Capotorti, Deschenes and the PACE have different ways of identifying a minority. Capotorti refers to a group with ethnic, religious, cultural characteristics which is numerically fewer than *the rest of the population* of a State. Deschenes writes of a numerical minority, while the PACE suggests that a minority should be ‘sufficiently representative, although smaller in number than the rest of the population of that state or *of a region* of that state’, thus adding another defining dimension of the term ‘minority.’ Based on the example of Belgium, this sub-section aims to demonstrate that the PACE’s approach may lead to a more coherent definition. A minority in a non-dominant position should be protected both at State and regional levels.

It is a common assumption that a minority group constitutes a numerical minority. No minimum or maximum threshold is, however, identified, and a context-specific and

⁴⁹⁴ Thornberry, *International Law and the Rights of Minorities* (n 447) 157.

pragmatic approach to the matter is preferred.⁴⁹⁵ Even where a minority is a numerical one, statistics should be used cautiously, because “[a]n ethnic, religious or linguistic group may prove to be a minority in the State as a whole, yet a majority in some districts (where the overall majority is actually in a minority).”⁴⁹⁶ Therefore, the PACE’s approach is more useful.

As to ‘non-dominance’, the term does “not necessarily imply being subordinate or oppressed, which tends to support the view that in a plural society the several ethnic, religious and linguistic groups could all be considered minorities.”⁴⁹⁷ Yet a mere co-existence of several minority groups in a country does not automatically suggest a non-dominant position.⁴⁹⁸ To qualify for minority protection, a group may need to have a disadvantaged political, economic, social or cultural status.⁴⁹⁹

However, the requirement of non-dominance is complicated by the fact that in some States the country-wide majority may constitute a minority at a regional level and may need the protection afforded to a minority group.⁵⁰⁰ This may depend on the degree of autonomy accorded to a district/region where a minority group constitutes an overall majority. Therefore, it may be useful to think of a minority “in the sense that such a group plays a minor role in the affairs of its country”⁵⁰¹ or a region.

⁴⁹⁵ Shaw, ‘The Definition of Minorities in International Law’ (n 445) 25.

⁴⁹⁶ Yoram Dinstein, ‘Collective Human Rights of Peoples and Minorities’ (1976) 25(1) *The International and Comparative Law Quarterly* 102-120, 112.

⁴⁹⁷ Henrard, *Devising an Adequate System of Minority Protection...* (n 449) 36.

⁴⁹⁸ Wolfrum, ‘The Emergence of “New Minorities” as a result of Migration’ (n 413) 162.

⁴⁹⁹ Henrard, *Devising an Adequate System of Minority Protection...* (n 449) 37.

⁵⁰⁰ For example, Spaniards in Catalonia, English speakers in Quebec.

Nonetheless, the protection of minorities at the sub-State level is extremely controversial. There is even a significant discrepancy in the approaches of the UN and CoE institutions. Thus, in *Ballantyne, Davidson, McIntyre v Canada*,⁵⁰² concerning the usage of signs in English in French-speaking Québec, the HRC observed that Article 27 ICCPR refers to minorities *in States*.⁵⁰³ The HRC interpreted Article 27 in the light of Article 50 ICCPR, which provides that the ICCPR applies to all parts of Federal States. Hence, the English-speaking citizens of Canada could not benefit from the protection under Article 27.⁵⁰⁴

In an individual opinion, Evatt et al rightly criticise this narrow interpretation of the HRC, because it could have the

... result that a State party would have no obligation under the Covenant to ensure that a minority in an autonomous province had the protection of article 27 where it was not clear that the group in question was a minority in the State considered as a whole entity.⁵⁰⁵

In contrast to the HRC's narrow approach, various CoE bodies consider that national minorities should be protected both at a sub-State and State levels. Recent debates within the CoE concerning Belgium exemplify this tension between a numerical criterion and the requirement of non-dominance at the State or regional levels.

⁵⁰¹ Dinstein, 'Collective Human Rights of Peoples and Minorities' (n 496) 112.

⁵⁰² *Ballantyne, Davidson, McIntyre v Canada* (n 39).

⁵⁰³ *Ballantyne, Davidson, McIntyre v Canada* (n 39) para 11.2.

⁵⁰⁴ Significantly, Article 23 of the Canadian Charter of Rights and Freedoms remedies this situation by allowing children of English- and French-speaking citizens of Canada to be educated in their mother tongue in primary and secondary schools where they constitute a minority in a province with another official language. Canadian Charter of Rights and Freedoms (Enacted as Schedule B to the Canada Act) (1982) c. 11 <<http://laws.justice.gc.ca/en/charter/#instruction>> accessed 11 August 2009.

⁵⁰⁵ Elisabeth Evatt, Individual opinion co-signed by Nisuke Ando, Marco Tulio Bruni Celli and Vojin Dimitrijevic (concurring and elaborating) in *Ballantyne, Davidson, McIntyre v Canada* (n 39).

Belgium's experience, discussed below, sheds light on these two defining criteria of 'minority'.

Currently, French-speakers represent 40% (3.36 million inhabitants) and Dutch-speakers 59% (5.9 million inhabitants)⁵⁰⁶ of the population of Belgium; a German-speaking minority constitutes a small percentage of the total population. Despite a slight numerical majority of Dutch-speakers as compared to French-speakers, these groups are co-dominant because they are on an equal political footing. Generally, international law does not protect co-dominant majorities in a State, because there is little risk that another language, culture or religion may be imposed on them against their will. The FCNM, however, specifies that if a majority constitutes a minority in the areas populated by another co-dominant nation, they may sometimes be protected as minorities.⁵⁰⁷ In its monitoring of State compliance, the ACFC follows the same practice in relation to, for example, Bosnia and Herzegovina, which, as in Belgium, has three co-dominant majorities.⁵⁰⁸ This approach is not fully supported in Belgium, where Flanders insists that the principle of territoriality should be enforced rigidly in order to protect the Flemish language. Therefore, in their view, French-speakers do not constitute a minority at the regional level. In contrast, French-speakers residing in Flanders argue that they have the right to preserve their cultural identity. To this end, they have (unsuccessfully) contested a strict application of the territoriality principle

⁵⁰⁶ Patxi Juaristi, Timothy Reagan and Humphrey Tonkin, 'Language Diversity in the European Union: An overview' in X Arzoz (ed) *Respecting Linguistic diversity in the European Union* (John Benjamins B.V., Amsterdam 2008) 66.

⁵⁰⁷ FCNM (n 3) Article 20.

⁵⁰⁸ ACFC, 'First Opinion on Bosnia and Herzegovina' (n 282).

in the context of educational and political rights before the ECtHR on numerous occasions.⁵⁰⁹

The issue of who are minorities in Belgium was magnified when Belgium, upon signing the FCNM, made the following reservation:

[t]he Kingdom of Belgium declares that the Framework Convention applies without prejudice to the constitutional provisions, guarantees or principles, and without prejudice to the legislative rules which currently govern the use of languages. The Kingdom of Belgium declares that the notion of [a] national minority will be defined by the inter-ministerial conference of foreign policy.⁵¹⁰

To ascertain whether this declaration contradicts the FCNM, the PACE requested the Venice Commission to express an opinion on possible groups of persons who could be protected under the FCNM in Belgium. Van Dijk's preliminary observations clarify that the lack of a definition in the FCNM does not mean that States can determine for themselves who constitutes a minority. Moreover, the fact that the FCNM refers to 'national minorities' does not exclude a regional approach. Thus, if the communes and regions of Belgium are treated as separate territories, then the French-speakers in Flanders and the Dutch-speakers in Wallonia would constitute national minorities. This approach is compatible with the FCNM "*if and to the extent that the communities and regions concerned have legislative and/or executive and/or judicial powers which determine rights and obligations covered by the Framework Convention.*"⁵¹¹

⁵⁰⁹ *Belgian Linguistics* (n 63); *Mathieu-Mohin and Clerfayt* (n 101).

⁵¹⁰ Belgian reservation accompanying the signature of the Framework Convention for the Protection of National Minorities, 31 July 2001 <http://www.coe.int/t/e/human_rights/minorities/Country_specific_eng.asp#P105_5544> accessed 07 August 2009. None of the States Parties to the FCNM objected to this reservation.

In Belgium, where the State transferred powers in the sphere of education to the communes, a regional approach should be favoured. Indeed, this was confirmed by the Court of Arbitration, the highest court in Belgium, in its judgment no 54/1996. The Court ruled that “it is the duty of each legislator, within the limits of its competence to ensure the protection of minorities”⁵¹² and held Flanders responsible for the protection of French-speakers in the Flemish communes with linguistic facilities.

Furthermore, the Venice Commission emphasised that in a context of devolving political powers and territorial sub-divisions, “an increasing number of laws and decisions affecting the rights of persons belonging to national minorities are taken at the regional and local level, not at the State level.”⁵¹³ Therefore, while a State bears international accountability for its obligations under the FCNM, it should take into account the decentralisation of powers. If regional authorities take decisions affecting national minorities, excluding application of the FCNM may contradict the spirit of the Convention.

To reaffirm this finding, the PACE condemned the broad reservation to the FCNM by Belgium, considering it to be incompatible with the instrument and capable of

⁵¹¹ Venice Commission, ‘Preliminary observations on Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities could be applied in Belgium’ (2001) CDL (2001)121 (emphasis in original).

⁵¹² PACE, ‘Report on Protection of minorities in Belgium’ (2002) Doc 9536 <<http://assembly.coe.int/Documents/WorkingDocs/Doc02/EDOC9536.htm>> accessed 15 August 2009.

⁵¹³ Venice Commission, ‘Opinion on Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities could be applied in Belgium’ (2002) CDL-AD (2002) 1.

violating Article 19 of the Vienna Convention on the Law of Treaties.⁵¹⁴ In its Resolution on protection of minorities in Belgium, the PACE warned that the French-speakers in Flanders and the Dutch-speakers in Wallonia may be “in danger of losing ... [their] identity by the operation of democratic institutions at the regional level.”⁵¹⁵ Article 20 FCNM reaffirms this finding. The provision stipulates that, where a minority group constitutes a local majority, they should “respect the rights of others, in particular those of persons belonging to the majority” who form a so-called minority-in-minority, i.e. “a minority in a sub-State unit where the majority constitutes a minority at the State level.”⁵¹⁶ This provision is supported, for example, by the declaration made by Switzerland to the FCNM, which defines national minorities as “groups of individuals numerically inferior to the rest of the population of the country *or* of a canton.”⁵¹⁷ Furthermore, according to the PACE Recommendation 1201 (quoted on page 157), one of the defining criteria of minorities is sufficient representation of a minority group in a State *or a region of that State*.⁵¹⁸ The French-speakers in Flanders satisfy this criterion: the last population census in Belgium that included language data in 1947 showed that French-speakers comprised between 20% and 46% in many Flemish communes.⁵¹⁹

⁵¹⁴ PACE, ‘Resolution on Protection of minorities in Belgium’ (2002) 1301(2002), para 4 <<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta02/ ERES1301.htm>> accessed 15 August 2009.

⁵¹⁵ PACE, ‘Resolution on Protection of minorities in Belgium’ (n 514) para 19.

⁵¹⁶ Verstichel, ‘Personal Scope of Application...’ (n 395) 143.

⁵¹⁷ Switzerland reservation accompanying the signature of the Framework Convention for the Protection of National Minorities, 21 October 1998 (emphasis added) <http://www.coe.int/t/e/human_rights/minorities/Country_specific_eng.asp#P919_50093> accessed 12 August 2009.

⁵¹⁸ Recommendation 1201(1993) (n 360) Article 1(d).

⁵¹⁹ PACE, ‘Report on Protection of minorities in Belgium’ (n 512) Explanatory memorandum, para 41.

On the basis of the above discussion it is possible to conclude that in Belgium, at the State level French-speakers do not constitute a minority group, because politically they are on the same footing as the Dutch-speaking population. The same applies to Brussels-capital with a population of 980,000,⁵²⁰ where Dutch-speakers comprise only 15% of the population, but have substantial guarantees at the same level as French-speakers. Consequently, only the German-speaking minority constitutes a minority at the State level. However, because of the territorial division of the country and allocation of competences, on the regional and local levels French-speakers may constitute a minority in the Dutch- and German-speaking areas and so may Dutch-speakers in French- and German-speaking regions. Chapter IV of this thesis explores in more detail the legal implications of the territoriality principle in Belgium, with a focus on education.

The above example demonstrates that, in defining ‘minority’, both statistics and the requirement of non-dominance should be handled with care. In Belgium, even though Dutch-speakers constitute a slight numerical majority they have felt minoritised for decades; therefore, the numerical criterion should not feature in the definition of a minority. Equally, the criterion of non-dominance may be misleading if its application is limited to the State level only. Where minority-in-minority situations are present, the correct approach is to take as a frame of reference the internal political make up of the country “insofar as these entities have certain concrete competences which can influence the population groups concerned.”⁵²¹ Overall, it is the minor position of a minority that should prevail in defining the term. Thus, for the purposes of an EU

⁵²⁰ Juaristi, Reagan and Tonkin, ‘Language Diversity in the European Union...’ (n 506) 66.

⁵²¹ Henrard, *Devising an Adequate System of Minority Protection...* (n 449) 35.

definition, a ‘minority’ is a group which is in a non-dominant position at the State or regional level.

3.2.3. Nationality/citizenship requirement

There is significant controversy surrounding the requirement of citizenship for protection of minority rights. All three definitions considered above contain the criterion of citizenship/nationality. The terms citizenship/nationality are often used interchangeably. Indeed, they denote two interlinked aspects of an individual’s connection with a State. The concept of ‘citizenship’ describes the internal dimension of an individual’s belonging to a State, where he/she enjoys civil and political rights, while the term ‘nationality’ is the external aspect of a legal connection between an individual and a State; it is a term of international public law.⁵²²

Some commentators support inclusion of this requirement in the definition of ‘minority’.⁵²³ This narrow view, however, is increasingly criticised in the literature.⁵²⁴

This sub-section first contrasts the generous approach of the HRC, which does not require nationality/citizenship as a pre-requisite of minority protection, with the restrictive approach adopted by the PACE. On the basis of Latvia’s example discussed below and explored in more detail in Chapter III of this thesis, it then

⁵²² John Dugard, ‘South Africa’s “Independent” Homelands: An Exercise in Denationalization’ (1980-1981) 10 *Denver Journal of International Law and Policy* 11, 22.

⁵²³ Gudmundur Alfredson, ‘Minority Rights and the New World Order’ in D Gomien (ed) *Broadening the Frontiers of Human Rights: Essays in Honour of Asbjorn Eide* (Scandinavian University Press, Oslo 1993) 69.

⁵²⁴ Nowak, ‘The Evolution of Minority Rights in International Law, Comments’ (n 440) 116; Wolfrum, ‘The Emergence of “New Minorities” as a result of Migration’ (n 413) 161.

demonstrates how the requirement of nationality/citizenship in the definition of ‘minority’ may disadvantage a minority group.

One of the arguments against a citizenship requirement in the definition of ‘minority’ is that Article 27 ICCPR refers to persons, not citizens, as does Article 25 ICCPR on political rights.⁵²⁵ Therefore, a definition of ‘minority’ under Article 27 should not include the requirement of citizenship. Indeed, the HRC in its comment on Article 27 noted that

... the individuals designed to be protected need not be citizens of the State party. In this regard, the obligations deriving from article 2.1 [ICCPR] are also relevant, since a State party is required under that article to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens...⁵²⁶

The HRC’s approach is rather generous, because it insists that not only is it unnecessary for minorities to be nationals or citizens, but also they need not be permanent residents: accordingly, “migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights.”⁵²⁷

This is, certainly, a very broad reading of Article 27 ICCPR, where the requirement of citizenship is omitted. It is not, however, as broad as the wording may suggest. Scheinin clarifies that,

⁵²⁵ Shaw, ‘The Definition of Minorities in International Law’ (n 445) 26; Henrard, *Devising an Adequate System of Minority Protection...* (n 449) 39.

⁵²⁶ General Comment No 23 (n 51) para 5.1.

⁵²⁷ General Comment No 23 (n 51) para 5.2.

... contrary to what some ironic commentators have suggested, the HRC did not say that visitors as a group would be a minority in the sense of Article 27. Rather, ... a state must not deny a migrant worker or a visitor membership in an existing minority merely on the basis of the temporary nature of his or her stay.⁵²⁸

Consequently, if migrant workers wish to identify with a well-established pre-existing minority group in a State, those workers may “very well claim the same protection as other members of the group, for instance, in the education system.”⁵²⁹ However, a completely new linguistic, religious or ethnic group that arrives in a country may not immediately demand the same level of protection.⁵³⁰ This is what the requirement of maintaining “longstanding, firm and lasting ties with [the] state” in the definition proposed by the PACE emphasises. It aims to discourage newly arrived groups from profiling themselves as minorities “since this is perceived to have negative repercussions for national unity.”⁵³¹ However, as Shaw rightly warns, the requirement of ‘long-established’ should not be subject to excessive interpretation: “[i]t means that the minority must exist as such. There is no stipulation as to how long this state of affairs has continued, nor any minimum qualification period.”⁵³²

The following example of Latvia aims to illustrate how a strict interpretation of the requirements of ‘citizenship’ and ‘long-established’ in the State may lead to exclusion of large segments of a population. A brief historic overview aims to place the issue of strict citizenship laws in its context.

⁵²⁸ Scheinin, ‘The United Nations International Covenant on Civil and Political Rights...’ (n 17) 26.

⁵²⁹ Scheinin, ‘The United Nations International Covenant on Civil and Political Rights...’ (n 17) 31.

⁵³⁰ Scheinin, ‘The United Nations International Covenant on Civil and Political Rights...’ (n 17) 31.

⁵³¹ Henrard, *Devising an Adequate System of Minority Protection...* (n 449) 41.

⁵³² Shaw, ‘The Definition of Minorities in International Law’ (n 445) 27.

Latvia has never been independent for long. Since the 10th century it had been ruled in turn by Russia, Germany, Sweden and Poland.⁵³³ This is why the acquisition of independence from the Russian Empire in 1919 had such a profound significance for Latvia. It wanted to assert itself not only as a State, but also as a nation.⁵³⁴ The collapse of the Russian empire in 1917⁵³⁵ and imperial Germany in 1918 marked a new stage in Latvia's evolution. The Allied Powers hastily recognised it as an independent State to prevent any further strengthening of Germany on the Baltic Sea.⁵³⁶ Latvia also concluded peace treaties with the German Reich on 15 July 1920 and Russia on 11 August 1920.⁵³⁷ This was a significant development, because it

⁵³³ The strategic location of Latvia on the shores of the Baltic Sea has always attracted Russia, Germany, Sweden and Poland, which have competed to establish their influence over this territory since the 10th century. As early as 1030, Russian princes, who sought to access the western shore, established the military outpost of Yuriyev in Tartu and had a significant influence in the Baltic region. Interrupted by Mongol invasions in 1240–1480, Russia renewed its efforts to re-establish influence over this region, beginning in the 16th century. As a result of these efforts, Russia acquired the Northern part of Latvia from Sweden in 1721 (Treaty of Nystadt) and the southern part of the country during the partition of Poland in 1795. The independence of Kurland (present day Latvia) was re-established for a short period by Napoleon. Finally, the incorporation of Latvia into the Russian Empire in 1813 lasted for over a century: Nicolai Vakar, 'Russia and the Baltic States' (1943) 3(1) *Russian Review* 45-54, 45-46.

⁵³⁴ Throughout history the Latvians were exposed to strong external influences. For over 150 years, the German minority remained in a privileged position and played the role of intermediary between the Russians and the local population in Latvia. At the end of the nineteenth century, the Russian Empire asserted its influence over the Latvians and began an active policy of Russification of the population: after 1890, the Russian language became compulsory in schools: Vakar, 'Russia and the Baltic States' (n 533) 46.

⁵³⁵ Following the February Russian Revolution, on 5 July 1917, Latvia was granted local self-government. The Latvians perceived this as insufficient, and on 30 July 1917 the Latvian Political Conference declared that Latvia should be independent; finally, a Latvian Provisional National Committee adopted a resolution on Latvian separation from Soviet Russia on 17-18 November 1917: Alfred Bilmanis, 'Free Latvia in Free Europe' (1944) 232 *Annals of the American Academy of Political and Social Science* 43-48, 45.

⁵³⁶ Likewise, on 11 November 1918 the British Government and on 28 April 1920 France granted *de facto* recognition to Latvia. This development was convenient to Russia too: as a buffer zone Latvia removed "the ghost of Allied military intervention in Russia": Vakar, 'Russia and the Baltic States' (n 533) 48; see also Max Laserson, 'The Recognition of Latvia' (1943) 37(2) *The American Journal of International Law* 233-247, 236.

⁵³⁷ Laserson, 'The Recognition of Latvia' (n 536) 240.

allowed Latvia to assert its independence, thus making void under international law any future territorial claims from Germany or Russia.⁵³⁸

With the rise of Nazism in Europe and Germany's interest in re-incorporating Latvia, Soviet Russia felt free to renounce its previous obligations towards the State.⁵³⁹ On 23 July 1940, Latvia became one of the Republics of the Soviet Union.⁵⁴⁰ Following the Soviet annexation of Latvia and its occupation by Germany during World War II, the ethnic composition of the country underwent significant changes.⁵⁴¹ Thus, the percentage of Latvians decreased from 73.4% in 1934 to 52% by 1989, with a simultaneous increase of Russians from 10.6% to 34%.⁵⁴² Moreover, supported by the Soviet policy of Russification, these immigrants, mainly military or blue-collar workers, had little incentive to assimilate. As a result, Latvia came "to the verge of losing its ethnic majority."⁵⁴³

⁵³⁸ Laserson, 'The Recognition of Latvia' (n 536) 240.

⁵³⁹ On 5 October 1939, Russia pressured Latvia to sign a Pact of Mutual Assistance and established control over its naval and coastal artillery bases. On 23 August 1939, Germany and Russia signed a treaty concerning spheres of influence, which resulted in Russia's annexation of Latvia by military aggression in breach of all international agreements: Laserson, 'The Recognition of Latvia' (n 536) 247; see also Bilmanis, 'Free Latvia in Free Europe' (n 535) 47.

⁵⁴⁰ This act was condemned by the West; for example, the USA "denounced the tactics used by the Soviet Union in 'deliberately annihilating' the independence of the three Baltic States": Laserson, 'The Recognition of Latvia' (n 536) 247.

⁵⁴¹ German occupation resulted in the near elimination of the Jewish community; also 51,000 Baltic Germans had already left Latvia during the War. Moreover, the Soviet Union deported 15,000 Latvians, Poles and other ethnic groups in 1941. Additionally, in 1949, 45,000 people were exiled from Latvia to Siberia. The Soviet Union occupation of Latvia after World War II was accompanied by a policy of heavy industrialisation leading to a mass immigration of Russians. Approximately 1,500,000 people were moved both voluntarily and by force from different regions of the USSR to Latvia: Latvia State Report (2006) ACFC/SR(2006)001, para 29-30.

⁵⁴² Gabrielle Hogan-Brun, 'Baltic National Minorities in a Transitional Setting' in G Hogan-Brun and S Wolff (eds) *Minority Languages in Europe: Frameworks, Status, Prospects* (Palgrave Macmillan, Houndsmills 2003) 122.

⁵⁴³ Hogan-Brun, 'Baltic National Minorities in a Transitional Setting' (n 542) 123.

When Latvia re-established its independence on 21 August 1991, it denounced the Soviet Union's absorption as invalid in international law.⁵⁴⁴ Thus, the 1990 Declaration on the Renewal of the Independence of the Republic of Latvia reinstated the authority of the Constitution of 1922.⁵⁴⁵ By relying on the principle of State continuity, Latvia resumed the legal order that had existed before the Soviet occupation.⁵⁴⁶

International law defines State succession as “the replacement of one State by another in the responsibility for the international relations of territory.”⁵⁴⁷ State restoration based on the principle of continuity is a particularly controversial type of State succession.⁵⁴⁸ Unlike other types of succession, such as the dissolution or merger of States, the principle of State continuity relieves restored States from having to act as

⁵⁴⁴ Latvia relied on the principle of *ex injuria non oritur jus* (no one may derive an advantage from his own unlawful acts (“clean hands theory”)): the Soviet Union must not benefit from its illegal occupation in any way: Ineta Ziemele, ‘Incorporation and Implementation of Human Rights in Latvia’ in M Scheinin (ed) *International Human Rights Norms in the Nordic and Baltic Countries* (Martinus Nijhoff, The Hague 1996) 75.

⁵⁴⁵ Declaration of the Supreme Soviet of the Latvian SSR on the Renewal of the Independence of the Republic of Latvia, 4 May 1990, Section 3 <<http://www.uta.edu/cpsees/latind.htm>> accessed 20 August 2007.

⁵⁴⁶ Latvia wanted to emphasise that it was “‘restored’ rather than [having] ‘new’ sovereign[y]”: Jeff Chinn and Lise Truex, ‘The Question of Citizenship in the Baltics’ (1996) 7(1) *Journal of Democracy* 133-147, 133. The restoration of the Latvian State was internationally recognised. On 27 August 1991, the European Community issued a Declaration welcoming the restoration of the Baltic States. Also, the USA recognised this restoration on 4 September 1991: M Shaw, *International Law* (Cambridge University Press, Cambridge 2003) 866.

⁵⁴⁷ Constantin Economides, Declaration on the Principles, Rules and Recommendations concerning the Question of the Nationality of Individuals and Legal Persons in State Succession (1996) CDL-NAT(1996)003e-restr <[http://www.venice.coe.int/docs/1996/CDL-NAT\(1996\)003-e.asp](http://www.venice.coe.int/docs/1996/CDL-NAT(1996)003-e.asp)> accessed 12 September 2007.

⁵⁴⁸ Matthew Craven, ‘The Problems of State Succession and the Identity of States under International Law’ (1998) 9 *EJIL* 142.

direct successors to predecessor States.⁵⁴⁹ Thus, Latvia does not consider itself a successor of the USSR. Moreover,

there is a legal presumption that a State which lost its sovereignty but reverted to it (before the dust of history ha[s] settled), recovers a full ... sovereignty. The interpretation of rights and obligations connected with such sovereignty would therefore be in favour of the reverting State.⁵⁵⁰

Directly connected with sovereignty is nationality, “jealously guarded by States.”⁵⁵¹ Nationality represents a “legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”⁵⁵² International law allows several ways of acquiring nationality. First, the entire population of a State can be granted nationality based on the ‘zero option’ model. Second, restored States may reinstate their original citizenship legislation. Third, the ‘mixed model’ makes new elements in restored legislation the preconditions for acquiring nationality.⁵⁵³

Latvia followed the more restrictive second model. It restored its citizenship laws of 1919. Automatic citizenship was granted only to residents and their descendants who had lived in Latvia *before 1940*.⁵⁵⁴ Because the Soviet Union ceased to exist in 1991,

⁵⁴⁹ Rein Müllerson, ‘The Continuity and Succession of States by Reference to the Former USSR and Yugoslavia’ (1993) 42 ICLQ 473, 482.

⁵⁵⁰ Charles Alexandrowicz, ‘New and Original States: The Issue of Reversion to Sovereignty’ (1969) 45(3) International Affairs 465-480, 474.

⁵⁵¹ Vaclav Mikulka, State Succession and Its Impact on the Nationality of Natural and Legal Persons (1995) Forty-seventh session of International Law Commission 14 citing Chan Johannes, ‘The Right to a Nationality as a Human Right: the current Trend towards Recognition’ (1991) 12(1-2) Human Rights Law Journal 1.

⁵⁵² *Nottebohm case, second phase (Liechtenstein v Guatemala)* [1955] ICJ Reports 4.

⁵⁵³ Carmen Thiele, ‘The Criterion of Citizenship for Minorities: the Example of Estonia’ (1999) ECMI Working paper No 5, 12.

740,000 Soviet-era immigrants in Latvia became non-citizens. In 1994, Latvia introduced a rigorous process of naturalization for non-citizens, which included *inter alia* “a test on constitutional and historical knowledge, and on language competence.”⁵⁵⁵

Moreover, the Law on Naturalization instituted a ‘windows’ system based on age and birthplace. This established eight categories, with the last category beginning the naturalisation process after 1 January 2003.⁵⁵⁶ Effectively, the stronger the links with the Soviet regime, the longer applicants had to wait to begin the naturalisation process.⁵⁵⁷ In addition, several categories could never become citizens.⁵⁵⁸ Under

⁵⁵⁴ Supreme Council of the Republic of Latvia, ‘Resolution on the Renewal of Republic of Latvia Citizens’ Rights and Fundamental Principles of Naturalization’, 15 October 1991.

Citizenship of Latvia is granted to persons, who belong to the aggregate body of Republic of Latvia citizens and who had Republic of Latvia citizenship on 17 June 1940, and their descendants, who at the moment of this resolution’s adoption live in the Republic of Latvia or abroad. *Those who did not hold citizenship on 17 June 1940 may acquire it by naturalization.* (emphasis added).

For further discussion see Brigita Zepa, ‘Citizenship, Official Language, Bilingual Education in Latvia: Public Policy in the Last 10 Years’ (2003) Baltic Institute of Social Sciences 86.

⁵⁵⁵ Law on Citizenship of the Republic of Latvia, 21 June 1994 (as amended on 22 July 1994), Article 12 (General regulations for naturalization) <<http://www.humanrights.lv/doc/latlik/citiz1.htm>> accessed 22 August 2007.

Citizenship of Latvia shall be granted through naturalization only to those persons who are registered in the Residents’ Registry and:

- (i) Whose place of permanent residence, on the submission date of their application for naturalization, has been Latvia for no less than five years counting from 4 May 1990 (for persons who arrived in Latvia after 1 July 1992, the five-year term shall be counted from the date of the issuance of their permanent residence permit);
- (ii) Who have command of the Latvian language;
- (iii) Who know the basic principles of the Republic of Latvia Satversme (Constitution) and the Constitutional Law on the Rights and Obligations of a Citizen and a Person;
- (iv) Who know the national anthem and the history of Latvia;
- (v) Who have a legal source of income;
- (vi) Who have taken an oath of loyalty to the Republic of Latvia;
- (vii) Who have submitted a statement of renunciation of their former citizenship and have received an expatriation permit from the State of their former citizenship, if such permit is provided for by the laws of that State, or have received a document certifying the loss of citizenship.

For a critique see Hogan-Brun, ‘Baltic National Minorities in a Transitional Setting’ (n 542) 129.

⁵⁵⁶ Nida Gelazis, ‘The effects of EU Conditionality on Citizenship Policies and Protection of National Minorities in the Baltic States’ (2000) 68 EUI working papers 8.

pressure from the international community, Latvia eliminated the windows system in 1998 and thereafter all eligible candidates could apply for citizenship.⁵⁵⁹

Nevertheless, even nowadays Russian-speaking minorities have to undergo a strict process to acquire Latvian citizenship. Although rigorous naturalisation procedures exist in many countries,⁵⁶⁰ they are generally applied to workers who choose to migrate. The Russian-speakers' immigration during the Soviet era was profoundly different, because they were moving freely within *one* State, or were forced to move by the authorities. The Russian-speaking minority who settled in Soviet Latvia "in good faith assuming that it was their own country"⁵⁶¹ considered the denial of

⁵⁵⁷ For example, under this system Latvian-born descendants of migrants could apply for naturalization before 2000, while Soviet-era migrants had to wait even longer. In 1994, there was also an attempt to adopt a bill which would set an annual naturalization quota. However, the President sent it back to the Parliament after international pressure from Russia, Scandinavian States and the OSCE: Chinn and Truex, 'The Question of Citizenship in the Baltics' (n 546) 137-138.

⁵⁵⁸ Law on Citizenship (n 555) Article 11 (Restrictions on naturalization)
Citizenship is denied to persons who:

- (i) Using anti-constitutional methods, have turned against the Republic of Latvia's independence, its democratic, parliamentary State system or the existing State power in Latvia, if such has been established by a court decree;
- (ii) Have been convicted with imprisonment for international criminal acts or have been called to criminal responsibility at the time that the granting of citizenship is being decided;
- (iii) Are serving in the USSR Armed Forces, USSR Interior Armed Forces or State security services, as well as persons who after 17 June 1940, have chosen the Republic of Latvia as their place of residence after demobilization from the USSR Armed Forces, USSR Interior Armed Forces or State security services and who, upon induction into such service, did not permanently reside in Latvia's territory.

⁵⁵⁹ However, the protectionism of the majority and resistance to the Soviet past transmuted into stringent language policies which were intended to revive Latvian language and subordinate Russian. For criticism of international organizations see Human Rights Committee, 'Concluding Observations on Latvia' (1995) CCPR/C/79/Add.53. See also PACE, 'Resolutions on the Situation of the Russian and Russian-speaking population in Latvia and Estonia' (1997) Written Declaration No 266, Doc 7951; 'Civil rights situation of non-titular communities in Latvia' (1997) Written Declaration No 257, Doc 7855; 'Latvia's honouring of commitments and obligations undertaken upon accession to the Council of Europe' (1997) Motion for a Resolution, Doc 7879; 'Violation by the Latvian authorities of universally recognised human rights' (1998) Motion for a resolution Doc 8039.

⁵⁶⁰ For discussion see Ferenc Feher and Agnes Heller, 'Naturalisation or "Culturalisation"?' and Dilek Cinar, 'From Aliens to Citizens: A Comparative Analysis of Rules of Transition' in R Baubock (ed) *From Aliens to Citizens: Redefining the Status of Immigrants in Europe* (Avebury, Aldershot 1994).

citizenship discriminatory, believing that their rights have been “*taken away*.”⁵⁶² Therefore, the Russian-speaking minorities in Latvia thought that they should not be treated as aliens because of their established domicile.⁵⁶³ Moreover, they should not lose their political rights, which are “among the most precious of all human rights”.⁵⁶⁴ From the perspective of Latvia, however, this policy compensated for the wrongs of the Soviet regime. International organizations,⁵⁶⁵ including the EU, strongly objected to this policy and encouraged Latvia to integrate its Russian-speaking population.

Nevertheless, there are still approximately 350,000 Russian-speaking non-citizens in Latvia.⁵⁶⁶ The naturalisation rate of non-citizens has been very slow. It reached its peak in 2004 (21,297); however, in 2008 this number decreased by almost eight times

⁵⁶¹ Asbjørn Eide, ‘Citizenship and the Minority Rights of Non-citizens’ (1999) Working Paper of the Commission on Human Rights, E/CN.4/Sub.2/AC.5/1999/WP.3, para 31.

⁵⁶² Lowell Barrington, ‘The Domestic and International Consequences of Citizenship in the Soviet Successor States’ (1995) 47(5) *Europe-Asia Studies* 731-763, 747 (emphasis in original). The situation of the Russian-speaking minorities in Latvia is in stark contrast with their position in Lithuania, where the Russian-speaking population acquired automatic citizenship.

⁵⁶³ See the objection of Ms Ždanoka, the representative of Latvian Human Rights Committee, who emphasised that “The same naturalization procedures were applied to non-citizens and foreigners alike. Such procedures were ineffective and slow”: Committee on the Elimination of Racial Discrimination, ‘Thematic Discussion on Non-citizens and Racial Discrimination’ (2004) CERD/C/SR.1624, para 43. see also, James Hughes, ‘Exit in Deeply Divided Societies’ (2005) 43(4) *JCMS* 739, 755; Eide, ‘Citizenship and the Minority Rights of Non-citizens’ (n 561) para 32.

⁵⁶⁴ A.Eide, ‘Citizenship and the Minority Rights of Non-citizens’ (n 561) para 46. Minorities should not be deprived of their right to political participation as it constitutes a human right of all individuals: Henry Steiner, ‘Political Participation as a Human Right’ (1988) 1 *Harvard Human Rights Year Book* 77.

⁵⁶⁵ The requirement of no arbitrary and unjustified discrimination between citizens and ‘non-citizens’ was a membership conditionality of the Council of Europe. See PACE, ‘On the application by Latvia for membership of the Council of Europe’ (1995) Opinion No 183, para 7.

⁵⁶⁶ The total number of non-citizens in Latvia is 372,421. Non-citizens (Latvia) <[http://www.smsi.net/Non-citizens\(Latvia\)](http://www.smsi.net/Non-citizens(Latvia))> accessed 31 August 2009. There are approximately 410,000 Russian-speaking citizens in Latvia. The population of Latvia is 2.27 million (Latvians 59.03%, Russians 28.29%, others 12.68%); 16% of the Latvian population are non-citizens <<http://www.li.lv/index.php?option=comcontent&task=view&id=222&Itemid=16>> accessed 31 August 2009.

(2,601). It slightly increased in 2009 reaching 3,470. Overall, in 1995–2009, only 131,102 persons acquired citizenship by naturalisation.⁵⁶⁷

This example aimed to demonstrate that the requirement of citizenship should not be a defining criterion of ‘minority’,

... since the status as non-citizens is not always a result of recent arrival. But lack of citizenship can have serious consequences for members of minorities. In particular, it can seriously undermine their possibilities of effective participation in the political life of the country.⁵⁶⁸

Nevertheless, some commentators express concern that “by abandoning the requirement of citizenship and easing the necessity of a long stay on the territory of the state”⁵⁶⁹ international law may weaken the regime of minority protection by opening it to a large number of persons. In particular, if a group meets most of the defining criteria of ‘minority’ as in the case of traditional ethno-cultural groups of non-citizens, it is important to establish whether the lack of citizenship is the result of domestic policies which violate international rules.⁵⁷⁰ For example, “unreasonable distinctions in determining citizenship”⁵⁷¹ may breach Article 26 ICCPR⁵⁷² on equal

⁵⁶⁷ Information on naturalisation process in Latvia <<http://www.np.gov.lv/index.php?id=440&top=440>> accessed 29 January 2010.

⁵⁶⁸ Asbjørn Eide, The Rights of ‘Old’ versus ‘New’ Minorities (2002/2003) *European Yearbook of Minority Issues* 379.

⁵⁶⁹ Pentassuglia, *Minorities in International Law* (n 448) 59.

⁵⁷⁰ Pentassuglia, *Minorities in International Law* (n 448) 70.

⁵⁷¹ Pentassuglia, *Minorities in International Law* (n 448) 70.

⁵⁷² Article 26 ICCPR reads as follows:

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.

treatment or even Article 25 ICCPR⁵⁷³ on political rights. Furthermore, ethnically motivated deprivation of citizenship may violate Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination.⁵⁷⁴ Therefore, it is argued that, instead of broadening the definition of minorities, it is important to remedy obstacles to the enjoyment of minority rights.⁵⁷⁵

However, as the above example of Latvia suggests, States may use the citizenship criterion to limit the enjoyment of minority rights. Despite significant international pressure to alter the situation, Latvia has maintained its restrictive policies for the past twenty years. Even though this situation is indicative of weak enforcement of some international rules, the fact that States are allowed a broad margin of discretion in the matter sometimes results in a restrictive interpretation of the concept ‘minority.’ For example, because the FCNM does not contain a definition of ‘minority’, Latvia, upon

⁵⁷³ Article 25 ICCPR reads as follows:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

⁵⁷⁴ Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (n 131) stipulates:

... States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- ...
- (c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- (d) Other civil rights, in particular:
 - ...
 - (iii) The right to nationality;
 - ...

⁵⁷⁵ Pentassuglia, *Minorities in International Law* (n 448) 70.

its ratification of the instrument in 2005, placed an interpretative declaration which defines national minorities as only those minorities who possess Latvian citizenship.⁵⁷⁶ Non-citizens may “enjoy the rights prescribed in the Framework Convention, unless specific exceptions are prescribed by law”.⁵⁷⁷ By adopting this restrictive interpretation, Latvia can, for example, restrict political rights to those minorities who are citizens: the rights of non-citizens to effective participation in political life of the country may be limited through national laws. The legality of the Latvian reservation is discussed further in Chapter II of this thesis on pages 223-224.

Therefore, the requirement of citizenship/nationality should not feature as a defining criterion of ‘minority’. The ACFC, too, warns that “the citizenship criterion may cause problems linked to certain guarantees relating to important areas covered by the Framework Convention.”⁵⁷⁸ Furthermore, in the context of EU law, the jurisprudence of the ECJ⁵⁷⁹ suggests that “it will become increasingly difficult for States to restrict arrangements for linguistic minorities to its own citizens.”⁵⁸⁰ During its monitoring of the accession process to the EU, the Commission, too, has not relied on a citizenship criterion in the definition of minorities. For example, the Commission disagreed with Estonia’s “citizenship-centred definition”⁵⁸¹, introduced in a reservation to the

⁵⁷⁶ Latvia’s reservation to the FCNM <http://www.coe.int/t/e/human_rights/minorities/Country_specific_eng.asp#P423_21869> accessed 31 August 2009.

⁵⁷⁷ Latvia’s reservation to the FCNM (n 576).

⁵⁷⁸ ACFC, ‘Second Opinion on Hungary’ (n 75) para 22; ‘Second Opinion on Italy’ (n 283) para 32.

⁵⁷⁹ *Bickel and Franz* (n 34); Case 137/84 *Ministere Public v Robert Heinrich Maria Mutsch* [1985] ECR 2681.

⁵⁸⁰ Verstichel, ‘Personal Scope of Application...’ (n 395) 146.

⁵⁸¹ Dimitry Kochenov, ‘Pre-accession, Naturalisation and “Due Regard to Community Law”’ (2004) 4(2) *Romanian Journal of Political Science* 71, 80.

FCNM.⁵⁸² In both Estonia and Latvia, the Commission applied minority standards “regardless of the nationality held and difference in personal status arising from nonpossession of Latvian [or Estonian] nationality”.⁵⁸³ Significantly, the European Parliament in its Resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe,⁵⁸⁴ while recommending basing an EU definition of minorities on Recommendation 1201(1993) of the PACE (quoted above on page 157), has deliberately omitted the requirement of citizenship from the list of defining elements.⁵⁸⁵ Accordingly, an EU definition of minorities should not contain the criterion of citizenship. The legal effect of this would be protection of groups which satisfy all the conditions to qualify for ‘minority’ status, but who might have been arbitrarily excluded through restrictive citizenship policies in their home State.

3.2.4. The subjective element

Another important consideration in defining ‘minority’ is a group’s sense of solidarity aimed at preserving their identity. This sub-section briefly outlines the subjective elements of a definition: an implicit intention to maintain a common identity as a group and self-identification of individuals as belonging to a minority.

⁵⁸² Estonia, Declaration contained in the instrument of ratification, deposited on 6 January 1997 <http://www.coe.int/t/e/human_rights/minorities/Country_specific_eng.asp#P263_14100> accessed 13 July 2008.

⁵⁸³ Commission, ‘Agenda 2000 – Opinion on Latvia’s Application for Membership of the European Union’ [1997] DOC/97/14, 18. Both Latvia and Estonia use terms ‘citizenship’ and ‘nationality’ interchangeably. For discussion see, Gerard-René de Groot, ‘Towards a European Nationality Law’ (2004) 8(3) *Electronic Journal of Comparative Law* 2. See also Latvia’s Law on Entry into and Residence in the Republic of Latvia of Aliens and Stateless Persons, Part I <<http://www.ttc.lv/New/lv/tulkojumi/E0039.doc>> Accessed 13 July 2007.

⁵⁸⁴ European Parliament, ‘Resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe’ [2005] 2005/2008(INI), A6-0140/2005.

⁵⁸⁵ Verstichel, ‘Personal Scope of Application...’ (n 293) 147.

If there is no sentiment to maintain a distinct identity, Article 27 ICCPR would not apply.⁵⁸⁶ To qualify as a ‘minority’ it is not enough that, for instance, a group speaks the same language. The group also needs to decide that exactly those people who share common characteristics should form a group.⁵⁸⁷ Such a decision to preserve a minority identity, as the definitions by Capotorti and Deschenes suggest, may be implicit. Otherwise States could pressure a minority so that they would be unable to express their collective wish to survive as a group,⁵⁸⁸ in particular, in the case of those minorities which live under undemocratic regimes.⁵⁸⁹

Equally important in this respect is self-identification as a minority. Article 3(1) FCNM leaves this choice with individual members of a group. This choice, however, does not imply a “right for an individual to choose arbitrarily to belong to any national minority.”⁵⁹⁰ Self-identification is “inseparably linked ... to objective criteria relevant to the person’s identity.”⁵⁹¹ Let us take the example in *Lovelace*,⁵⁹² where, under domestic legislation, the female author, who married a non-aboriginal person, was permanently excluded from her aboriginal community. The HRC stressed that Sandra Lovelace “not only identified herself (subjectively) as a Maliseet Indian but

⁵⁸⁶ Thornberry, *International Law and the Rights of Minorities* (n 447) 165.

⁵⁸⁷ Marko, ‘Constitutional Recognition of Ethnic Difference...’ (n 14) 22.

⁵⁸⁸ Shaw, ‘The Definition of Minorities in International Law’ (n 445) 28.

⁵⁸⁹ Pentassuglia, *Minorities in International Law* (n 448) 69.

⁵⁹⁰ FCNM and Explanatory Report (n 196) para 35.

⁵⁹¹ Verstichel, ‘Personal Scope of Application...’ (n 395) 130.

⁵⁹² *Lovelace v Canada* (n 337).

also was ethnically (objectively) a Maliseet Indian.”⁵⁹³ Therefore, she had the right to belong with her group and reside on reserve lands belonging to her group. The HRC deemed the State’s denial of her rights as unjustifiable and found a violation of Article 27 ICCPR.

Accordingly, an implicit will to maintain a common identity should be regarded as a defining element of a ‘minority’. Moreover, self-identification with a group is a matter of individual choice and no disadvantage may arise from making such choice. The subjective element is linked to the objective elements of the definition – self-identification is not enough to qualify as a minority.

Overall Conclusions to Chapter I

This chapter aimed to identify the scope of rights covered in this thesis and the beneficiaries of these rights in the context of EU law. It established that the minimum standard of minority protection includes the principle of non-discrimination. To ensure substantive equality of minorities, however, States may also need to grant special rights. These rights are not privileges. Rather they aim to put minorities, disadvantaged from the outset through speaking a different language or practicing a different religion, on an equal footing with majorities. These rights include political participation, freedom to manifest religion, the right to education, and autonomy arrangements. Sections 1 and 2 of this chapter highlighted the dual nature of minority protection.

⁵⁹³ Scheinin, ‘The United Nations International Covenant on Civil and Political Rights...’ (n 17) 29.

As to the principle of non-discrimination, it appears to be the least controversial among minority rights. Nevertheless, even this right has not been fully explored, especially in relation to non-discrimination based on a national minority status. It is hoped that Protocol 12 ECHR and the FCNM may positively impact the development of anti-discrimination law based on the membership in a national minority. In addition, wider application of the principle of indirect discrimination may have a beneficial impact on the protection of minority rights.

Where special rights are concerned the picture is less satisfactory. As to political participation, the analysis shows that the principle of non-discrimination remains a driving force in ensuring equal treatment of minorities in the exercise of this right. However, non-discriminatory treatment in political participation is not sufficient on its own. States also must ensure the *conditions* necessary for the effective participation of minorities, i.e., take positive State action to guarantee that minorities can participate in matters of particular concern to them, as required by Article 15 FCNM.

An even less satisfactory picture exists in relation to the manifestation of religion. The ECtHR's restrictive reading of Article 9 ECHR is disappointing, because it disregards the need of minorities to preserve their identity, which in case of some religions may manifest itself through religious dress. In this respect, the potential of Article 18(2) ICCPR should be used to its fullest to avoid coercion against religious minorities in education.

In education, given the narrow wording of P1-2, there is only a possibility for a case-by-case assessment by the ECtHR of access to mother-tongue education. Despite the significance of *Cyprus v Turkey*, it is unlikely that the ECtHR would develop a general principle on mother-tongue education. The potential of Article 27 ICCPR has not yet been fully explored. Arguably, this provision should cover positive State action on the provision of education in a minority language.

The least satisfactory situation presents itself in relation to autonomy arrangements, which do not even feature as a minority right. International human right instruments are silent on this right, although the jurisprudence of courts is favourable where the context allows. Where minority-specific instruments are concerned, some inferences may be made through reading Articles 1 and 27 ICCPR together or broad construal of the ‘conditions’ necessary for effective participation of minorities under Article 15 FCNM. More explicit endorsement of this right could significantly enhance the protection of minorities.

As to the beneficiaries of these rights, the sheer diversity of situations and approaches across Member States renders it necessary to have a broad definition under EU law. In the light of the discussion in Section 3 of this Chapter and given the presence of diverse minority groups in EU Member States, an EU definition of minorities must inevitably be broad. The following elements can be suggested:

- The protection of minorities should focus on their needs, not on their labels. Labels should not affect the content of the definition of ‘minority’; rather, the particular needs of a group may inform the degree of required positive State action. For example, a linguistic minority may need mother-

tongue education, while a religious one may only require accommodation of its religious practices. If such groups are also protected under other international instruments, this should not detract from their enjoyment of minority guarantees.

- The presence of a well-established group in one or more Member State, such as Catalans in Spain and France, is one of the defining features of ‘minority’. A well-established group should regard itself and be regarded in the community as having a particular historic identity of belonging to another group. Such a group possesses certain religious, linguistic, cultural or other characteristics which distinguish them from the majority of the population at the State or regional levels.

- To benefit from the regime of minority protection, a group should be in a non-dominant position at the State or regional level. The numerical factor is not necessary as it may limit the scope of the definition.

- The requirement of citizenship should not feature as a defining criterion of ‘minority’, because States may use this condition to exclude unwanted groups.

- The subjective element of the definition is closely linked to the objective criteria – it is not sufficient to self-identify as a minority.

- Both collective and individual rights of minorities should be guaranteed because only a combination of individual, minority and collective rights can ensure meaningful protection of minorities.

Summing up the proposed features, the following working EU definition of ‘minority’ may be suggested:

A 'minority' is a well-established group in one or more EU Member States. Such a group identifies itself and is identified by others as different from the rest of the population of a State or a region, on the basis of its language, religion, common culture, history and/or geographic origin. Only groups in a non-dominant position at a State or regional level may benefit from the regime of minority protection. The existence of a minority is determined by fact, not law. The choice of belonging to a 'minority' lies with the individual. Citizenship/nationality is not a defining criterion of a minority as such. The degree of protection, entailing different rights, depends on particular needs of a group. A minority group is entitled to individual and collective enjoyment of their rights to a separate language, religion, culture, and political participation domestically (including regional level where relevant) and on the EU level in matters of direct concern to them.

Accordingly, for the purposes of this thesis, a broad definition of 'minority' is adopted. The novelty of this definition is that it is based on examples from EU Member States and it takes into consideration the peculiarities of EU law resulting, for example, from the existence of the EU free movement regimes and EU citizenship. This definition is preferable because it is more inclusive in that it emphasises the needs of minorities, as opposed to 'labels'. Such a broad definition may prevent States from excluding unwanted minority groups from the enjoyment of rights at the domestic and EU levels.

The next four chapters build on the discussion in Chapter I, placing the rights of minorities in the EU context.

PART 2. CASE STUDIES

CHAPTER II. LOST IN TRANSITION: THE RIGHT TO POLITICAL PARTICIPATION OF RUSSIAN-SPEAKING NON-CITIZENS IN LATVIA

1. Introduction

With the inception of EU citizenship, the political rights of EU citizens⁵⁹⁴ have acquired strong symbolic and practical significance.⁵⁹⁵ However, EU law contains no minority right to political participation⁵⁹⁶ in EU law-making in matters which may affect their identity. The political rights of minorities,⁵⁹⁷ exercised through the participation in electoral processes, are “crucial to enable minorities to express their views when legislative measures and public policies of relevance to them are

⁵⁹⁴ For example, Article 22 TFEU (ex-Article 19 EC) equipped EU citizens with the right to vote and stand for elections in municipal and European Parliament elections in a host State under the same conditions as nationals of that State. See also, Article 20(2)(b) TFEU and Articles 39(1) and 40 CFR. Other political rights include the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language. See, Article 20(2)(d) TFEU and Articles 41(4), 43 and 44 CFR.

⁵⁹⁵ P Craig and G de Burca, *EU Law: Text, Cases and Materials* (4th ed OUP, Oxford 2008) 869. See also European Parliament and Council (EC) Decision 1904/2006 establishing for the period of 2007 to 2013 the programme ‘Europe for Citizens’ to promote active European citizenship [2006] OJ L 378/32. On political participation of minorities and migrants see, Anais Faure Atger, ‘Education and Political Participation of Migrants and Ethnic Minorities in the EU’ (2009) CEPS Special Report.

⁵⁹⁶ The notion of ‘political participation’ encompasses a broad range of rights guaranteed by international and regional human rights instruments, such as the right to vote and stand for election, to access the public service and to take direct or indirect part in the conduct of public affairs: Marc Weller, ‘Effective Participation of Minorities in Public Life’ in M Weller (ed) *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (OUP, Oxford 2007) 484. This chapter does not deal with all rights constituting political participation, but rather focuses only on the right to vote and be elected. The issue is discussed in the context of Latvia.

⁵⁹⁷ Sasse suggests that minority rights themselves are political rights: “[u]ltimately, the right to a distinct cultural identity and its active preservation and promotion embodies a political claim to difference and recognition, and it may be articulated in public, though not necessarily through political institutions”: Gwendolyn Sasse, ‘The Political Rights of National Minorities: Lessons from Central and Eastern Europe’ in W Sadurski (ed) *Political Rights under Stress in 21st Century Europe* (Oxford University Press, Oxford 2007) 239-282, 244; see also, S Wheatley, *Democracy, Minorities and International law* (CUP, Cambridge 2006) 193.

designed.”⁵⁹⁸ With the expansion of EU competences which have an impact on minorities in Member States, it is increasingly important to have specific provisions in EU law which guarantee effective political participation of minorities at the EU level, particularly where a State excludes a minority from political participation through restrictive citizenship laws, as in Latvia. Sub-section 3.2.3 of Chapter I (pages 167-180) traced the historical background of exclusionary citizenship policies towards Russian-speaking non-citizens in Latvia which *inter alia* affect their political participation. Based on that overview, Section 1 of Chapter II assesses the EU’s response to this issue before (1.1) and after Latvia’s accession to the EU (1.2). Section 2 then evaluates whether there are any possible EU rules which could improve the political participation of Russian-speaking minorities in Latvia.

2. The European Union and Latvia

2.1. EU pre-accession conditionality

EU relations with Latvia developed smoothly. Within a week of Latvian independence, on 27 August 1991, it had established diplomatic relations with the EC. Furthermore, the EC signed the 1992 Trade and Cooperation Agreement with Latvia, and these links were strengthened through the 1994 Free Trade Agreement. Finally, on 12 June 1995, Latvia and the EC entered into a Europe Agreement. Latvia then sought EU membership on 27 October 1995.

⁵⁹⁸ ACFC, ‘Commentary on the Effective Participation...’ (n 188) para 80.

Before the membership negotiations began, the Commission's approach to the issue of non-citizens in Latvia had echoed international concerns. In its communication on the strategy *vis-à-vis* the Baltic States, the Commission made it clear that integration of the Russian-speaking residents, following the recommendations of international organisations, would significantly improve regional security and stability.⁵⁹⁹ Moreover, the Commission envisioned that the EU had "a role in promoting . . . the rights of persons belonging to minorities".⁶⁰⁰

However, after negotiations commenced, the greater leniency of the Commission on the issue of non-citizens in Latvia contrasted with the approach of the UN⁶⁰¹ and the CoE,⁶⁰² which condemned exclusionary practices towards Russian-speaking non-citizens. This divergence may be explained by the Commission's desire to expedite the integration process of the CEECs. In July 1997, the Commission approved Latvia as a candidate for EU membership, describing it as having "the characteristics of a democracy, with stable institutions guaranteeing the rule of law, human rights, and respect for and protection of minorities".⁶⁰³

Furthermore, in its opinion on Latvia's application, the Commission stated:

[a]s regards the more general situation of the Russian-speaking minority (regardless of whether they possess Latvian citizenship or

⁵⁹⁹ Commission, 'Orientations for a Union Approach towards the Baltic Sea Region' [1994] SEC(94) 1747 final, 3.

⁶⁰⁰ Commission, 'Orientations for a Union Approach towards the Baltic Sea Region' (n 599).

⁶⁰¹ Human Rights Committee, 'Concluding Observations on Latvia' (1995) CCPR/C/79/Add.53.

⁶⁰² PACE, 'On the application by Latvia for membership of the Council of Europe' (n 565) para 7.

⁶⁰³ D Bungs, *The Baltic States: Problems and Prospects of Membership in the European Union* (Nomos Verlagsgesellschaft, Baden-Baden 1998) 50.

not), their rights are respected and protected even though some problems still have to be resolved.⁶⁰⁴

While the UN and the CoE condemned the differential treatment of non-citizens, the Commission found “no evidence that these minorities are subject to discrimination except for problems of access to certain professions in Latvia”.⁶⁰⁵ In approving Latvia’s accession, the Commission chose to overlook approximately sixty “legislative differences between the rights of Latvian citizens and those of non-citizens, including rights pertaining to employment and involvement in political life”.⁶⁰⁶

To accede to the EU, Latvia was required to respect human rights and protect minorities pursuant to two documents. First, the Europe Agreement⁶⁰⁷ contained a stringent human rights clause, which suspended the agreement without consultation in case of breaches of human rights. Second, under the 1993 Copenhagen criteria,⁶⁰⁸ to qualify for EU membership Latvia had to demonstrate respect for and protection of its minorities. The Commission closely monitored Latvia’s compliance with the accession criteria. In its annual monitoring reports on Latvia’s progress, the Commission made recommendations for improving the situation of non-citizens in Latvia. For example, the Commission, like the OSCE, the UN and the CoE, criticised

⁶⁰⁴ Commission, ‘Agenda 2000 – Opinion on Latvia’s Application for Membership’ (n 583) 20.

⁶⁰⁵ Commission, ‘Agenda 2000: For a stronger and wider Union’ (Vol I); ‘The Challenge of Enlargement’ (Vol.II) [2000] COM(97)2000final, 45.

⁶⁰⁶ CERD, ‘Thematic Discussion on Non-citizens and Racial Discrimination’ (2004) CERD/C/SR.1624, para 43.

⁶⁰⁷ Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Latvia, of the other part, 12 June 1995.

⁶⁰⁸ Copenhagen criteria (n 5).

the ‘windows’ system for naturalisation, discussed on pages 174-175. However, after this system was abolished in 1998, the major focus of its recommendations became the requirements for Russian-speaking minorities to become proficient in Latvian. Indeed, the reports mainly focused on statistics indicating the number of Russians who had mastered Latvian.⁶⁰⁹ The 1999 Commission’s regular report states, for example:

[s]ince currently, about 43% of the population has a language other than Latvian as a first language, language training will remain one of the key instruments for the integration of the ethnic minorities in the years to come.⁶¹⁰

While international law encourages minorities to gain proficiency in the State language to ensure integration,⁶¹¹ this process should not seek to assimilate. As McKean explains,

any assimilation that might take place must be clearly voluntary and members of minority groups should not be deprived of the rights enjoyed by other citizens of the state so as to enable them to integrate should they so desire.⁶¹²

The monitoring reports stressed the significance of integrating the Russian-speaking minorities, particularly in matters concerning language, to the extent that the Commission’s approach suggested a preference for assimilation.⁶¹³ Overall, views on the impact and quality of the Commission’s monitoring differ markedly. Some

⁶⁰⁹ For example, Commission, ‘1999 Regular Report from the Commission on Latvia’s Progress towards Accession’ [1999] <http://ec.europa.eu/enlargement/archives/pdf/key_documents/1999/latvia_en.pdf> accessed 22 April 2007 17.

⁶¹⁰ Commission, ‘1999 Regular Report from the Commission on Latvia’s Progress...’ (n 609).

⁶¹¹ FCNM (n 3) Article 14(3).

⁶¹² W McKean, *Equality and Discrimination under International Law* (Clarendon Press, Oxford 1983) 142.

⁶¹³ Gwendolyn Sasse, ‘EU Conditionality and Minority Rights: Translating the Copenhagen Criterion into Policy’ (2005) 16 EUI Working Papers 16.

commentators maintain that accession conditionality played a crucial role in improving minority protection in Latvia.⁶¹⁴ Others argue that the Commission's regular reports were superficial and inconsistent regarding minority rights.⁶¹⁵ Most commentators agree, however, that the EU used the most leverage when it decided to defer the opening of negotiations with Latvia in 1997.⁶¹⁶ This decision had a drastic effect on Latvian policies, affecting amendments to the Citizenship Law,⁶¹⁷ the Language Law⁶¹⁸ and the Constitution.⁶¹⁹

The strength of the EU's bargaining position declined once accession negotiations began. Certainly, EU accession conditionality had limited success in Latvia because, first, the EU lacked both a legal basis for and internal standards of minority protection,⁶²⁰ and, secondly, minority rights "have never been an internal EU political priority".⁶²¹ As a result, in the process of monitoring, the EU mainly relied on the

⁶¹⁴ Nida Gelazis, 'The effects of EU Conditionality on Citizenship Policies and Protection of National Minorities in the Baltic States' (2000) 68 EUI Working Papers 27; Jekaterina Dorodnova, 'EU Concerns in Estonia and Latvia: Implications of Enlargement for Russia's Behaviour Towards the Russian-speaking Minorities' (2000) 40 EUI Working Papers 30.

⁶¹⁵ James Hughes and Gwendolyn Sasse, 'Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs' (2003) 1 Journal on Ethnopolitics and Minority Issues (Europe Issue).

⁶¹⁶ Tim Haughton, 'When does the EU Make a Difference? Conditionality and the Accession Process in Central and Eastern Europe' (2007) 5 Political Studies Review 233, 238; see also, Sasse, 'The Political Rights of National Minorities...' (n 597) 262.

⁶¹⁷ The age windows system was abolished in 1998 and children of non-citizens obtained the right to citizenship: Sasse 'The Political Rights of National Minorities' (n 597) 263.

⁶¹⁸ The Latvian President Vaira Vike-Freiberga refused to sign a very restrictive Language Law and returned it to the Parliament for revision in line with EU legislation: Haughton, 'When does the EU Make a Difference?...' (n 616) 238.

⁶¹⁹ In 1998, Chapter VIII on Fundamental Rights was incorporated into the Constitution of Latvia: Anita Usacka 'The Impact of the European Integration Process on the Constitution of Latvia' in A Kellermann, J de Zwaan, J Czuczai (eds) *EU Enlargement: The Constitutional Impact at EU and national level* (TMC Asser Press, The Hague 2001) 338.

⁶²⁰ Sasse, 'EU Conditionality and Minority Rights...' (n 613) 5.

⁶²¹ Sasse, 'EU Conditionality and Minority Rights...' (n 613) 5.

standards and reports of the CoE and the OSCE. This in turn led to inconsistencies in the Commission's reports. For example, the 1999 Commission Report on Latvia's progress stated that, "Latvia now fulfils all recommendations expressed by the OSCE in the area of naturalization and citizenship".⁶²² However, in the 2001 report, fresh concerns emerged over stringent language regulations.⁶²³ The 2002 report condemned the language policy for hindering the naturalisation process and the political participation of minorities; yet it concluded with praise for the county's considerable progress in protecting its minorities.⁶²⁴ Sasse convincingly argues that this practice of imposing different external standards produced "ambiguity and internal inconsistencies".⁶²⁵ Instead of developing internal monitoring mechanisms, the Commission preferred to rely on vague 'international' or 'European' standards without properly specifying their requirements.⁶²⁶

Moreover, this inconsistency led the Commission to adopt two contradictory approaches to minority protection, i.e., favouring their assimilation in Latvia and Estonia, but promoting the cultural autonomy of minorities in other candidate countries,⁶²⁷ such as the Czech Republic, Slovakia and Hungary. Thus, the Commission's demands to the Czech Republic to modify exclusionary citizenship

⁶²² Commission, '1999 Regular Report from the Commission on Latvia's Progress...' (n 609) 17.

⁶²³ Commission, '2001 Regular Report on Latvia's progress towards Accession' [2001] SEC(2001)1749, 26; see also, Sasse, 'EU Conditionality and Minority Rights...' (n 613) 8.

⁶²⁴ Commission, '2002 Regular Report on Latvia's Progress Towards Accession' [2002] Sec(2002)1405, 141.

⁶²⁵ Sasse, 'EU Conditionality and Minority Rights...' (n 613) 9.

⁶²⁶ Hughes and Sasse, 'Monitoring the Monitors...' (n 615) 17.

⁶²⁷ Dimitry Kochenov, 'A Summary of Contradictions: An Outline of the EU's Main Internal and External Approaches to Ethnic Minority Protection' (2008) XXXI(1) Boston College International and Comparative Law Review 1, 5.

policies are in stark contrast with Latvia's experience. The Czech citizenship law prevented many Roma from acquiring citizenship status. Despite the similarities in these situations, the Commission made demands of the Czech Republic only. The country was required to change its naturalisation policy, including the grounds for naturalisation, "something that had never happened in the context of reporting of Latvian or Estonian progress towards accession".⁶²⁸ Consequently, a lack of consistent yardsticks on minority protection allowed the Commission to evade sharp edges in politically sensitive matters and apply conditionality selectively. As a result, inconsistencies in the Commission's reports sent the wrong signals to Latvia: if it could join the EU without resolving the issue of its minorities, it might be able to avoid criticism afterwards.⁶²⁹

⁶²⁸ Kochenov, 'A Summary of Contradictions...' (n 627) 47.

⁶²⁹ Interestingly, this is not the first time that Latvia has excluded a minority group from citizenship. After World War I, the first years of Latvia's independence were marked by defective citizenship policies which targeted the Jewish minority. The Jewish minority has lived in Latvia since the 14th century. The economic development in the second half of the 19th century significantly enhanced the role of the Jewish community in Latvia. So many Jews moved to Latvia from Lithuania, Belarus, Poland and Ukraine that before World War I their number reached 170,000 persons. During World War I, 127,000 Jews fled Latvia, and "only one third of them was to return after the war": 'The Euromosaic Study: Other Languages in Latvia', para 5 <http://ec.europa.eu/education/policies/lang/languages/langmin/euromosaic/lat5_en.html> accessed 7 September 2009.

Initially, the 1919 Law on Citizenship gave "Latvian nationality to all former Russian citizens living on Latvian territory, and all who are nationals of districts now belonging to Latvia, who belonged to these districts by Russian law"; however, in 1921, the amended law limited the acquisition of citizenship to "persons not formally registered, if they had been resident in Latvia for 20 years before 1 August 1914, or had resided there continuously up to 1884, and the descendants of such persons": L Mair, *The Protection of Minorities: the Working and Scope of the Minorities Treaties under the League of Nations* (Christophers, London 1928) 13 and 114.

It appears that the law targeted Jews specifically because they had had to leave the country during the war as a result of the Russian Empire's policies, and were to be barred from returning because of Latvia's restrictive legislation. The apparent reason for the denial of citizenship was the number of Jews who returned to Latvia in 1920: according to Latvian official statistics their number was greater "than the number of persons belonging to any other minority": Mair, *The Protection of Minorities...*, (above) 114. Heyking argues that another significant reason for their exclusion was the fact that these individuals did not belong to the Latvian race (Baron Heyking, 'The Baltic Minorities' (1921) 7 *Transactions of the Grotius Society* 119-132, 124). Accordingly, the Jewish minority was excluded from citizenship, even though they were legally residents in Latvia before its independence. Although a naturalisation process was established, it was denied to many Jews: Ztle Zigurds, 'The Legal Framework of Minorities' policies in Latvia: Background Constitution, and the League of Nations' (1980) 11(1) *Journal of Baltic Studies* 10.

It is also instructive that, to acquire international support and assert itself as an independent State, immediately after becoming independent, Latvia applied to become a member of the League of Nations. After World War I, the Versailles Peace Treaty of 28 June 1919 (effective as of 10 January

1920) made specific references to Latvia in Articles 116, 117 and 433. By these references, it effectively granted Latvia *de facto* recognition. It is noteworthy in the context of the geo-political interests of the Allied Powers in Latvia that this recognition took place a month and a half *before* the Latvian Government was established on 14 July 1919. Yet Latvia struggled to acquire *de jure* recognition for political reasons surrounding its cession from Russia.

However, the lack of *de jure* recognition hampered the development of economic partnerships of the principal powers with Latvia. Moreover, the interests of the UK and France required the establishment of a buffer State which would be equally alien to Russia and Germany. As a result, Latvia was recognised *de jure* by the League of Nations on 24 January 1921. On 22 September 1921 Latvia became a member of the League of Nations: Laserson, 'The Recognition of Latvia' (n 536) 238-244. As a condition of membership, the League of Nations obliged Latvia to protect its minorities. On 15 December 1920, the Assembly of the League of Nations adopted recommendations requiring Latvia to comply with the principles of the Minorities Treaties. This requirement stemmed from the fact that the League of Nations lacked universal minority provisions. Instead, general principles were derived from a number of bilateral treaties concluded between the Principal Allied and Associated Powers and individual States in Europe in which the ethnic composition had been altered as a result of border shifts after World War I. To accede to the League, the Latvian Government adopted a declaration confirming its commitment to "enter into negotiations with the Council of the League of Nations in order to determine the extent and the methods of carrying out its international obligations for the protection of minorities": Laserson, 'The Recognition of Latvia' (n 536) 246 citing League of Nations, Records of the First Assembly, the 25th Plenary Meeting, 15 December 1920.

However, Latvia's attitude drastically changed *after* its accession to the League was finalised. On 11 January 1922, the Council invited Latvia to draft a declaration on the protection of minorities. In response, Latvia strongly objected to this idea and negotiated a minority clause for two years. Among the arguments Latvia advanced were claims that its Constitution had more extensive guarantees, its minority population was very small, conditionality of this kind could not be imposed on a recognised State, agreement on minority rights should bind all members of the League, and the Covenant did not authorise the League to protect minority rights: Mair, *The Protection of Minorities...* (above) 53-55.

On 26 September 1922, Da Gama's report on Protection of Minorities in Latvia was laid before the Council and Latvia. A draft declaration was enclosed with the report. It established the principle of non-discrimination, as well as guarantees on the acquisition of citizenship, equal protection of the law, religious tolerance and linguistic freedom. Latvia strongly opposed this declaration under the excuse it contradicted her Constitution and threatened her sovereignty. The negotiations continued for two years until the Latvian government resigned: Zigurds, 'The Legal Framework of Minorities' policies in Latvia...' (above) 18. A compromise was finally reached in July 1923: "while avoiding the obnoxious word 'guarantee,' Latvia in fact accepted practically the same obligations as the States which have signed Minorities Treaties": Mair, *The Protection of Minorities...* (above) 56.

Why, then, could not the League of Nations prevent Latvia from depriving the Jewish minority of citizenship status? One reason for the League's failure was the lack of universally applicable minority provisions: the Allied Powers imposed responsibility to protect minorities only on the States defeated in World War I or new States in return for additional territory or recognition of independence: Alfred de Zayas 'The International Judicial Protection of Peoples and Minorities' in C Brölmann, R Lefebvre and M Zieck (eds) *Peoples and Minorities in International Law* (Martinus Nijhoff, The Hague 1993) 258. This created resentment in the States which were bound by the standards of Minorities treaties. It led to States' failing to implement or even make commitments; moreover, minorities themselves regarded these treaties as inadequate: David Wippman 'The Evolution and Implementation of Minority Rights' (1998) 66 *Fordham Law Review* 597, 602. As a result, these treaties were not implemented in good faith, and the system eventually failed.

Actually, parallels between the League of Nations and the EU may be drawn here. In both regimes, pre-accession conditionality was applied to selected countries, but did not bind the system as a whole. Moreover, both the end of World War I and the political transformation in Europe in the 1990s influenced the security considerations behind the protection of minorities. It is convincingly argued that the EU concern for Russian-speaking and Roma minorities during the accession process was informed more by "its external relations with its most powerful neighbour and main energy supplier, and own narrow soft security migration problems, than with minority protection as a norm *per se*": Hughes and Sasse, 'Monitoring the Monitors...' (n 615) 16. Accordingly, minority provisions were "the clearest indication of the political, not the humanitarian, character of the protection": Pablo de Azcarate, 'Protection of Minorities and Human Rights' (1946) 243 *Annals of the American Academy of Political and Social Science* 124-128, 127. Furthermore, in both frameworks, any acceptance of minority

2.2. Latvia in the European Union: post-accession situation

Latvia's accession to the EU in 2004 did not automatically solve the problems of a large number of mainly Russian-speaking non-citizens in Latvia.⁶³⁰ On the contrary, Latvia has attempted to tighten further the rules on naturalisation of non-citizens or retention of their legal status as non-citizens.⁶³¹ Thus, only twenty days after Latvia's accession to the EU, on 20 May 2004, the Latvian Parliament (Saeima) amended the law on the status of non-citizens to the effect that, if they acquire permanent residence in another country, they automatically lose their non-citizen status and become

protection in Latvia was partly driven by its desire to gain international support and membership of international organisations; “inevitably interest fell away as these goals were achieved...”: John Hiden and David Smith, ‘Looking beyond the Nations State: A Baltic Vision for National Minorities between the Wars’ (2006) 41 *Journal of Contemporary History* 387, 390.

The similarities between the systems are not coincidental. Following the ethnic conflicts in Europe, Western States attempted to establish standards of minority protection to influence the transition process to democracy in post-communist Europe. The League of Nations system provided a useful guide for debates in contemporary Europe: despite its deficiencies, the system provided for elaborate guarantees on minority rights.

However, the different context of these debates must also be considered. First, it took the EU itself a long time to initiate ‘minority talk.’ Anyone who compares the present rules with the mainly economic background of integration might applaud the EU for its achievements, because it has no explicit mandate to protect minorities. It is only when judged against the present level of European integration that it seems unsatisfactory for these rules to remain incomplete: EU accession conditionality managed to bring the issue of protecting minorities to the agendas of many European countries. However, it failed to clarify “the issue, substantive measures and policy practice, [and thereby] allowed historical domestic precedents to resurface”: Sasse, ‘EU Conditionality and Minority Rights...’ (n 613) 25. Second, unlike the League of Nations, the European Union is not alone in dealing with minority rights. The CoE, the OSCE and the UN have in place complex legal and political instruments and monitoring mechanisms (discussed in Sections 1 and 2 of Chapter I), albeit not particularly strong ones. Thus the political and legal environment is quite different, although the claims that it is not time for a supranational regime of minority protection remain the same. Proposals to establish a universally applicable general system of minority protection or supranational guarantees were rejected under the League of Nations, because “it would be too rigid to meet special cases; more probably, as a matter of fact, it would be too vague”: Lucy Mair, ‘The Machinery of Minority Protection’ (1928) 7(4) *Journal of the Royal Institute of International Affairs* 256-266, 264. For views regarding the EU see de Witte, ‘The European Communities and its Minorities’ (n 418) 185.

⁶³⁰ Peter van Elsuwege, ‘The Impact of EU Enlargement on the Triangular Relationship between the EU, Russia and the Baltic States’ (2006) Jean Monnet Conference on ‘European Union Enlargement of 2004 and Beyond: Responding to the Political, Legal and Socio-Economic Challenges’, Riga, 20–22 April 2006, 3.

⁶³¹ J Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space* (Cambridge University Press, Cambridge 2007) 330.

stateless.⁶³² Another limitation was enacted in August 2006: individuals who fail Latvian language tests three times can no longer qualify for naturalisation.⁶³³ Latvia's accession to the EU has also increased the number of legislative differences between Latvian citizens and non-citizens. In 2008, there were 75 such differences, ranging from a prohibition on occupying certain positions in the public and private sectors, to enjoyment of political and property rights.⁶³⁴

The most contentious areas, where differential treatment is the most adverse, remain strict naturalisation rules, the lack of political rights and the hardening of linguistic policies, harshly criticised by international organisations such as the UN and the CoE. The main criticism concerns the slow naturalisation process and emphasises three aspects. First, naturalisation conditions remain too complex.⁶³⁵ Making the conditions for naturalisation, such as language and history tests, more flexible may increase the naturalisation rate.⁶³⁶ Secondly, a common criticism concerns children's rights: there are 13,000 non-citizen or stateless children in Latvia; this number increases from year

⁶³² The Constitutional Court of Latvia subsequently declared these amendments to be incompatible with Article 3(1) of Protocol 4 to the ECHR, which provides the right not to be expelled individually or collectively from a country where an individual is a *national*. Case No 2004-15-0106, Constitutional Court of the Republic of Latvia, Riga, 7 May 2005. For further discussion see page 212.

⁶³³ Shaw, *The Transformation of Citizenship in the European Union* (n 631) 330.

⁶³⁴ Only citizens can work as state officials, civil servants, judges, public prosecutors, police and prison guards; be sworn advocates and advocate's assistants, defenders in criminal proceedings, court bailiffs, sworn notaries and notary's assistants; stand and vote in parliamentary and local elections, participate in the elections to the European Parliament and State referenda; and own land: Latvian Human Rights Committee, 'Citizens of a Non-Existent State: The Long-term Phenomenon of Mass Statelessness in Latvia' (Riga, 2008) 24–28.

⁶³⁵ The most recent examples are: Committee on the Rights of the Child (CRC), 'Latvia' (2006) CRC/C/LVA/CO/2, para 26; Committee against Torture (CAT), 'Latvia' (2008) CAT/C/LVA/CO/2 para 19; PACE, 'Resolution on Rights of national minorities in Latvia' (2006) Res 1527, para 17.10 <<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/eres1527.htm>> accessed 23 June 2008; Commissioner for Human Rights (CHR), 'Memorandum to the Latvian Government: Assessment of the progress made in implementing the 2003 recommendations of the Council of Europe Commissioner for Human Rights' (2007) CommDH(2007)9 para 33; European Commission against Racism and Intolerance (ECRI), 'Third report on Latvia' (2008) CRI(2008)2, para 117.

⁶³⁶ PACE, 'Resolution 1527(2006)' (n 635) para 17.10.

to year because children continue to be born as non-citizens.⁶³⁷ It is argued that Latvia should amend its legislation to enable parents to choose the status they want for their children when they register their births.⁶³⁸ The third concerns the elderly. It is suggested that 300,000 elderly people in the country would not be able to comply with naturalisation requirements however simple the tests are.⁶³⁹ Therefore, Latvia should automatically naturalise the elderly.⁶⁴⁰

Furthermore, significant criticism is directed towards non-citizens' lack of political rights,⁶⁴¹ mainly aimed at excluding Russian-speaking minorities from participation in the political life of the country. Thus, out of a hundred members of the Saeima, only eighteen belong to ethnic minorities.⁶⁴² By maintaining political dominance, ethnic Latvians retain the power to enact restrictive laws. However, arguably, a national government should not only represent a simple majority, but as far as possible all the people.⁶⁴³ It is clear that in Latvia a balance between majorities and minorities is significantly tilted towards the ethnic majority: “[c]itizens elected parliaments controlled by members of the respective titular nation who, once in office, implemented policies that extend Baltic ownership of the state.”⁶⁴⁴

⁶³⁷ CRC, ‘Latvia’ (n 635) para 27.

⁶³⁸ CHR, ‘Memorandum to the Latvian Government...’ (n 635) para 38.

⁶³⁹ Melanie Feakins and Luiza Białasiewicz, ‘“Trouble in the East”: The New Entrants and Challenges to the European Ideal’ (2006) 47(6) *Eurasian Geography and Economics* 647, 653.

⁶⁴⁰ PACE, ‘Resolution 1527(2006)’ (n 635) para 17.8.

⁶⁴¹ PACE, ‘Resolution 1527(2006)’ (n 635) para 17.11; CHR, Memorandum to the Latvian Government (n 635) para 43; ECRI, ‘Third report on Latvia’ (n 635) para 132.

⁶⁴² ECRI, ‘Third report on Latvia’ (n 635) para 130.

⁶⁴³ *Chassagnou v France* (App nos 25088/94, 28331/95, 28443/95) (2000) 29 EHRR 615, para 112.

One way in which Latvia excludes Russian-speaking minorities from political participation is through tightening Latvian language regulations:

[a]s ethnic Latvians have begun to speak Latvian much more widely in interpersonal contacts, and more aggressively insist that non-Latvians learn the Latvian language, there appears evidence of retrenchment and hardening of the language situation.⁶⁴⁵

For instance, since 1998 Latvia has been moving towards a Latvian-only educational system. The first stage of reforms began in 2004, when minority schools were required to teach 60% of subjects in Latvian, with only 40% being taught in Russian. Fear of forced assimilation created significant opposition among Russian-speaking minorities:

[p]rotest actions were organised throughout 2003 and climaxed with a 100,000-signature petition against the language shift inscribed in the education reform. The government responded by making such demonstrations illegal and maintained the foreseen plan and time-schedule.⁶⁴⁶

Despite the Government's contentions that 60–70% of schools were ready for the language shift,⁶⁴⁷ a lack of qualified Latvian-speaking teachers and textbooks exacerbated further difficulties in the implementation of reforms.

Some commentators argue that these processes in Latvia are both natural and legitimate in the light of the country's past. Hogan-Brun explains that the titular nation in Latvia "feel that they have been victimised by their (previously dominant)

⁶⁴⁴ Michele Commercio, 'Systems of Partial Control: Ethnic Dynamics in Post-Soviet Estonia and Latvia' (2008) 43 *St Comp. Int. Dev.* 81, 96.

⁶⁴⁵ Carol Schmid, 'Ethnicity and language tensions in Latvia' (2008) 7 *Language Policy* 3, 15.

⁶⁴⁶ Jean-Bernard Adrey, 'Minority Language Rights Before and After the 2004 EU Enlargement: The Copenhagen Criteria in the Baltic States' (2005) 26(5) *Journal of Multilingual and Multicultural Development* 453, 461.

⁶⁴⁷ Adrey, 'Minority Language Rights Before and After the 2004 EU Enlargement...' (n 646) 461.

minorities, and there is a fear that the latter lack loyalty, and that they will collaborate with their powerful kin-state (i.e. Russia)".⁶⁴⁸ Similarly, Ozolins claims that there is no minority issue in Latvia, rather it is a policy of a "neighbouring State utilising some population aspect to impose foreign relations demands".⁶⁴⁹ Moreover, in Ozolins' view, Latvia's restrictive policies are essential to protect its language and culture from Russian-speaking minorities, which makes the language situation in Latvia unique.⁶⁵⁰

Other authors argue that Latvia should integrate its Russian-speaking minorities and develop a "sense of 'belonging' to Latvian culture".⁶⁵¹ Such integration may increase their identity of being Latvian despite the fact that they have privileged links to Russia.⁶⁵² Besides, if in the early years of independence exclusion of Russian-speaking minorities from public life might have been justified as strengthening democracy by isolating potentially destabilising cleavage,⁶⁵³ it is very hard to sustain this excuse now. Latvia has established a strong democracy and become a member of leading international organisations, such as the EU, the UN, the OSCE and the CoE. Moreover, as a State Latvia holds "all the cards, not only in terms of sovereignty and

⁶⁴⁸ Gabrielle Hogan-Brun, 'The Baltic Republics and Language Ideological Debates Surrounding European Union Accession' (2005) 26(5) *Journal of Multilingual and Multicultural Development* 367, 372.

⁶⁴⁹ Uldis Ozolins, 'The Impact of European Accession upon Language Policy in the Baltic States' (2003) 2 *Language Policy* 217, 226.

⁶⁵⁰ Uldis Ozolins, 'Between Russian and European Hegemony: Current Language Policy in the Baltic States' (1999) 6(1) *Current Issues in Language and Society* 6, 43.

⁶⁵¹ Pieter Batelaan, 'Bilingual Education: the case of Latvia from a comparative perspective' (2002) 13(4) *Intercultural Education* 359, 373.

⁶⁵² Batelaan, 'Bilingual Education...' (n 651) 373.

⁶⁵³ Timm Beichelt, 'Minorities in New European Democracies: A Source of Destabilization?' (2003) 2 *European Yearbook of Minority Issues* 53.

territorial integrity but also in terms of national implementation”.⁶⁵⁴ Consequently, Latvia’s exclusionary practices towards its Russian-speaking minorities based on the requirement of citizenship are unjustified.

3. ‘Testing’ relevant EU rules on Latvia

As there is no explicit right to political participation of minorities in EU law, it may be useful to overview relevant EU rules on non-discrimination which could require equal treatment of minorities. The principle of non-discrimination based on sex⁶⁵⁵ and nationality⁶⁵⁶ featured strongly from the early years of the EC. Recent years have been marked by the further development of the principle of non-discrimination in EU law. Thus, the 1997 Treaty of Amsterdam introduced Article 13 TEC (now Article 19 TFEU) to provide that the Council may adopt secondary legislation against discrimination on several grounds, such as sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation.⁶⁵⁷ This list of grounds does not, however, include national minority status, nationality or language.

Within one year of Article 13 TEC’s (now Article 19 TFEU) entering into force, the Council adopted Directives on the ‘Equal Treatment between Persons Irrespective of

⁶⁵⁴ Alfredsson, ‘A Frame an Incomplete Painting...’ (n 13) 304.

⁶⁵⁵ *Sotgiu* (n 76).

⁶⁵⁶ *Bilka-Kaufhaus* (n 96); see also E Ellis, *EU Anti-Discrimination law* (Oxford University Press, Oxford 2005).

⁶⁵⁷ In addition, Article 10 TFEU specifies that ‘[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.’

Racial or Ethnic Origin’ (Race Directive)⁶⁵⁸ and on ‘Establishing a General Framework for Equal Treatment in Employment and Occupation’ (Employment Directive),⁶⁵⁹ together referred to as the Equality Directives.⁶⁶⁰ The Equality Directives require Member States to protect individuals against direct and indirect discrimination, harassment and victimisation on the grounds of racial or ethnic origin (Race Directive), and religion or belief, disability, age and sexual orientation (Employment Directive). The scope of the Race Directive is significantly wider, because it applies to employment and occupation, the provision of goods and services, including education in both public and private spheres. Conversely, the Employment Directive has a somewhat more limited scope, because it applies to employment and occupation in the public sector only.⁶⁶¹

Under the Equality Directives, direct discrimination takes place where one person is treated “less favourably than another is, has been or would be treated in a comparable situation”⁶⁶² on grounds specifically prohibited by the respective Directives. Indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin, sex, religion or belief, disability, age

⁶⁵⁸ Directive 2000/43 (Race Directive) (n 41).

⁶⁵⁹ Directive 2000/78 (Employment Directive) (n 43). In addition, in 2004, the Council adopted a Directive on equal treatment in access to and supply of goods and services to combat gender discrimination in provision of goods and services: Council (EC) Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37 (Goods and Services Directive).

⁶⁶⁰ For an assessment of the Equality Directives’ contribution to the development of EU anti-discrimination law see, Ellis, *EU Anti-Discrimination law* (n 655); Marc Bell, ‘Equality and the European Union Constitution (2004) 33 *Industrial Law Journal* 242-260.

⁶⁶¹ Furthermore, although the Goods and Services Directive (n 659) applies to both public and private sectors, it is limited to access to and supply of goods and services; for example, it explicitly excludes from its scope the content of media and advertising, as well as education (Article 3(3)).

⁶⁶² Directive 2000/43 (Race Directive) (n 41) Article 2(2)(a).

and sexual orientation at a particular disadvantage compared with other persons.⁶⁶³ Under the Race and Employment Directives, indirect discrimination may, however, be justified if a measure has a legitimate aim, to be achieved by appropriate and necessary means.⁶⁶⁴

In addition, the Equality Directives contain several exceptions. For example, Article 4 of the Race Directive and Article 4(1) of the Employment Directive stipulate that differential treatment based on a characteristic related to *inter alia* racial or ethnic origin, and religion or belief, would not be considered discriminatory if, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.⁶⁶⁵ It is hoped that the limitations in the Equality Directives will not detract from their protective scope, but this will largely depend on the ECJ's reading of the instruments.

So far the ECJ's interpretation of the Race Directive has been generous, such as in *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV (Feryn)*,⁶⁶⁶ where the Court dealt with the concept of direct discrimination. The case

⁶⁶³ Directive 2000/43 (Race Directive) (n 41) Article 2(2)(b).

⁶⁶⁴ Directive 2004/113 (Goods and Services Directive) (n 659) introduces the similar concept of objective justification without limiting it to cases of indirect discrimination (Article 4(5)). The preamble of the Goods and Services Directive refers, for example, to single-sex shelters aimed at protecting victims of sex-related violence (Preamble (Recital 16)).

⁶⁶⁵ Directive 2000/43 (Race Directive) (n 41) Article 4.

⁶⁶⁶ Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] All ER 1127.

concerned public statements by one of the directors of Feryn, who claimed that his firm, which specialised in the sale and installation of doors, would not recruit persons of Moroccan origin, because some customers do not want them in their private homes. The Belgian Centre for Equal Opportunities and Opposition to Racism brought proceedings against Feryn before national courts. The national court stayed the proceedings and asked the ECJ to provide guidance on whether public statements by an employer declaring that it would not recruit employees of a certain ethnic origin constitute direct discrimination under the Race Directive.

One of the distinct features of the case is a lack of an identifiable victim in the case. The United Kingdom and Ireland, therefore, argued that this claim by a public interest body was hypothetical: the Race Directive does not apply “in the absence of an identifiable complainant who has become the victim of discrimination”.⁶⁶⁷ Conversely, Advocate General Maduro maintained that if situations where no victim could be identified were excluded from the scope of the Directive, employers could discriminate against racial and ethnic minorities “simply by publicising the discriminatory character of their recruitment policy as overtly as possible beforehand”.⁶⁶⁸ Therefore, there was a case of direct discrimination.

The ECJ agreed with the Advocate General’s arguments and held that the existence of direct discrimination was not dependant on an identifiable complainant who claims to be a victim.⁶⁶⁹ The scope of the Race Directive would be limited if it only applied to

⁶⁶⁷ *Feryn* (n 666) para 10.

⁶⁶⁸ *Feryn* (n 666) Opinion of Advocat General Maduro, 12 May 2008, para 17.

⁶⁶⁹ *Feryn* (n 666) para 25.

“those cases in which an unsuccessful candidate for a post, considering himself to be the victim of direct discrimination, brought legal proceedings against the employer”.⁶⁷⁰ The ECJ ruled that an employer’s public statements in the context of a recruitment drive, stating that applications from persons of a certain ethnic origin would be turned down, amounted to direct discrimination under the Race Directive. This is so because such statements are likely to hinder access to the labour market by dissuading certain candidates from applying for advertised positions.

The ECJ’s generous interpretation of the Race Directive confirms that the Court is likely to take racial and ethnic discrimination in the EU very seriously. Thus, in *Feryn*, neither the ECJ nor the Advocate General discussed the possibility that, in some exceptional cases, genuine and determining occupational requirements⁶⁷¹ may require an employer to differentiate among the applicants. Although the straightforward facts of the case might have rendered such discussion unnecessary, this may also be indicative of the ECJ’s intention to interpret exceptions under the Race Directive very narrowly.

Were a member of the Russian-speaking minority in Latvia to consider that State policies contravene the Equality Directives, could they rely on these instruments or domestic law implementing the Directives? The Employment Directive is unlikely to be of significant help, because exclusion of these minorities is based on their language and not on religion. However, in cases of direct discrimination based on ethnic origin, exclusionary practices against Russian-speaking minorities could be attacked under

⁶⁷⁰ *Feryn* (n 666) para 24.

⁶⁷¹ Directive 2000/43 (Race Directive) (n 41) Article 4.

the Race Directive. In the absence of explicit statements by employers as in *Feryn*, it is possible to invoke rules on indirect discrimination⁶⁷² by demonstrating that obstacles to accessing the labour market disproportionately affect Russian-speaking minorities as compared to ethnic Latvians. Indeed, the Report on the Implementation of the Race Directive in Latvia explicitly refers to language regulations and ethnic origin as ‘suspect’ grounds.⁶⁷³ Therefore, rigid linguistic regulations limiting access to the labour market and differential treatment of non-citizens could be challenged under the provision on indirect discrimination in the Race Directive.⁶⁷⁴

However, even if a provision of Latvian legislation were to be found indirectly discriminatory, this finding would not fully remedy violations of the rights of Russian-speaking non-citizens. The Race Directive does not contain special rights essential to protect minority identity; it is limited to the prohibition of discrimination only,⁶⁷⁵ leaving positive action at Member States’ discretion. Thus, Article 5 of the Race Directive specifies that, to ensure full equality in practice, Member States are *not precluded* from maintaining or adopting positive action to prevent or compensate for disadvantages entailed by discrimination.⁶⁷⁶

⁶⁷² Directive 2000/43 (Race Directive) (n 41) Article 2(2)(b).

⁶⁷³ European Network of Independent Experts, ‘Latvia: report on measures to combat discrimination Directives 2000/43 and 2000/78’ [2007] Country report 2007, 2, <<http://www.non-discrimination.net/content/media/2007-LV-Country%20Report%20Final.pdf>>; see also ‘Latvia: report on measures to combat discrimination Directives 2000/43 and 2000/78’ [2008] Country report 2008, 4 <<http://www.non-discrimination.net/content/media/2008-LV-Country%20Report%20final.pdf>> accessed 29 June 2009.

⁶⁷⁴ Norbert Reich, ‘The Constitutional Relevance of Citizenship and Free Movement in an Enlarged Union’ (2005) 11(6) ELJ 675, 694.

⁶⁷⁵ Reich, ‘The Constitutional Relevance of Citizenship...’ (n 674) 694.

⁶⁷⁶ Directive 2000/43 (Race Directive) (n 41) Article 5; Directive 2000/78/EC (Employment Directive) (n 43), Article 7; Directive 2004/113 (Goods and Services Directive) (n 659) Article 6. In addition, the Equality Directives clarify that the provisions of these instruments are minimum standards and Member States are free to maintain higher standards of protection: Directive 2000/43

In addition, the range of issues which could come under the Race Directive does not extend to political participation *per se*. Although Recital 12 of the Preamble of the Race Directive states that the development of democratic and tolerant societies requires active participation of everyone irrespective of ethnic origin, it is unlikely that Russian-speakers' exclusion from political participation would fall within the ambit of this instrument. The Race Directive could be invoked by a member of the Russian-speaking minority if this individual is denied access to employment based on ethnic origin, for example, in a political party. Consequently, the Race Directive may have limited impact on the rights of Russian-speaking non-citizens.

Potentially, several other provisions of EU law may be relevant. First, a continued democratic deficit in Latvia may trigger the application of Article 7 (2) and (3) TEU. This provision may apply if the principles in Article 2 TEU, i.e., democracy and fundamental rights, including the rights of persons belonging to a minority, were seriously and persistently breached by a Member State. In this case, recommendations may be addressed to this Member State and some of its rights might be suspended, including voting rights in the Council. However, the mechanism of Article 7 is politically sensitive and constitutes a procedure for crisis response.⁶⁷⁷ Therefore, in

(Race Directive) (n 41) Article 6(1); Directive 2000/78/EC (Employment Directive) (n 43) Article 8(1); Directive 2004/113 (Goods and Services Directive) (n 659) Article 7 (1).

Moreover, the implementation of these Directives may not reduce the level of protection that was already afforded under national laws: Directive 2000/43 (Race Directive) (n 41) Article 6(2); Directive 2000/78/EC (Employment Directive) (n 43) Article 8(2); Directive 2004/113 (Goods and Services Directive) (n 659) Article 7(2).

⁶⁷⁷ In 1997, the Treaty of Amsterdam introduced Article 7 TEU. In 2000, the mechanism already proved inefficient in fashioning a response to the Haider affair, when an extreme right-wing party entered into a coalition government in Austria. On its own, this victory in domestic elections did not constitute a breach of fundamental rights and, therefore, did not trigger application of the Article 7 mechanism. Consequently, 14 Member States imposed sanctions on Austria outside of the EU legal framework. Subsequently, Article 7 TEU was revised by the Treaty of Nice. For discussion see,

practice, it will be invoked only if there is a serious and persistent breach of minority rights. The application of this mechanism to Latvia has not yet been contemplated by the EU institutions or Member States. Most likely, this provision would apply to Latvia only if exclusionary practices against Russian-speaking non-citizens escalate into ethnic conflict or civil unrest, which could draw the EU's attention to the problem. This, however, is unlikely given the weak political organisation among Russian-speaking minorities in Latvia.⁶⁷⁸ So, the EU may avoid sanctioning Latvia under this mechanism.

Because the status of non-citizens in Latvia is almost equivalent to stateless persons,⁶⁷⁹ under EU law they may qualify as TCNs,⁶⁸⁰ and hence may benefit from the Long-Term Residents Directive.⁶⁸¹ However, the Directive does not grant TCNs political rights, even though TCNs contribute to the economic, cultural and social well-being of the EU on an equal footing with EU citizens. Currently, TCNs are entitled only to petition the European Parliament (EP) and have a right of appeal to the European Ombudsman.⁶⁸² As highlighted in Chapter I on pages 138-143, despite

Gráinne de Búrca, 'Beyond the Charter: How Enlargement has Enlarged the Human Rights Policy of the European Union' (2004) *Fordham International Law Journal* 679-714, 695-699.

⁶⁷⁸ Anton Steen, 'Ethnic relations, elites and democracy in the Baltic States' (2000) 16(4) *Journal of Communist Studies and Transition Politics* 68, 73.

⁶⁷⁹ Non-citizens in Latvia have a special legal status under the Law on the Status of the Former USSR Citizens who are not Citizens of Latvia or any other State of 12 April 1995 <<http://www.humanrights.lv/doc/latlik/noncit.htm>> accessed 25 May 2007. As amended in 2000, this defines "the basic rights and obligations attached to such status, which include many fundamental social and economic rights, the right of exit and entry and the right to family reunification": European Commission against Racism and Intolerance 'Second report on Latvia' (2002) 21, para 33. Nevertheless, non-citizens have significant limitations on the right to employment and involvement in political life: Committee on the Elimination of Racial Discrimination 'Thematic Discussion on Non-citizens and Racial Discrimination' (n 563) para 43.

⁶⁸⁰ The status of TNCs as a minority in EU law is discussed in Chapter I on pages 140-143.

⁶⁸¹ Directive 2003/109 (Long-Term Residents Directive) (n 42) Preamble (Recital 5).

⁶⁸² Charter of Fundamental Rights (n 9) Articles 41 and 46.

the improvement in the TCNs' legal position, significant differences remain between EU citizens and permanently-resident TCNs, further marginalised by being "pushed to a third-class citizenship status in their host states".⁶⁸³

The ECJ's ruling in *Spain v the United Kingdom*⁶⁸⁴ suggests some development in this regard. Spain challenged the United Kingdom's rules granting a right to all residents of Gibraltar, including those who do not hold EU citizenship, to vote and to stand for election to the EP. Conversely, the UK argued that no EU rules prohibit extending these rights to nationals of non-Member States.⁶⁸⁵

In Advocate General Tizzano's view, the electoral base of a Member State might be widened to include foreigners "by reason of specific national situations or political choices made by the legislature."⁶⁸⁶ In principle, the Advocate General advocated the recognition of voting rights of the maximum number of persons, including foreigners established in a Member State, "who, like citizens, are effectively subject to the measures approved by the national and Community legislative authorities".⁶⁸⁷ However, in this particular case, granting votes to non-citizens in Gibraltar contravened Annex II to the Act on Direct Elections; the extension did not "stem from

⁶⁸³ Ece Atikcan, 'Citizenship or Denizenship: The Treatment of Third Country Nationals in the European Union' (2006) 85 Sussex European Institute Working Paper 21.

⁶⁸⁴ C-145/04 *Spain v United Kingdom (Gibraltar)* [2006] ECR I-7917; [2007] 1 CMLR 3.

⁶⁸⁵ *Gibraltar* (n 684) para 49.

⁶⁸⁶ *Gibraltar* (n 684) Opinion of Advocate General Tizzano, para 84.

⁶⁸⁷ *Gibraltar* (n 684) Opinion of Advocate General Tizzano, para 93.

the need to ensure the exercise of a fundamental right”.⁶⁸⁸ Although granting voting rights to foreigners is desirable, it is “a freely made political choice”.⁶⁸⁹

The ECJ dismissed the Advocate General’s arguments and established that the EC legislation did not define “expressly and precisely who are to be entitled to the right to vote and to stand as a candidate in elections to the European Parliament”.⁶⁹⁰

Therefore, EC law did not preclude Member States from granting the right to persons “other than their own nationals or citizens of the Union resident in their territory”.⁶⁹¹

This lenient approach may be also explained by the ECtHR’s judgment in *Matthews v the United Kingdom*,⁶⁹² which established that withholding by the UK of the right to participate in elections to the EP in Gibraltar in 1994 was incompatible with Article 3 of Protocol 1 to the ECHR (P1-3).⁶⁹³ Nevertheless, the wording of the judgment is

⁶⁸⁸ *Gibraltar* (n 684) Opinion of Advocate General Tizzano, para 128.

⁶⁸⁹ *Gibraltar* (n 684) Opinion of Advocate General Tizzano, para 130.

⁶⁹⁰ *Gibraltar* (n 684) para 70.

⁶⁹¹ *Gibraltar* (n 684) para 78.

⁶⁹² *Matthews v the United Kingdom* (App no 24833/94) (1999) 28 EHRR 361.

⁶⁹³ When the United Kingdom acceded to the Treaty Establishing the European Economic Community, pursuant to the Treaty on the Accession of 22 January 1972, it restricted the application of certain provisions of the EEC Treaty to Gibraltar, as its dependent territory (for example, Gibraltar was excluded from certain parts of the EEC, such as the free movement of goods: *Matthews v the United Kingdom* (n 692) paras 8, 11 and 12). Furthermore, the application of Annex II of the 1976 Act on Direct Elections to the European Parliament was limited to the United Kingdom, and did not apply to Gibraltar (Council (EEC) Decision 76/787 relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage, OJ 1976 L278/1: “The United Kingdom will apply the provisions of this Act only in respect of the United Kingdom.”) Consequently, the population of Gibraltar could not participate in elections to the European Parliament and was affected by “legislation emanating from the legislative process of the European Community” (*Matthews v the United Kingdom* (n 692) para 34), but had no say in the choice of their legislature.

In the ECtHR’s view this situation was incompatible with Article 3 of Protocol 1 to the ECHR, which “enshrines a characteristic of an effective political democracy” (*Matthews v the United Kingdom* (n 692) para 41), where people can freely express their choice of legislature. Because the applicant was completely deprived of the right to vote in the 1994 elections to the European Parliament, the ECtHR found a violation of the Convention right: Ms Matthews was “completely denied any opportunity to express her opinion in the choice of the members of the European Parliament” (*Matthews v the United Kingdom* (n 692) para 64).

very careful. It does not affirm granting voting rights to foreigners as a general rule; rather, it uses negative terms, not criticising the United Kingdom for its action.⁶⁹⁴

Consequently, persons who do not hold EU citizenship can have the right to vote and to stand for election to the EP. However, this encouraging finding has one significant limitation. The decision to grant EU political rights to non-citizens remains with a Member State. Therefore, this dictum is unlikely to alter the political rights of Russian-speaking non-citizens in Latvia.

Accordingly, there is little likelihood that the position of the Russian-speaking minorities in Latvia would improve if they acquired the status of EU long-term residents.⁶⁹⁵ Besides, the acquisition of the status of EU long-term resident requires TCNs to comply with the integration conditions set by Member States in their national legislation.⁶⁹⁶ In Latvia, these requirements, which include knowledge of a State language, stable and regular resources and sickness insurance, are rather similar to the requirements for naturalisation for Russian-speaking minorities. So, if non-citizens can pass the hurdles of the integration requirements they would be better off to naturalise and, thus gain the full benefits of EU citizenship.

However, there might be an easier way for Russian-speaking non-citizens to acquire EU citizenship. This could be achieved through a generous interpretation of Articles 9 TEU and Article 20(1) TFEU (ex-Article 17 TEC). Article 9 TEU establishes that

⁶⁹⁴ *Gibraltar* (n 684) paras 95 and 96.

⁶⁹⁵ Peter Van Elsuwege, 'Russian-speaking Minorities in Estonia and Latvia: Problems of Integration at the Threshold of the European Union' (2004) 20 ESMI Working Paper 43.

⁶⁹⁶ Directive 2003/109 (Long-Term Residents Directive) (n 42) Article 5(2).

‘[e]very *national* of a Member State shall be a citizen of the Union.’⁶⁹⁷ Article 20(1) TFEU is worded slightly differently and stipulates that ‘[e]very person holding the *nationality* of a Member State shall be a citizen of the Union.’⁶⁹⁸

Significantly, the Constitutional Court of Latvia, in interpreting the term ‘national’ in Article 3(1) of Protocol 4 (P4-3) to the ECHR, shed some light on the legal status of the Russian-speaking non-citizens in Latvia.⁶⁹⁹ In the view of the Constitutional Court, the concept ‘national’ in P4-3 refers ‘to persons with a legal status in the territory of the state, which is determined in accordance with the national laws’. Consequently, because the status of a non-citizen is created under national law, non-citizens could not be expelled from Latvia. Accordingly, the Constitutional Court confirmed that the concept of ‘national’ includes ‘non-citizens’. However, the Constitutional Court emphasised that these terms are not equivalent. ‘Non-citizens’ is a category of persons ‘up to that time unknown in the international law’. Therefore, they cannot be treated as Latvian citizens. Nevertheless, they are entitled to protection under the ECHR.

Let us consider the Constitutional Court’s assertion that a legal category of non-citizen is unknown in international law. The Latvian Law on Citizenship creates four categories of persons: citizens,⁷⁰⁰ foreigners,⁷⁰¹ stateless persons⁷⁰² and non-

⁶⁹⁷ Emphasis added.

⁶⁹⁸ Emphasis added.

⁶⁹⁹ Case No 2004-15-0106 (n 632).

⁷⁰⁰ Citizenship Act of 22 July 1994 (n 555) governs the legal status of citizens.

⁷⁰¹ Aliens and Stateless Persons (Entry and Residence) Act of 9 June 1992 regulates the concept of aliens, which includes foreign nationals and stateless persons.

citizens.⁷⁰³ The 1995 Law on the ‘Status of the Former USSR Citizens who are not Citizens of Latvia or any other State’ (Status of the Former USSR Citizens) defines non-citizens as those individuals who had Latvian residence before 1 July 1992 and do not have citizenship of any State.⁷⁰⁴ This categorization differs, however, from all three types of non-citizen in international law:

[f]irstly, non-citizens may enjoy the status of ‘aliens’, i.e. foreign citizens. Secondly, non-citizens may under certain circumstances be granted the status of ‘refugees’. Thirdly, non-citizens may be ‘stateless’ persons.⁷⁰⁵

This divergence has important implications. Although there is no binding international document on the status of aliens, their core fundamental human rights are entitled to protection in a host State.⁷⁰⁶ Moreover, their State of citizenship provides them with diplomatic and consular protection.⁷⁰⁷ As regards refugees, under the 1951 Convention related to the Status of Refugees, they are entitled to the same treatment as aliens.⁷⁰⁸ Additionally, they cannot be discriminated against based on

⁷⁰² Stateless Persons Act of 18 February 1999 read in conjunction with the Immigration Act of 1 May 2003 defines the status of stateless persons.

⁷⁰³ The Law on the Status of the Former USSR Citizens who are not Citizens of Latvia or any other State of 12 April 1995 governs the status of non-citizens <<http://www.humanrights.lv/doc/latlik/noncit.htm>> accessed 25 May 2007.

⁷⁰⁴ The Law on the Status of the Former USSR Citizens... (n 703) Article 1:
those citizens of the former USSR of their children, residing in Latvia or are temporarily away from the country for a specified period of time, who are not or have not been citizens of Latvia or any other country, who had registered residence in Latvia as of July 1, 1992, as well as persons whose last registered place of residence before July 1, 1992 was Latvia, or persons who resided on the territory of Latvia for at least 10 years without interruption.

⁷⁰⁵ Venice Commission, ‘Report on Non-citizens and Minority Rights’ (2007) CDL-AD(2007)001, para 96. These three categories (aliens, refugees and stateless persons) differ largely in the degree of protection offered by host States (paras 97-100).

⁷⁰⁶ Venice Commission ‘Report on Non-citizens and Minority Rights’ (n 705) para 97.

⁷⁰⁷ 1963 Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261, Article 5 <http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf> accessed 22 September 2007.

race, religion or State of origin,⁷⁰⁹ and have rights to education⁷¹⁰ and freedom of religion.⁷¹¹ Also, the status of stateless persons partly resembles that of aliens and refugees under the 1954 Convention relating to the Status of Stateless Persons.⁷¹²

Non-citizens in Latvia do not fit any of the above categories. They have no other State to protect them, because they were citizens of a State now defunct. Under Latvian laws they are neither refugees nor stateless.⁷¹³ Consequently, Russian-speaking non-citizens cannot rely on the guarantees of relevant international instruments governing other regimes. Effectively, by creating this special legal category of non-citizens, Latvia not only violates its obligations under international law to avoid statelessness⁷¹⁴ and denies these minorities protection under the existing international regimes for non-citizens,⁷¹⁵ but also may be in breach of EU law.

⁷⁰⁸ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, Article 7 <<http://www1.umn.edu/humanrts/instrree/v1crs.htm>> accessed 22 September 2007.

⁷⁰⁹ Convention related to the Status of Refugees (n 708) Article 3.

⁷¹⁰ Convention related to the Status of Refugees (n 708) Article 22.

⁷¹¹ Convention related to the Status of Refugees (n 708) Article 4.

⁷¹² 1954 Convention relating to the Status of Stateless Persons (adopted 28 September 1954 entered into force 6 June 1960) <<http://www.ohchr.org/english/law/stateless.htm>> accessed 23 September 2007. Article 3 provides for the principle of non-discrimination similar to that in the Convention related to the Status of Refugees (n 709).

⁷¹³ There are separate laws on the status of asylum-seekers and refugees in Latvia (Asylum Act of 7 March 2002) and stateless persons (Stateless Persons Act of 18 February 1999).

⁷¹⁴ International law prohibits the creation of statelessness by States. See The UN Convention on the Reduction of Statelessness (adopted 30 August 1961 and entered into force 13 December 1975) UN Doc A/Conf.9/15. Thus, Article 9 of this instrument precludes States from depriving “any person or group of persons of their nationality on racial, ethnic, religious or political grounds”; moreover, Article 8 requires States Parties “not deprive a person of his nationality if such deprivation would render him stateless”. Latvia ratified the UN Convention on the Reduction of Statelessness on 14 April 1992. See also European Convention on Nationality (1997) ETS No 166, Article 4. Latvia signed the European Convention on Nationality on 30 May 2001.

⁷¹⁵ To demonstrate the depth of the problem and international disapproval of a similar deprivation of political rights, a parallel can be drawn between non-citizens in Latvia and the situation of Blacks in South Africa during apartheid (1948-1990) (The term ‘Black’ with a capital letter was officially used in

This is so because, although Member States may identify their nationals, according to the ECJ's ruling in *M V Micheletti v Delegacion del Gobierno en Cantabria*,⁷¹⁶ this right is not absolute. In a preliminary ruling procedure, the ECJ ruled that EC law prevented Member States denying Community rights to nationals of other Member States who were also nationals of third States.⁷¹⁷ Moreover, the ECJ established that “[u]nder international law, it is for each Member State, *having due regard to Community law*, to lay down the conditions for the acquisition and loss of nationality.”⁷¹⁸ Thus, the judgment conveys the Court's intention to leave some scope for restricting Member States' rights in this matter. The Court's approach is

the legislation of South Africa to describe the African people): Dugard, 'South Africa's "Independent" Homelands...' (n 522). Although the political context and scale of this denial in Latvia and South Africa are different, the issue is essentially the same. South Africa initiated a policy of homelands to evade world criticism for denying political rights to Blacks: since 1971 it proclaimed Bophuthatswana, the Ciskei, Lebowa, Venda, Gazankulu, Qwaqwa and kwaZulu as self-governing territories: J Dugard, *Human Rights and the South African Legal Order* (Princeton University Press, Princeton 1978) 93. According to this policy, Blacks exercised political rights in their own 'States,' so that Whites could retain political control over the rest of the territory. Consequently, the political rights of Blacks in homelands were not equivalent to those enjoyed by Whites, because they did not extend to the central political process. Even more, through granting independence to some of these homelands (Transkei, Bophuthatswana, Venda and Ciskei), South Africa denationalized the Blacks who had linguistic, cultural and ethnic links with the 'independent' homelands. Although legislation on denationalization did not refer specifically to race, it was intended to apply to Blacks.

The international community understood that the price for the new States' independence would be the denationalization of Blacks, and refused recognition: Dugard, 'South Africa's "Independent" Homelands...' (n 522) 15, footnote 14 citing General Assembly of the United Nations, UNGA Res 3151G, 28 UN GAOR, Supp (No 30) 32, UN DocA/9030 (1973); UNGA Res 3411D, 30 UN GAOR, Supp (No 34) 37, UNDocA/10034 (1975). Nevertheless, millions of Blacks living and working in South Africa were treated as aliens without any right to political participation there. Although international law provides for the right not to be arbitrarily deprived of nationality, it was the *implementation* of carefully worded domestic legislation that was discriminatory: Universal Declaration of Human Rights (n 192) Article 15: "no one shall be arbitrarily deprived of his nationality."

This example from the experience of South Africa demonstrates that "denationalization measures based on racial, ethnic, religious, or other related grounds are impermissible under contemporary international law": M McDougal, H Lasswell and L Chen, 'Nationality and Human Rights: the Protection of the Individual in External Arenas (1974) 83 Yale Law Journal 900, 958. See also International Convention on the Elimination of All Forms of Racial Discrimination (n 131)) Article 5(d)(iii); Convention on the Reduction of Statelessness (n 714) Article 9.

⁷¹⁶ Case C-369/90 *M V Micheletti v Delegacion del Gobierno en Cantabria* [1992] ECR I-4239.

⁷¹⁷ *Micheletti* (n 716) para 15

⁷¹⁸ *Micheletti* (n 716) para 10 (emphasis added).

justifiable; because the Community chose to define the personal scope of free movement and political rights based on nationality, “the determination of which nationals qualify for the enjoyment of ... [these rights] is also a question for Community law...”⁷¹⁹

Were the ECJ to follow *Micheletti* and the reasoning of the Constitutional Court of Latvia, it could rule that the term ‘non-citizens’ is included in the definition of ‘national’ under Articles 9 TEU and 20(1) TFEU. As a result, Russian-speaking non-citizens in Latvia could acquire the benefits of EU citizenship, including political rights. After all, the term ‘non-citizen’ was artificially fashioned to avoid international condemnation for creating statelessness, while excluding a large segment of the population from political participation.

The general principles of EU law and constitutional traditions common to Member States (general principles), as developed by the ECJ in its jurisprudence, provide another source of vague promise. The ECtHR’s case law on the rights of Russian-speaking minorities in Latvia is of particular significance in this respect. Two categories of cases are noteworthy. First, even though the ECHR does not include the right to citizenship, the ECtHR considered the compatibility of deportation orders in respect of Russian-speaking individuals in Latvia with their right to private and family life under Article 8 ECHR. The second relevant category of cases came before the

⁷¹⁹ S O’Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (Kluwer Law International, The Hague 1996) 40-41; see also, T Hartley, *EEC Immigration law* (European Studies in Law, Amsterdam 1978) 78. For the opposite view see, H D’Oliveira and A Evans, ‘Nationality and Citizenship’ in A Cassese, A Clapham and J Weiler (eds) *Human Rights and the European Community. Towards 1992 and Beyond: Methods of Protection* (Vol 2 Nomos, Baden Baden 1991) 299-348.

ECtHR under P1-3 ECHR, which guarantees the “free expression of the opinion of the people in the choice of the legislature.”

Where leave to remain in Latvia is concerned, the ECtHR has not developed general principles on the rights of Russian-speaking non-citizens in Latvia, but has limited its role to finding violations of Article 8 ECHR in individual cases, such as in *Slivenko v Latvia*,⁷²⁰ *Shevanova v Latvia*,⁷²¹ *Kaftailova v Latvia*,⁷²² and *Sisojeva v Latvia*,⁷²³ relating to deportation orders against Russian-speaking non-citizens from Latvia. In the ECtHR’s view, an arbitrary denial of nationality may amount to interference with the rights protected under Article 8 ECHR on the right to private and family life. In its jurisprudence on the rights of Russian-speaking non-citizens to remain in Latvia, the ECtHR interpreted the concept of private life to include “the network of personal, social and economic relations that make up the private life of every human being.”⁷²⁴ Relying on this generous interpretation, the ECtHR had no difficulty in finding that the deportation orders against the applicants interfered with their right to private life under Article 8(1). In addition, the Court established that Article 8 does not merely compel States to abstain from interference with these aspects of private life, but also entails “positive obligations inherent in effective respect for private or family life”.⁷²⁵ In other words, it was not enough that Latvia refrained from deporting the applicants

⁷²⁰ *Slivenko v Latvia* (App no 48321/99) (2004) 39 EHRR 24.

⁷²¹ *Shevanova v Latvia* (App no 58822/00) ECHR 15 June 2006.

⁷²² *Kaftailova v Latvia* (App no 59643/00) ECHR 22 June 2006.

⁷²³ *Sisojeva v Latvia* (App no 60654/00) (2006) 43 EHRR 33.

⁷²⁴ Daniel Thym, ‘Respect for Private and Family Life under Article 8 ECHR in Immigration cases: A Human Right to Regularize Illegal Stay?’ (2008) 57 ICLQ 87, 88.

⁷²⁵ *Shevanova v Latvia* (n 721) para 69.

from the country after long periods of uncertainty and insecurity. The Government also had to take necessary measures to afford these individuals the enjoyment of Convention rights, such as their right to private life.⁷²⁶

Having found an interference with Article 8(1), the ECtHR considered whether such interference could be justified under Article 8(2) ECHR. To be justified, a restriction should be prescribed by law, pursue a legitimate aim listed in Article 8(2), such as protection of national security and preventing disorder, and be necessary in a democratic society. The ECtHR accepted the lawfulness and legitimate aims of deportation orders without much ado. Where the necessity test is concerned, the Court stated that in the light of the circumstances,

the Latvian authorities overstepped the margin of appreciation enjoyed by the Contracting Parties in such a matter, and ... they failed to strike a fair balance between the legitimate aim of the protection of national security and the interest of the protection of the applicants' rights under Article 8.⁷²⁷

Thus, the interference with the applicants' rights had not been necessary in a democratic society. Therefore, Latvia was in breach of the ECHR.

Despite the significance of these findings, these cases have allowed the applicants only to remain in Latvia without remedying their long-term exclusions from public life or guaranteeing citizenship status. Nor did the Grand Chamber of the ECtHR rectify this omission. In *Shevanova v Latvia*,⁷²⁸ *Kaftailova v Latvia*⁷²⁹ and *Sisojeva v*

⁷²⁶ *Shevanova v Latvia* (n 721) para 69.

⁷²⁷ *Slivenko* (n 720) para 128.

⁷²⁸ *Shevanova v Latvia* (App no 58822/00) ECHR 7 December 2007.

⁷²⁹ *Kaftailova v Latvia* (App no 59643/00) ECHR 7 December 2007.

Latvia,⁷³⁰ the Grand Chamber, having established that the applicants did not face deportation orders anymore and measures indicated by the Latvian authorities would allow them to remain in the country, stated that,

neither Article 8 nor any other provision of the Convention can be construed as guaranteeing, as such, the right to a particular type of residence permit; the choice of permit is in principle a matter for the domestic authorities alone.⁷³¹

As a result, the ECtHR's jurisprudence has had a limited impact on the political rights of Russian-speaking non-citizens in Latvia. The more-recently admitted case of *Jurijs Petropavlovskis v Latvia*⁷³² may induce the ECtHR to deal with the legal status of non-citizens in Latvia more directly. The case concerns a Russian-speaking non-citizen who has passed all necessary tests to naturalise and acquire citizenship. However, when the Naturalisation Board sent his documents to the Cabinet of Ministers for the final approval, the Cabinet refused to grant him citizenship. The applicant attempted to challenge this decision in the Latvian courts. However, the administrative courts in the country ruled that the measure was political and not legal. Therefore, it was not possible to quash the decision of the Cabinet. The applicant complained to the ECtHR and claimed that the only reason for the refusal of citizenship status was his active participation in meetings and demonstrations protesting against Latvian-only education in 2003–2004. He argued that Latvia violated his rights to free speech⁷³³ and freedom of assembly.⁷³⁴ When the ECtHR decides this case, the analysis could reveal that denial of Latvian citizenship aims to

⁷³⁰ *Sisojeva v Latvia* (App no 60654/00) (2007) 45 EHRR 33.

⁷³¹ *Sisojeva* (n 730) para 91.

⁷³² *Jurijs Petropavlovskis v Latvia* (App no 44230/06) ECHR (admissibility decision) 3 June 2008.

⁷³³ ECHR (n 24) Article 10.

⁷³⁴ ECHR (n 24) Article 11.

exclude Russian-speaking non-citizens from public life. However, it is likely that the Court may limit its assessment to the facts of the case and avoid broader discussion of this problem in Latvia, largely due to the political sensitivity of the issue.

Similarly, the ECtHR case law on the political rights of Russian-speaking minorities in Latvia only partially remedies their situation. As discussed in Chapter I on pages 61-62, in *Podkolzina v Latvia*, the ECtHR's finding of a violation of P1-3 ECHR was purely on procedural grounds and did not question the strict linguistic requirements involved.⁷³⁵ Furthermore, in *Ždanoka v Latvia*⁷³⁶ (discussed on pages 63-64), the Grand Chamber overly relied on the historical and political context of the country and found that the applicant's active participation in the work of the Communist Party during Latvia's transition to independence rendered logical and proportionate her exclusion from standing for a seat in the national Parliament.⁷³⁷

The ECtHR's more recent jurisprudence in *Sejdić and Finci v Bosnia and Herzegovina* on the right of minorities not to be discriminated against in political participation (discussed on pages 47-49 and 65-66)⁷³⁸ may eventually impact the political rights of Russian-speaking minorities in Latvia. The case affirmed the importance of guaranteeing the enjoyment of political rights in countries where such participation by minorities may be politically sensitive.

⁷³⁵ See also the communication of the HRC in *Antonina Ignatane v Latvia* (n 166).

⁷³⁶ *Ždanoka v Latvia* (n 173).

⁷³⁷ *Ždanoka v Latvia* (n 174) para 132.

⁷³⁸ See also, Case Comment, 'Sejdic and Finci v Bosnia and Herzegovina (Application Nos 27996/06 and 34836/06): discrimination on grounds of ethnic origin - eligibility to stand for election to legislature and Presidency' (2010) *European Human Rights Law Review* 235-239.

However, can non-citizens rely on P1-3 ECHR? Smyth argues that although “non-citizens do have a right of universal suffrage under P1-3, ... States may impose a citizenship criterion on the exercise of the right.”⁷³⁹ Given that there are significant variations in electoral systems of European countries,⁷⁴⁰ the ECtHR is likely to grant States a wide margin of discretion, if restriction of non-citizens’ political rights pursues a legitimate aim. In addition, exclusion must be proportionate to the aim pursued because

[a] blanket restriction of the right to vote/stand for election applied to all non-citizens, regardless of the duration of their residence, and to all manner of elections (local, national, European Parliament) could offend against the proportionality test.⁷⁴¹

Regrettably, such a claim has not yet been brought by a Russian-speaking non-citizen in Latvia. Were a Russian-speaking non-citizen to complain to the ECtHR about restrictions on his/her political rights, what would be the outcome of the case? Theoretically, the ECtHR could find a violation of the Convention through a combined reading of its rulings in *Matthews* and *Sejdić and Finci*. It seems only logical that non-citizens in Latvia are as entitled to enjoy voting rights as non-citizens in Gibraltar and minorities in Bosnia and Herzegovina, because the lack of political rights deprives them of participation in both domestic and EU decision-making.

⁷³⁹ Ciara Smyth, ‘The Right to Vote and Participate in Local Elections: Citizen’s Right or Human Right?’ (2006) 1 Law WPS 18.

⁷⁴⁰ Andrew Reynolds, ‘Electoral Systems and the Protection and Participation of Minorities’ (Minority Rights Group International 2006) <http://www.conflictrecovery.org/bin/Minority_rights_group_international_202006.pdf>; see also, Yash Ghai, ‘Public Participation and Minorities’ (Minority Rights Group International 2003) <<http://www.minorityrights.org/980/reports/public-participation-and-minorities.html>> accessed 12 May 2009.

⁷⁴¹ Smyth, ‘The Right to Vote and Participate in Local Elections...’ (n 739) 19.

One argument that Latvia could advance to oppose such development is to rely on Article 16 ECHR, which specifies that nothing in Article 10 on freedom of speech, Article 11 on freedom of assembly and Article 14 on non-discrimination can prevent States from imposing restrictions on the political activity of aliens. The ECtHR has interpreted this provision only once in *Piermont v France*,⁷⁴² which touched upon political participation in the EC prior to the inception of EU citizenship. The case concerned a German national who alleged that administrative measures regarding political participation taken by France infringed *inter alia* her right to freedom of expression. France attempted to justify the restriction under Article 16. Because the application was launched before the inception of EU citizenship, France considered that both this factor and the applicant's status as a Member of the EP (MEP) were irrelevant. This is because Member States had the right to lay down the rules on the acquisition and loss of nationality.⁷⁴³ Since the applicant was not a national of France, the restriction on her political rights as an alien were legitimate.

The ECtHR disagreed and established that because the applicant possessed the nationality of an EU Member State and was a MEP, France could not invoke Article 16 against the applicant.⁷⁴⁴ Because of this narrow reading of Article 16, the ECtHR has “avoided dealing with the substantive and problematic content”⁷⁴⁵ of the provision. Regrettably, this archaic norm may still affect the rights of Russian-speaking non-citizens in Latvia, because they do not possess EU citizenship.

⁷⁴² *Piermont v France* (App no 15773/89; 15774/89) (1995) 20 EHRR 301.

⁷⁴³ *Piermont v France* (n 742) para 61.

⁷⁴⁴ *Piermont v France* (n 742) para 64.

⁷⁴⁵ Smyth, ‘The Right to Vote and Participate in Local Elections...’ (n 739) 20.

However, were the ECtHR to take into consideration the Latvian Constitutional Court's dictum, which included the term 'non-citizen' as part of the concept 'national' (discussed on page 212), the outcome of the case could be in favour of a Russian-speaking non-citizen.

Overall, although the restrictions on the political rights of Russian-speaking minorities in Latvia may in theory contravene the ECHR provisions, implied limitations read by the ECtHR in the exercise of political rights, as well as Article 16 ECHR, may induce the Court to retain its reserved position on the issue.

Were the FCNM a part of the general principles of EU law, would it have a significant impact on the political rights of Russian-speaking minorities in Latvia? As noted in Chapter I on pages 178-179, Latvia narrowed the scope of the FCNM's application to non-citizens through a reservation. None of the contracting States objected specifically to Latvia's reservation. There is no definition of the concept 'national minority' in the FCNM and some States either listed specific minorities⁷⁴⁶ or supplied their own definitions,⁷⁴⁷ thus limiting the instrument's scope. Only the Russian Federation (which has a national interest in exerting influence over former Soviet Republics) placed a declaration with the FCNM, objecting to States' unilateral definitions of 'national minorities' and,

attempts to exclude from the scope of the Framework Convention the persons who permanently reside in the territory of States Parties to the Framework Convention and previously had citizenship but have been

⁷⁴⁶ Germany, Slovenia and the Former Yugoslav Republic of Macedonia. For the list of declarations made with respect to the FCNM see <<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=157&CM=8&DF=25/06/2010&CL=ENG&VL=1>> accessed 12 July 2008.

⁷⁴⁷ Estonia, Luxembourg and Switzerland: list of declarations made with respect to the FCNM (n 746).

arbitrarily deprived of it, [which] contradict the purpose of the Framework Convention for the Protection of National Minorities.⁷⁴⁸

It appears that the Russian declaration of 1 December 1998 was pre-emptively directed against Latvia seven years before the latter ratified the FCNM. So far the ACFC has interpreted the declaration to mean that the Russian Federation itself offers protection to non-citizens within its jurisdiction⁷⁴⁹ and its impact on Latvia is not clear.

The second obstacle to the FCNM having an impact on the situation of Russian-speaking non-citizens in Latvia stems from the controversy between the universal and European standards as to the criterion of citizenship as a prerequisite of minority protection. As discussed in Chapter I on pages 167 and 169, some European instruments still maintain this criterion,⁷⁵⁰ although there are suggestions that this requirement should be relaxed. This is particularly so “in the case of a break-up of a multi-ethnic State, [where] those who suddenly lost the citizenship of their State of residence were at particular risk of exclusion”,⁷⁵¹ as in Latvia. Therefore, on the European level, a citizenship criterion, which determines the scope of minority rights, “should be replaced by a residence requirement”.⁷⁵² This, however, has been difficult to achieve under the FCNM; ACFC suggestions to include non-citizens in the definition of ‘national minority’ under the instrument created considerable opposition

⁷⁴⁸ Russian Federation’s declaration to the FCNM: list of declarations made with respect to the FCNM (n 746).

⁷⁴⁹ ACFC, ‘First Opinion on the Russian Federation’ (2002) ACFC/INF/OP/I(2003) 005, para 21.

⁷⁵⁰ PACE, ‘Recommendation on the Rights of Minorities’ (1990) Rec 1134, para 11 <<http://www.minelres.lv/coe/pace/rec1134.htm>> accessed 30 June 2008.

⁷⁵¹ Venice Commission, ‘Report on Non-citizens and Minority Rights’ (n 705) para 137; see also PACE, ‘Resolution 1527(2006)’ (n 635) paras 2–4, 9, 11.

⁷⁵² Venice Commission, ‘Report on Non-citizens and Minority Rights’ (n 705) para 137.

from some Member States. For example, in response to the suggestions of the Advisory Committee to expand the scope of the FCNM's application,⁷⁵³ the Italian government commented that

the possible extension of the safeguards provided by the Framework Convention to include other minorities can only be examined in the event that the Italian Parliament decides, under appropriate draft legislation, to recognise the existence of any additional minority language groups.⁷⁵⁴

Similarly, the ACFC's insistence in its monitoring reports that Latvia ought to grant all non-citizens the right to full political participation may create opposition from Latvia. Nevertheless, as the ACFC suggests,

[w]hile citizenship requirements can be applied in relation to parliamentary elections, State Parties are encouraged to provide non-citizens belonging to national minorities with a possibility to vote and to stand as candidates in local elections and governing boards of cultural autonomies.⁷⁵⁵

Furthermore, language proficiency requirements imposed on candidates for parliamentary and local elections contravene Article 15 FCNM,⁷⁵⁶ because they have a negative impact on effective participation of national minorities in public affairs.⁷⁵⁷

Does Latvia comply with the FCNM? The ACFC has not disclosed the report on Latvia's compliance with the FCNM. Therefore, the overall impact of the instrument

⁷⁵³ ACFC, 'First Opinion on Italy' (n 283) 19.

⁷⁵⁴ 'Comments of the Government of Italy on the Opinion of the Advisory Committee on the implementation of the Framework Convention for the Protection of National Minorities in Italy', (2002) GVT/COM/INF/OP/I(2002)007, 2; for discussion of similar comments made by Germany, see Elizabeth Craig, 'The Framework Convention for the Protection of National Minorities and the Development of a 'Generic' Approach to the Protection of Minority Rights in Europe?' in G Guliyeva & G Pentassuglia (eds) 'Minority Groups Across Legal Settings: Global and Regional Dimensions' (Special Issue) (2010) 17(2) *International Journal on Minority and Group Rights* 307-325.

⁷⁵⁵ ACFC, 'Commentary on the Effective Participation...' (n 188) para 101.

⁷⁵⁶ ACFC, 'Commentary on the Effective Participation...' (n 188) para 102.

⁷⁵⁷ See, for example, ACFC, 'First Opinion on Estonia' (n 172) para 55.

on the situation of non-citizens is not yet clear. Chapter I on page 68 highlighted requirements towards States under Article 15 FCNM, which includes effectiveness of participation, especially in matters of a particular concern to a group. In Latvia, while the overwhelming majority of non-citizens belong to minorities, they are debarred “from participating in the political life of their country. They can neither vote nor be elected, even at the local level”.⁷⁵⁸ Despite numerous recommendations of international organisations to allow participation of non-citizens in local elections,⁷⁵⁹ Latvia adamantly maintains its exclusionary practices. Furthermore, the participation of those representatives of the Russian-speaking minorities who have already acquired citizenship is hampered by the stringent language requirements. Consequently, Latvia may be in breach of Article 15 FCNM.⁷⁶⁰

4. Conclusion

This chapter dealt with the right of minorities to political participation in the context of Latvia. The case study showed how through restrictive citizenship policies Latvia has effectively deprived a large number of Russian-speaking minorities from political participation. Significantly, political rights are at the heart of protecting minorities, because they allow minorities to participate in shaping the rules they must follow. This is even more important in the EU, where an additional layer of political rights are available through EU citizenship. Arguably, in the EU, which was created to balance

⁷⁵⁸ CHR, ‘Memorandum to the Latvian Government’ (n 635) para 43.

⁷⁵⁹ See PACE, ‘Resolution 1527(2006)’ (n 635) para 17.11; CHR, ‘Memorandum to the Latvian Government’ (n 635) para 43; ECRI, ‘Third report on Latvia’ (n 635) para 132.

⁷⁶⁰ This conclusion may be further supported by the ACFC’s approach to the similar situation of Russian-speaking minorities in Estonia.

the excesses of State power, the political rights of minorities and the benefits of political union should be linked.

As the analysis in Section 3 of this Chapter highlighted, the EU legal framework is not equipped adequately to deal with Latvia's exclusion of large numbers of Russian-speaking non-citizens from political participation. Although the Equality Directives may have some impact on this situation, they are limited to non-discrimination and do not elaborate on the special rights necessary to protect this group's identity. Moreover, their scope does not extend to political participation *per se*. Furthermore, even though theoretically the EU could put some pressure on Latvia under Article 7 TEU, this mechanism is too politically sensitive and is likely to be used only if there is a persistent and serious breach of minority rights, threatening to escalate into ethnic conflict. Were Russian-speaking non-citizens to acquire a status of TCNs they would still be excluded from political participation. Besides, the integration requirements under the Long-Term Residents Directive are similar to the naturalisation demands, so acquisition of citizenship may be more beneficial and no more burdensome. Access of Russian-speaking non-citizens to EU citizenship rights could in principle be achieved through a generous reading of Articles 9 TEU and 20(1) TFEU, interpreted in the light of *Micheletti* and the Latvian Constitutional Court's decision on the term 'national' (discussed on page 212). Although possible and highly desirable, such a development could prove highly controversial in practice. Finally, where the general principles of EU law are concerned, Article 8 ECHR guarantees individuals belonging to Russian-speaking minorities mainly the right to remain on the territory of Latvia. This, however, does not entitle those individuals to acquire citizenship (and, by extension, political rights) automatically. As to political rights, so far the ECtHR's

approach to the political rights of Russian-speaking minorities in Latvia has been fairly reserved, based on historical and political considerations. It is to be hoped that *Sejdić and Finci* will impact the future case law of the ECtHR, particularly the pending case of *Jurijs Petropavlovskis*.

The only instrument that explicitly requires States to ensure effective participation of national minorities in the political life of a country is the FCNM. The analysis above suggested that Latvia may be in breach of Article 15 FCNM. However, first the ACFC has not disclosed its findings. This may be partly explained by the weaker monitoring mechanism under the FCNM – a failure of a State to follow the ACFC’s recommendations may undermine the usefulness of the instrument. Therefore, the ACFC prefers constructive dialogue with a State to open condemnation. Second, the FCNM has not yet been formally endorsed as a part of the general principles of EU law.

Accordingly, the EU has some potential to address the issue of political rights of minorities in its Member States. As it stands, however, the EU lacks a coherent system of minority protection. The question then is, should the EU get involved in minority protection any further, and why?

The main lesson for the EU from Latvia’s treatment of minorities is that it should be consistent in its accession conditionality and ensure that it has mechanisms to tackle unresolved minority issues in its Member States.⁷⁶¹ As the case study suggests, to deal effectively with exclusionary practices of States aiming to restrict the political

⁷⁶¹ EUobserver, ‘MEPs revisit post-WW II period in debate on Slovak minorities’, 06 November 2007, <<http://euobserver.com/9/25091/?rk=1>> accessed 06 November 2007.

participation of minorities, the EU may need a more effective legal framework. Moreover, the example of Latvia is not unique. Other countries that aspire to EU membership have similar exclusionary practices against minorities, such as the former Yugoslav Republic of Macedonia,⁷⁶² Kosovo⁷⁶³ and Bosnia and Herzegovina.⁷⁶⁴ However, as Latvia's experience demonstrates, the usefulness of EU conditionality in candidate countries may be limited in time and space.⁷⁶⁵ Therefore, the EU will either need to insist that candidate countries fully resolve all the issues concerning minorities before accession (which may delay some enlargement negotiations), or have internal mechanisms in place that would guarantee political participation of minorities in domestic and EU affairs in matters of particular concern to these groups.

Accordingly, there would be several benefits of an EU regime of minority protection. First, the EU would have a consistent set of benchmarks to avoid double standards towards candidate countries and its Member States. Moreover, it would have in place

⁷⁶² Ljubica Spaskovska, 'Macedonia's Nationals, Minorities and Refugees in the Post-Communist Labyrinths of Citizenship' (2010) 05 CITSEE working paper series. On exclusion of minorities from political participation through citizenship requirements in the Former Yugoslav Republics see Igor Štiks, 'A Laboratory of Citizenship: Shifting Conceptions of Citizenship in Yugoslavia and its Successor States' (2010) 02 CITSEE working paper series.

⁷⁶³ Gëzim Krasniqi, 'The challenge of building an independent citizenship regime in a partially recognised state: the case of Kosovo' (2010) 04 CITSEE working paper series.

⁷⁶⁴ Interestingly, in its 2009 Progress Report on Bosnia and Herzegovina's accession to the EU, the Commission maintained (before the ECtHR's judgment in *Sejdić and Finci*) that the exclusion of minorities from elections in Bosnia and Herzegovina is incompatible with Protocols 1 and 12 ECHR: Commission, '2009 Progress Report on Bosnia and Herzegovina, accompanying the Communication from the Commission to the European Parliament and the Council' [2009] SEC(2009)1338, 8.

⁷⁶⁵ Thorsten Gromes, 'The Perspective of European Integration and Conflict Transformation in Bosnia and Herzegovina' (2007) Paper presented at the conference on Making Sense of a Pluralist World: Sixth Pan-European Conference on International Relations of the ECPR Standing Group on International Relations, Turin, 12-15 September 2007, 24; Edward Joseph and Bruce Hitchner, 'Making Bosnia Work: Why EU Accession is Not Enough' (2008) USIPeace Briefing 5, 8; Edin Sarcevic, 'Bosnia and Herzegovina and Controversies of the EU Integration Processes (Constitutional View)' (2009) 64 ZÖR 237-249, 249; Eldar Sarajlic, 'The Bosnian Triangle: Ethnicity, Politics and Citizenship' (2010) 06 CITSEE working paper series.

mechanisms to address outstanding minority issues in its new Member States post-accession. The conclusions and recommendations of this thesis discuss the form that an EU regime of minority protection could take.

The desirability of a coherent system of minority protection in the EU does not mean, however, that this will be easily achieved in practice. Given political opposition to the protection of minority rights in some Member States,⁷⁶⁶ such a development may be unlikely in the short run. Nevertheless, in the light of explicit references to minorities in EU primary law, sooner or later the ECJ may be asked to interpret the term. A generous interpretation of the term by the ECJ (as proposed in Chapter I on page 186) may be one concrete way that the EU could contribute to minority protection. A broad definition of ‘minority’ could, for example, address the situation of Russian-speaking non-citizens in Latvia, who undoubtedly constitute a minority group. Therefore, they are entitled not only to non-discriminatory treatment, but also special rights, such as the right to political participation (discussed in Chapter I on pages 56-69). Accordingly, a broad definition of ‘minority’ in EU law could ensure the right of minorities to political participation irrespective of their status or ‘label’ under domestic law. Furthermore, by omitting a citizenship requirement from the defining characteristics of ‘minority’, the EU could prevent States from excluding unwanted groups through restrictive citizenship policies. Even though such a development is possible in principle, for now it remains unrealistic, because of some Member States’ sensitivity to minority protection and their determination to stop the EU from acting outside of its competences.

⁷⁶⁶ Indeed, during the drafting process of the Treaty Establishing a Constitution for Europe, the Latvian and Slovakian Governments strongly opposed the Hungarian proposal to include explicit minority rights in the draft Constitutional Treaty. As a result, instead of explicit minority rights, only a vague reference to ‘respect for human rights, including the rights of persons belonging to minority groups’ was included in Article I-2 of the Draft Constitutional Treaty.

CHAPTER III. UNVEILING THE VEIL: THE FREEDOM TO WEAR RELIGIOUS DRESS IN PUBLICLY-FUNDED SCHOOLS IN ENGLAND

Indeed, individuals belonging to ethnic minority groups often face a predicament. They either comply with the religious law of their faith, which requires wearing the symbol and which means they fail to comply with state law, or else they violate the religious law to obey the secular law. These individuals end up breaking the law one way or the other.⁷⁶⁷

1. Introduction

Recent negotiations of the draft Constitutional Treaty in 2002-2004 brought the issue of religion in the EU to the forefront of public attention. The proposal from Germany, Italy, Poland and Slovakia to include in the preamble of the Constitutional Treaty references to ‘God’ and to ‘Europe’s Christian heritage’,⁷⁶⁸ based on requests from the late Pope John Paul II, was strongly opposed by secular France and the Netherlands; as a result, the Preamble of the draft Constitutional Treaty (and now the Lisbon Treaty) only refer to “[d]rawing inspirations from the cultural, religious and humanist inheritance of Europe...”⁷⁶⁹ This debate reignited during the adoption of the EU’s 50th birthday declaration in March 2007 and negotiations on the Lisbon Treaty. Once more there was an attempt to include references to ‘God’ and ‘Christianity’ in the EU Treaties. German proposals to incorporate religion in the Lisbon Treaty were opposed by France and the UK, “worried over national secularist traditions or

⁷⁶⁷ Alison Renteln, ‘Visual Religious Symbols and the Law’ (2004) 47(12) *American Behavioral Scientist* 1573-1596, 1574.

⁷⁶⁸ D McGoldrick, *Human Rights and Religion – The Islamic Headscarf Debate in Europe* (Hart Publishing, Oxford 2006) 15-16.

⁷⁶⁹ McGoldrick, *Human Rights and Religion...* (n 768) 15-16.

damaging relations with Islamic EU candidate Turkey.”⁷⁷⁰ Indeed, some argue that such references have the potential to exclude many who do not share those ideals, because

... an EU founded on Christian values implicitly suggests the inferiority of non-majority religious identities already present within the Union, and rejects the idea of a place in Europe for some who are currently outside the EU, such as Turkey and other predominantly Muslim candidate states.⁷⁷¹

These proposals in EU law and the heated debates on permissible restrictions on the freedom to manifest religion in a number of EU Member States (discussed below on pages 238-246) have important repercussions on the freedom of religious minorities to manifest their beliefs. Freedom of religion is one of the central facets of protecting a minority group’s religious identity. As outlined in Chapter I, such protection presupposes not only non-discriminatory treatment (pages 40-42), but also special rights allowing a group to manifest religion by, for example, wearing religious dress (pages 69-92).⁷⁷² As indicated in Chapter I on page 53-56, these special rights aim to

⁷⁷⁰ Andrew Rettman, ‘Merkel gives up on God in EU treaty’ EU Observer, 15 May 2007 <<http://euobserver.com/9/24066>> accessed 20 September 2008.

⁷⁷¹ Madeleine Heyward, ‘What Constitutes Europe?: Religion, Law and Identity in the Draft Constitution for the European Union’ (2005) 1(2) *Hanse Law Review* 227-235, 229; for further discussion see Philip Schlesinger and François Foret, ‘Political Roof and Sacred Canopy?: Religion and the EU Constitution’ (2006) 9 *European Journal of Social Theory* 59; Robert Congdon, ‘The European Union and the Supra-Religion’ (2005) Paper presented at Fourteenth Annual Pre-Trib Study Group, Dallas, 5 December 2005; Ronan McCrea, ‘The Recognition of Religion within the Constitutional and Political Order of the European Union’ (2009) LEQS Paper No 10.

⁷⁷² The UN Human Rights Committee interpreted broadly the right to manifest one’s religion. In its view

[t]he freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the *wearing of distinctive clothing or headcoverings*, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group.

General Comment No 22 (n 198) para 4 (emphasis added).

ensure that minorities enjoy all human rights and to “eliminate discrimination in both law and practice.”⁷⁷³ However, it is worth noting from the outset that there are many different views

on whether it is necessary for religious adherents to wear particular head coverings such as the Muslim hijab, Sikh turban or Jewish yarmulke. For some it may be considered necessary, for others permissible but not necessary and for others not necessary at all, depending upon their perspective.⁷⁷⁴

This chapter deals with minorities’ freedom of religion, with the focus on its manifestation through wearing religious dress in publicly-funded schools in England. Before considering the limitations on freedom to manifest religion⁷⁷⁵ in England and possible remedies available to religious minorities in EU law, Section 2 paints a bigger picture of the role and place of religion in the EU. Several factors are relevant to this discussion: the role of manifesting religion in public space in Europe since World War II (2.1); debates in some Member States on curtailment of religious manifestation, closely interlinked with matters of migration (2.2.); the broader role of the EU in dealing with migrants from third countries (2.3) and demands made to candidate countries in connection with EU accession (2.4). Section 3 then presents England’s experience, with the focus on judicial decisions involving limitations on freedom to manifest religion. Section 4 seeks possible solutions in EU law for advancing the rights of religious minorities.

⁷⁷³ Alfredsson, ‘A Frame an Incomplete Painting ...’ (n 13) 293.

⁷⁷⁴ S Knights, *Freedom of Religion, Minorities and the Law* (OUP, Oxford 2007) 45.

⁷⁷⁵ Article 18(3) ICCPR and Article 9(2) ECHR permit limitations only on manifesting religious beliefs and do not allow the imposition of limitations on conscience itself: Jeremy Gunn, ‘Introduction: The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief: A Comparative Perspective’ (2005) 19 *Emory International Law Review* vii-xi, ix.

2. Painting a bigger picture

2.1 The role of religion in Europe since the EU's inception

The original EC Treaties did not refer to the religious heritage of Europe. However, the position of European States on this matter may be inferred from the drafting of the European Convention on Human Rights (ECHR), which took place prior to negotiation of the EC Treaties. As discussed in Chapter I on page 70, Article 9 ECHR accords absolute protection to private beliefs of individuals (paragraph 1), while permitting limitations on the external manifestation of such beliefs in public space (paragraph 2).⁷⁷⁶ Arguably, the structure of Article 9 ECHR, written in a context of relative religious homogeneity in Europe, “reflects the needs of fragmented Christianity within a Christian continent, not the broader religious diversity we ... face today.”⁷⁷⁷ This is clear from the public/private divide central to the structure of this provision.

It may be useful to clarify the European conception of ‘public space’ and why the manifestation of religion may be limited in this sphere. Chelini-Pont argues that because “Europeans understand the State as the first intermediary between society and citizens – the State is responsible for legal and practical civil society.”⁷⁷⁸ Thus, in some European States, such as France, the true public sphere is “the space where the

⁷⁷⁶ P van Dijk et al, *Theory and Practice of the European Convention on Human Rights* (Intersentia, Oxford 2006) Chapter 13.

⁷⁷⁷ Gareth Davies, ‘(Not Yet) Taking Rights Seriously: The House of Lords in *Begum v. Headteacher and Governors of Denbigh High School*’ (2006) Human Rights and Human Welfare Working Paper No 37 <<http://www.du.edu/gsis/hrhw/working/2006/37-davies-2006.pdf>> accessed 01 September 2008.

⁷⁷⁸ Blandine Chelini-Pont, ‘Religion in the Public Sphere: Challenges and Opportunities’ (2005) *Brigham Young University Law Review* 611-627, 615.

State exerts its authority for the benefit of all and at the service of all.”⁷⁷⁹ Accordingly, the State is responsible for public order and may impose legal limitations in the public sphere in order to protect its citizens.⁷⁸⁰

This perception of a public sphere is influential in two ways. First, a State and religion have a specific relationship, where the State grants religion a status and exercises the power to limit religious activities. Second, religion is considered to be a “public, charitable, medical, educational, and even spiritual service”⁷⁸¹ that a State acquires for its citizens by collaborating with religious leaders. Thus, based on the Western conception of religion, in some States where religious institutions are structurally separated from political bodies,⁷⁸²

the European public sphere is well delineated and ordered. The clarity of religion’s role in the public sphere means that new or minority religions benefit from the state-religion dynamic only after they make necessary legal claims.⁷⁸³

This background may explain why, in its jurisprudence, the ECtHR has read implied limitations in the interpretation of Article 9 ECHR (discussed in Chapter I on pages 74-75). The ECHR institutions’ conception of public space is based on the separation of State and religion, i.e., the principle of secularism.⁷⁸⁴ This is, however, largely a

⁷⁷⁹ Chelini-Pont, ‘Religion in the Public Sphere...’ (n 778) 615.

⁷⁸⁰ Chelini-Pont, ‘Religion in the Public Sphere...’ (n 778) 615.

⁷⁸¹ Chelini-Pont, ‘Religion in the Public Sphere...’ (n 778) 617.

⁷⁸² Donna Sullivan, ‘Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination’ (1988) 82 *American Journal of International Law* 487-520, 490.

⁷⁸³ Chelini-Pont, ‘Religion in the Public Sphere...’ (n 778) 617.

⁷⁸⁴ Where the principle of secularism is concerned, it may be helpful to distinguish two notions of secularism: liberal and fundamentalist. Although both notions of secularism have as their starting point a distinction between the competence of religion and the powers of political institutions, they have different approaches to the idea that religion is confined to private space only: Ingvill Thorson Plesner,

Western approach to religious freedoms, which may not necessarily accommodate other religions. Not every religion permits believers to leave their symbols and practices at home when they enter public space. Indeed, the ECtHR has been “accused of being unsympathetic to the claims of those from non-Christian traditions or religions without a long history in Europe”,⁷⁸⁵ while having no difficulty in upholding the right to proselytise;⁷⁸⁶ arguably, the Court’s support for mainly familiar religious practices may have serious repercussions for religious minorities.⁷⁸⁷ Furthermore, the ECtHR tends to “substitute the actual experience of affected minorities with its own objective assessment of the impact of state action”,⁷⁸⁸ such as in headscarf case-law (discussed in Chapter I on pages 76-87).⁷⁸⁹ Kurban offers a solution by arguing that

‘The European Court on Human Rights between fundamentalist and liberal secularism’ (2005) Paper for the seminar on The Islamic Head Scarf Controversy and the Future of Freedom of Religion or Belief, Strasbourg, 28-30 July 2005. Liberal secularism regards religion as a private issue in the sense that “it is neither a public responsibility nor right to enforce a religious (or non-religious) doctrine or practice on its citizens, because religion and belief is a matter of personal conscience and identity” (ibid). Accordingly, although liberal secularism excludes the influence of religious groups over political institutions, “the separation does not exclude religious manifestation in the public realm” (ibid). Conversely, the fundamentalist notion of secularism builds on the idea that the religious identity of individuals should be “left behind, hidden, or at least not clearly manifested when entering the public domain and especially public institutions” (ibid). The fundamentalist nature of this approach stems from its blanket character of imposing a secularist lifestyle on all individuals entering the public domain. It appears that the ECtHR has adhered to fundamentalist secularism by simply accepting that “wearing the headscarf contravened the principle of secularism”: Sylvie Langlaude, ‘Indoctrination, secularism, religious liberty, and the ECHR’ (2006) *International & Comparative Law Quarterly* 929-944.

⁷⁸⁵ C Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP, Oxford 2001) 125.

⁷⁸⁶ *Kokkinakis v Greece* (n 203).

⁷⁸⁷ Evans, *Freedom of Religion under the European Convention on Human Rights* (n 785) 125; see also, P Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP, Cambridge 2005) 203.

⁷⁸⁸ Peter Danchin and Lisa Forman, ‘The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities’ in P Danchin and E Cole (eds) *Protecting the Human Rights of Religious Minorities in Eastern Europe* (Columbia University Press, New York 2002) 192-221, 210.

⁷⁸⁹ In finding limitations on wearing headscarves compatible with Article 9 ECHR, the ECtHR sought to exploit the “liberating potential of the secular public sphere ... as a corrective for the oppression of Muslim girls and women”: Lieve Gies, ‘What not to wear: Islamic Dress and School Uniforms’ (2006) *14 Feminist Legal Studies* 377-389, 383. The ECtHR assumed that the headscarf is not consistent with and detrimental to gender equality, because it is a “requirement imposed upon women by a precept of

the freedom of minorities to wear religious dress should be regarded as an accommodation of a group's different way of life under Article 8 ECHR, as opposed to manifesting religion, which could be limited on the basis of the grounds listed in Article 9(2) ECHR.⁷⁹⁰ Indeed, such an approach is capable of ensuring that religious minorities can preserve their practices distinct from those of the majority, including the wearing of religious dress. As discussed in Chapter I on pages 76-87, the ECtHR's current restrictive jurisprudence built on the public/private divide under Article 9 ECHR is largely unsatisfactory, because it fails to "construct a consistent vision of religious freedom alongside the core value of pluralism that the Court has endeavoured to articulate over the last decade."⁷⁹¹

Significantly, by virtue of Article 6(3) TEU, the ECtHR's interpretation of religious freedoms is a part of the general principles of EU law. Furthermore, once the EU accedes to the ECHR pursuant to Article 6(2) TEU, arguably, the EU will be under the legal obligation to take full account of the ECtHR's jurisprudence. Furthermore,

the Koran": *Dahlab v Switzerland* (n 216); see also Dawn Lyon and Debora Spini, 'Unveiling the Headscarf Debate' (2004) 12 *Feminist Legal Studies* 333-345, 338. In the Court's view, shariah is not conducive to the constant evolution of public freedoms because it is too stable.

However, there is a consistent jurisprudence of the ECtHR that accepts Islam as compatible with the ECHR. On the one hand, in 2005, in *IA v Turkey* ((App no 42571/98) ECHR 13 September 2005) the ECtHR established that Islam is one of the protected religions under the Convention. Furthermore, in *Gunduz v Turkey* ((App no 35071/97) (2005) 41 EHRR 59), the ECtHR ruled that Article 10 ECHR permitted a sect to advocate the introduction of shariah. In addition, in *Hasan and Eylem Zengin v Turkey* (n 258) the ECtHR affirmed the compatibility of religious teaching with the ECHR. On the other hand, the ECtHR defies the practices that are part of the Islamic religion. (See also the ECtHR's approach to the dissolution of political parties in Turkey. The Court found that the dissolution of the Communist Party (n 331) and Socialist Party (n 332) violated Article 11 ECHR, while Turkey was justified in dissolving an Islamic Party in *Case of Refah Partisi (the Welfare Party) and others v Turkey* (n 212); see also ECHR (Grand Chamber) 13 February 2003.) It is rather contradictory to accept the religion, but not its practice.

⁷⁹⁰ Kurban, 'Substantive Challenges to the Protection of Religious Freedom...' (n 444) 125.

⁷⁹¹ Isabelle Rorive, 'Religious Symbols in the Public Space: In Search of a European Answer' (2009) 30(6) *Cardozo Law Review* 2669-2698, 2672.

the ECtHR's restrictive position on the public/private divide is taken even further in some Member States, as discussed next.

2.2. Religious dress and immigration rules in some Member States

Over the past few years, heated debates surrounding the issue of religious dress have taken place in a number of EU Member States. These debates, which have led to certain legal and political developments, indicate that religious freedoms are significant factors in the formation of the identities of Member States themselves, and in shaping the 'Europeanness'⁷⁹² of EU citizens. In the face of the post-9/11 world, potential Turkish membership in the EU, and relatively large numbers of Muslim migrants in the EU, it appears that attempts to base European belonging on 'Christian values' are strengthening. The most severe restraint that comes with the imposition of 'European' values on members of minority religions, however, is "the acceptance of limitations on the public role of religion and of the legitimacy of a zone of individual freedom from religion and its prescriptive norms."⁷⁹³

One such limitation concerns the manifestation of religious dress, such as the *hijab* (headscarf traditionally worn by Muslim women), which is perceived by some "as a blanket instrument of oppression of women, as religious extremism, as a political symbol, as evidence of the failed integration of immigrants, and as linked to holy war (*jihad*) and terrorism."⁷⁹⁴ Furthermore, these debates have resulted in tightening of

⁷⁹² Schlesinger and Foret, 'Political Roof and Sacred Canopy?...' (n 771) 60.

⁷⁹³ Ronan McCrea, 'Limitations on Religion in a Liberal Democratic Polity: Christianity and Islam in the Public Order of the European Union' (2007) 18 LSE Working Papers 19.

⁷⁹⁴ McGoldrick, *Human Rights and Religion...* (n 768) 13.

immigration rules, requiring immigrants from predominantly Muslim-majority countries to comply with integration requirements. Let us consider each of these developments in turn.

Debates about religious dress in publicly-funded schools were first sparked in France. The controversy started in 1989, when three Muslim girls came to school in Creil wearing their headscarves. Having failed to persuade them to remove their headscarves, the school's principal, in the name of the school's secularity (*laïcité*), excluded those students from the school. The matter ultimately came before the *Conseil d'État*, which ruled that pupils in state schools had the right to manifest their religious beliefs as long as they respected pluralism and the freedoms of others.⁷⁹⁵

This case, along with subsequent similar claims,⁷⁹⁶ generated debates on religious dress in France. In 2003, the President of France instructed the 'Stasi Commission', named after the chair Bernard Stasi, the Ombudsman of France, to study the compatibility of religious symbols in public schools with the principle of *laïcité*. In its Report, the Stasi Commission established that wearing religious dress such as a headscarf or yarmulke/kippa (Jewish skullcap) contravenes the principle of neutrality. Moreover, according to the Stasi Commission, women wearing headscarves may discriminate against themselves by accepting a subordinate position, because this

⁷⁹⁵ Paul Meredith, 'Incorporation of the European Convention on Human Rights into UK Law: Implications for education' (1998) 2 *European Journal for Education Law and Policy* 7-23, 16-18.

⁷⁹⁶ On the annulment of the internal rules of schools banning religious dress or signs in classes or on the school premises on the grounds that the terms used were too general see *Kehrouaa* (no 130394) 2 November 1992 and *Melles Yilmaz* (no 145656) 14 March 1994; prohibition of penalties for mere wearing of a headscarf without any intention to proselytise *Mlle Saglamer* (no 169522) 27 November 1996 and *époux Mehila* (no 173130) 2 April 1997. However, French courts upheld expulsions from school for failure to remove a headscarf during sports lessons: *époux Aoukili* (no 159981) 10 March 1995, and *Aït Ahmad* (no 181486) 20 October 1999, or refusal to attend sports classes *Chedouane and Wissaadane* (no 170209) 27 November 1996.

religious dress undermines the principles and values that the school should develop, including equal treatment of men and women.⁷⁹⁷ Based on these findings and relying on the principle of *laïcité*, in 2004, France banned any attire which may conspicuously exhibit the religious affiliation of students in public schools.⁷⁹⁸ Significantly, small crosses and Stars of David are exempt, “raising questions as to the extent to which the law is intended to exclude and discriminate against adherents to only some religions.”⁷⁹⁹ Arguably, this law has a disproportionately adverse effect on Muslim, Sikh and Jewish minorities. The invocation of the principle of *laïcité* in French law has been a subject of significant criticism because in practice France does “in fact support private schools where the religious symbols, such as headscarves, skull caps and crosses are worn.”⁸⁰⁰ Moreover, “the French secularist principles are not even uniformly applied within the territory of Metropolitan France in that secularism does not apply in Alsace-Moselle”,⁸⁰¹ where public religious schools are directly supported by the government.

As in France, in the Netherlands public schools are neutral. However, unlike in France, this neutrality is manifested by permitting both religious and non-religious

⁷⁹⁷ Nusrat Choudhury, ‘From the Stasi Commission to the European Court of Human Rights: *L’Affaire du Foulard* and the Challenge of Protecting the Rights of Muslim Girls’ (2007) 16 Columbia journal of gender and law 199-296, 202, footnote 11.

⁷⁹⁸ Act of 15 March 2004 regulating, in implementation of the principle of secularism, the wearing of signs or clothing demonstrating adherence to a particular religion in public primary and secondary education (2004) Act No 2004-228, JO 5190. See also, Leigh Phillips, ‘French National Assembly bans burqa’ EU Observer 14 July 2010 <<http://euobserver.com/9/30477/?rk=1>> accessed 14 July 2010.

⁷⁹⁹ Madeleine Heyward, ‘What Constitutes Europe?...’ (n 771) 233.

⁸⁰⁰ Alan Riley, ‘Headscarves, Skull Caps and Crosses: Is the Proposed French Ban Safe from European Legal Challenge?’ (2004) 49 Centre for European Policy Studies Policy brief 3.

⁸⁰¹ Riley, ‘Headscarves, Skull Caps and Crosses...’ (n 800) 3.

expression to be present in Dutch society.⁸⁰² In 2000, a case concerning restrictions imposed on a Muslim student, who wished to cover her face completely, came before the Dutch Equal Treatment Commission. A school dress code precluded students from wearing items of clothing which would conceal their facial expressions during lessons. The Equal Treatment Commission decided that the “educational policy of the school did not suffice to justify this indirect discrimination”⁸⁰³ and found a violation. Significantly, in a subsequent case decided in 2003, concerning two female Muslim pupils in a school preparing them for a career in education, the Equal Treatment Commission decided that a ban on wearing clothing covering their faces completely was indirectly discriminatory; however, these measures were justified, because the *niqab* (a full face cover) makes communication between staff and students more difficult. Moreover, it would be impossible to identify people visiting school premises if wearing the *niqab* was allowed.⁸⁰⁴ Thus, recent trends in the Netherlands mirror developments in other Member States.

As in France, in Germany the State ought to be neutral towards religions. However, unlike the French law based on *laïcité*, which requires the State to distance itself from religious matters, neutrality in Germany demands the State to be “even-handed in granting public status to religion”.⁸⁰⁵ This may explain the different outcome of a headscarf-case that came before German courts. In 2003, a Muslim primary school teacher, Fereshta Ludin, was refused a job in Baden-Württemberg because she wanted

⁸⁰² Primary Education Act, Article 46, Section 1.

⁸⁰³ Sophie van Bijsterveld, ‘The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the Netherlands’ (2005) 19 *Emory International Law Review* 929.

⁸⁰⁴ EU Network of Independent Experts, ‘Thematic Comment No 3...’ (n 15) 39 citing the decision of the Equal Treatment Commission of 20 March 2003, oordeel 2003-04.

⁸⁰⁵ Christian Joppke, ‘State neutrality and Islamic headscarf laws in France and Germany’ (2007) 36 *Theor Soc* 313–342, 314.

to wear a headscarf to school.⁸⁰⁶ Although she had worn a headscarf to her teaching training, the school board decided that young children could be easily influenced if she were to teach wearing a headscarf. Therefore, it was not permissible for her to cover her head at school. In its assessment of the case, the German Constitutional Court emphasised the principle of State neutrality, i.e., the policy to “open the sphere of the state for religions in principle though within certain limits, to give them room without endorsing any of them.”⁸⁰⁷ It emphasised a crucial distinction

between religious symbols installed on public property on the order of the state, and the state tolerating the personal decision of an individual to wear a religious symbol herself. If the state tolerates such a symbol worn by an individual, it is not making this a symbol of its own.⁸⁰⁸

Significantly, in the view of the Constitutional Court, a headscarf should not be interpreted as a sign of women’s oppression or an obstacle to teaching the values of the German Constitution. Nor was there sufficient empirical data to “indicate any harmful influence of the headscarf-*hijab* on children.”⁸⁰⁹ However, in the Court’s view, the German Länder had the power to ban religious headscarves as long as they enacted specific legislation; as there was no legislation in place at the time of the judgment, Ms Ludin had a technical victory in this case.⁸¹⁰ Subsequently, several Länder, such as Baden-Wurttemberg, Hessen and Bavaria,⁸¹¹ adopted laws

⁸⁰⁶ Bundesverfassungsgericht (n 224).

⁸⁰⁷ Matthias Mahlmann, ‘Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court’s Decision in the Headscarf Case’ (2003) 4(11) German Law Journal <<http://www.germanlawjournal.com/article.php?id=331>> accessed 12 September 2008.

⁸⁰⁸ Riley, ‘Headscarves, Skull Caps and Crosses...’ (n 800) 4.

⁸⁰⁹ McGoldrick, *Human Rights and Religion...* (n 768) 113.

⁸¹⁰ McGoldrick, *Human Rights and Religion...* (n 768) 122.

⁸¹¹ Christine Langenfeld and Sarah Mohsen, Case Comment ‘Germany: the teacher head scarf case’ (2005) 3(1) International Journal of Constitutional Law 86-94.

prohibiting teachers from wearing headscarves in schools. However, these laws may be problematic, because despite their broad wording they mainly target the wearing of Islamic religious dress, with practically no impact on the Christian cross or Jewish kippa (skullcap).⁸¹²

Similarly, in Sweden, pursuant to the decision of the Swedish National Agency for Education of 24 October 2003, educational establishments have the right to ban students from wearing the *burqa* (head-to-toe covering) and *niqab* (a full face cover), both for educational reasons and as part of general school rules. The EU Network of Independent Experts considered such a ban undesirable, because it took effect “without a discussion of values, equality issues and democratic obligations and rights.”⁸¹³

Luxembourg and Austria have adopted a less stringent approach, which does not impose prohibition on the wearing of religious dress, such as headscarves, turbans, kippas and Christian crosses, unless compelling circumstances so require, for example, for reasons of safety.⁸¹⁴

Let us now turn to debates concerning immigration rules. Since the late 1940s, a large number of migrants from third countries have been moving to EU Member States to fulfil labour demands. This has continually increased the number of religious minorities in the EU:

⁸¹² McGoldrick, *Human Rights and Religion...* (n 768) 115.

⁸¹³ EU Network of Independent Experts, ‘Thematic Comment No 3...’ (n 15) 39.

⁸¹⁴ EU Network of Independent Experts, ‘Thematic Comment No 3...’ (n 15) 39.

[t]hese migration flows had a considerable impact on the religious diversity of western Europe and juxtaposed a dominant, complacent and increasingly secular Christian majority against vulnerable minorities, many of whom were not Christian but for whom religion was an important aspect of their identity.⁸¹⁵

To cope with these changes and protect their values, some Member States have resorted to integration requirements, which increasingly demand “explicit reassurances from individual migrants that they are personally committed to liberal democratic values.”⁸¹⁶ Thus, in 2000, 2002, 2003 and 2006, the Netherlands amended its laws to require individuals wishing to naturalise to indicate their integration by passing exams on the knowledge of Dutch society and language.⁸¹⁷ If applicants failed to integrate or supposedly were unable to integrate, they would be refused admission or a more secure status, including the equal treatment stemming from that status.⁸¹⁸ Arguably, these tests have mainly targeted applicants from Muslim-majority countries,⁸¹⁹ such as Morocco and Turkey, because immigrants from, for example, the USA, Canada, Australia, New Zealand and Japan are exempt from taking these exams.⁸²⁰ The government attempted to justify this differentiation by claiming that the exempted countries share social and economic backgrounds similar to the Dutch

⁸¹⁵ Samantha Knights, ‘Religious Symbols in the School: Freedom of Religion, Minorities and Education’ (2005) 5 *European Human Rights Law Review* 499-516.

⁸¹⁶ McCrea, ‘Limitations on Religion in a Liberal Democratic Polity...’ (n 793) 19.

⁸¹⁷ McCrea, ‘Limitations on Religion in a Liberal Democratic Polity...’ (n 793) 33-34; see also ‘Netherlands introduces Dutch language test for immigrants’, 21 February 2006 <http://www.workpermit.com/news/2006_02_21/europe/netherlands_introduces_immigrant_test.htm> accessed 23 March 2010.

⁸¹⁸ Kees Groenendijk, ‘Legal Concepts of Integration in EU Migration Law’ (2004) 6 *European Journal of Migration and Law* 111–126, 113.

⁸¹⁹ McCrea, ‘Limitations on Religion in a Liberal Democratic Polity...’ (n 793) 34.

⁸²⁰ ‘New Dutch immigration test under attack’, 06 April 2006 <http://www.workpermit.com/news/2006_04_06/europe/new_dutch_immigration_test.htm> accessed 23 March 2010.

one; therefore, their integration will not lead to problems within Dutch society.⁸²¹

However, as Human Rights Watch argues, this explanation shows that “the measure was primarily introduced to limit immigration and not to improve integration.”⁸²²

In 2000, similar reforms took place in Germany through the amendments of laws on nationality, which require candidates for citizenship to adhere to the values in the Basic law.⁸²³ Tests designed to examine such a commitment were initially applied to applicants from 57 States which have Muslim-majority population.⁸²⁴ Although the authorities may now require applicants from a broader range of countries to take these exams, it is argued that more Muslims have to take these exams, because there are discrepancies between Muslim beliefs and the German Constitution where, for example, gender equality is concerned.⁸²⁵

⁸²¹ ‘Human Rights Watch: Dutch citizenship tests discriminate’, 16 May 2008, <http://www.expatica.com/nl/essentials_moving_to/relocation/Human-Rights-Watch_-Dutch-citizenship-tests-discriminate_12047.html> accessed 23 March 2010.

⁸²² ‘Human Rights Watch: Dutch citizenship tests discriminate’ (n 821).

⁸²³ McCrea, ‘Limitations on Religion in a Liberal Democratic Polity...’ (n 793) 36.

⁸²⁴ McCrea, ‘Limitations on Religion in a Liberal Democratic Polity...’ (n 793) 37.

⁸²⁵ McCrea, ‘Limitations on Religion in a Liberal Democratic Polity...’ (n 793) 37-38.

The situation in France is well illustrated by the case *El Morsli v France* ((App no 15585/06) ECHR (inadmissibility decision) 4 March 2008; for discussion see Case Comment, ‘Veils: religious dress – security – art.9’ (2008) 4 European Human Rights Law Review 534-536). In 2006 a Moroccan national residing in Marrakech was denied a French visa to join her husband in France. When she went to the French consulate in Marrakech she was asked to remove her veil. Her refusal resulted in denial of access to the building. Her subsequent paper application was rejected and she was denied a visa. Her claim to the ECtHR, based on the argument that by asking her to remove her veil French authorities violated her freedom of religion under Article 9 ECHR, was declared inadmissible. In its inadmissibility decision the ECtHR established that although France interfered with the applicant’s right to manifest her religion under Article 9(1) ECHR, this interference was justified under Article 9(2) ECHR on the grounds of public safety or public order, because the consulate could legitimately ask her to remove her veil to prove her identity. Her assertion that she would have consented to remove her veil in the presence of a female official was not accepted because it was not clear whether the authorities had been aware of this possibility. Accordingly, the ECtHR rejected her claims. It was legitimate for French authorities to require the applicant to remove her veil. Similarly, the ECtHR declared inadmissible a complaint of a Sikh who was required to remove his turban during security checks enforced at airports: *Phull v France* (App no 35753/03) ECHR 11 January 2005.

Some of these moves in Member States not only severely curtail the freedom of minorities to manifest their religion, but also have broader implications at the EU level. In particular, changes to immigration rules in some Member States have been translated into the imposition of a ‘European’ identity on TCNs with the potential of limiting manifestation of religion. The section below briefly overviews EU law and policy in relation to migrants from third countries.

2.3. Religious freedoms and immigration laws in the EU

The above-discussed trends taking place in Member States have found their way into EU law. The recently adopted Refugee,⁸²⁶ Long-Term Residents⁸²⁷ and Family Reunification⁸²⁸ Directives all contain references to integration requirements as set by Member States. Although the Directives themselves do not mention limitations on manifestation of religion, these may well be required under domestic laws. Thus, Article 33 of the Refugee Directive specifies the access of refugees to integration programmes that Member States may consider appropriate. In addition, Member States may create pre-conditions that guarantee access to such programmes. These pre-conditions may well contain requirements of adherence to ‘European’ values and have exclusionary effects on some refugees.

⁸²⁶ Council (EC) Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12; see also Hugo Storey, ‘EU Refugee Qualification Directive: a Brave New World?’ (2008) 20(1) *International Journal of Refugee Law* 1-49.

⁸²⁷ Directive 2003/109 (Long-Term Residents Directive) (n 42).

⁸²⁸ Council (EC) Directive 2003/86 on the right to family reunification [2003] OJ L 251/12 (Family Reunification Directive).

In a similar manner, the Long-Term Residents Directive specifies in Article 5(2), regarding conditions for acquiring long-term resident status, that ‘Member States may require third-country nationals to comply with integration conditions, in accordance with national law.’ The rationale for creating Long-Term Resident status was to allow third-country nationals to exercise some of the rights that EU citizens enjoy, such as free movement rights within the EU. However, if an individual acquired this status in a Member State that does not have strict integration requirements and then moved to a State with stricter rules, the second Member State may still require third-country nationals to comply with integration measures, in accordance with its national laws.⁸²⁹ Bearing in mind the hardening of immigration rules in the domestic legislation of some Member States, it is likely that these integration requirements may also include limitations on manifestation of religion in public space and lead to the exclusion of some individuals who belong to religious minorities.

Perhaps the most controversial of all these instruments is the Family Reunification Directive,⁸³⁰ some provisions of which were unsuccessfully challenged by the EP before the ECJ.⁸³¹ The Directive facilitates family reunification of TCNs, mainly with their spouses and minor children.⁸³² Article 7(2) of the instrument stipulates that ‘Member States may require third country nationals to comply with integration

⁸²⁹ Directive 2003/109 (Long-Term Residents Directive) (n 42) Article 15(3) on Conditions for residence in a second Member State.

⁸³⁰ Directive 2003/86 (Family Reunification Directive) (n 828).

⁸³¹ Case C-540/03 *European Parliament v Council* [2006] ECR I-5769.

⁸³² Directive 2003/86 (Family Reunification Directive) (n 828) Preamble (recital 12) and Article 4(1).

measures, in accordance with national law.’ Moreover, where a child of a third country national is

aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive.⁸³³

Furthermore, by way of derogation, Member States may refuse family reunification with children over 15 years.⁸³⁴ In addition, spouses under 21 years old are suspected of forced marriages, and, therefore, may be required to wait until they reach the minimum marriageable age of a Member State before they can re-unite with their spouses.⁸³⁵

All these requirements and derogations are indicative of an uneasiness of the EU and its Member States with integrating TCNs, who may belong to religious minorities. In the light of developments in some Member States as discussed in Section 2.2 above (pages 238-246), the references in these Directives to the integration requirements as set in domestic laws may lead to exclusionary practices against religious minorities, including Muslims. Nevertheless, the Commission has recently “boldly announced that the integration of immigrants goes hand in hand with acceptance of the fundamental values of the EU...”⁸³⁶ However, it is essential that the fundamental values of the EU set out in Article 2 (ex-Article 6(1)) TEU⁸³⁷ are not interpreted in an

⁸³³ Directive 2003/86 (Family Reunification Directive) (n 828) Article 4.

⁸³⁴ Directive 2003/86 (Family Reunification Directive) (n 828) Article 4(6).

⁸³⁵ Directive 2003/86 (Family Reunification Directive) (n 828) Article 4(5).

⁸³⁶ Imen Gallala, ‘The Islamic Headscarf: An example of Surmountable Conflict between Sharī’a and the Fundamental Principles of Europe’ (2006) 12(5) *European Law Journal* 593-612, 594-595.

⁸³⁷ Article 2 TEU reads as follows:

exclusionary manner. For example, the principle of pluralism should not curb religious freedom and violate the “axiomatic principle of religious pluralism, and by extension, democracy itself.”⁸³⁸ Therefore, setting out standards applicable to all religions may eliminate the appearance of double standards applied by the EU and its Member States to religious minorities. A lack of such yardsticks may create an impression that the EU has chosen to

assume compatibility between Christianity and the model of liberal democracy to which the Union attached while subjecting Muslims to rigorous examination of their secular bona fides.⁸³⁹

The EU has already been criticised for applying double standards in the enlargement practice, overviewed next, based on examples from the Commission’s monitoring of Bulgaria and Turkey’s compliance with the Copenhagen criteria.

2.4. Religious freedoms in EU enlargement law and practice

The Commission’s Progress Reports have not yet dealt with the issue of manifesting religion in publicly-funded schools; the monitoring reports have mainly picked up on broader issues of freedom of religion. Let us examine, for example, the Commission’s response to controversy surrounding religious freedoms in Bulgaria. In 2003, Bulgaria substituted its Denominations Act of 1949 with the Religious Denominations Act, which established governmental control over religious activities in the country. The

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

⁸³⁸ Parker Todd, ‘The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses in the ICCPR and the ECHR’ (2006) 17 *Duke Journal of Comparative and International Law* 91-129, 99.

⁸³⁹ McCrea, ‘Limitations on Religion in a Liberal Democratic Polity...’ (n 793) 43.

Act legalised Bulgaria's attempts to restrict the activities of minority religions and established the privileged position of the Bulgarian Orthodox Church.⁸⁴⁰ In 2002, the representatives of Protestant, Muslim, Catholic, Orthodox and Hare Krishna groups unsuccessfully petitioned the President of Bulgaria to veto this discriminatory law.⁸⁴¹ Moreover, the ECtHR⁸⁴² and a number of international organisations, such as the OSCE⁸⁴³ and CoE,⁸⁴⁴ criticised Bulgaria's discriminatory treatment of minority religions, often stemming from the implementation of ambiguous provisions of the Religious Denominations Act. For example, *Hassan and Chaush v Bulgaria*⁸⁴⁵ and the case of *Supreme Holy Council of the Muslim Community v Bulgaria*,⁸⁴⁶ discussed in Chapter I on pages 109-110, highlighted the authorities' interference with the leadership of religious groups, which the ECtHR found contrary to Article 9 ECHR.

⁸⁴⁰ Krassimir Kanev, 'The New Bulgarian Religious Law: Restrictive and Discriminatory' (2002/3) 2 European Yearbook of Minority Issues 655-673, 656; see also, Krassimir Kanev, 'Law and Politics toward the Muslims in Bulgaria' in P Danchin and E Cole, *Protecting the Human Rights of Religious Minorities in Eastern Europe* (Columbia University Press, New York 2002) 316-344; for more general discussion on the re-definition of role of religion in Central and Eastern Europe, including Bulgaria, see Balazs Schanda, 'Religion and State in the Candidate Countries to the European Union: Issues concerning Religion and State in Hungary' (2003) 64(3) *Sociology of Religion* 333-348.

⁸⁴¹ Krassimir Kanev, 'The New Bulgarian Religious Law...' (n 840) 661.

⁸⁴² *Hassan and Chaush v Bulgaria* (n 319); *Lotter and Lotter v Bulgaria* (App no 39015/97) ECHR (friendly settlement) 19 May 2004; *Case of Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and others v Bulgaria* (App no 35677/04) ECHR 22 January 2009.

⁸⁴³ 'OSCE Reviewer Looks into Bulgaria's Denominations Act' 11 June 2003 <http://www.novinite.com/view_news.php?id=23215> accessed 20 September 2008.

⁸⁴⁴ 'Bulgaria: The Opinion of the Council of Europe Experts about the Bulgarian Draft Denominations Act is Negative', 18 May 2001 <<http://www.bghelsinki.org/index.php?module=news&lg=en&id=255>> accessed 20 September 2008.

⁸⁴⁵ *Hassan and Chaush v Bulgaria* (n 319).

⁸⁴⁶ *Case of Supreme Holy Council of the Muslim Community v Bulgaria* (n 321).

By contrast, the Commission did not mention the Act even once in its 2003 report.⁸⁴⁷ The 2004 Regular Report discussed it in one paragraph only. The Commission indicated that there was a lack of clear procedural guidelines in the Denomination Act, which created difficulties in the implementation of registration requirements at the local level. Bulgaria was advised to clarify the property rights of local churches.⁸⁴⁸ Thus, the matter of religious freedoms did not find prominence relating to Bulgaria's accession process to the EU.

Conversely, Turkey's Regular Reports have consistently devoted at least two full pages on discussion of religious freedoms in the country.⁸⁴⁹ The Commission criticised the Turkish authorities for restrictive interpretation of domestic legislation, which significantly limited freedom of religion as compared with European standards. In particular, problems of non-Muslim religious communities "related to legal personality, property rights, training of clergy, schools and internal management"⁸⁵⁰ have been consistently emphasised.

These examples indicate that, in dealing with religious freedoms in candidate countries, the EU has differentiated between the countries and minorities at issue.

⁸⁴⁷ Commission, '2003 Regular Report on Bulgaria's progress towards accession' <http://ec.europa.eu/enlargement/archives/pdf/key_documents/2003/rr_bg_final_en.pdf> accessed 2 September 2008.

⁸⁴⁸ Commission, '2004 Regular Report on Bulgaria's progress towards accession' [2004] SEC(2004)1199 <http://ec.europa.eu/enlargement/archives/pdf/key_documents/2004/rr_bg_2004_en.pdf> accessed 2 September 2008.

⁸⁴⁹ Commission, '2002 Regular Report on Turkey's Progress Towards Accession' [2002] SEC(2002) 1412, 38-39; '2003 Regular Report on Turkey's progress towards accession' [2003] 33-35, '2004 Regular Report on Turkey's progress towards accession' [2004] SEC(2004)1201, 43-44 <http://ec.europa.eu/enlargement/candidate-countries/turkey/key_documents_en.htm> accessed 2 September 2008.

⁸⁵⁰ Commission, '2004 Regular Report on Turkey's progress towards accession' (n 849) 18; '2003 Regular Report on Turkey's progress towards accession' (n 849) 34.

This is not to say that the Commission's assessment of Turkey's treatment of religious minorities should have been sketchy. Rather these comparisons highlight how the lack of uniform yardsticks in EU enlargement practice impacts the Commission's assessment of the progress made by candidate countries. The EU is in need of consistent benchmarks of minority protection, which would eliminate any doubts that the EU is open to all religions and not create the impression of being an exclusive 'Christian club'.

The next section presents a case study of England, with the focus on the judgments of English courts dealing with religious dress in publicly-funded schools.

3. Lessons from England

Historically, in the 1689 Toleration Act, England made the first steps towards ensuring legal equality amongst many different religions.⁸⁵¹ In common law, religious liberty was a negative freedom, which generally favoured individual freedom of action; in the absence of a legal prohibition people were permitted to do as they wished.⁸⁵² Therefore, courts have tended to accommodate the situation of specific individuals as opposed to prescribing rules relating to their behaviour.⁸⁵³ Moreover, English legal system has significant accommodation of religious minorities, in matters

⁸⁵¹ Natan Lerner, 'Religious Human Rights Under the United Nations' in J van der Vyver and J Witte (eds) *Religious Human Rights in Global Perspective: Legal Perspectives* (Kluwer Law International, the Hague 1996) 84; Arcot Krishnaswami, 'Study of Discrimination in the Matter of Religious Rights and Practices' (1960) UN Doc E/CN.4/sub.2/200/rev.1.

⁸⁵² Russell Sandberg, 'Is nothing sacred? Clashing symbols in a secular world' (2007) Public law 488.

⁸⁵³ Sandberg, 'Is nothing sacred?...' (n 852) 488.

such as school uniforms.⁸⁵⁴ Furthermore, racial and ethnic minorities have generally received a higher level of protection under the national law than the ECHR by relying on the Race Relations Act (RRA)⁸⁵⁵ and the *Wednesbury*⁸⁵⁶ unreasonableness test. For example, whereas the ECmHR held that Sikhs had to wear crash helmets while driving motorcycles,⁸⁵⁷ in 1976, the British Parliament enacted an explicit exemption of turbaned Sikhs from the statutory requirements to wear crash helmets.⁸⁵⁸

However, the 1998 Human Rights Act (HRA), which incorporated the ECHR into the legal system of the UK, has clearly affected the “legal regulation of religious symbols and dress.”⁸⁵⁹ Despite adding to the strong guarantees on non-discrimination some positive rights on the freedom to manifest religion, the HRA has deepened the divide between ethnic and religious minorities, because the former can benefit from both the RRA and the HRA, while the latter group can rely only on the HRA. In addition, when

ruling on whether a public authority has breached s 6 [HRA], the courts are not so much concerned with the extent to which a school has reached the ‘right decision’, but rather whether the school has arrived at its decision i[n] a lawful manner.⁸⁶⁰

⁸⁵⁴ McGoldrick, *Human Rights and Religion...* (n 768) 175.

⁸⁵⁵ Race Relations Act (n 383).

⁸⁵⁶ *Associated Provincial Picture Houses, Limited v Wednesbury Corportation*, 7 November 1947.

⁸⁵⁷ *X v the United Kingdom* (1978) 14 DR 234.

⁸⁵⁸ Peter Cumper, ‘Religious Liberty in the United Kingdom’ in J van der Vyver and J Witte (eds) *Religious Human Rights in Global Perspective: Legal Perspectives* (Kluwer Law International, the Hague 1996) 228.

⁸⁵⁹ Sandberg, ‘Is nothing sacred?...’ (n 852) 488.

⁸⁶⁰ Sylvie Bacquet, ‘School Uniforms, Religious Symbols and The Human Rights Act 1998: The ‘Purity Ring’ Case’ (2008) Westminster School of Law Research Paper No 08-05.

In their assessment the courts also determine whether a public authority's measures are proportionate.⁸⁶¹

These legislative developments demonstrate that the gap between religious and ethnic minorities in England is widening, which is clearly exemplified by the different outcomes of the cases involving two Muslim girls⁸⁶² and a Christian girl⁸⁶³ who relied on the HRA⁸⁶⁴ on one hand, and a Sikh girl⁸⁶⁵ who relied on the RRA on the other hand, all wishing to manifest their religion while attending a publicly-funded school.

We will overview each case in some detail. Perhaps the most significant case is that of Shabina Begum.⁸⁶⁶ Shabina attended a majority-Muslim school (79% of students) in Luton. The Head Teacher of the school was a Bengali Muslim woman. The school had generally accommodated religious minorities by allowing them to wear an alternative school uniform called *shalvar kameez* (*shalvar* is loose trousers, *kameez* is a long tunic), designed in consultation with parents, the school and the local mosques.⁸⁶⁷ After wearing this uniform for two years, Shabina refused to wear

⁸⁶¹ Christopher Knight, 'The Test that Dare Not Speak its Name: Proportionality Comes Out of the Closet?' (2007) 12(2) *Judicial Review* 117-121.

⁸⁶² *R (on the application of Begum (by her litigation friend, Rahman)) (Respondent) v Headteacher and Governors of Denbigh High School (Appellants)* [2006] UKHL 15; *R (on the application of X) v Headteachers and Governors of Y School* [2007] EWHC 298 QBD (Admin).

⁸⁶³ *R (on the application of Playfoot) v Governing Body of Millais School* [2007] EWHC 1698 (Admin).

⁸⁶⁴ Human Rights Act, Sections 2, 3 and 6.

⁸⁶⁵ *R (on the application of Watkins-Singh) v Aberdare Girls' High School Governors* [2008] WL 2872609.

⁸⁶⁶ *Shabina Begum (through her litigation friend Mr Sherwas Rahman) v the Headteacher and Governors of Denbigh High School* [2004] EWHC 1389 (Admin).

⁸⁶⁷ *Shabina Begum* (Admin) (n 866) para 42.

shalvar kameez after puberty because it was not sufficiently modest according to a strict interpretation of Islam. The school did not allow her to attend school unless she complied with the school uniform. Shabina applied to the High Court claiming that the school violated her freedom of religion under Article 9 ECHR.

The High Court dismissed Shabina's claims.⁸⁶⁸ In the High Court's view, she was not excluded from school for her religious beliefs, but rather because she refused to comply with the school uniform. Moreover, she had alternative means of exercising this right, for example, by attending another school or receiving her education at home. Therefore, there was no violation of Article 9(1) ECHR. Nor did the High Court recognise that Shabina's right to education was breached under P1-2 ECHR, because she was not excluded from school. The provision guaranteed only the right to be educated. It did not impose an obligation to ensure the enjoyment of this right at a particular school. As long as a pupil was offered education at other schools, P1-2 was not breached.

The applicant appealed. The Court of Appeal rightly pointed out that in considering this case nobody

started from the premise that the claimant had a right which is recognised by English law, and that the onus lay on the School to justify its interference with that right. Instead, it started from the premise that the uniform policy was there to be obeyed: if the claimant did not like it, she could go to a different school.⁸⁶⁹

⁸⁶⁸ *Shabina Begum (Admin)* (n 866).

⁸⁶⁹ *Shabina Begum v the Headteacher and Governors of Denbigh High School* [2005] EWCA Civ 199.

The Court of Appeal overturned the decision of the High Court. It found that Article 9(1) ECHR was engaged in this case. In the Court's view, Shabina was excluded from school due to her religious beliefs. However, in deciding whether the limitation could be justified under Article 9(2) ECHR, instead of assessing whether the limitation was necessary in a democratic society, the Court of Appeal "outlined the decision-making structure which the school should have used since ... the onus lay on the school to justify its interference with the Convention right."⁸⁷⁰ However, while a procedural test is used in judicial review of public authorities' decisions, it may be too much to expect the public authorities themselves to apply the proportionality test to every decision they make.⁸⁷¹

That is why the House of Lords overturned the decision of the Court of Appeal and restored the decision of the High Court.⁸⁷² The Law Lords did not accept that the measures taken on disciplinary grounds amounted to exclusion from school, because Shabina could return to her school at any time were she to comply with the school uniform policy. Therefore, there was no interference with her freedom of religion under Article 9 ECHR.

In deciding the case, the House of Lords relied extensively on the ECtHR's restrictive jurisprudence on freedom of religion, discussed in Chapter I on pages 76-87, in particular, the 'specific situation' rule as developed by the ECtHR. Thus, if an individual is, for example, in a contractual relation, one's freedom to manifest religion

⁸⁷⁰ Sandberg, 'Is nothing sacred?...' (n 852) 488.

⁸⁷¹ Sandberg, 'Is nothing sacred?...' (n 852) 488.

⁸⁷² *R (on the application of Begum (by her litigation friend, Rahman)) v the Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

may be legitimately limited by a contract.⁸⁷³ In addition, Article 9 ECHR is not violated, if an individual has a possibility to alter his/her situation. However, applying this particular line of argument to Shabina's case ignores the fact that in "state schools there is no contractual relationship between school and pupil."⁸⁷⁴

Moreover, there is a certain amount of confusion in the House of Lords' application of the ECtHR's 'headscarf' jurisprudence. As discussed in Chapter I on page 78, in the first headscarf case, *Karaduman v Turkey*,⁸⁷⁵ the ECmHR found that there was no interference with Article 9(1) ECHR. Subsequently, in *Şahin v Turkey* the Chamber⁸⁷⁶ and the Grand Chamber⁸⁷⁷ of the ECtHR "reinterpreted *Karaduman* to be a case where there was in fact an interference but one that was justified under Art.9(2)",⁸⁷⁸ without any explicit indication that they changed the interpretation of the precedent. The implications of this re-interpretation is that manifestation of religion through, for example, a headscarf, falls within the ambit of Article 9(1) ECHR, even though based

⁸⁷³ *Stedman v United Kingdom* (n 209).

⁸⁷⁴ Sandberg, 'Is nothing sacred?...?' (n 852) 488.

⁸⁷⁵ *Karaduman v Turkey* (n 221).

⁸⁷⁶ *Şahin v Turkey* (n 219)

⁸⁷⁷ *Şahin v Turkey* (n 218).

The case sparked a lively academic debate with a particular emphasis on secularism and gender equality: Elizabeth Defeis, 'Religious Liberty and Protections in Europe' (2006) (45) *Journal of Catholic Legal Studies* 73-114; Howard Gilbert, 'Redefining manifestation of belief in Leyla Sahin v Turkey' (2006) *European Human Rights Law Review* 308; Gallala, 'The Islamic Headscarf (n 836); Sylvie Langlaude, 'Indoctrination, secularism, religious liberty, and the ECHR' (2006) *International & Comparative Law Quarterly*; Anastasia Vakulenko, 'Islamic Dress in Human Rights Jurisprudence: A Critique of current trends' (2007) *Human Rights Law Review* 717-739; Anastasia Vakulenko, "'Islamic Headscarves" and the European Convention on Human Rights: An Intersectional Perspective' (2007) *16 Social Legal Studies* 183; Riley, 'Headscarves, Skull Caps and Crosses...' (n 800) 6; Knights, 'Religious Symbols in the School...' (n 815) 499-516, Tom Lewis, 'What not to wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) *56 International and Comparative Law Quarterly* 395-414, 409; Choudhury, 'From the Stasi Commission to the European Court of Human Rights...' (n 797) 199.

⁸⁷⁸ Howard Gilbert, 'Redefining manifestation of belief in Leyla Sahin v Turkey' (2006) *European Human Rights Law Review* 308.

on the specific facts of a case the limitation on manifestation may be legitimately justified under Article 9(2). It appears that although the House of Lords did refer to *Şahin v Turkey*, they mainly followed the reasoning in *Karaduman*, which denied that wearing a headscarf comes within the ambit of Article 9(1). This, however, leads to an unsatisfactory line of reasoning, because the ECtHR's recent jurisprudence recognises that wearing a headscarf may be regarded as "motivated or inspired by a religion or religious belief",⁸⁷⁹ while the Law Lords' majority reasoning⁸⁸⁰ fails to recognise that wearing religious dress is covered by Article 9(1) ECHR, even though a limitation may be justified under Article 9(2) ECHR.

Lord Nicholls and Lady Hale's joint concurring opinion in *Begum* is more satisfactory in this respect. Unlike the other three Law Lords, they approached the issue in line with the ECtHR's current jurisprudence⁸⁸¹ and argued that Shabina's rights under Article 9(1) ECHR was breached; however, the interference was justified under Article 9(2) ECHR. Regrettably, the dissenting Judges' opinions are silent on why their approach is more consistent with the ECHR.

There is significant academic criticism of this decision, particularly where the application of the proportionality test is concerned. While it is important that the school made an effort to respect the religious freedoms of the majority of pupils, the House of Lords decision failed to consider whether the school chose to achieve its aim of being inclusive by an appropriate means. Gies further questions "whether it is

⁸⁷⁹ *Şahin v Turkey* (n 218) para 78.

⁸⁸⁰ Lord Bingham, Lord Hoffmann and Lord Scott.

⁸⁸¹ *Şahin v Turkey* (n 218).

justified for a public body to favour particular religious beliefs on no other ground than that they are majoritarian and moderate.”⁸⁸² Accordingly, the judgment implies that a non-individualised view towards religious dress is favoured and “school authorities can now select between religious beliefs (i.e. adopt the views considered acceptable by mainstream Muslim opinion, but ignore the views of stricter Muslims).”⁸⁸³ Similarly, Vakulenko criticises the House of Lords for not questioning the school’s ‘knowledge’ on the matter:

[t]he House of Lords did not explain why banning certain clothes would be the best way of protecting girls from ‘external pressures’, let alone why being pressurised into wearing a jilbab [long and loose-fit coat] might be worse than being told to remove it.⁸⁸⁴

On the other hand, Bennoune, building on her personal experience, argues that

Begum is a sensible, careful, contextual consideration of limits on religious expression in school in light of its meanings and impact on the human rights of others and questions of agency, particularly appropriate with regard to children. It is in accordance with international human rights law, limiting religious expression in only a minimal way and doing so in the face of serious questions about the freedom of choice of the girl in question and her classmates, in context.⁸⁸⁵

Surely meeting the needs of the majority of Muslims is not a sufficient ground to assume that it is “simply for the minority to obey the policy and if they do not like it

⁸⁸² Lieve Gies, ‘What not to wear: Islamic Dress and School Uniforms’ (2006) 14 *Feminist Legal Studies* 377-389, 387.

⁸⁸³ Mohammad Idriss, ‘The defeat of Shabina Begum in the House of Lords’ (2006) 27 *Liverpool Law Review* 417-436, 426-427.

⁸⁸⁴ Anastasia Vakulenko, ‘Islamic Dress in Human Rights Jurisprudence: A Critique of current trends’ (2007) 7(4) *Human Rights Law Review* 717-739.

⁸⁸⁵ Karima Bennoune, ‘Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women’s Equality Under International Law’ (2007) 45(2) *Columbia Journal of Transnational Law* 367-426, 413.

to choose a different school.”⁸⁸⁶ Arguably, the balancing exercise between individual rights and collective welfare caused more harm than permitting more conservative religious dress, because it alienated a “minority which already feels marginalised to a worrying extent.”⁸⁸⁷ Undoubtedly, society would achieve more sustainable results in integrating minorities by permitting girls to wear their religious clothing while educating them in the spirit of tolerance, openness and gender equality, as opposed to excluding them from schools. The former is more likely to imbue in them the “values of sexual equality and independent thought, so that by the time they reach adulthood they will be in a position to make an informed decision as to whether or not to continue to wear the *hijab*.”⁸⁸⁸

Regrettably, *Begum* set the tone for the subsequent case law of the British courts. Thus, in 2007, a 12-year old Muslim girl who was a pupil at Y school wished to wear a *niqab* (a full face cover) while attending the school when she was taught by male teachers or was likely to be seen by males.⁸⁸⁹ The claimant’s three sisters had studied in the same school and had worn *niqab* in accordance with the school’s uniform policy at the time in 1997-2004. Despite the claimant’s arguments that she legitimately expected to be permitted to wear a *niqab* as her sisters had, she was not allowed to attend the school until she complied with the school uniform policy. The school arranged for her to receive some tuition at home funded by the school, which was not comparable to the tuition she could have received were she allowed to attend

⁸⁸⁶ Ann Blair and Will Alps, ‘What not to wear and other stories: addressing religious diversity in schools’ (2005) 17(1-2) *Education and the Law* 1-22, 8.

⁸⁸⁷ Gies, ‘What not to wear...’ (n 882) 388; Davies, ‘(Not Yet) Taking Rights Seriously...’ (n 777).

⁸⁸⁸ Sebastian Poulter, ‘Muslim Headscarves in School: Contrasting Legal Approaches in England and France’ (1997) 17(1) *Oxford Journal of Legal Studies* 43-74, 72.

⁸⁸⁹ *R (on the application of X) v Head Teacher and Governors of Y School* [2007] EWHC 298 (Admin).

her school. She challenged the school's decision by claiming that her freedom to manifest religion under Article 9 ECHR was violated. The High Court decided that there was no interference with her rights under Article 9 ECHR, because she had alternative means to exercise her freedom. That is, she had been offered a place at school Q where she could wear the *niqab*. However, the claimant rejected this offer without any explanation as to why this school was unacceptable to her. Furthermore, the High Court held that the school was justified in imposing the restriction in the public interest as it is difficult to recognise a person entering the school's premises in the *niqab*. As in *Begum*, the High Court failed to recognise that, even though interference with the applicant's freedom to manifest religion may be justified under Article 9(2) ECHR, wearing a *niqab* is covered by Article 9(1) ECHR.⁸⁹⁰

Claims regarding manifestation of religion are not limited to Muslims only. In 2007, Ms Lydia Playfoot, who wished to wear a Silver Ring Thing Purity ring⁸⁹¹ to school, brought a case before the courts claiming a violation of her freedom to manifest religious beliefs under Article 9 ECHR. Lydia had worn the ring for a year starting in 2004. In 2005, she was asked to remove the ring as the school uniform policy precluded pupils from wearing jewellery to school. In 2006, having failed to comply

⁸⁹⁰ The broader implications of these cases translated into new guidance on school uniforms. In assessing the UK's compliance with the FCNM, the ACFC has criticised the new guidance for schools in England on school uniforms and religious dress in schools. The guidelines permit schools to ban full-face veils (the *niqab*) on the grounds of security and safety after consulting parents. Bearing in mind that the governing bodies of schools in England already had the right to set regulations on school uniforms, the ACFC expressed its concern that there is a "risk that the new guidance may be interpreted by schools in a way that restricts the right of every person belonging to a national minority to manifest his or her religion and/or belief": ACFC, 'Second Opinion on the United Kingdom' (2007) ACFC/OP/II(2007)003, para 158. As discussed in Section 2 of Chapter I on page 72, Article 8 FCNM explicitly stipulates the freedom of minorities to manifest their religion. Kurban rightly argues that if a conflict arises between the ECtHR's pronouncements and the ACFC's approach, the latter may need to deviate from the Court's case-law to protect the rights of, for example, Muslim minorities. Kurban, 'Substantive Challenges to the Protection of Religious Freedom...' (n 444) 125.

⁸⁹¹ *R (on the application of Playfoot) v Governing Body of Millais School* (n 863).

with the instruction again, she received disciplinary sanctions and was taught separately from her class. Following this incident, Lydia wrote to the Assistant Head Teacher and explained that she was a “committed Christian with a genuine belief that she should remain sexually abstinent before marriage, and that the ring is a sign of this belief.”⁸⁹² The matter was brought to the Governing Body of the school, which decided that there was “no evidence or explanation linking the belief in sexual abstinence to wearing the ring to the extent that [they] could conclude that wearing the ring was a manifestation of her belief.”⁸⁹³ Lydia and her father challenged this decision before the court. The court assessed whether Lydia’s actions were ‘intimately linked’ to her belief⁸⁹⁴ and concluded that the “[c]laimant was under no obligation, by reason of her belief, to wear the ring; nor does she suggest that she was so obliged.”⁸⁹⁵ Moreover, in its reasoning the judge relied on Lord Bingham’s argument in *Begum*:

[t]he Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience.⁸⁹⁶

⁸⁹² *R (on the application of Playfoot) v Governing Body of Millais School* (n 863) para 11.

⁸⁹³ *R (on the application of Playfoot) v Governing Body of Millais School* (n 863) para 11.

⁸⁹⁴ *R (on the application of Playfoot) v Governing Body of Millais School* (n 863) para 20 and 21. The Court relied on a number of judgments, including *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15; [2005] 2 AC 246 and *R (on the application of Begum (by her litigation friend, Rahman)) v the Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

⁸⁹⁵ *R (on the application of Playfoot) v Governing Body of Millais School* (n 863) para 11.

⁸⁹⁶ *R (on the application of Playfoot) v Governing Body of Millais School* (n 863).

Building on this reasoning, the judge concluded that “[w]hatever the ring is intended to symbolise, it is a piece of jewellery.”⁸⁹⁷ The judge outlined a list of alternative course of action the claimant could undertake, such as attaching her ring, or a key ring or other visible sign, to her bag, using key chains, badges or stickers, generating open discussion of these issues in her class or transferring to another school, such as Thomas Bennett Community College, which would allow her to wear the ring. Because there were alternative means to exercise her right, as well as no clear connection between wearing the ring and her belief, the judge found that there was no interference with her Article 9 ECHR right. Therefore, the school was justified to preclude Lydia from wearing it.

These judgments demonstrate that the reasoning of the British courts is not compatible with the recent jurisprudence of the ECtHR: “[t]he assertion that insistence on wearing religious dress does not constitute a manifestation of one’s religion or belief is plainly wrong.”⁸⁹⁸ Even though limitations may be justified on the facts of the case under Article 9(2) ECHR, it is important to recognise that individuals do have freedom to manifest their religious beliefs under Article 9(1) ECHR.

Another controversy surrounding freedom of religion in England stems from the fact that some minorities which share both a common ethnic origin and a common religion are entitled to a higher level of protection under the Race Relations Act (RRA) than religious minorities, as discussed in Chapter I on pages 148-150. In 2008, in a case involving a Sikh girl wishing to wear at school the Kara, a plain steel bangle

⁸⁹⁷ *R (on the application of Playfoot) v Governing Body of Millais School* (n 863).

⁸⁹⁸ Sandberg, ‘Is nothing sacred?...’ (n 852) 488.

manifesting her religious beliefs, Justice Silber found that there was a violation of the applicant's rights.⁸⁹⁹ From the outset the judge differentiated this case from the preceding three cases by emphasising that all of them were

founded largely, if not solely, on the provisions of the Human Rights Act 1998 but in this case the claim is based mainly on the totally different provisions of the Race Relations Act 1976 ("RRA") as amended and the Equality Act 2006 ("EA"), which are provisions on which the claimants in the previous three cases were unable to rely but on which the claimant can and does rely.

Relying on sections 1(1A) and 71 of the RRA and Part II of the EA, in particular Section 49(1) thereof, the applicant argued that by precluding her from wearing the Kara and by excluding her from school for failure to remove the bangle, the school indirectly discriminated against her as a member of an ethnic minority. The applicant also relied on the House of Lords decision in *Mandla v Dowell Lee*⁹⁰⁰ establishing that Sikhs are an ethnic minority entitled to wear their religious dress at school, as discussed in Chapter I on pages 146-147.

In *R (on the application of Watkins-Singh)*, the Judge did not accept the school's arguments which tried to justify its uniform policy in line with the previous case law, by arguing, for example, that there was no direct link between wearing the Kara and the Sikh beliefs. The Court accepted expert evidence on the significance of the Kara. Moreover, the judge, following the French practice of outlawing large symbols, emphasised that the *niqab* (a full face cover) and *jilbab* (long and loose-fit coat) were

⁸⁹⁹ *R (on the application of Watkins-Singh) v Aberdare Girls' High School Governors* (n 865). See also, Ian Leigh, 'Recent Developments in Religious Liberty' (2009) *Ecclesiastical Law Journal* 65.

⁹⁰⁰ *Mandla v Dowell Lee* (n 92).

much more visible than the small and unostentatious Kara⁹⁰¹ (although this line of reasoning does not explain why a similarly small symbol such as a Purity Ring should not benefit from a similar protection). Accordingly, the Court found that the school indirectly discriminated against the applicant by precluding her from wearing the Kara.

It is significant that the claim was represented not as a case concerning freedom to manifest religion, but rather as indirect discrimination, and, hence, was significantly stronger. Moreover, the imbalance in the protection of ethnic and religious minorities is most evident in these cases. Thus, the ACFC noted that

[w]hile the Race Relations Act (1976) has been interpreted to provide protection from discrimination to those religious groups that are considered to be an ethnic group, such as Jews and Sikhs, other groups, such as Muslims, Hindus, Buddhists and others do not have this protection unless they are linked to a recognised ethnic group.⁹⁰²

This gap may be bridged to an extent through the Equality Act, as it prohibits discrimination based on religion in Section 45, which defines direct and indirect discrimination on the ground of religion. Unlike the EU Employment Directive, which is limited to employment and vocational training, the Equality Act applies to educational establishments as well. Thus, religious discrimination in publicly-funded schools is contrary to Section 49. This, however, precludes differential treatment of pupils from various religions (for example, if children of a certain religion are refused admission to a school), but does not permit individuals to claim freedom to manifest religion.

⁹⁰¹ *R (on the application of Watkins-Singh) v Aberdare Girls' High School Governors* (n 865) para 78.

⁹⁰² ACFC, 'First Opinion on the United Kingdom' (2001) ACFC/INF/OP/I(2002)006, 14.

How might these legislative developments affect the question of religious dress in England? It is argued that unlike

disputes concerning sex-based dress codes where direct discrimination is usually the issue, [reference is omitted] but similar to race discrimination, it will usually be indirect discrimination that will form the basis of a claim based on dress associated with religion.⁹⁰³

Although religious minorities may be successful in demonstrating that they are disadvantaged compared to other individuals where the manifestation of religion is concerned, the courts are likely to find indirect discrimination unjustifiable only where a school fails to defend an imposed limitation by reference to matters other than a pupil's religion or belief.

So far, the courts have accepted the schools' justifications. Thus, in the case of a Muslim girl wishing to cover her face, the school relied on twelve justifications, including the necessity of a teacher observing a pupil's facial expression as a "key part of the learning process and of skill development in, for example, drama, English and any subject in which role play is adopted",⁹⁰⁴ and the need to identify persons on the school's premises for security reasons.⁹⁰⁵ So, although indirect discrimination may be found in more cases from now on, limitations on pupils' right to wear

⁹⁰³ Damian Carney and Adele Sinclair, 'School uniform revisited: procedure, pressure and equality' (2006) 18 (2-3) *Education and the Law* 131-148, 140-141. See also Section 45(3) of the Equality Act:

(3) A person ("A") discriminates against another ("B") for the purposes of this Part if A applies to B a provision, criterion or practice—

(a) which he applies or would apply equally to persons not of B's religion or belief,
(b) which puts persons of B's religion or belief at a disadvantage compared to some or all others (where there is no material difference in the relevant circumstances),
(c) which puts B at a disadvantage compared to some or all persons who are not of his religion or belief (where there is no material difference in the relevant circumstances), and
(d) which A cannot reasonably justify by reference to matters other than B's religion or belief.

⁹⁰⁴ *R (on the application of X) v Head Teacher and Governors of Y School* (n 889) para 64(h).

⁹⁰⁵ *R (on the application of X) v Head Teacher and Governors of Y School* (n 889) para 64(j).

religious dress are likely to be approved based on the objective justifications of schools.

As argued in Chapter I on page 84, although non-discrimination on the ground of religion is essential to the protection of minorities, it is equally important that States undertake positive action to preserve the religious identity of a group. Although the ECHR does not contain specific minority rights, nevertheless, Article 9 ECHR envisions some positive rights. Therefore, it is crucial that courts in England change their assessment of Article 9 ECHR, because even though a violation may be justified under Article 9(2) ECHR, it is essential to recognise that a ban on wearing religious dress violates Article 9(1) ECHR.

The next section overviews relevant provisions of EU law that could support claims of religious minorities wishing to manifest their religion by wearing religious dress.

4. 'Testing' EU rules

As early as 1976, the ECJ emphasised the significance of accommodating practices of religious minorities in *Vivien Prais v Council*.⁹⁰⁶ For religious reasons, the applicant could not attend a test required to take part in a job competition for the European Communities. The ECJ established that, if informed duly, it is the duty of the appointing authority "to take reasonable steps to avoid fixing for a test a date which would make it impossible for a person of a particular religious persuasion to undergo

⁹⁰⁶ Case 130/75 *Vivien Prais v Council* [1976] ECR 1589.

the test.”⁹⁰⁷ Moreover, it is desirable for an appointing authority to inform itself of dates which may be unsuitable for religious reasons and to avoid fixing such dates for tests.⁹⁰⁸

Thus, the ECJ’s early approach suggested the accommodation of religious minorities. Were a member of a religious minority in England to succeed in persuading a national court to address the ECJ with a preliminary ruling question enquiring whether limitations on the manifestation of religion contravene any EU rules, would the ECJ be equally generous? The outcome of such a case would depend on the ECJ’s interpretation of the existing EU rules, discussed below.

The Employment Directive precludes direct and indirect discrimination, harassment and victimisation on the ground of religion or belief in employment, occupation and vocational training. However, the ECJ’s reasonable accommodation of applicants on the ground of religion in *Vivien Prais* did not find its way into the Employment Directive; currently, such a duty exists only in relation to disability.⁹⁰⁹ Furthermore, the instrument does not apply to education or provision of services. As a result, even though a Muslim woman dismissed from her job for wearing a headscarf may claim discrimination under the Employment Directive, a young girl who has been subjected to differential treatment in an educational establishment may not rely on this

⁹⁰⁷ *Vivien Prais v Council* (n 906) para 19.

⁹⁰⁸ *Vivien Prais v Council* (n 906) para 18.

⁹⁰⁹ Kristin Henrard, ‘Equal Rights versus Special Rights? Minority Protection and the Prohibition of Discrimination’ (European Commission, 2007) 28.

instrument. In addition, the Employment Directive establishes in Article 2(5) that the instrument is without prejudice to measures laid down by national law which

in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

This limitation, which replicates Article 9(2) ECHR, may further curtail the scope of rights under the Directive, i.e., the ECJ may interpret this provision in light of the ECtHR's restrictive headscarf jurisprudence.

Moreover, the Directive leaves Member States a broad margin of discretion. For example, Article 4(1) of the Employment Directive stipulates an exception: notwithstanding provisions on direct and indirect discrimination, differential treatment based on a characteristic related to religion or belief would not be considered discriminatory if

by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.⁹¹⁰

In addition, based on Article 4(2), which permits a specific exception to the principle of equal treatment in the case of churches and other organisations with an ethos based on religion or belief, employers may choose a 'person of the same religion or belief for a job where being of that religion or belief is a genuine, legitimate and justified occupational requirement.' However, when transposing the Directive into their

⁹¹⁰ Directive 2000/78/EC (Employment Directive) (n 43) Article 4(1).

national laws, some Member States have provided “exceptions that may go beyond the strict terms of the Directive or which remain ambiguous.”⁹¹¹

To date, the ECJ has not considered a case concerning religious discrimination based on the Employment Directive.⁹¹² However, the application of the above-mentioned limitations is clear from the case of Mrs Azmi in England.⁹¹³ The applicant, a Muslim teaching support assistant at the Headfield Church of England (Controlled) Junior School,⁹¹⁴ was dismissed for refusing an instruction not to wear a veil covering her face while assisting a male teacher in class with pupils. Mrs Azmi brought a case before the Employment Tribunal (ET) at Leeds, claiming direct and indirect discrimination, harassment and victimisation on the ground of religion under the Employment Equality (Religion or Belief) Regulations 2003, which incorporates EU Employment Directive in the UK legal system.

⁹¹¹ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, ‘The application of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation’ [2008] COM(2008) 225 final/2, 4.

⁹¹² Case C-144/04 *Mangold v Helm* [2006] 1 CMLR 43 and Case C-411/05 *Felix Palacios de la Villa v Cortefiel Servicios Sa* [2007] ECR I-853 on age discrimination; Case C-303/06 *S Coleman v Attridge Law and Steve Law* [2008] ECR I-5603 and Case C-13/05 *Chacon Navas v Eurest Colectividades SA* [2006] 3 CMLR 40 on disability discrimination; and Case C-276/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757 on discrimination based on sexual orientation.

⁹¹³ *Azmi v Kirklees Metropolitan Borough Council* [2007] Employment Appeal Tribunal, Appeal no UKEAT/0009/07/MAA.

Eweida v British Airways plc [2009] ICR 303 is another case where the applicant claimed direct and indirect discrimination, due to limitations imposed on the manifestation of her religion. She was suspended from her job for wearing a cross on top of her uniform. The applicant’s claims were unsuccessful at the employment tribunal, because wearing a cross was not required by her religion; the subsequent appeal to the Employment Appeal Tribunal (EAT) attempted to challenge the finding on indirect discrimination. The EAT too did not find indirect discrimination, because there was no identified group which was disadvantaged by the employer’s decision and the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660) did not protect individual religious views. See also, Lucy Vickers, ‘Case Comment, Indirect Discrimination and Individual belief: *Eweida v British Airways Plc*’ (2009) *Ecclesiastical Law Journal* 197.

⁹¹⁴ 92% of pupils and 35% of the staff of the school were Muslims: *Azmi v Kirkless Metropolitan Borough Council* (n 913) para 3.

In the decision of 19 October 2006 the Employment Tribunal dismissed her claims of direct discrimination and harassment; the claim of victimisation succeeded and she was awarded monetary compensation. Furthermore, the Tribunal found that although the treatment in question could amount to indirect discrimination against the applicant on the ground of religion, such treatment was justified because it pursued a legitimate aim and was proportionate.

The Employment Appeal Tribunal (EAT) upheld this decision. In its assessment it relied on Articles 1 (Purpose of the Employment Directive), 2 (Concept of Discrimination) and 4 (Occupational Requirements).⁹¹⁵ Where direct discrimination is concerned, the EAT followed the restrictive approach of the ET by ruling that Azmi's comparator should not be another Muslim woman who covers her head but not her face.⁹¹⁶ Instead, the appropriate comparator was a person who was issued instructions and following a failure to follow the instructions was suspended.⁹¹⁷ In applying this approach, both the ET and the EAT simply substituted the term 'religious belief' for 'gender'⁹¹⁸ and applied principles developed in the context of sex discrimination law. The case signals the significance of choosing an appropriate comparator. A choice of such a broad comparator in this case is unfortunate and is unlikely to help the claim of any Muslim woman dismissed for a failure to follow the instructions which she

⁹¹⁵ The EAT specifically emphasised that Article 2(5) of Directive 2000/78/EC (Employment Directive) (n 43) replicates Article 9(2) ECHR by providing limitations on freedom to manifest religion (para 42); however, it was noted that the UK implementing legislation did not have an equivalent provision: *Azmi v Kirkless Metropolitan Borough Council* (n 913) para 47.

⁹¹⁶ *Azmi v Kirkless Metropolitan Borough Council* (n 913) para 55.

⁹¹⁷ *Azmi v Kirkless Metropolitan Borough Council* (n 913) para 56.

⁹¹⁸ *Azmi v Kirkless Metropolitan Borough Council* (n 913) para 53 quoting *Shamoon v Chief Constable of the RUC* [2003] ICR 337, para 4; *Showboat Entertainments Centre Ltd v Owens* [1984] IRLR 7, para 20.

deemed to contradict her religious belief. Arguably, in a case of discrimination on the ground of religion, at the very least, a comparator should have been a person who refused to follow instructions due to one's religion or belief.

Furthermore, both Tribunals found that persons who shared the applicant's belief were likely to be disadvantaged by the school's practice as compared to others. The Tribunals, however, were influenced by the school's statements indicating that observation of Mrs Azmi's teaching demonstrated that it was unsatisfactory when she taught in a veil covering her face as compared to her teaching without it. Accordingly, her dismissal was a proportionate measure necessary to achieve the legitimate aim of ensuring proper learning by pupils who should be able to interpret the facial expression of a teacher. Thus, this case demonstrates that, although the Employment Directive made it possible for individuals to bring claims of discrimination on the ground of religion, it may be too weak to remedy the situation of religious minorities. It is regrettable that the EAT refused to refer a preliminary ruling question to the ECJ, so we will need to wait and see what the latter's approach would be.

In its recent report on the implementation of the Employment Directive by Member States, the Commission indicated several issues concerning the prohibition of discrimination on grounds of religion or belief.⁹¹⁹ In particular, the Commission pointed out that

[n]ational case law arising since the adoption of the Directive has highlighted conflicts between employee dress codes and manifestations of religious belief. Some of these cases have been treated as human rights matters (raising issues of freedom of religious expression) rather

⁹¹⁹ Commission, 'The application of Directive 2000/78/EC...' (n 911).

than discrimination cases, but they indicate that this area is likely to be a sensitive issue in implementing the Directive.⁹²⁰

Another problem in implementing the Employment Directive may stem from the lack of a definition of the terms ‘religion’ or ‘belief’ in the majority of Member States. Arguably, it is often difficult to delimit race and religion,⁹²¹ which may prove problematic in the application of the Race and the Employment Directives, particularly where “a religion can be linked to ethnicity, either because a religious group is considered to have an ethnic character, or because members of a religion belong predominantly to particular ethnic groups.”⁹²² Indeed, as the practice of courts in England shows, some groups which have both a common ethnic origin and a common religion, such as Sikhs,⁹²³ Gypsies⁹²⁴ and Jews,⁹²⁵ may be protected as ethnic/racial minorities, while others, who share only religion, such as Muslims,⁹²⁶ Rastafarians⁹²⁷ and Jehovah’s Witnesses,⁹²⁸ may be excluded. As a result, the former group of minorities may indirectly benefit from the Race Directive.

⁹²⁰ Commission, ‘The application of Directive 2000/78/EC...’ (n 911).

⁹²¹ See, for example, a recent case concerning denial of access to a Jewish school in the UK. The school admissions policy allowed access only to children whose mothers were either Orthodox Jews or had undergone a recognised conversion. As the mother’s conversion in this case was not recognised, the pupil was denied admission to the school. The case illustrates the difficulties in delimiting religion and ethnicity: *R (E) v Governing Body of JFS and another (United Synagogue and others intervening)*, High Court [2008] EWHC 1535 & 1536 (Admin); Court of Appeal [2009] EWCA Civ 626; Supreme Court [2009] UKSC 15; [2009] WLR (D) 366. For discussion see Aileen McColgan, ‘Class Wars? Religion and (in)equality in the Workplace’ (2009) 38(1) *Industrial Law Journal* 1-29, 6-7.

⁹²² Commission, ‘The application of Directive 2000/78/EC...’ (n 911) 4. See also Erica Howard, ‘Anti Race Discrimination Measures in Europe: An Attack on Two Fronts’ (2005) 11(4) *European Law Journal* 468–486, 475.

⁹²³ *Mandla v Dowell Lee* (n 92).

⁹²⁴ *Commission for Racial Equality v Dutton* [1989] IRLR 8.

⁹²⁵ *Seide v Gillette Industries Ltd* [1980] IRLR 427.

⁹²⁶ *Tariq v Young* [1988] COIT 24773/88.

⁹²⁷ *Crown Suppliers v Dawkins* (n 459).

In short, the Employment Directive would not remedy a situation of a school-girl wishing to wear religious dress to a publicly-funded school, because its scope does not extend to education; even if it did, the limitations in the instrument significantly reduce its potential, as compared to the Race Directive.

Thus, if an individual belonging to an ethnic group succeeds in invoking the protection of the Race Directive, unlike a member of a religious minority, s/he may bring a claim of discrimination not only in employment, occupation and vocational training, but also in education and provision of goods and services in both public and private spheres. This may result in an imbalance in the protection of ethnic and religious minorities. Indeed, commentators emphasise the hierarchy of the grounds under the Equality Directives; thus, in education “pupils now enjoy equivalent rights to their teachers in the case of race, a slightly less advantageous position in sex discrimination, and no targeted provision at all in the case of Religion or Belief and Sexual Orientation.”⁹²⁹ To remedy this hierarchy of grounds, the Commission recently proposed to expand the scope of the Employment Directive to cover social protection, including *inter alia* education.⁹³⁰ Regrettably, in relation to the

⁹²⁸ *Lovell-Badge v Norwich City College of Further and Higher Education* [1998] ET/1502237/97.

⁹²⁹ Ann Blair and Will Alps, ‘What not to wear and other stories: addressing religious diversity in schools’ (2005) 17(1-2) *Education and the Law* 1-22, 11; For criticism see Lisa Waddington and Mark Bell, ‘More Equal than Others: Distinguishing European Union Equality Directives’ (2001) 38 *Common Market Law Review* 587–611, 588; Elisabeth Holzleithner, ‘Mainstreaming Equality: Dis/entangling Grounds of Discrimination’ (2005) 14 *Transnational Law and Contemporary Problems* 927-957, 932; for explanation of factors which may have contributed to differing levels of protection see Mark Bell and Lisa Waddington, ‘Reflecting on Inequalities in European Equality Law’ (2003) 28(3) *European Law Review* 349-369.

⁹³⁰ Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘Non-discrimination and Equal Opportunities: A Renewed Commitment’ [2008] COM(2008) 420 final, 2.

manifestation of religion, the Commission specified that the Employment Directive does not cover

national laws relating to the secular nature of the State and its institutions, nor to the status of religious organisations. *Member States may thus allow or prohibit the wearing of religious symbols in schools.*⁹³¹

Moreover, all the matters concerning the organisation of the school system, including activities and the content of education and differential treatment in access to religious educational institutions, will remain within the Member States' discretion.⁹³² Consequently, the expansion of the Employment Directive's scope would not enhance the EU's role in this field. Instead, the instrument explicitly excludes its involvement with the right of religious minorities to display their dress in publicly-funded schools. Accordingly, if the Commission's proposal including the suggested limitations is accepted, it will be too restrictive to offer any relief to religious minorities wishing to preserve their distinct features. In contrast, if the Race Directive were interpreted in line with the jurisprudence of English courts, groups which share both a common ethnic origin and a common religion could claim indirect discrimination in education and could succeed in wearing religious dress to publicly-funded schools.

⁹³¹ Commission, 'Non-discrimination and Equal Opportunities...' (n 930) 9 (emphasis added).

⁹³² Article 3(3) and 3(4) of the proposed Directive provide:

3. This Directive is without prejudice to the responsibilities of Member States for the content of teaching, activities and the organisation of their educational systems, including the provision of special needs education. Member States may provide for differences in treatment in access to educational institutions based on religion or belief.

4. This Directive is without prejudice to national legislation ensuring the secular nature of the State, State institutions or bodies, or education, or concerning the status and activities of churches and other organisations based on religion or belief. It is equally without prejudice to national legislation promoting equality between men and women.

See also Commission, 'Non-discrimination and Equal Opportunities...' (n 930) 8.

Another instrument of relevance to the situation of religious minorities may be the CFR. It is noteworthy from the outset that the CFR is not addressed to individuals and applies to the EU institutions when they legislate and to Member States when they implement EU law. Therefore, were there an EU act which had an impact on the manifestation of religion, an applicant could in principle challenge this act before the ECJ and invoke the provisions of the CFR as grounds for review. Similarly, an individual could challenge, based on the CFR, a Member State's implementing measures of such an act. The relevant provisions of the CFR are discussed below.

Article 10 CFR stipulates everyone's freedom of religion. However, where the manifestation of religion is concerned, the explanatory memorandum to the CFR indicates that Article 10 corresponds to Article 9 ECHR, and hence may be limited in a democratic society in accordance with law if justified by a legitimate aim of protecting, *inter alia*, the rights of others. The same requirement can be found in Article 52(3) CFR, which requires the interpretation of the meaning and scope of the rights in line with the ECHR. So, the outcome of such a case would be no different from the ECtHR's jurisprudence.

Furthermore, Article 21 CFR precludes discrimination against minorities based on religion and membership of a national minority. However, despite its wide reach, Article 21 does not create any power for the EU institutions to enact anti-discrimination laws protecting religious minorities, nor does it comprise a sweeping ban on discrimination in wide ranging areas. Its aim is mainly to address "discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when

they are implementing Union law.”⁹³³ So, the application of this provision will not guarantee the right of religious minorities to wear clothes prescribed by their religions.

Arguably, Article 22 CFR, committing the EU to respect religious diversity, should entail “respect for the differences of religious minorities, requiring the adaptation of dominant practices.”⁹³⁴ One implication of such adaptation could be the right of persons belonging to religious minorities to dress in clothing required by their religion. However, a substantial impact of Article 22 CFR on the rights of religious minorities is unlikely. The explanatory memorandum to the CFR specifies that this provision was inspired by the Declaration on the Status of Churches and Non-confessional Organisations, which is now Article 17 TFEU. The Declaration, adopted simultaneously with the introduction of Article 13 TEC (now Article 19 TFEU), signalled the uneasiness of EU Member States with a provision authorising the Council to adopt secondary legislation prohibiting discrimination on the ground of religion or belief in EU law. The Declaration, and now Article 17(1) TFEU, specifies that the EU ‘respects and does not prejudice the status under national law of churches and religious association or communities in the Member States.’ Furthermore, while recognising their identity and specific contribution, under Article 17(3) TFEU, the EU is committed to maintaining an open, transparent and regular dialogue with churches and philosophical and non-confessional organisations. We need to wait and see how the ECJ interprets Articles 22 CFR and 17 TFEU.

⁹³³ Explanations relating to the Charter of Fundamental Rights (2007) C 303/02 <http://eur-lex.europa.eu/en/treaties/dat/32007X1214/htm/C2007303EN.01001701.htm#Note_E0001_expl> accessed 12 June 2008.

⁹³⁴ Marguerite Bolger, ‘Discrimination on Grounds of Religion’ in C Costello and E Barry (eds) *Equality in Diversity: The New Equality Directives* (Irish Centre for European Law, 2003) 377.

Finally, Article 14(3) CFR guarantees the right of parents to educate their children in line with their religious beliefs and freedom to establish schools. These guarantees are somewhat curtailed by the references to respect for democratic principles and the national laws governing the exercise of such freedom and right. Nevertheless, Article 14 could be strengthened if coupled with other provisions of the Charter, such as Articles 10, 21 and 22.⁹³⁵ This will, however, depend on the context of a particular case and the ECJ's willingness to be creative in ensuring the right of religious minorities to manifest their religious dress in publicly-funded schools. Besides, as discussed in Chapter I on pages 87-90, parental rights in education under the ECHR have not entailed the right of their children to wear particular dress at school. A similar interpretation is likely to apply under the CFR.

Regrettably, because of the vague wording of the CFR's provisions and the EU's limited competence in the field of minority protection, even the combined effect of relevant norms may not be enough to have sufficient 'bite' to remedy the situation of religious minorities.

As to the general principles and constitutional traditions common to Member States, the ECtHR's 'headscarf' case law has been consistently criticised for not upholding the right of minorities and individual believers to manifest their beliefs,⁹³⁶ and

⁹³⁵ European Parliament, 'Article 22: Cultural, Religious and Linguistic Diversity' <http://www.europarl.europa.eu/compar/libe/elsj/charter/art22/default_en.htm> accessed 12 March 2008.

⁹³⁶ Evans, *Freedom of Religion under the European Convention on Human Rights* (n 785) 132; Zdenka Machnyikova, 'Religious Rights' in M Weller (ed) *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (OUP, Oxford 2007) 187-188, 195.

ignoring the concept of indirect discrimination developed in its earlier jurisprudence.⁹³⁷ What the general principles could achieve is to correct the erroneous application of Article 9 ECHR by English courts as discussed on pages 252-267. Unfortunately, none of the cases considered in England have reached either the ECtHR or the ECJ. Consequently, national courts may continue to exclude freedom to manifest religious dress from the scope of Article 9(1) ECHR.

As discussed in Chapter I on page 82, the FCNM contains two provisions on freedom of religion: Article 7 corresponds to Article 9(1) ECHR, and Article 8 emphasises the freedom of minorities to manifest their religion. However, according to Article 19 FCNM and the explanatory note to the FCNM, the same limitations as in Article 9(2) ECHR are likely to apply under Articles 7 and 8 FCNM. While emphasising the importance of the manifestation of religion, the drafters of the instrument intended these provisions as declaration of principle only.⁹³⁸ Besides, these provisions are as yet unlikely to have an impact on EU law, because the FCNM has not been endorsed as part of the general principles of EU law.

5. Conclusion

This Chapter illustrated that the manifestation of religion is perhaps one of the most controversial aspects of minority protection. Even in England, which historically

⁹³⁷ Isabelle Rorive, 'Religious Symbols in the Public Space: In Search of a European Answer' (2009) 30(6) *Cardozo Law Review* 2669-2698, 2695.

⁹³⁸ Zdenka Machnyikova, 'Article 8' in M Weller (ed) *The Rights of Minorities in Europe: A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP, Oxford 2005) 242.

tolerated religious freedoms, we can detect a tightening of rules in relation to religious dress and a questionable application of Article 9 ECHR.

What is the EU's current contribution to this field? First, under the Employment Directive, the EU can deal with direct and indirect discrimination based on religion. However, the requirement of reasonable accommodation established by the ECJ in *Vivien Prais v Council* is unlikely to extend to matters of religious dress under the Employment Directive for several reasons. First, the scope of the Employment Directive is currently confined to employment and vocational training. When and if the Commission's proposals are accepted, the matter of religious dress may be excluded from the potentially wider scope of the Employment Directive. Second, even without the Commission's explicit exclusion of this matter from the instrument's scope, the limitations clauses could achieve the same result. As the case of *Azmi* demonstrated, although claims of indirect discrimination could be brought under the Employment Directive, the difference in treatment can be justified by States and the success of such claims will depend on the choice of comparator. Furthermore, a lack of a definition of 'religion or belief' in the instrument may lead to divergent practices in Member States.

In contrast, the Race Directive could prove a potent instrument to challenge direct and indirect discrimination against groups which share a common ethnic origin and a religion. If the instrument is interpreted in line with the jurisprudence of English courts, some groups, such as Sikhs and Jews, may be able to manifest their religion in publicly-funded schools. However, the EU-wide implications of such an interpretation could prove problematic in States like France.

At first sight, the CFR has a number of useful provisions, such as Articles 10, 14, 21 and 22. However, the CFR has to be interpreted in line with the ECHR. Given the ECtHR's restrictive headscarf jurisprudence, neither the CFR nor the general principles of EU law are likely to remedy the situation of religious minorities prevented from wearing religious dress in schools. Even though the combined reading of the CFR's provisions could in principle lead to a more favourable interpretation, they are too vague to be construed as conferring a freedom of minorities to manifest their religion. Moreover, such a reading could be regarded as an extension of EU competences, explicitly precluded by Article 51(2) CFR. What the EU could achieve, however, is to correct a questionable application of Article 9 ECHR, were a relevant claim to come before the ECJ.

Should the EU has any further contribution into this field, and why? The issue of the manifestation of religion is becoming increasingly prominent in the EU through constitutional debates and Treaty amendments in EU law, controversy surrounding permissible limitations on religious dress, as well as changes to immigration legislation, in some Member States, and the jurisprudence of the ECtHR based on the public/private divide embedded in the structure of Article 9 ECHR. The implications of these debates are two-fold: first, they result in tightening of rules on religious manifestation at domestic level; and second, restrictive rules at national level have a spill-over effect on EU Directives, requiring compliance with integration requirements as set in domestic law.

These developments lead some to argue that the EU favours only particular religions. This is not only detrimental to the image of the Union based on the principles of democracy, pluralism and respect for fundamental rights, including persons belonging to a minority, but also may negatively impact on its relations with candidate countries, such as Turkey. Moreover, the situation is further aggravated by the fact that the impact of changes at the EU level is felt mostly by religious minorities which are also TCNs, and hence already constitute a vulnerable group.

One way in which the EU could contribute to this field is through adopting a broad definition of ‘minority’, as discussed in Chapter I on page 186, which includes both TCNs and religious minorities, because these two categories often overlap and are in need of protection. In addition, such definition may help the EU to close a gap between religious and ethnic minorities, which otherwise may lead to a hierarchy in grounds of protection, as the experience of England demonstrates.

CHAPTER IV. RECREATING BABEL? THE RIGHT TO ACCESS MOTHER-TONGUE EDUCATION IN BELGIUM

The language of a minority group being an essential element of its culture, its capacity to survive as a cultural group is in jeopardy if no instruction is given in that language.⁹³⁹

1. Introduction

Even before the Member States introduced an explicit, though limited, EC competence in education in 1992, access to education strongly featured in the ECJ's case law through its generous interpretation of the concept of vocational training, equal treatment based on nationality, free movement regimes, and, subsequently, EU citizenship.⁹⁴⁰ Where minority education is concerned, an attempt was made to ensure access to mother-tongue education of migrant workers' children from other Member States under Directive 77/486.⁹⁴¹ Despite the significance of these developments, the role of the EU in education remains limited. This is so because Member States are unwilling to relinquish their powers in the field of education, as exemplified by an

⁹³⁹ Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (n 377) 84.

⁹⁴⁰ For example, in *Gravier* the ECJ ruled with respect to enrolment fees imposed on a French national in Belgium (which were not levied on Belgian nationals) that

... any form of vocational training which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training and skills for such a profession, trade or employment is vocational training, whatever the age and the level of training of the pupils or students, and even if the training programme includes an element of general education.

Case 293/85 *Gravier v City of Liège* [1985] ECR 593, para 30.

Furthermore, the ECJ established that under Article 12 of Regulation 1612/68 access to education extends to *all forms* of education, whether primarily vocational or not. Joined cases 389/87 and 390/87 *Echternach and Moritz v Minister van Onderwijs en Wetenschappen* [1989] ECR 723, para 29.

⁹⁴¹ Directive 77/486 on the education of the children of migrant workers (n 421).

emphasis on funding programmes⁹⁴² and Member States' cooperation in the field of higher education under the Bologna Declaration.⁹⁴³ Member States' reluctance to accord the EU wider powers in education is likely to be even stronger in relation to minority education, because in States like Belgium "language frontiers paved the way for the development of political boundaries"⁹⁴⁴.

However, education in a minority language and learning a minority language⁹⁴⁵ are essential to protect the identity of minorities. As discussed in Chapter I on pages 53-56, because minority rights are distinct from and additional to fundamental rights, it follows that in addition to non-discriminatory treatment in education, further requirements, such as equality of opportunity with the majorities and pluralism in education,⁹⁴⁶ have to be satisfied. As Van Dyke puts it:

if pupils who speak different languages are in the same school and if one of the languages becomes the medium of instruction, then some

⁹⁴² Council (EC) Regulation 1360/90 on establishing a European Training Foundation [1990] OJ L 131; Council (EC) Decision 1999/311 adopting the third phase of the trans-European cooperation scheme for higher education (Tempus III) (2000-2006) [1999] OJ L 120/30; European Parliament and Council (EC) Decision 253/2000 establishing the second phase of the Community action programme in the field of education 'Socrates' [2000] OJ L 28. For discussion of EU soft law instruments in education, see Ulf Fredriksson, 'Changes of Education Policies within the European Union in the Light of Globalisation' (2003) 2(4) *European Educational Research Journal* 522-546; Hubert Ertl, 'European Union Policies in Education and Training: the Lisbon Agenda as a Turning Point?' (2006) 42(1) *Comparative Education* 5-27; Niamh Nic Shuibhne, 'EC Law and Minority Language Policy: Some Recent Developments' in X Arzo (ed) *Respecting Linguistic diversity in the European Union* (John Benjamins B.V., Amsterdam 2008) 123-143.

⁹⁴³ European Ministers of Education, 'Bologna Declaration', 19 June 1999 <http://www.bologna-bergen2005.no/Docs/00-Main_doc/990719BOLOGNA_DECLARATION.PDF> accessed 23 March 2008.

⁹⁴⁴ Jean-Claude Scholsem, 'Belgium: Federalism and Protection of Minorities' (1994) CDL-MIN(94)7, 4-15, para 1.5 (emphasis omitted) <[http://www.venice.coe.int/docs/1994/CDL-MIN\(1994\)007-e.pdf](http://www.venice.coe.int/docs/1994/CDL-MIN(1994)007-e.pdf)> accessed 23 April 2008; Xabier Arzo, 'The Nature of Language Rights' (2007) 6 *Journal on Ethnopolitics and Minority Issues in Europe* 1-34, 32.

⁹⁴⁵ These rights are not mutually exclusive. See, ACFC, 'Commentary on Education...' (n 265) 24.

⁹⁴⁶ Holly Cullen, 'Education Rights or Minority Rights?' (1993) 7 *International Journal of Law and the Family* 143-177; it is also argued that conflict prevention is another founding principle of minority protection: Jan de Groog and Gracienne Lauwerst, 'Education Policy and Law: the politics of multiculturalism in education' (2002) 14(1-2) *Education and the Law*.

students automatically gain an advantage and others are handicapped. At the same time, to teach some in a language that is widely used and others in a language that is little used would mean that the life chances opened up to members of the two groups would be very unequal.⁹⁴⁷

In light of this dual need of minorities, to be integrated whilst preserving their unique identity, it is rightly argued that education of both majorities and minorities may pose the greatest challenge to States wishing to accommodate the educational rights of its minority groups.⁹⁴⁸ This challenge is further compounded by the fact that minority languages are often regarded as obstacles to the unity of a State, which, in this context, “correlate with exclusiveness”⁹⁴⁹ of majority languages. Because the choice of national language is a “deliberately political act”,⁹⁵⁰ minority languages are likely to lack protection through institutional and political structures,⁹⁵¹ and have reduced value if States do not offer additional protection. Therefore, States should evaluate minority demands against the principle of substantive equality, and ensure a differential approach based on the particular circumstances of a group.⁹⁵²

⁹⁴⁷ Vernon Van Dyke, ‘Equality and Discrimination in Education: A Comparative and International Analysis’ (1973) 17 *International Studies Quarterly* 375, 384.

⁹⁴⁸ Henrard, *Devising an Adequate System of Minority Protection...* (n 449) 262; see also Tamas Kozma, ‘Minority Education in Central Europe’ (2003) 35(1) *European Education* 35-53, 51-52.

⁹⁴⁹ Thornberry, *International Law and the Rights of Minorities* (n 447) 1.

⁹⁵⁰ Stephen May ‘Language, Nationalism and Democracy in Europe’ in G Hogan-Brun and S Wolff (eds) *Minority Languages in Europe: Frameworks, Status, Prospects* (Palgrave Macmillan, Houndsmills 2003) 212; see also, F de Varennes, *Language, Minorities and Human Rights* (Martinus Nijhoff Publishers, The Hague 1996) 87.

⁹⁵¹ N Nic Shuibhne, *EC Law and Minority Language Policy: Culture, Citizenship and Fundamental Rights* (Kluwer Law International, The Hague 2002) 50.

⁹⁵² Kristin Henrard, ‘Devising an Adequate System of Minority Protection in the Area of Language Rights’ in G Hogan-Brun and S Wolff (eds) *Minority Languages in Europe: Frameworks, Status, Prospects* (Palgrave Macmillan, Houndsmills 2003) 41.

This chapter assesses the right to access education in the EU, with an emphasis on the needs of minorities to preserve their identity. As discussed on page 92, access to education has to satisfy three requirements: physical accessibility, economic accessibility and non-discriminatory treatment. The discussion begins with a case study of Belgium in section 2, followed by the application of relevant EU rules on access to education and choice of language in section 3. The chapter concludes with suggestions as to the future courses of action the EU could take in this field.

2. Case study: Belgium

The language of instruction in Belgium has been an issue of political controversy between Flemings (Dutch-speakers) and Walloons (French-speakers) for centuries. Even though Flemings constitute the numerical majority in the country, until recently Flemish was a minority language.⁹⁵³ The 1831 Constitution of Belgium affirmed the equal status of both languages, but, “this remained a dead letter.”⁹⁵⁴ It took Flemings a century before language laws established in 1932 that the local language would be the language of instruction in primary and secondary schools, with special facilities granted in areas where 30% of the population spoke another language.⁹⁵⁵ Accordingly, the 1932 linguistic legislation based on the territoriality principle established the use of French or Dutch in monolingual regions of Belgium. However, this law did not significantly improve the position of Flemish, because many Flemings and French parents evaded this law by sending their children to French

⁹⁵³ W Halls, ‘Belgium: a case study in educational regionalism’ (1983) 19(2) *Comparative Education* 170.

⁹⁵⁴ Halls (n 953) 171.

⁹⁵⁵ Halls (n 953) 174.

schools. As a result, a linguistic census due to take place in 1960 was cancelled because, in the view of Flemings, some inhabitants were declaring themselves to be French-speakers, leading to Walloons taking over Flemish communes.⁹⁵⁶

This controversy sparked a determination to fix the linguistic boundaries in Belgium. The issue of language in education “turned this reform into a battlefield of social and political views on society and its future.”⁹⁵⁷ The 1961 and 1962 acts established “a definitive linguistic frontier, with no further reference to subsequent population movements or the wishes of the inhabitants.”⁹⁵⁸ The laws of 1962-1963 finalised the demarcation of linguistic boundaries and established unilingualism in linguistic communes of Belgium. The inhabitants of only 27 communes acquired the right to request linguistic facilities *inter alia* in education. Thus, education in French is available in all nine communes of the German-speaking Community and six communes situated in the periphery of Brussels, which is a Flemish Region with a large number of French-speakers.⁹⁵⁹ Furthermore, the communes on the border between Wallonia and Flanders grant facilities to Dutch- and French-speakers respectively.⁹⁶⁰ Lastly, linguistic facilities are granted to German-speakers in the two borderline communes in Wallonia. The Constitutional amendments of 1988 sealed

⁹⁵⁶ In the view of Flemish politicians, Francophone majority “spreads into Dutch-speaking Flanders like an ‘oil stain’”: Sherrill Stroschein, ‘What Belgium can teach Bosnia: The Uses of Autonomy in ‘Divided House’ States’ (2003) 3 *Journal of Ethnopolitics and Minority Issues in Europe* 7.

⁹⁵⁷ Willy Wielemans, ‘Comprehensive Education in Belgium: a Broken Lever?’ (1991) 26(2) *European Journal of Education* 167.

⁹⁵⁸ Scholsem, *Belgium: Federalism and Protection of Minorities* (n 944) para 1.4.

⁹⁵⁹ Venice Commission, ‘Opinion on Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities could be applied in Belgium’ (2002) CDL-AD(2002), 1 <[http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)001-e.asp](http://www.venice.coe.int/docs/2002/CDL-AD(2002)001-e.asp)> accessed 12 January 2008.

⁹⁶⁰ Venice Commission, ‘Opinion on Possible Groups of Persons...’ (n 959).

these arrangements and changes can be adopted only by enacting a federal law with a special majority.⁹⁶¹ Therefore, French-speakers in Flanders and Dutch-speakers in Wallonia cannot benefit from education in their mother tongue and run the risk of assimilation into the regional language. Consequently, the boundaries of public education are strictly delimited.

Accordingly, access to education in Belgium is largely informed by the principle of territoriality. In unilingual communes, education is exclusively in the language of the commune: in Wallonia it is French, in Flanders, Dutch, and in the German-speaking communes, German. Only in 27 communes of Belgium (out of 589) is there access to education in a minority language. Six of these communes are in the Brussels periphery in Flanders.

Conflicts between French-speakers and the Flemish Government regarding access to education in French have arisen since the 1960s. In 1968, the dispute regarding access to education in French in the Flemish communes reached the ECtHR in the *Belgian Linguistics* case, discussed in Chapter I on pages 94-95. Even though the ECtHR did not criticise the rigid application of the principle of territoriality in Belgium, it found that the requirement of residence violated Article 2 of Protocol 1 ECHR (P1-2).

To date, Belgium has failed to implement fully the ECtHR's judgment in *Belgian Linguistics*. Seeking to remedy this situation, in 1998 and 2002, the PACE called on Belgium to ensure access to French-speaking schools of children of French-speakers who do not reside in communes with linguistic facilities, in line with the ECtHR

⁹⁶¹ PACE, 'Resolution on Situation of the French-speaking population living in the Brussels periphery' (1998) Res 1172 <<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta98/ERES1172.htm>> accessed 15 January 2008.

decision.⁹⁶² Likewise, in its thematic comment on minority rights, the EU Network of Independent Experts criticised Belgium for its failure to implement the *Belgian Linguistics* case.⁹⁶³ Furthermore, the PACE adopted a number of resolutions condemning the attempts of the Flemish authorities to assimilate French-speakers into the regional language.⁹⁶⁴ In the 1998 Resolution, the PACE recommended that the Flemish Government should “seek to integrate, but not assimilate”⁹⁶⁵ French-speaking Belgian citizens in Flanders, and also to recognise the rights of the French-speaking minority in Flanders to keep their own identity and language.⁹⁶⁶ This, however, has not led to any action in Belgium or at the EU level.

The following section evaluates whether EU law could assist the French-speakers’ demands for mother-tongue education in Flanders.

3. ‘Testing’ EU rules

To evaluate the right of minorities to education in a minority language in the context of EU law, it may be useful to discuss the EU’s relevant competences on education (3.1) and languages (3.2). Moreover, the reach of EU action in internal situations need

⁹⁶² PACE, ‘Resolution on Protection of minorities in Belgium’ (2002) Res 1301, para 23 <<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta02/ERES1301.htm>> accessed 15 January 2008; PACE, Resolution 1172(1998) (n 961) para 7.

⁹⁶³ EU Network of Independent Experts, ‘Thematic Comment No 3...’ (n 15) 107-108.

⁹⁶⁴ PACE, Report on Protection of minorities in Belgium (n 512); Resolution 1301(2002) (n 962); Resolution 1172(1998) (n 961).

⁹⁶⁵ PACE, ‘Resolution 1172(1998)’ (n 961) para 8(i).

⁹⁶⁶ PACE, ‘Resolution 1172(1998)’ (n 961) para 8(ii).

to be assessed in order to determine the extent of the EU's support for the educational rights of minorities in its Member States (3.3).

3.1. EU competence in education

Prior to 1992, the matter of access to education was mainly dealt through the medium of free movement regimes. Even before the TEU amended the EC Treaty to include an explicit reference to education, the ECJ established that, although educational policies remain within the competence of Member States, this does not mean that the “exercise of powers transferred to the Community is in some way restricted if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training.”⁹⁶⁷ This finding allowed the ECJ to interpret extensively Article 12 of Regulation 1612/68,⁹⁶⁸ which provides for the educational rights of migrant workers' children in the context of the free movement of workers. For example, the Court established that, under Article 12 of Regulation 1612/68, access to education extends to *all forms* of education, whether primarily vocational or not.⁹⁶⁹ The ECJ applied this inclusive definition to courses such as university courses in veterinary medicine,⁹⁷⁰ gunsmithing⁹⁷¹ and economics and advanced vocational

⁹⁶⁷ Case 9-74 *Donato Casagrande v Landeshauptstadt München* [1974] ECR I-9713.

⁹⁶⁸ Council (EEC) Regulation No 1612/68 on freedom of movement for workers within the Community [1968] OJ L 257/2, Article 12:

The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory. Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.

⁹⁶⁹ *Echternach and Moritz v Minister van Onderwijs en Wetenschappen* (n 940) para 29.

⁹⁷⁰ Case 24/86 *Blaizot v University of Liège* [1989] 1 CMLR 57.

training at a technical college.⁹⁷² Furthermore, the ECJ has generously construed the concept of ‘child’ under Article 12 of Regulation 1612/68. Although Article 10 of the Regulation stipulated⁹⁷³ the right of a worker’s descendants under the age of 21 years to live in a host State, the ECJ ruled in *Gaal* that access to education under Article 12 does not vary with age or dependency.⁹⁷⁴

To facilitate free movement regimes further, the Council adopted Directive 77/486 on the education of the children of migrant workers.⁹⁷⁵ The instrument requires Member States to ensure that the children of migrant workers attend schools and have an opportunity to learn the official language(s) of their host State. The innovative feature of the Directive is the duty of Member States to promote the “teaching of the mother tongue and culture of the country of origin for the children.”⁹⁷⁶ Thus, the link “between the principle of *equality* on the one hand and the need for *special measures* on the other is the key to Directive 77/486...”⁹⁷⁷ Indeed, the instrument does not extend “existing national rules on multicultural education to Community nationals, but imposes on all States the adoption of a specified policy of multicultural

⁹⁷¹ Case 309/85 *Barra v Belgium* [1988] 2 CMLR 409.

⁹⁷² *Echternach and Moritz v Minister van Onderwijs en Wetenschappen* (n 940) para 30.

⁹⁷³ Article 10 of Regulation No 1612/68 (n 968) was repealed by Article 38(1) of Directive 2004/38 with the effect from 30 April 2006. See, European Parliament and Council (EC) Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158 (Citizenship Directive).

⁹⁷⁴ Case C-7/94 *Landesamt für Ausbildungsförderung Nordrhein-Westfalen v Lubor Gaal* [1995] ECR I-1031, para 31.

⁹⁷⁵ Directive 77/486 on the education of the children of migrant workers (n 421).

⁹⁷⁶ Directive 77/486 on the education of the children of migrant workers (n 421) Article 3.

⁹⁷⁷ Bruno de Witte, ‘Educational Equality for Community Workers and their families’ in B de Witte (ed) *European Community Law of Education* (Nomos Verlagsgesellschaft, Baden-Baden 1989) 74 (emphasis in original).

education.”⁹⁷⁸ Although the primary purpose of the instrument is to promote the intra-Community mobility of the workers,⁹⁷⁹ it is significant that the instrument moves “beyond formal non-discrimination, and imposes an obligation on Member States to take ‘affirmative action’”⁹⁸⁰ to grant special benefits to children of migrant workers.

Regrettably, the resistance of States to providing for education in non-official languages is evident from the attitude of Member States that has made “this directive ... one of the most underenforced Acts of Community law.”⁹⁸¹ Nevertheless, despite its limited implementation and application to ‘new’ minorities from other Member States, the Directive shows that it is possible and desirable for Member States to accommodate, at the very least, the learning of minority languages.

With the acquisition of a limited competence in education under Article 149 EC (now Article 165 TFEU)⁹⁸² in 1992, the EC (and now the EU) can supplement the Member States’ action in this field, ‘while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.’ Accordingly, Member States retain their competences in dealing with education in minority languages. EU action in the field of education is limited to developing the European dimension in education,

⁹⁷⁸ de Witte, ‘Educational Equality for Community Workers and their families’ (n 977) 75.

⁹⁷⁹ Bruno de Witte, ‘Surviving in Babel? Language Rights and European Integration’ in Y Dinstein and M Tabory (eds) *The Protection of Minorities and Human Rights* (Martinus Nijhoff Publishers, Dordrecht 1992) 291.

⁹⁸⁰ de Witte, ‘Educational Equality for Community Workers and their families’ (n 977) 75.

⁹⁸¹ de Witte, ‘The European Communities and its Minorities’ (n 418) 182.

⁹⁸² The limited powers of the EU in education are in stark contrast with its more extensive competence in vocational training under Article 166 TFEU (ex-Article 150 EC), which indicates that the EU has stronger interest in vocational training than in the general right to education. See, Fredriksson, ‘Changes of Education Policies within the European Union...’ (n 942) 525.

particularly through the teaching and dissemination of the languages of the Member States, encouraging student and teacher mobility, promoting cooperation between educational establishments, and so on.⁹⁸³ The lists of EU incentive measures in Articles 165 and 166 TFEU, in the European Parliament's view, are not exhaustive, "but are rather in the nature of examples."⁹⁸⁴ However, it is debatable "whether these measures can be regarded as sources of Community law."⁹⁸⁵ The recommendations that EU institutions issue in the field of education are not legally binding⁹⁸⁶ and may only influence Member States' actions indirectly.

As a result of this limited competence, Article 149 EC (now Article 165 TFEU) has played a marginal role in the ECJ's interpretation of the EU right to education. In formulating EU law on access to education and vocational training, the ECJ has relied on rules governing the free movement regimes, such as Articles 7 and 12 of Regulation 1612/68 on the free movement of workers,⁹⁸⁷ Article 12 EC (Article 18 TFEU) on equal treatment based on nationality, Article 18 EC (now Article 21 TFEU) on EU citizenship and Article 150 EC (now Article 166 TFEU) on vocational training. In its interpretation of these instruments, the ECJ used various techniques to ensure broad access to education and training⁹⁸⁸ and overcome the EU's jurisdictional handicaps in the field of education.⁹⁸⁹

⁹⁸³ Article 165(2) TFEU (ex-Article 149(2) EC).

⁹⁸⁴ European Parliament, 'Resolution on education and training policy in the run-up to 1993' [1992] OJ C150/366, 368.

⁹⁸⁵ S O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (Kluwer Law International, The Hague 1996) 180.

⁹⁸⁶ Article 249 EC (now Article 288 TFEU); Case C-322/88 *Grimaldi v Fonds des Maladies Professionnelles* [1990] ECR I-4402.

⁹⁸⁷ Regulation No 1612/68 (n 968).

So far, the ECJ's case law has contributed greatly to satisfying three requirements of access to education, i.e., physical accessibility, economic accessibility and non-discriminatory treatment. Thus, the ECJ's case law made some demands on Member States in relation to physical accessibility of education. It is argued, for example, that *Gravier* established an independent right to residence in a host State; if students were to enjoy rights of access to vocational training, a right to residence would be necessary to enjoy such rights, at least for the duration of their studies,⁹⁹⁰ a proposition that was subsequently confirmed in *Raulin and European Parliament v Council*.⁹⁹¹ The ECJ ruled that under Articles 12 EC (now Article 18 TFEU) and 150 EC (now Article 166 TFEU) there is a limited residence right for a student undertaking a vocational training course in the host State, "for otherwise the right to equal treatment would be illusory."⁹⁹²

Furthermore, in *Echternach and Moritz*⁹⁹³ the Court held that a child retains the status of a worker's family (within the meaning of Regulation 1612/68) even when that child's family returns to their home State and the child remains in the host State to

⁹⁸⁸ For example, the ECJ interpreted broadly the definition of 'child' as a beneficiary of educational rights in *Landesamt für Ausbildungsförderung Nordrhein-Westfalen v Lubor Gaal* (n 974) para 31; Case C-200/02 *Zhu and Chen* [2004] ECR I-9925 para 20); and the right to residence for the purposes of access to education in another Member State in Case C-357/89 *Raulin v Minister van Onderwijs en Wetenschappen* [1992] ECR I-1027; *Echternach and Moritz v Minister van Onderwijs en Wetenschappen* (n 940) para 23.

⁹⁸⁹ Julian Lonbay, 'Towards Educational Rights' in R Blackburn (ed) *Rights of Citizenship* (Mansell Publishing Limited, London 1993) 226.

⁹⁹⁰ O'Leary, *The Evolving Concept of Community Citizenship...* (n 985) 161.

⁹⁹¹ *Raulin v Minister van Onderwijs en Wetenschappen* (n 988).

⁹⁹² Jo Shaw, 'From the Margin to the Centre: Education and Training Law and Policy' in P Craig and G de Búrca (eds) *The Evolution of EU Law* (Oxford University Press, Oxford 1999) 570.

⁹⁹³ *Echternach and Moritz v Minister van Onderwijs en Wetenschappen* (n 940) para 23.

continue their studies. Thus, a child of a worker does not even have to live with their parents in order to benefit from access to all forms of education in a host State. Moreover, since the inception of EU citizenship, “even a young child may make use of the rights of free movement and residence guaranteed by Community law.”⁹⁹⁴

The ECJ took this finding a step further in *Baumbast and R*,⁹⁹⁵ where it ruled that a migrant worker’s children retain their right to continue their education in a host State:

[t]he fact that the parents of the children concerned have meanwhile divorced, the fact that only one parent is a citizen of the Union and that parent has ceased to be a migrant worker in the host Member State and the fact that the children are not themselves citizens of the Union are irrelevant in this regard.⁹⁹⁶

Thus, the ECJ interpreted the residence rights broadly and permitted children to continue their courses, even after a parent had ceased to be a worker in the host State, and ruled that the State should permit the parent to receive a residence permit to ensure the successful continuation of the children’s studies. This finding was confirmed and further strengthened in *Teixeira*,⁹⁹⁷ where the ECJ ruled that additional residence requirements, introduced by Article 7 of Directive 2004/38, such as sufficient resources for the parent not to become a burden on the social assistance of a host Member State, did not affect the application of Article 12 of Regulation 1612/68 independent of other EU rules;⁹⁹⁸ furthermore, the *travaux préparatoires* to Directive

⁹⁹⁴ Case C-76/05 *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach* [2007] ECR I-6849, para 90, Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, para 20.

⁹⁹⁵ C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

⁹⁹⁶ *Baumbast and R v Secretary of State for the Home Department* (n 995) para 63.

⁹⁹⁷ Case C-480/08 *Maria Teixeira v London Borough of Lambeth, Secretary of State for the Home Department*, 23 February 2010; see also Case Comment, ‘Right of Residence of Parent of Child in Education not Conditional on Resources’ (2010) 270 EU Focus 16-18.

2004/38⁹⁹⁹ showed that it was intended to be consistent with the decision in *Baumbast*.¹⁰⁰⁰ In the ECJ's view, Article 12 of Directive 2004/38¹⁰⁰¹ also confirmed the right to residence in the host Member State both of children who are installed in the host State and enrolled at an educational establishment, and the parent who has actual custody over the children. Although children who have reached the age of majority can in principle meet their own needs, the parents' right to residence in the host Member State may extend beyond that age, if the child continues to need the parent's presence in order to complete their education.¹⁰⁰² Accordingly, where access to education is concerned, in order to create the best possible conditions for their education, the ECJ requires Member States to guarantee both physical accessibility of education to children and the residence rights of the parent who is the child's primary caregiver.

As to economic accessibility, the ECJ's initial jurisprudence, mainly in the context of the free movement of workers, saw the development of strong principles. Thus, the ECJ generously interpreted workers' right to economic accessibility of education on the presumption that "a worker will be deterred from moving into another country if that country denies educational facilities, either to himself or to his family."¹⁰⁰³ Therefore, Articles 7(2) and (3) of the Regulation 1612/68 give equal access for

⁹⁹⁸ *Maria Teixeira* (n 997) paras 53 and 61.

⁹⁹⁹ COM(2003) 1999 final 7.

¹⁰⁰⁰ *Maria Teixeira* (n 997) paras 36 and 58.

¹⁰⁰¹ Directive 2004/38 (Citizenship Directive) (n 973).

¹⁰⁰² *Maria Teixeira* (n 997) paras 86-87.

¹⁰⁰³ de Witte, 'Educational Equality for Community Workers and their families' (n 977) 71.

workers both to vocational training and university education,¹⁰⁰⁴ because migrant workers are entitled to “the same social advantages as national workers.”¹⁰⁰⁵ Furthermore, these social advantages cover not only workers’ study fees, but also maintenance and training grants.¹⁰⁰⁶

The ECJ has subsequently extended this reading to Article 12 of Regulation 1612/68, which refers to access to education of migrant workers’ children ‘under the same conditions as the nationals of that State’. In *Casagrande*,¹⁰⁰⁷ the Court held that this phrase refers “not only to rules relating to admission, but also to general measures intended to facilitate educational attendance.”¹⁰⁰⁸ This allowed a migrant worker’s child attending secondary school to take “advantage of benefits provided by the laws of the host country relating to educational grants, under the same conditions as nationals who are in a similar position.”¹⁰⁰⁹ Furthermore, the ECJ considered enrolment fees as an integral part of access to education. It ruled in *Forcheri*¹⁰¹⁰ that requiring a national of another Member State to pay an enrolment fee that is not paid by nationals of a host State in order to take part in educational courses contravenes the terms of Article 12 EC (Article 18 TFEU) on non-discrimination based on nationality and Article 150 EC (Article 166 TFEU) on vocational training. Similarly, in *Echternach and Moritz* the ECJ ruled that “it is recognised in Community law that ...

¹⁰⁰⁴ Case 197/86 *Steven Malcolm Brown v Secretary of State for Scotland* [1988] ECR 3205.

¹⁰⁰⁵ K Beiter, *The Protection of the Right to Education by International Law* (Martinus Nijhoff Publishers, Leiden 2006) 190.

¹⁰⁰⁶ Case 39/86 *Sylvie Lair v Universitat Hannover* [1988] ECR 3161.

¹⁰⁰⁷ *Donato Casagrande v Landeshauptstadt München* (n 967) para 9.

¹⁰⁰⁸ *Donato Casagrande v Landeshauptstadt München* (n 967) para 9.

¹⁰⁰⁹ *Donato Casagrande v Landeshauptstadt München* (n 967) para 7.

¹⁰¹⁰ Case 152/83 *Forcheri v Belgium* [1983] ECR 2323, para 18.

[migrant worker's] children must be eligible for study assistance from the State in order to make it possible for them to achieve integration in the society of the host country."¹⁰¹¹

These findings were further strengthened in *Schwarz*,¹⁰¹² where a German national court enquired from the ECJ whether the treatment of school fees payable to certain German schools (but not payments of school fees to schools in the rest of the EC) under the heading of special expenditure leading to a reduction of income tax is compatible with EU citizenship and free movement rights.¹⁰¹³ The German Government argued that the freedom to provide services does not oblige it to provide tax relief for school fees in other Member States, because it would have the effect of giving a tax advantage to educational establishments in other Member States.¹⁰¹⁴ The ECJ held that tax relief was not a subsidy to schools, but a tax advantage to parents. In order to avoid an excessive burden, Germany could limit the amount of deductible school fees to a certain level, which would be a less stringent measure than a total refusal of relief.¹⁰¹⁵ Because any private school established in another Member State

¹⁰¹¹ *Echternach and Moritz v Minister van Onderwijs en Wetenschappen* (n 940) para 35.

¹⁰¹² *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach* (n 994).

¹⁰¹³ The Schwarzes were German nationals living in Germany who sent their two children to a private school in Scotland. The authorities refused them tax relief on the ground that the German legislation reserved this right to taxpayers paying school fees to German private schools in Germany, German Schools abroad and European schools.

¹⁰¹⁴ *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach* (n 994) para 50. Moreover, since the Government does not exercise any influence over the form and content of a private school education in another Member State, it should not be required to subsidise the functioning of such a school through tax benefits (para 52). Otherwise, such a subsidy might become an unreasonable burden on a Member State's tax system. In addition, the private school in Scotland was not comparable with the private schools in Germany.

¹⁰¹⁵ *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach* (n 994) para 80; Opinion of the Advocate General in Case C-76/05 *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach*, 21 September 2006, para 62.

was automatically excluded by the reason of its not being established in or by Germany,¹⁰¹⁶ the ECJ ruled that the domestic legislation in question has the “effect of deterring taxpayers resident in Germany from sending their children to schools established in another Member State.”¹⁰¹⁷ Furthermore, it discouraged private schools in other Member States from offering education to the children of taxpayers resident in Germany.¹⁰¹⁸ Consequently, this legislation constitutes an obstacle to the freedom to provide services.¹⁰¹⁹ Thus, through tying the educational rights to free movement regimes, the ECJ strengthened EU guarantees on equal access to education.

Regrettably, the ECJ’s most recent case seems to partially abandon this generous approach. In *Förster v IB-Groep*,¹⁰²⁰ a German national in the Netherlands, who worked to support herself during her studies, obtained a maintenance grant to support her studies. Because the applicant did not engage in gainful employment between July and December 2003, the funding body required her to re-pay excess sums. At the material time, only Directive 93/96 applied to the applicant, who could reside in the Netherlands but was not entitled to receive a maintenance grant. Nor did Regulations 1251/70 and 1612/68 support the applicant’s claims. This was because only a worker can benefit from social advantages. The ECJ did not accept the applicant’s arguments that, for the purposes of Article 39 EC (Article 45 TFEU) and Regulation 1612/68, she should be regarded as a worker at the material time. Furthermore, even though Directive 2004/38 (Citizenship Directive) had introduced the right to finance the

¹⁰¹⁶ *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach* (n 994) para 73; Opinion of the Advocate General (n 1015) para 43.

¹⁰¹⁷ *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach* (n 994) para 66.

¹⁰¹⁸ *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach* (n 994) para 66.

¹⁰¹⁹ *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach* (n 994) para 67.

¹⁰²⁰ Case C-158/07 *Förster v IB-Groep* [2008] ECR I-4323.

studies of EU citizens, relevant provisions apply only after five years of residence in the host Member State, and the applicant did not satisfy this requirement either. The applicant therefore relied on Article 12 EC (Article 18 TFEU) and the ECJ's decision in *Bidar*.¹⁰²¹

In *Bidar*, a French national was refused financial assistance towards his maintenance costs because he did not satisfy the residence requirements in the UK. The ECJ found that residence conditions may be indirectly discriminatory, because fewer students from other Member States may meet them. However, the Court also emphasised that Member States could grant assistance only to those students who are sufficiently integrated in a host State. Such requirements can be satisfied through a period of residence.¹⁰²²

Both Advocate General Mazak and the ECJ agreed that the five-year residence requirement was legitimate, because it aimed to ensure sufficient integration of students receiving financial assistance. However, in the Advocate General's view, this requirement was disproportionate. The ECJ did not accept this view. Instead, it ruled that because the Citizenship Directive imposes five-year residence requirement to qualify for permanent residence, the same length of time may apply to study grants. This line of argument is unfortunate as it detracts from the potential of *Bidar*. The Advocate General's approach is preferable, as it could make it possible to uphold both the Citizenship Directive and *Bidar*. Thus, the five-year requirement could apply in all

¹⁰²¹ Case C-209/03 *R (on the application of Danny Bidar) v London Borough of Ealing, Secretary of State for Education and Skills* [2005] ECR I-2119.

¹⁰²² C Barnard, *The Substantive Law of the EU: The Four Freedoms* (2nd edition Oxford University Press, 2007) 434.

cases; however, if there were additional circumstances demonstrating sufficient integration, then *Bidar* could apply as well. Regrettably, it appears that applicants may not be able to pursue the second line of argument after *Förster*.¹⁰²³

As to non-discriminatory treatment in access to education, the ECJ's case law on equality of treatment in education based on nationality has been significantly strengthened since the inception of EU citizenship.¹⁰²⁴ This trend began in *Grzelczyk*¹⁰²⁵ where a student, who supported his studies during the first three years, applied for the Belgian minimum income guarantee to finance the final year of his studies. This possibility was open to students of Belgian nationality, but not to migrant students. The ECJ ruled that, by virtue of his EU citizenship and because he was exercising free movement rights, Grzelczyk was entitled to protection under Article 12 EC (Article 18 TFEU) on non-discrimination based on nationality, and thus could claim financial assistance. A similar conclusion was reached in *Bidar*, discussed above.

In *Bressol*,¹⁰²⁶ concerning limitations on access to medical and paramedical courses at higher educational establishments based on the residence requirement in the French communes of Belgium, the ECJ ruled that the principle of non-discrimination

¹⁰²³ Mislav Mataija, 'Case C-158/07, Jacqueline Förster v IB-Groep – Student Aid and Discrimination of Non-Nationals: Clarifying or Emaciating Bidar?' (2009) 15 Columbia Journal of European Law Online 59-64, 63.

¹⁰²⁴ Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para 31: "Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for."

¹⁰²⁵ *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* (n 1024).

¹⁰²⁶ Case C-73/08 *Nicholas Bressol and others, Céline Chaverot and others v Gouvernement de la Communauté française*, 13 April 2010; see also Case Comment, 'Limit on Non-Resident Students must be Justified' (2010) 271 EU Focus 7-8.

prohibits not only direct discrimination based on nationality, but also indirect discrimination which, through the application of other criteria of differentiation, leads in fact to the same result.¹⁰²⁷ The ECJ was not convinced that the difference in treatment between Belgian nationals and nationals of other Member States in access to education could be objectively justified based on the fear of the Belgian government that an increase in the number of students could lead to an excessive burden on the financing of higher education. However, indirect discrimination based on nationality could be justified on the ground of public health. It was for the national court to assess the appropriateness of domestic legislation to attain the legitimate aims of the limitation. Accordingly, the ECJ has established high standards in guaranteeing non-discriminatory access to education, comparable to the UN standards.¹⁰²⁸

Non-discriminatory treatment in access to education is further strengthened through EU citizenship rights. Thus, not only a host State, but also a home State is obliged to treat equally its nationals who choose to exercise EU citizenship rights, by granting them educational grants for the purposes of education abroad. The ECJ established this requirement in *Morgan and Bucher*.¹⁰²⁹ In *Morgan*, after the completion of her secondary education in Germany, Ms Morgan worked in the UK for a year and then began her studies in applied genetics in the UK. When she applied for a grant in Germany, she was refused because she did not satisfy the conditions in the national law: to qualify, she had to study in Germany for one year and then continue the same

¹⁰²⁷ *Nicholas Bressol and others* (n 1026) para 40.

¹⁰²⁸ The ECJ has also confirmed that Articles 18 and 21 TFEU pursue in essence the same objective as Articles 13(2)(c) on access to higher education and 2(2) ICCPR on non-discrimination in the exercise of the rights enunciated in the Covenant: *Nicholas Bressol and others* (n 1026) para 86.

¹⁰²⁹ Case C-11/06 *Rhiannon Morgan v Bezirksregierung Köln* and C-12/06 *Iris Bucher v Landrat des Kreises Düren* [2007] ECR I-9161.

course in another Member State (first-stage studies condition).¹⁰³⁰ The German national court asked the ECJ to interpret the compatibility of the conditions on the award of an educational or training grant in order to study in a higher education establishment in another Member State with EU citizenship rights under Articles 17 EC (20 TFEU) and 18 EC (21 TFEU).¹⁰³¹ The ECJ ruled that the two-fold obligations under the German Federal Law on the Encouragement of Education and Training Students discouraged EU citizens from leaving Germany and from exercising their freedom to move under Articles 17 EC (20 TFEU) and 18 EC (21 TFEU).¹⁰³² Germany was obliged to ensure equal treatment of its nationals who exercised EU citizenship rights by allowing them access to educational grants. Thus, EU citizenship rights have become another driving force for educational rights, particularly in ensuring non-discriminatory treatment in access to education and associated financial assistance.

In addition to EU citizenship, the Race Directive may become a similarly powerful instrument for advancing the rights of racial and ethnic minorities. The Race Directive applies to all persons in both public and private spheres, including public bodies,¹⁰³³

¹⁰³⁰ Similarly, in *Bucher* (n 1029), Ms Bucher, who studied ergotherapy in the Netherlands, did not satisfy these conditions.

¹⁰³¹ *Morgan and Bucher* (n 1029).

¹⁰³² *Morgan and Bucher* (n 1029) paras 30 and 51.

Germany argued that the first-stage studies condition was justified because it allowed students to show their willingness to pursue their studies successfully and without delay and to determine that they had made 'the right choice' in choosing a particular course of study. The ECJ disagreed. It established that the first-stage studies condition in itself did not guarantee successful completion of studies, and therefore, was disproportionate to the aim pursued (*Morgan and Bucher* (n 1029) para 36). Furthermore, the continuity between the courses contradicted the very aim of ensuring that the students' choice was right, because it could discourage students from abandoning their initial course of study at the risk of losing the possibility of obtaining a grant (para 38). This condition was particularly stringent in respect of courses which had no equivalent in Germany, as in the case of the applicants to these proceedings (para 39).

in relation to *inter alia* education, and “thereby follows the model of Regulation 1612/68...”¹⁰³⁴ Article 3(1)(g) does not specify the level of education to which it applies,¹⁰³⁵ nor is it limited to access to education. Bearing in mind the reference to the ICESCR in the Preamble of the Directive,¹⁰³⁶ arguably, education under the Directive should be available, accessible, acceptable and adaptable (discussed on page 92), particularly in light of Article 5, which permits positive State action.¹⁰³⁷

Despite the potentially broad reach of the Race Directive, the instrument does not define the concepts ‘racial or ethnic origin’, nor does it include discrimination based on language. However, it is argued that

[m]inority languages could be protected by this Directive indirectly. After all, demanding in an unreasonable or disproportionate way that minorities speak the official language of the state instead of the minority language, could lead to a form of indirect discrimination on the grounds of ethnic origin as prohibited under the Race Equality Directive.¹⁰³⁸

¹⁰³³ Directive 2000/43 (Race Directive) (n 41) Article 3(1)(g).

¹⁰³⁴ Bruno de Witte, ‘The Protection of linguistic diversity through provisions of the EU Charter other than Article 22’ in X Arzoz, *Respecting Linguistic diversity in the European Union* (John Benjamins B.V., Amsterdam 2008) 182.

¹⁰³⁵ Lilla Farkas, ‘Segregation of Roma Children in Education: Addressing Structural Discrimination through the Race Equality Directive’ (European Commission, Brussels 2007) 23.

¹⁰³⁶ Directive 2000/43 (Race Directive) (n 41) Preamble (Recital 3).

¹⁰³⁷ Directive 2000/43 (Race Directive) (n 41).

¹⁰³⁸ Anneleen Van Bossuyt, ‘Is there an effective European Legal Framework for the Protection of Minority Languages? The European Union and the Council of Europe screened’ (2007) 32(6) ELR 860-877.

Besides, although racial and ethnic origin does not automatically implicate minority protection standards, the general wording of the Directive can preclude discrimination against, for example, Roma.¹⁰³⁹ Farkas argues that under the Directive

... the lack of correct information in the general curriculum about Roma as a racial and ethnic group amounts to direct discrimination, given of course that information about the majority population is included in the curriculum and it is correct.¹⁰⁴⁰

Therefore, the Race Directive may become a tool for enhancing non-discriminatory access of racial and ethnic minorities to wider educational rights.

Another provision which could be useful to minorities wishing to challenge EU acts and Member States' implementing measures in education is the carefully phrased Article 14 CFR,¹⁰⁴¹ modelled on P1-2 ECHR and Article 13(2) ICESCR. It provides for the right to education and access to vocational and continuing training for all.¹⁰⁴² This right includes the *possibility* to receive free compulsory education¹⁰⁴³ and the freedom to establish private schools.¹⁰⁴⁴ In addition, similar to P1-2 ECHR, Article 14(3) CFR provides for respect for the religious and philosophical beliefs of parents. Significantly, Article 14(3) CFR also guarantees a parental right to ensure that the

¹⁰³⁹ de Witte 'The Constitutional Resources for an EU Minority Protection Policy' (n 18) 116; Dimitrina Petrova 'Racial Discrimination and the Rights of Minority Cultures' in S Fredman (ed) *Discrimination and Human Rights – The Case of Racism* (OUP, Oxford 2001) 45; Gabriel Toggenburg 'The Race Directive: A New Dimension in the Fight against Ethnic Discrimination in Europe' (2002) 1 *European Yearbook of Minority Issues* 231.

¹⁰⁴⁰ Farkas, 'Segregation of Roma Children in Education...' (n 1035) 33; see also, Patrick Thornberry and Dianne Gibbons, 'Education and Minority Rights: A Short Survey of International Standards' (1997) 4 *International Journal on Minority and Group Rights* 115-152, 141.

¹⁰⁴¹ For criticism see Tove Skutnabb-Kangas, 'The Right to Mother Tongue Medium Education – the Hot Potato in Human Rights Instruments' (2004) Paper presented at II Mercator International Symposium Europe 2003: A New Framework for all Languages?, 4.

¹⁰⁴² Charter of Fundamental Rights (n 9) Article 14(1).

¹⁰⁴³ Charter of Fundamental Rights (n 9) Article 14(2).

¹⁰⁴⁴ Charter of Fundamental Rights (n 9) Article 14(3).

education and teaching of their children is in line with their pedagogical convictions. It is argued that such wording can be interpreted more favourably and encompass linguistic requirements.¹⁰⁴⁵ However, Article 14(3) emphasises that the exercise of such right will be ‘in accordance with national law’, which may potentially limit the utility of this wording.¹⁰⁴⁶ Because the meaning and scope of CFR rights are the same as those of the corresponding provisions of the ECHR,¹⁰⁴⁷ educational rights of minorities as interpreted by the ECtHR will serve as a guide in the application of the Charter. It may, therefore, be useful to overview the general principles of EU law to ascertain the level of protection offered by both the CFR and the general principles of EU law.

As the analysis in Chapter I on pages 100-101 illustrated, the limited wording of P1-2 may not lead to the establishment of a general right to mother-tongue education, while the potential of Article 27 ICCPR has not yet been fully explored. Therefore, as in *Cyprus v Turkey*, the ECtHR is likely to continue finding exceptions on a case-by-case basis. Were a case come before the the ECtHR now, would the Court apply *Cyprus v Turkey* to allow access to a mother-tongue education of the French-speaking minority in Flanders? It is noteworthy that, similar to *Cyprus v Turkey*, the applicants in *Belgian Linguistics* claimed that the lack of access to mother-tongue education interfered with their family life under Article 8 ECHR. However, unlike in *Cyprus v Turkey*, the ECtHR ruled that parents who chose to send their children to be educated

¹⁰⁴⁵ Nic Shuibhne, *EC law and Minority Language Policy...*(n 951) 243.

¹⁰⁴⁶ Dick Mentink and Flora Goudappel, ‘The Education Provision in the Charter of Fundamental Rights of the European Union: A Bleak Perspective’ [2000] 4 *European Journal for Education Law and Policy* 145-148, 146.

¹⁰⁴⁷ Charter of Fundamental Rights (n 9) Articles 52(3) and 53. Admittedly, these provisions do not prevent the EU from offering more extensive protection.

in French language schools in Brussels, Wallonia or abroad could not claim a violation of their family life, because their separation from their children was not imposed by legislation, but was through the exercise of their free will. Moreover, the right to family life did not guarantee the right to be educated in the parents' language by the public authorities or with their financial support.¹⁰⁴⁸

Undoubtedly, *Cyprus v Turkey* was a context-specific judgment, more in the nature of an exception than a general rule. Therefore, it is not entirely clear which of these precedents would prevail, were a similar claim brought before the ECtHR now. Accordingly, the application of the general principles of EU law and the CFR may be only context specific and, therefore, does not entail a general State duty to guarantee education in a minority language.

Whether there is a State obligation to offer teaching of, or instruction in, a minority language in State schools is not entirely clear even under the FCNM. Where access to education without a linguistic component is concerned, Article 12(3) obliges States to promote "equal opportunities for access to education at all levels to persons belonging to national minorities." The clear wording of the provision allowed the ACFC "to be rather bold under Article 12 in relation to equal access to and equal standards of education and curricular reviews..."¹⁰⁴⁹ In contrast, Article 14 FCNM has very timid wording:¹⁰⁵⁰ paragraph 1 refers to the right to learn a minority language; paragraph 2

¹⁰⁴⁸ *Belgian Linguistics* (n 63) para 7.

¹⁰⁴⁹ Kristin Henrard, 'The Impact of International Non-discrimination Norms in combination with General Human Rights for the Protection of National Minorities: The European Convention on Human Rights' (2006) DH-MIN(2006)020.

¹⁰⁵⁰ Article 14 FCNM (n 3) stipulates:

1. The Parties undertake to recognise that every person belonging to a national minority has the right to learn his or her minority language.

obliges States to take measures for the teaching of, or instruction in, a minority language. Regrettably, Article 14(1) FCNM is passive in character and refers only to the right to learn a minority language,¹⁰⁵¹ as opposed to an active form, like the phraseology indicating a right to be taught in a minority language in Article 14(2).¹⁰⁵² However, where Article 14(1) is “straightforward in its wording”,¹⁰⁵³ Article 14(2) is qualified by a number of clauses, such as ‘in areas inhabited ... traditionally or in substantial numbers’, ‘if there is sufficient demand’, ‘the Parties shall endeavour to ensure’, ‘as far as possible’, ‘within the framework of their education systems’ and ‘adequate opportunities’. These hedges allow States a broad margin of discretion and require them only to make an effort where they can.¹⁰⁵⁴ Moreover, Article 14(3) FCNM requires that minorities learn the official language of a State because they may otherwise be segregated or lack equal opportunities in access to employment.¹⁰⁵⁵ Thus, the right to learn a minority language is subject to the conditions in paragraphs

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.

¹⁰⁵¹ The ACFC interpreted Article 14(1) broadly to extend this right to the majority who constitute a local minority in areas which are predominantly populated by a minority group, such as the Finnish-speaking population in the Swedish-speaking province of Åland: ACFC, ‘First Opinion on Finland’ (n 370) para 46.

¹⁰⁵² ACFC, ‘Commentary on Education...’ (n 265) 24.

¹⁰⁵³ Fernand de Varennes and Patrick Thornberry, ‘Article 14’ in M Weller (ed) *The Rights of Minorities in Europe* (Oxford University Press, Oxford 2005) 413.

¹⁰⁵⁴ The obligation stemming from Article 14(2) requires States to recognise this right in their legal systems, even though such recognition does not “automatically entail an economic responsibility for the provision of such education in all circumstances”: ACFC, ‘Commentary on Education...’ (n 265) 24.

¹⁰⁵⁵ Fernand de Varennes, ‘The Existing Rights of Minorities in International Law’ in M Kontra et al (eds) *Language: A Right and a Resource: Approaching Linguistic Human Rights* (CEU Press, Budapest 1999) 131.

2 and 3.¹⁰⁵⁶ The Explanatory Report does not elaborate on these paragraphs, “though it conceded that bilingual education may be a means of fulfilling Convention requirements.”¹⁰⁵⁷ Similarly, the Advisory Committee indicated that “it considered a truly bilingual education to be a most appropriate way to implement the obligations flowing from Article 14 of the Framework Convention.”¹⁰⁵⁸ Because the provision is already minimalist enough, States should abstain from imposing further conditions on the right to education in a minority language.¹⁰⁵⁹

At present, these provisions have no legal effects in EU law. As stated in the previous chapters, the FCNM is not yet an integral part of the general principles of EU law.

3.2. EU competence on languages

As with education, the EU has a limited competence as to languages. It deals mainly with 23 official languages.¹⁰⁶⁰ However, there are recent encouraging developments. In 2005, the Council decided that some EU documents will be translated into certain additional languages, which have official status in all or some part of a Member State. Although the Council approves the additional languages, it is the obligation of the

¹⁰⁵⁶ de Varennes and Thornberry, ‘Article 14’ (n 1053) 423.

¹⁰⁵⁷ Ad Hoc Committee for the Protection of National Minorities (CAHMIN) Explanatory Report on the Framework Convention for the Protection of National Minorities (1995) H(1995)010, Article 14, para 2(77); see also de Varennes and Thornberry, ‘Article 14’ (n 1053) 423.

¹⁰⁵⁸ Rainer Hofmann, ‘The Impact of International Norms on the Protection of National Minorities in Europe: The Added Value and Essential Role of the Framework Convention for the Protection of National Minorities’ (2006) DH-MIN(2006)018, 20.

¹⁰⁵⁹ de Varennes and Thornberry, ‘Article 14’ (n 1053) 423.

¹⁰⁶⁰ Article 55(1) TEU (ex-Article 53 TEU, as well as now repealed Article 314 EC) establishes the authenticity of EU official languages. Article 342 TFEU (ex-Article 290 EC) provides that the Council will determine the rules governing the languages of the institutions.

individual Member State to cover translation costs and to bear all the responsibility for this process. Some Member States have already put this arrangement into practice. Thus, Spain made an agreement with EU institutions and bodies to allow the use of Basque, Catalan and Galician before them.¹⁰⁶¹ Moreover, Article 55(2) TEU now specifies that, as determined by Member States, the founding EU Treaties may also be translated into any other languages which enjoy official status in their territory.¹⁰⁶² Despite these positive developments, regional and minority languages are not included in Regulation 1/58,¹⁰⁶³ and thus speakers of these languages are excluded from the full benefit of the guarantees which official languages have under primary EU law.¹⁰⁶⁴

Another provision that may be of indirect relevance to minorities is Article 167 TFEU, which explicitly articulates the EU's commitment to protect the cultural diversity of Europe. Authors who interpret this provision broadly claim that one of the elements of cultural diversity is language.¹⁰⁶⁵ Arguably, minority cultures, including

¹⁰⁶¹ Xabier Arzoz, 'Introduction: Respecting Linguistic diversity in the European Union' in X Arzoz (ed) *Respecting Linguistic diversity in the European Union* (John Benjamins B.V., Amsterdam 2008) 7.

¹⁰⁶² This provision can be regarded as a result of 20 year struggle of Catalonia to convince the EU to recognise the Catalan as an official EU language. For detailed discussion see, Antoni Milian Massana, 'Languages that are official in part of the territory of the Member States' in X Arzoz (ed) *Respecting Linguistic diversity in the European Union* (John Benjamins B.V., Amsterdam 2008) 200-209.

¹⁰⁶³ Regulation 1/58 as last amended by Council (EC) Regulation No 1791/2006, 20 November 2006.

¹⁰⁶⁴ Bruno de Witte, 'Language Law of the European Union: Protecting or Eroding Linguistic Diversity?' in R Craufurd Smith (ed) *Culture and European Law* (OUP, Oxford 2004) 205-241, 224.

¹⁰⁶⁵ A Loman et al, *Culture and Community Law: Before and After Maastricht* (Kluwer Law and Taxation Publishers, Deventer 1992) 194; Nic Shuibhne, *EC law and Minority Language Policy...* (n 951) 107-154. Similarly, in an annulment procedure under Article 230 TEC (now Article 263 TFEU) in Case C-42/97 *European Parliament v Council of the European Union* [1999] ECR I-869, the European Parliament argued that the legal basis of a Council decision on a multiannual programme to promote the linguistic diversity of the EC in the information society should have been not only Article 157(3) TEC (now Article 173(3) TFEU), but also Article 151 TEC (now Article 167 TFEU). The Parliament argued that the aim of the programme was the promotion of cultural and linguistic diversity, which triggered the application of both Article 151(4) and 151(2). The Council and the Commission disagreed. In its assessment the ECJ focused on the centre of gravity of the decision and found that the

sixty indigenous regional or minority languages,¹⁰⁶⁶ are a significant part of European cultural heritage. Regrettably, respect for cultural diversity couched in vague terms is insufficient to guarantee the right to education in a minority language.

Article 22 CFR, on the EU's commitment to respect linguistic and cultural diversity, may also be relevant to minorities wishing to challenge an EU act or a Member State's implementing measure. Could such challenge be based on the argument that linguistic and cultural diversity includes minority languages and cultures? Originally, proposed drafts of Article 22 CFR were intended to protect and respect the identity and the rights of minorities.¹⁰⁶⁷ The final version of the provision does not, however, include such references, and represents a compromise between Member States willing to promote a coherent minority protection scheme and those opposing such a development. Therefore, some degree of minority protection may be read into this Article. However, the extent of such protection will depend on the ECJ's reading of the wording of Article 22. For example, the term 'respect' is much weaker than 'fulfil' or 'promote';¹⁰⁶⁸ therefore, it is not clear what degree of positive duties may be imposed on the EU institutions and Member States. Arguably, 'respect' entails equal treatment of EU citizens regardless of their cultural identities; this may entail

Council was correct in regarding the cultural aspects of the measure as incidental. The decision was criticised for wavering "between pragmatism and a potentially restrictive understanding of culture": Niamh Nic Shuibhne, 'Minority Languages, Law and Politics: Tracing EC Action' in D Castiglione and C Longman (eds) *The Language Question in Europe and Diverse Societies: Political, Legal and Social Perspectives* (Hart Publishing, Oxford 2007) 136.

¹⁰⁶⁶ Commission, 'Regional and minority languages of the European Union' <http://ec.europa.eu/education/policies/lang/languages/langmin/regmin_en.html> accessed 12 April 2008.

¹⁰⁶⁷ Arzoz, 'Article 22 of the EU Charter' (n 16) 147-150; see also, Guido Schweltnus, 'Reasons for Constitutionalization: Non-discrimination, Minority Rights and Social Rights in the Convention on the EU Charter of Fundamental Rights' (2006) 13(8) *Journal of European Public Policy* 1265-1283, 1273-1274.

¹⁰⁶⁸ Ahmed, 'A Critical Appraisal of EU Governance...' (n 20) 267.

EU action that varies according to the linguistic needs in question.¹⁰⁶⁹ Furthermore, the phrase ‘linguistic diversity’ could be interpreted broadly to include not only the 23 EU official languages, but also any other languages which enjoy official status in all or some part of a Member State under Article 55(2) TEU; minority and regional languages in the EU irrespective of their legal status; and potentially even the languages of immigrant groups.¹⁰⁷⁰ Such broad interpretation, however, is unlikely without Treaty revisions, because the EU is bound to respect the national identities¹⁰⁷¹ and regional diversity¹⁰⁷² of its Member States, which may limit its action to official languages.¹⁰⁷³ Moreover, the EU’s action under Article 22 CFR is further limited by virtue of Article 51(2), which does not allow the Charter to extend, establish or modify existing EU competences (as noted in the Introduction to the thesis on page 7). As the EU does not have a competence in the field of minority education, a generous interpretation of Article 22 is unlikely without relevant Treaty revisions.

Where free movement regimes boosted the development of an EU right to education, the ECJ’s jurisprudence on minority languages suggests that, depending on the context, the requirements as to the knowledge of a minority language might be considered unfavourably by the ECJ, as it may raise further barriers within the

¹⁰⁶⁹ Miquel Strubell, ‘The Political Discourse on Multilingualism in the European Union’ in D Castiglione and C Longman (eds) *The Language Question in Europe and Diverse Societies: Political, Legal and Social Perspectives* (Hart Publishing, Oxford 2007) 158.

¹⁰⁷⁰ Arzoz, ‘Article 22 of the EU Charter’ (n 16) 153.

¹⁰⁷¹ Article 4(2) TEU (ex-Article 6(3) TEU).

¹⁰⁷² Article 167 TFEU (ex-Article 151(1) TEC).

¹⁰⁷³ Based on pragmatic considerations, certain differences of treatment may be allowed even in relation to official EU languages, as the decisions in *Kik* demonstrate: Case T-107/94 *Kik v Council and Commission* [1995] ECR II-1717 and Case T-120/99 *Kik v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* [2001] ECR II-2235, but cf Case T-185/05 *Re Commission Recruitment Notices: Italy (Spain and Latvia, intervening) v Commission of the European Communities* [2009] 1 CMLR 34.

internal market.¹⁰⁷⁴ Therefore, the ECJ and national courts may assess the effect of Member States' language regulations on the enjoyment of EU rights as, for instance, a language criterion for employment may be indirectly discriminatory against EU citizens. The ECJ asserted this jurisdiction in *Gröener*.¹⁰⁷⁵ In order to be employed on a permanent basis in Ireland, a Dutch national had to demonstrate proficiency in the Irish language, despite the fact that she was a teacher of painting. The ECJ expressed a certain sensitivity towards the national identity of Ireland and found that it was not unreasonable to expect a teacher to speak the first official language of the State.¹⁰⁷⁶

Furthermore, depending on the context, internal market freedoms could have a detrimental effect on minority languages where the ECJ opens up linguistic facilities granted by Member States to protect minorities to all EU citizens. Thus, in *Mutsch*,¹⁰⁷⁷ a Luxembourg national residing in a German-speaking commune of Belgium claimed the right to use German in criminal proceedings. The right to use German before the authorities was a linguistic privilege granted to Belgian nationals residing in the German-speaking communes and aimed to protect the rights of minorities.¹⁰⁷⁸ Advocate General Lenz argued that the fact that the advantages are designed to promote the rights of minorities does not mean that they may not apply to the nationals of other Member States, because the principle of equal treatment applies

¹⁰⁷⁴ de Witte, 'Surviving in Babel?...' (n 979) 295; R Creech, *Law and Language in the European Union: The Paradox of a Babel "United in Diversity"* (Europa Law Publishing, Groningen 2005) 140.

¹⁰⁷⁵ *Gröener* (n 420).

¹⁰⁷⁶ *Gröener* (n 420) para 19 and 20.

¹⁰⁷⁷ *Ministere Public v Robert Heinrich Maria Mutsch* (n 579).

¹⁰⁷⁸ Gabriel Toggenburg, 'Minority Protection in a Supranational Context: Limits and Opportunities' in G Toggenburg (ed) *Minority protection and the enlarged European Union: the way forward* (OSI/LGI, Budapest 2004) 28.

also “in areas which are not primarily governed by Community law.”¹⁰⁷⁹ The ECJ did not base its reasoning on minority languages *per se*; instead, it relied on the free movement of workers. In the ECJ’s view, it was essential for migrant workers’ integration into the host State to use his language in the criminal proceedings.¹⁰⁸⁰

Similar to *Mutsch*, the case of *Bickel and Franz*¹⁰⁸¹ concerned the choice of language in criminal proceedings in Bolzano, Italy. The applicants in this case wanted to use a minority language that was available to German-speaking nationals of Italy. Unlike *Mutsch*, Bickel and Franz were not migrant workers in the host State, but rather tourists. The ECJ tied their rights to EU citizenship and ruled that, although the protection of minorities is a legitimate aim of the State, this aim would not be “undermined if the rules in issue were extended to cover German-speaking nationals of other Member States exercising their right to freedom of movement.”¹⁰⁸² Thus, the ECJ made a “clear connection between two rapidly evolving sets of rights within EU law: Union citizenship on the one hand and language rights (or, respectively, minority rights) on the other.”¹⁰⁸³ Thus, from *Mutsch* and *Bickel/Franz* it can be concluded that

national norms providing residents of certain regions with special language rights have to be extended to all EU citizens who find themselves ‘in the same circumstances,’ [reference omitted] i.e., whose ‘language is the same.’¹⁰⁸⁴

¹⁰⁷⁹ *Ministere Public v Robert Heinrich Maria Mutsch* (n 579); Opinion of the Advocate General Lenz in Case 137/84 *Ministere Public v Robert Heinrich Maria Mutsch*, 2685 and 2686.

¹⁰⁸⁰ Shuibhne, *EC law and Minority Language Policy...* (n 951) 79.

¹⁰⁸¹ *Bickel and Franz* (n 34).

¹⁰⁸² *Bickel and Franz* (n 34) para 29.

¹⁰⁸³ Peter Hilpold, ‘Union Citizenship and Language Rights’ in X Arzoz, *Respecting Linguistic diversity in the European Union* (John Benjamins B.V., Amsterdam 2008) 107.

¹⁰⁸⁴ Toggenburg, ‘Minority Protection in a Supranational Context...’ (n 1078) 29.

Accordingly, in its jurisprudence involving minority languages, the ECJ tended to extend the privileges available to minorities to other EU citizens. This jurisprudence has significant practical implications. On the one hand, the ECJ's case law may allow some 'new' minorities to claim special language rights in other Member States, for example, by Slovene citizens in Austria and Italy and by Hungarian citizens in Romania and Slovakia. Moreover, such claims may not necessarily be limited to criminal proceedings, but may also apply in other contexts, such as education.

On the other hand, while this case law is beneficial to 'new' minorities, it reveals a gap in EU law, which does not currently have in place any guarantees for mother-tongue education of 'traditional' minorities. This lack of action in the field of minority education has been strongly criticised by commentators, particularly because the UN and CoE instruments and jurisprudence seem to form "an emerging norm of international language law, particularly with regards to the obligation of states to take positive steps to promote minority languages."¹⁰⁸⁵ Furthermore, it is argued that

if the EU as a whole continues to avoid making difficult macro-level decisions, and if individual [M]ember [S]tates continue to be reluctant to pass legislation on minority languages, this may well result in damage to currently endangered languages in the EU.¹⁰⁸⁶

However, for the EU to offer protection to minority languages, it needs to acquire a relevant competence. Furthermore, EU law has limited impact on internal situations, as discussed next.

¹⁰⁸⁵ Creech, *Law and Language in the European Union* (n 1074) 143.

¹⁰⁸⁶ Juaristi, Reagan and Tonkin, 'Language Diversity in the European Union...' (n 506) 68; see also, Nancy Hornberger, 'Language Policy, Language Education, Language Rights: Indigenous, Immigrant and International Perspective' (1998) 27 *Language in Society* 439-458, 441.

3.3. The impact of EU law on internal situations

Although the ECJ criticised restrictive Belgian laws on access to education and virtually reversed Belgian educational policy in a number of cases,¹⁰⁸⁷ this was done largely to further the free movement of persons and had no impact on the rights of minorities within the country. *Government of the French Community and Walloon Government v Flemish Government*¹⁰⁸⁸ is informative about what impact EU law could have on Belgium's education system. Although this case does not concern education specifically, it suggests by analogy that Belgium is not immune from EU rules. It is noteworthy that, as with education, the communes in Belgium have competence to legislate in the area of care insurance. Therefore, some guidance can be derived from the judgment as to the interrelation of EU law and the communes' policies in Belgium.

In this case, the French Community and the Walloon Government questioned the compatibility of a care insurance scheme established by the Flemish Community of Belgium, with EC rules on citizenship, free movement and establishment. The insurance scheme applied to persons residing in the Flemish communes and to persons pursuing an activity in that territory and residing in another Member State. However, it explicitly excluded persons working in Flanders, but residing in the French communes of Belgium.

¹⁰⁸⁷ *Gravier v City of Liège* (n 940); Case 42/87 *Commission v Belgium* [1988] ECR 5445; *Blaizot v University of Liège* (n 970); *Barra v Belgium* (n 971); *Forcheri v Belgium* (n 1010); Case C-47/93 *Commission v Belgium* [1988] ECR 5445; Case 235/87 *Matteucci v Communauté Française de Belgique* [1988] ECR 5589. For discussion see, O'Leary, *The Evolving Concept of Community Citizenship...* (n 985) 164.

¹⁰⁸⁸ Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] ECR I-1683.

The ECJ firstly established that EC rules did not apply to persons who reside within a national territory and have not exercised free movement rights, even if they were excluded from the scheme. EU citizenship did not remedy this situation, because it was not “intended to extend the material scope of the Treaty to internal situations which have no link with Community law.”¹⁰⁸⁹ However, because the care insurance scheme depended on residence in a limited part of Belgium,¹⁰⁹⁰ it might have discouraged migrant workers from moving to other parts of Belgium as that would cause them to lose “the opportunity of eligibility for the benefits which they might otherwise have claimed.”¹⁰⁹¹ Consequently, domestic legislation that may result in a loss of eligibility or a limitation on the place of residence entailed an obstacle to the exercise of the rights under Articles 39 EC (45 TFEU) and 43 EC (49 TFEU). Moreover, Belgium could not plead its constitutional organisation and practices in its domestic legal order to justify a failure to observe EC rules.¹⁰⁹²

By analogy, the Flemish communes’ legislative acts on education could infringe upon the rights of French-speakers residing in Wallonia, if they hinder the exercise of free movement regimes in the EU. However, it is unlikely that EU rules would fundamentally affect a rigid application of the territoriality principle in Belgium and ensure access to mother-tongue education of French-speakers in Flanders. At best, under Article 7 TEU, the EU could sanction Belgium for non-implementation of

¹⁰⁸⁹ *Government of the French Community and Walloon Government* (n 1088) para 39.

¹⁰⁹⁰ *Government of the French Community and Walloon Government* (n 1088) para 47.

¹⁰⁹¹ *Government of the French Community and Walloon Government* (n 1088) para 48.

¹⁰⁹² *Government of the French Community and Walloon Government* (n 1088) para 58.

Belgian Linguistics for over forty years. Regrettably, the political sensitivity of both the language question and the mechanism of Article 7 TEU are likely to prevent such a development.

4. Conclusion

The case study of Belgium revealed how political controversy between the French- and the Dutch-speaking populations of Belgium impacts on the choice of language in education. Based on this example, the chapter aimed to illustrate how the lack of mother-tongue education may lead to the assimilation of a minority group.

Despite limited competences in education and minority protection, EU rules on access to education have certain strengths which could greatly enhance the educational rights of minorities. Whilst international law mainly emphasises non-discrimination in access to education, the ECJ has also placed a strong emphasis on physical and economic accessibility, although *Förster* is an unfortunate setback. In addition, the ECJ established strong guarantees on non-discriminatory treatment based on nationality. Thus, in access to education, both direct and indirect discrimination on the ground of nationality is prohibited. Furthermore, both host and home Member States must ensure equal treatment of nationals who choose to exercise their EU citizenship rights. Arguably, equally high standards should apply in relation to non-discrimination on the grounds of race and ethnic origin under the Race Directive. Moreover, EU law has in place effective means for individuals to claim EU

educational rights in their national courts.¹⁰⁹³ Furthermore, despite a low implementation rate in some Member States, Directive 77/486 contains an explicit provision on mother-tongue education of migrant workers' children.¹⁰⁹⁴ In addition, a case-by-case finding of the right to mother-tongue education can also be argued based on the general principles of EU law. One way in which the EU could advance the educational rights of minorities in Belgium is through insisting on the State's implementation of *Belgian Linguistics* based on Articles 2 and 7 TEU.

Coming back to the Belgian dilemma, it appears that EU law may have only a limited impact on the internal organisation of education in Member States. For example, it appears that in Belgium, with official languages which are also languages in the neighbouring countries (French, German and Dutch), there is a possibility for minorities to move to another country and claim EU educational rights. However, they are not entitled to this treatment while remaining in their home State (unless they have already exercised their EU citizenship rights). Unlike in Belgium, not all minority languages are present in other Member States. As a result, not all groups can benefit from access to education through free movement regimes.

Because of this cross-border context, it appears that the effects of the ECJ's case law on access to education are felt mainly by 'new' minorities, i.e., migrants from other Member States. EU law does not offer any protection to traditional minorities in Member States, unless they choose to exercise their EU citizenship rights. Even then,

¹⁰⁹³ Julian Lonbay, 'Towards Educational Rights' (n 989) 227.

¹⁰⁹⁴ In contrast, children of 'old' minorities in Member States or asylum seekers will still need positive State action guaranteeing access to mother-tongue education: Lidija Basta Fleiner, Report on The Principle of Equality and Non-discrimination under the Framework Convention for the Protection of National Minorities: Also a Tool Fostering the Integration of Migrants' Children in the Field of Education? (2009) CFL-UDT(2009)002, para 6.

the right of access would be limited to existing educational establishments and would not guarantee a choice of language of instruction. Therefore, although the EP argued that “Article 149 TEC in improving access to education could contribute, through furthering the integration of minorities into society, as provided for in Article 12 and 14 of the FCNM”,¹⁰⁹⁵ EU law is unlikely to offer protection equivalent to the FCNM without explicitly endorsing the educational rights of minorities. To do so, the EU needs a stronger competence in education and minority rights; only then could it prevent States from assimilating their minorities. A broad EU definition of ‘minority’, which includes ‘regional’ minorities, could also have beneficial impact on the protection of such groups. Were ‘regional’ minorities to be entitled to the same protection as ‘traditional’ minorities, they could demand that their home State stops assimilating them into the dominant language.

¹⁰⁹⁵ European Parliament, Resolution 2005/2008(INI) (n 584) para 49 (g).

CHAPTER V. BRIDGING THE GAP: TERRITORIAL MINORITIES AND THE EU

1. Introduction

As the EU supranational institutions strengthen and expand their competences, EU Member States are experiencing demands for devolution from their constituent regions.¹⁰⁹⁶ This process of simultaneous upward and downward redistribution of state functions from a centralised State¹⁰⁹⁷ has complex reasons. The first reason stems from a growing list of EU competences. To ensure an ever-closer Union, EU Member States tend to relinquish some of their powers in favour of the EU. Concurrently, the process of decentralisation in Member States has attempted both to ensure efficiency of the State's performance as a whole,¹⁰⁹⁸ and to address demands for greater control by the regional governments, in areas such as culture and education. When the competences of the EU and regional governments coincide, one of the concerns of regional governments, such as the German Länder, was that the EU and the home State's competences would prevail over theirs.¹⁰⁹⁹ In the view of regions, to reduce the chances of the EU's encroaching upon their competences, direct representation of regions within the sphere of EU decision-making should be allowed.

¹⁰⁹⁶ Kelly, 'Political Downsizing...' (n 474) 237.

¹⁰⁹⁷ Kelly, 'Political Downsizing...' (n 474) 237; see also Roht-Arriaza, 'The Committee on the Regions...' (n 469) 413-4; Keating, 'Regions and the Convention on the Future of Europe' (n 470) 193.

¹⁰⁹⁸ Francesco Palermo and Alessandro Santini, 'From NUTS to Constitutional Regions: Addressing EU Regions in the EU Framework' in R Toniatti et al (eds) *An Ever More Complex Union: The Regional Variable as a Missing Link in the EU Constitution?* (Nomos, Baden-Baden 2004) 6.

¹⁰⁹⁹ Roht-Arriaza, 'The Committee on the Regions...' (n 469) 423; Keating, 'Regions and the Convention on the Future of Europe' (n 470) 192.

Thus, on the insistence of the German Länder, a regional minister may represent his State in the Council, “where matters of regional competence [are] at stake.”¹¹⁰⁰ Such representation takes different forms and is at the discretion of a Member State. Overall, the stronger representation of regional governments moves the EU towards ‘multilevel governance’, where the “regions of Europe are increasingly finding their voices on the supranational plane.”¹¹⁰¹

Finding a voice at the supranational level is particularly relevant to territorial minorities (the term is defined on pages 151-155). The participation of regions, populated by territorial minorities in EU affairs raises their profiles as distinct nations but at the same time reduces the need for them to form a State of their own; “[s]tateless national movements have thus embraced Europe not as something that threatens their sovereignty but as something that enlarges their scope to become significant actors in a multi-level system.”¹¹⁰² The erosion of the traditional concept of ‘State’ in the EU significantly contributes to this process. Thus, because Member States have limited their sovereignty and divide and share many competences with the EU, some territorial minorities, such as Catalans and Basques, have embraced this opportunity as the means of increasing their role as a third level of government without seceding from a home State.¹¹⁰³

¹¹⁰⁰ Keating, ‘Regions and the Convention on the Future of Europe’ (n 470) 192; The Lisbon Treaty repealed Article 203 TEC and replaced it in substance by Article 16 (2) and (9) TEU.

¹¹⁰¹ Kelly, ‘Political Downsizing...’ (n 474) 238; see also Susana Borrás-Alomar et al, ‘Towards a “Europe of the Regions”?: Visions and Reality from a Critical Perspective’ (1994) 4(2) *Regional Politics and Policy* 1-27, 1.

¹¹⁰² Keating, ‘Federalism and the Balance of Power in European States’ (n 472) 15-6.

¹¹⁰³ Keating, ‘Federalism and the Balance of Power in European States’ (n 472) 15-6.

To gain access to the EU level by means of internal self-government, minority groups have to achieve greater autonomy at the domestic level to ensure “partial independence from the influence of the national or central government.”¹¹⁰⁴ The implications of such internal self-governance are two-fold. First, it strengthens the distinct cultural identity of a minority group, which may justify the need for autonomy arrangements to preserve the group’s language, culture and/or religion.¹¹⁰⁵ Where a certain territory is compactly inhabited by a minority group, a State may of course grant it territorial autonomy, i.e., a special status, aimed at serving the interests of this group.¹¹⁰⁶ The scope of such autonomy arrangements may range from basic administrative duties performed by local authorities to full autonomy, where a part of a State’s territory enjoys a special status with independent legislative, executive and judicial functions and competences over a variety of issues, including education and culture.¹¹⁰⁷ Hence, under autonomy arrangements, a territorial minority may acquire the right to make laws which are of particular concern to a group, based on their cultural or territorial association.¹¹⁰⁸ Second, a territorial minority’s acquisition of competences over various social and economic issues in domestic affairs may strengthen its claims to participate in EU decision-making, particularly in the areas

¹¹⁰⁴ Hans-Joachim Heintze, ‘Implementation of Minority Rights through the Devolution of Powers – the Concept of Autonomy Reconsidered’ (2002) 9 *International Journal on Minority and Group Rights* 325-343, 338.

¹¹⁰⁵ Hans-Joachim Heintze, ‘On the Legal Understanding of Autonomy’ in M Suksi (ed) *Autonomy: Applications and Implications* (Kluwer Law International, The Hague 1998) 9.

¹¹⁰⁶ Georg Brunner and Herbert Küpper, ‘European Options of Autonomy: A Typology of Autonomy Models of Minority self-governance’ in K Gál (ed) *Minority Governance in Europe* (LGI Publications, Budapest 2002); Kristin Henrard, ‘The Interrelationship between Individual Human Rights, Minority Rights and the Right to Self-Determination and Its Importance for the Adequate Protection of Linguistic Minorities’ (2001) 1(1) *The Global Review of Ethnopolitics* 41-61, 48.

¹¹⁰⁷ Hurst Hannum and Richard Lillich, ‘The Concept of Autonomy in International law’ (1980) 74 *American Journal of International Law* 858-889, 887.

¹¹⁰⁸ Heintze, ‘On the Legal Understanding of Autonomy’ (n 1105) 7.

which also fall within the sphere of EU competences. This opportunity to voice their concerns at the supranational level may in turn mobilise the efforts of territorial minorities to gain greater recognition of their identity at domestic level; this means giving them voice through participation and influence,¹¹⁰⁹ rather than their exit through independence and separation.

However, as discussed in Chapter I, there is limited support for the collective rights of minorities and their right to autonomy in international law. This is apparent from the wording of Article 27 ICCPR referring to '*persons* belonging to minorities'. Regrettably, Article 2 TEU follows the same formulation, which suggests that the EU too prefers an individualistic approach to minority protection.¹¹¹⁰ However, arguably, States' fears that the right to autonomy may lead to secession are fed by certain misconceptions about the collective rights of minorities. This chapter begins by assessing the collective rights of minorities (2.1). It then overviews the EU's approach to collective rights (2.2). The assessment of collective rights in the EU continues with Scotland's experience (2.3). Then relevant provisions of EU law are analysed to ascertain whether there are any rules in place closing the gap between the EU and territorial minorities in Member States (3).

¹¹⁰⁹ Klaus-Jürgen Nagel, 'Transcending the National / asserting the National: How Stateless Nations like Scotland, Wales and Catalonia react to European integration' (2004) 50(1) Australian Journal of Politics and history 58-75.

¹¹¹⁰ It is noteworthy that there were significant (non-binding) initiatives to accord group rights to minorities in EU Member States. For example, as early as in 1988, Article 3 of the draft EC Charter of Rights for Ethnic groups proposed to secure the protection of *ethnic groups*. Furthermore, Article 5 of this Charter proposed to accord *locus standi* to 100 members of an ethnic group before "supreme national courts and, in the last instance, to the European Court of Justice": (Nowak, 'The Evolution of Minority Rights in International Law, Comments' (n 440) 113. Regrettably, these proposals did not receive sufficient political support from Member States.

2. Collective Rights

2.1. Why do minorities need collective rights?

This sub-section assesses the significance of collective rights for effective protection of minority rights. The wording of Article 27 ICCPR suggests that minorities are entitled only to individual rights, which they enjoy 'in community with the other members of their groups'. Such exercise of rights is not equivalent, however, to enjoying collective rights. This is so because of State concern that the acquisition of collective rights may lead to claims of international legal personality by minority groups, and subsequently to self-determination and secession.¹¹¹¹

These political considerations are strongly present in Capotorti's four arguments opposing collective rights of minorities and insisting that minority rights should remain individual rights enjoyed in community with others. In his first argument, Capotorti links Articles 2(1) and 26 ICCPR on non-discrimination to Article 27 ICCPR on preservation of collective values of minorities. These two aspects of protection are equally important, and the emphasis on collective rights of minorities may weaken the significance of individual rights under the principle of non-discrimination. Secondly, the choice of belonging to a minority group should remain with an individual. Perceiving collective rights as the main goal of minority protection may lead to oppression by members of a group towards individuals who choose not to be treated as a minority. Thirdly, the recognition of collective rights of minorities may lead to claims of a right to self-determination. From a political point of view this may

¹¹¹¹ Van Den Bosch and Van Genugten, 'International Legal Protection...' (n 410) 217.

result in States' opposition, because "they fear that minorities could pretend to exercise that right as soon as they are considered the holders of collective rights."¹¹¹²

Fourthly, the recognition of collective rights may lead to an assumption that "each minority group is invested with authority to represent the interests of the corresponding community within the State".¹¹¹³ This may clash with a State's interests as a representative of the interests of the entire population. Therefore, treatment of minorities as a political or legal entity may lead to hostility of States towards these groups.

It appears that Capotorti discusses an exclusive emphasis on collective rights, such as in the former communist countries, where individuals' rights were generally subordinated to the "interests of the collectivity."¹¹¹⁴ Moreover, a restrictive approach to collective rights is usually advocated as the result of misconceptions surrounding the concepts of 'group' and 'individual' rights. Rather, it is a combination of collective and individual rights which can ensure meaningful protection of minorities. On their own, both the collective and the individual conceptions of rights are flawed.

Thus, the individual rights approach is reactive by nature, i.e., an individual complaint is addressed *after* a violation has occurred; it may not prevent discriminatory acts from happening again.¹¹¹⁵ Moreover, the individual rights approach may not be

¹¹¹² Francesco Capotorti, 'Are minorities entitled to collective international rights?' in Y Dinstein and M Tabory (eds) *The protection of minorities and Human Rights* (Kluwer Academic Publishers, The Hague 1992) 510.

¹¹¹³ Capotorti, 'Are minorities entitled to collective international rights?' (n 1112) 510.

¹¹¹⁴ Van Den Bosch and Van Genugten, 'International Legal Protection...' (n 410) 233.

¹¹¹⁵ Valentine, 'Toward a Definition of National Minority' (n 384) 445.

sufficient to protect a group from forced assimilation.¹¹¹⁶ For example, an educational policy formulated on the basis of an individual's needs "in a climate of formal equality fails to consider the importance of cultural identity in formulating and developing personality."¹¹¹⁷ Moreover, the interests of the majority are engrained in the fabrics of the society and state policies. Indeed, an individualist approach promotes the incorrect assumption that blindness to group difference results in homogeneous societies; in its turn, this approach may mask serious inequalities.¹¹¹⁸

Second, there is confusion between the collective and corporate conceptions of the notion of 'group rights'. Thus, in the collective conception, a group right is a "right held jointly by those who make up the group."¹¹¹⁹ This right cannot be equated to the sum of rights held by separate individuals who form a group;¹¹²⁰ rather such a group right is held jointly by the individuals belonging to a group. For example, fishing rights granted to an indigenous group are held individually by all members of the group, as well as by the group as a whole.¹¹²¹ Conversely, the 'corporate' conception of group rights "ascribes moral standing to the group as such."¹¹²² Accordingly, the right-bearer is a group and not the individuals belonging to the group.¹¹²³ Where minority rights are concerned, the corporate approach to group rights is undesirable

¹¹¹⁶ Preece, 'National minority rights vs. state sovereignty in ...' (n 479) 352.

¹¹¹⁷ O'Nions, *Minority Rights Protection in International Law...* (n 491) 266.

¹¹¹⁸ O'Nions, *Minority Rights Protection in International Law...* (n 491) 266.

¹¹¹⁹ Peter Jones, 'Human Rights, Group Rights, and Peoples' Rights' (1999) 21 *Human Rights Quarterly* 80-107, 85.

¹¹²⁰ Jones, 'Human Rights, Group Rights, and Peoples' Rights' (n 1119) 82.

¹¹²¹ Robert Weber, 'Individual Rights and Group Rights in the European Community's approach to minority languages' (2007) 17 *Duke Journal of Comparative and International Law* 361-413, 388.

¹¹²² Jones, 'Human Rights, Group Rights, and Peoples' Rights' (n 1119) 86.

¹¹²³ Jones, 'Human Rights, Group Rights, and Peoples' Rights' (n 1119) 86.

because it does not leave room for the personal autonomy of individual members of a group.

Conversely, the complementarity between collective and individual rights may prove beneficial for the protection of minority rights.¹¹²⁴ This is so because, even though individual rights are essential for majorities and minorities alike, the collective exercise of rights is central to the protection of a minority; some of the rights would be meaningless without other members of an ethnic, religious or linguistic minority.¹¹²⁵ Indeed, individual rights

... cannot take into account the basic truth that minority identity can only be lived and maintained in a group. There is no point in talking Frisian or dressing in Sorb costume while sitting alone in one's room. This is unsatisfactory both for the individual and for the Frisian or Sorb community respectively. Only when Frisian is spoken or Sorb costume is worn in the community can it serve as an expression of the identity of a minority group.¹¹²⁶

Thus, the collective element, supplementing individual human rights and minority rights, is essential for meaningful enjoyment of minority rights, because, for example, “cultural traditions, as well as educational and religious institutions are – and can be – maintained by a community only on a collective basis.”¹¹²⁷

Regrettably, international instruments deny collective rights to minorities, because States fear that collective exercise of, for example, the right to autonomy may lead to

¹¹²⁴ Weber, ‘Individual Rights and Group Rights...’ (n 1121) 386; see also Fernand de Varennes, ‘The Linguistic Rights of Minorities in Europe’ in S Trifunovska and F de Varennes (eds) *Minority Rights in Europe: European Minorities and Languages* (TMC Asser Press, The Hague 2001) 29.

¹¹²⁵ Douglas Sanders, ‘Collective Rights’ (1991) 13(3) *Human Rights Quarterly* 368-386, 374.

¹¹²⁶ Brunner and Küpper, ‘European Options of Autonomy...’ (n 1106) 18-19.

¹¹²⁷ Jelena Pejic, ‘Minority Rights in International Law’ (1997) 19 *Human Rights Quarterly* 666-685.

secession. This view is not supported by evidence from State practice. To the contrary, studies show that autonomy arrangements and federal systems have served as effective conflict resolution mechanisms in a number of cases.¹¹²⁸ Nevertheless, attempts to read the concept of ‘people’ inclusively, to incorporate ‘minority’ in order to advance their collective rights through an entitlement to self-determination, remains controversial.¹¹²⁹ However, as the example of Catalonia (discussed in Chapter I on pages 151-154) demonstrates, because autonomy allows a minority group to self-determine within a State, i.e., to govern matters of particular concern to a group, it can render secession superfluous.¹¹³⁰ Moreover, internal self-determination through autonomy may also prove an effective mechanism for resolving “deep-seeded disputes among ethnic, national and religious group.”¹¹³¹

Accordingly, even though the notion of collective rights is controversial, adequate protection of a group’s identity, which includes distinct ethnic, cultural, religious or linguistic characteristics differing from those of the rest of the population, can be

¹¹²⁸ Margaret Moore, ‘Sub-State Nationalism and International Law’ (2004) 25 *Michigan Journal of International Law* 1319-1340, 1337; John McGarry, ‘Federal Political Systems and the Accommodation of National Minorities’ in A Griffiths (ed) *The Handbook of Federal Countries* (McGill-Queen’s University Press, Montreal 2002) 416-447; T Gurr, *Peoples Versus States: Minorities at Risk in the New Century* (U.S. Institute of Peace Press, Washington 2000).

¹¹²⁹ R Higgins, *Problems and Process* (Clarendon, Oxford 1994) 124; Patrick Thornberry, ‘Self-determination, Minorities and Human Rights: A Review of International Instruments’ (1989) 38 *International and Comparative Law Quarterly* 867-889, 887; Alain Pellet, ‘The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples’ (1992) 3 *EJIL* 178, 179; Geoff Gilbert, ‘Autonomy and Minority Groups: A Right in International Law?’ (2002) 35 *Cornell International Law Journal* 307-353, 336; Hurst Hannum, ‘Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?’ (1993) 3 *Transnational Law and Contemporary Problems* 57-69, 66.

¹¹³⁰ Heintze, ‘On the Legal Understanding of Autonomy’ (n 1105) 29.

¹¹³¹ Steven Roach, ‘Minority Rights and an Emergent International Right to Autonomy: A Historical and Normative Assessment’ (2004) 11 *International Journal on Minority and Group Rights* 411-432, 430; see also, Gaetano Pentassuglia, ‘State Sovereignty, Minorities and Self-Determination: A Comprehensive Legal View’ (2002) 9 *International Journal on Minority and Group Rights* 303-324, 319-324.

ideally achieved through the combination of individual human rights, special minority rights and the right to (internal) self-determination.¹¹³²

2.2. The EU approach to collective rights

As discussed in Chapter I on page 104, in international law discretion to grant an autonomy regime firmly remains with individual States. The same approach can be observed in EU law. The EU does not object if Member States decentralise and grant a special status to certain territories within national borders. Equally, nor does the EU actively encourage the devolution of State powers to territorial minorities. As EU law stands, there is no State obligation to grant autonomy aimed at the accommodation of minority cultures and identities.

Initially, the EC founding Treaties largely left the question of sub-state authorities within the Member States' discretion.¹¹³³ Later, during the accession negotiations with new Member States, such as the UK and Finland, the EC showed some deference to island autonomies. For example, the EC granted special status to Åland Islands;¹¹³⁴ furthermore, it excluded the application of the EC Treaty to the Faeroe Islands¹¹³⁵ and

¹¹³² Henrard, *Devising an Adequate System of Minority Protection...* (n 449) 321.

¹¹³³ Sören Silverström, 'The Competence of Autonomous Entities in the International Arena – With Special Reference to the Åland Islands in the European Union' (2008) 15 *International Journal on Minority and Group Rights* 259-271, 266.

¹¹³⁴ Article 355(4) TFEU (ex-Article 299(5) EC). This special status is based on Protocol No 2 annexed to the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded [1994] OJ C241.

¹¹³⁵ Article 355(5)(a) TFEU (ex-Article 299(6)(a) TEC).

allowed Greenland to leave the EC after it acquired a status of autonomy.¹¹³⁶ Special status was also granted to the Channel Islands and the Isle of Man (although they were not legally part of the UK).¹¹³⁷ The EC consented to these special arrangements based on Member States' initiative. Significantly, special status does not imply a privileged position of these autonomies in EU affairs, but refers mainly to derogations from application of the Treaties. By way of example, Åland is exempted from EU rules on the harmonisation of Member States' laws on indirect taxation, aimed at "maintaining the viability of the Islands' economy."¹¹³⁸ On the other hand, although Åland requested a permanent derogation on the exercise of the right to vote and stand for elections in municipal elections, on Finland's insistence such an exemption was denied.¹¹³⁹ Accordingly, the EU leaves the question of autonomies to its Member States. Based on the initiative of a Member State, special derogations may be accorded to an autonomous island, although the same is not true of component units of federal states,¹¹⁴⁰ such as Flanders in Belgium or Catalonia in Spain.

Arguably, there should be closer EU involvement with autonomies in its Member States, as the lack of a direct link between the EU and territorial minorities may negatively impact on the effectiveness of EU law. This is so because, as EU law

¹¹³⁶ Frederik Harhoff, 'Greenland's Withdrawal from the European Communities' (1983) 20 *Common Market Law Review* 13-33; see also Silverström, 'The Competence of Autonomous Entities...' (n 1133) 265.

¹¹³⁷ Article 355(5)(c) TFEU (ex-Article 299(6)(c) EC).

¹¹³⁸ Claudio Scarpulla, 'The Constitutional Framework for the Autonomy of Åland: A Survey of the Status of an Autonomous Region in the throes of European Integration' (2002) 14 *Meddelanden från Ålands högskola* 87.

¹¹³⁹ Niklas Fagerlund, 'Autonomous European Island Regions Enjoying a Special Relationship with the European Union' in L Lyck (ed) *Constitutional and Economic Space of the Small Nordic Jurisdictions* (NordREFO, Copenhagen 1996) 90-112, 108.

¹¹⁴⁰ Silverström, 'The Competence of Autonomous Entities...' (n 1133) 266.

stands, while authorities of autonomous regions remain responsible for implementation of EU legislation, such as directives,¹¹⁴¹ their input into law-making may be limited. In addition, supremacy and the direct effect of EU law¹¹⁴² require every public authority to ensure the application and enforcement of directly effective EU law. Although a lack of implementation may result in EU enforcement measures towards Member States only,¹¹⁴³ an inclusive approach to autonomous regions may be more conducive for ensuring the effectiveness of EU law.

2.3. Collective rights in the EU: the example of Scotland

Scotland is one of the four constituent parts of the United Kingdom, in addition to England, Wales and Northern Ireland. The means of group accommodation in the UK constitutional legal order is devolution, which means the “delegation of governmental powers from the centre without the relinquishment of sovereignty.”¹¹⁴⁴ Thus, devolution is a “weaker form of divided government.”¹¹⁴⁵ As in Spain (briefly discussed in Chapter I on pages 151-154), there are different degrees of autonomous

¹¹⁴¹ Article 288 TFEU (ex-Article 249 EC).

¹¹⁴² Case 26/62 *Van Gend en Loos* [1963] ECR 1; Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585. See also Declaration No 17 concerning primacy and Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260) [2010] OJ C 83/344.

¹¹⁴³ C-69/81 *Commission v Belgium* [1982] ECR 153; C-107/05 *Commission v Finland* [2006] ECR I-10. For discussion see, Peter Bujäger, ‘Implementing and Enforcing EU Law at Regional Level’ in R Toniatti et al (eds) *An Ever More Complex Union: The Regional Variable as a Missing Link in the EU Constitution?* (Nomos, Baden-Baden 2004) 159-179.

¹¹⁴⁴ Colin Munro, ‘Scottish Devolution: Accommodating a Restless Nation’ (1999) 6 *International Journal on Minority and Group Rights* 97-119, 99.

¹¹⁴⁵ Keating, ‘Federalism and the Balance of Power in European States’ (n 472) 7.

powers granted to the constituent parts of the UK,¹¹⁴⁶ although there has been no rush to “regionalise England in order to match Scotland and Wales.”¹¹⁴⁷ The UK has practiced this form of group accommodation since the 1707 political union between Scotland and England.¹¹⁴⁸ The 1707 Act of Union gave Scotland autonomy with respect to the “legal system, the Church and the education system.”¹¹⁴⁹ The 1998 Scotland Devolution Act devolved Scotland’s autonomous rights further; for the first time since 1707, Scotland was entitled to have a Scottish Parliament and to form a Scottish Executive. The Scottish Parliament has extensive legislative powers over matters which are not explicitly reserved to the centre.¹¹⁵⁰

Accordingly, the Scotland Devolution Act can be regarded as an act of internal self-determination, where a territorial minority decided on how they wish to govern themselves. However, Section 28 of the Scotland Act specifies the continuing competence of the UK Parliament to legislate for Scotland:

[t]his serves as a reminder that the scheme is not federal and the Scottish Parliament is merely a devolved institution. There is no reason, legally, why the Scottish Parliament could not be abolished by a later Act of the Parliament at Westminster.¹¹⁵¹

¹¹⁴⁶ Scotland Act (1998) c.46, Northern Ireland Act (1998) c.47, Wales Act (1998) c.38.

¹¹⁴⁷ Keating, ‘Federalism and the Balance of Power in European States’ (n 472).

¹¹⁴⁸ Patricia Leopold, ‘Autonomy and the British Consitution’ in M Suksi (ed) *Autonomy: Applications and Implications* (Kluwer Law International, The Hague 1998) 224.

¹¹⁴⁹ Geoff Gilbert, ‘Autonomy and Minority Groups: A Right in International Law?’ (2002) 35 *Cornell International Law Journal* 307-353, 344-5.

¹¹⁵⁰ Keating, ‘Federalism and the Balance of Power in European States’ (n 472).

¹¹⁵¹ Munro, ‘Scottish Devolution...’ (n 1144) 114-115; see also, Michael Keating, ‘Devolution and Constitutional Reform in the United Kingdom, Spain and Italy’ (2009) 15 *LEQS Paper* 1-26, 5.

This hypothetical possibility of revoking devolution raises criticism among those who prefer a federalist route. Thus Olowofoyeku advocates the federal system as the most sound form of government and maintains that

[t]he old unitary centralist system is archaic, undemocratic, inefficient, and does nothing to satisfy the demands and aspirations of parts of the union for local participation and (at least some level of) self-determination.¹¹⁵²

Furthermore, McCarvey warns that Scottish devolution may have limited success because it was built on the existing system of government and “in many ways it has merely added a thick layer of democratic gloss to those institutions.”¹¹⁵³ Indeed, the limited nature of devolution makes it clear that Scotland is one of “enclaves of self-government within a system in which the dominant actors do not feel that their role has changed radically.”¹¹⁵⁴

Despite these criticisms, the above brief overview illustrates that, as a type of territorial autonomy, Scotland enjoys the benefits of delegated governance “based on a long held, clear and uncontested geographical border.”¹¹⁵⁵ The recently built institutional system allows Scotland to make decisions closer to the people and take the needs of this territorial minority into account.¹¹⁵⁶ Moreover, this example

¹¹⁵² Abimbola Olowofoyeku, ‘Decentralising the UK: the Federal Argument’ (1999) *Edinburgh Law Review* 57-84, 83.

¹¹⁵³ Neil McCarvey, ‘Devolution in Scotland: Change and Continuity’ in J Bradbury (ed) *Devolution, Regionalism and Regional Development* (Routledge, London 2008) 42.

¹¹⁵⁴ Keating, ‘Federalism and the Balance of Power in European States’ (n 472).

¹¹⁵⁵ Douglas Chalmers, ‘Scotland Year Zero – From Words to Action’ in K Gál (ed) *Minority Governance in Europe* (LGI Publications, Budapest 2002) 125-150.

¹¹⁵⁶ Matthew Denton and Matthew Flinders, ‘Democracy, devolution and delegated governance in Scotland’ (2006) 16(1) *Regional & Federal Studies* 63-82, 80.

demonstrates that the combination of individual, minority and collective rights to internal self-determination are essential to preserve a minority group's identity.

Significantly, Scotland's strong domestic status permits it to participate in EU affairs. Even though devolution failed to increase the regional authorities' influence over EU law-making, it has altered the nature of Scotland's participation, by creating a higher profile through the Scottish Parliament and Executive, which can liaise with the domestic, EU and other sub-national authorities.¹¹⁵⁷ For example, in the UK, the central government can invite a Scottish minister to attend the Council.¹¹⁵⁸ Such an involvement is based on flexible and informal procedures.¹¹⁵⁹ Another 'institutionalised' channel that allows the Scottish authorities to access the EU level is the Committee of the Regions (CoR),¹¹⁶⁰ an advisory body to the EP, the Council and the Commission.¹¹⁶¹ Furthermore, the Scottish Parliament can now be involved in the monitoring of the principle of subsidiarity (discussed below on page 340); under Article 6 of Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality, where appropriate, it is for each national Parliament to consult regional parliaments with legislative powers. Accordingly, a strong domestic status of a territorial minority may allow it to access the EU fora.

¹¹⁵⁷ Sloat, 'Scotland in the European Union...' (n 1160) 18.

¹¹⁵⁸ See, for example, Concordat on Co-ordination of EU, International and Policy Issues on Public Procurement, 25 November 1999, para 6.3; see also Keating, 'Federalism and the Balance of Power in European States' (n 472) 15-6.

¹¹⁵⁹ Jens Woelk, 'A Place at the Window: Regional Ministers in the Council' in R Toniatti et al (eds) *An Ever More Complex Union: The Regional Variable as a Missing Link in the EU Constitution?* (Nomos, Baden-Baden 2004) 137.

¹¹⁶⁰ Amanda Sloat, 'Scotland in the European Union: Expectations of the Scottish Parliament's Architects, Builders, and Tenants' (2001) 22 *Scotland Europa Paper* 1-31, 18.

¹¹⁶¹ Article 300 TFEU.

The next section assesses the quality of such participation and evaluates the role of the CoR, the principle of subsidiarity and the jurisprudence of the ECJ in supporting the aspirations of territorial minorities to greater participation in EU affairs.

3. 'Testing' EU rules

The most obvious forum for representation of territorial minorities is the CoR, which was established under the TEU in 1992.¹¹⁶² As a result of the CoR's creation, "some degree of meaningful input on the supranational plane of governance has been achieved by regions independent from their respective nation-states."¹¹⁶³ The CoR provides advisory opinions to the EU legislative institutions in areas such as culture, education, socio-economic cohesion, and so on.

However, the CoR fails to represent the interests of territorial minorities in autonomous regions for several reasons. First, a real opportunity for sub-State authorities to be represented at the EU level has been undermined by the Member States' 'gatekeeping' power in appointing the representatives of the CoR.¹¹⁶⁴

¹¹⁶² Even though there is no formal recognition of sub-national autonomy in EU law, this idea is by no means new in the EC/EU. Thus, as early as 1988, the European Parliament proposed a Community Charter for the Regions, subsequently clarified in the 'Resolution on Community regional policy and the role of the regions'. The Parliament first emphasised that as the Community's responsibilities strengthen, there is the need for decentralisation at the State level of certain tasks to regional authorities which represent the will of the people: 'Resolution on Community Regional Policy and the role of the regions', 18 November 1988, para 21.

¹¹⁶³ Kelly, 'Political Downsizing...' (n 474) 238.

¹¹⁶⁴ Article 305(3) TFEU (ex-Article 263(4) TEC) states: 'The Council shall adopt the list of members and alternate members drawn up in accordance with *the proposals made by each Member State*' (emphasis added). For criticism see, Adam Biscoe, 'The European Union and Minority Nations' in P Cumper and S Wheatley (eds) *Minority Rights in the 'New' Europe* (Martinus Nijhoff Publishers, The Hague 1999) 94-95.

Furthermore, where the structure is concerned, the CoR suffers from the fact that it is represented by local authorities, metropolitan areas, capital cities, coordinating authorities, etc., at the local level, and economic regions, administrative regions and regions with legislative powers at the regional level.¹¹⁶⁵ All these units have differing origins and functions, and often represent diverse interests which detract from enhancing the interests of minority groups. This deficiency in the CoR structure has resulted in stronger claims for a political role within the CoR by so-called ‘regions with legislative powers’, which at times refuse to bargain with municipal authorities.¹¹⁶⁶ Although these regions do not have any official status at the supranational level, their influence within the CoR may threaten the body’s already weak political role. Therefore, restructuring the CoR, which could contain a chamber composed of representatives of territorial minorities in autonomous regions, could meet their need for stronger representation at the EU level and stop the fragmentation within the CoR. Indeed, the EP has long advocated a differentiated approach to autonomous units of a regional character, which could become a first step in enhancing the role of minority groups in the EU.¹¹⁶⁷

¹¹⁶⁵ CoR, Opinion on ‘Devolution in the European Union and the place of local and regional self-government in the draft Constitutional Treaty’ [2006] C 31/01, 1.3; see also Adam Biscoe, ‘European Integration and the Maintenance of Regional Cultural Diversity: Symbiosis or Symbolism?’ (2001) 35(1) *Regional Studies* 57-64, 61.

¹¹⁶⁶ Giuseppe Avolio and Alessandro Santini, ‘The Committee of the Regions in the EU Policy-making Process: Actor or Spectator?’ in R Toniatti et al (eds) *An Ever More Complex Union: The Regional Variable as a Missing Link in the EU Constitution?* (Nomos, Baden-Baden 2004) 85-115, 92.

¹¹⁶⁷ To achieve this, in its 2003 resolution, the EP insisted that a clear recognition of diverse State structures should result in some recognition of minority needs. This argument is even more explicit in the EP’s 2008 motion for resolution on minority rights, where the EP called on the Commission to create partnership with the European regions, by utilising a “differentiated approach for regions from the federal Member States, the regionalised Member States, the decentralised Member States and the unitary Member States...”: European Parliament, Motion for a ‘Resolution on the protection of traditional national and ethnic minorities...’ (n 382) para 5(a).

The above-mentioned deficiency in the structure of the CoR can be explained by the omissions in the EU's approach to the regions. First, until recently, the EU did not recognise the role of the regions, provinces, communes or regional or local organisations which form part of the Member States.¹¹⁶⁸ The Lisbon Treaty incorporated only a limited acknowledgement of the existence of the sub-State units in Member States. In particular, Article 4(2) TEU stipulates that

[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, *inclusive of regional and local self-government*.¹¹⁶⁹

A similar acknowledgment can be found in the Preamble of the CFR, which states that the EU contributes to preserving and developing common values

while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, *regional and local levels*...¹¹⁷⁰

These provisions signal that the EU is no longer

blind as regards the existence and interests of the sub-state components of some Member States ... and underlines the fact that the regions are indeed considered to be a part of the European multilevel construction.¹¹⁷¹

However, this acknowledgment of respect for the internal make-up of Member States is somewhat passive and aims to protect Member States from the EU's attempts to influence the organisation of their public authorities.

¹¹⁶⁸ European Parliament, 'Resolution on the role of regional and local authorities in European integration' [2003] 2002/2141(INI), para 2.

¹¹⁶⁹ Emphasis added.

¹¹⁷⁰ Emphasis added.

¹¹⁷¹ Ingolf Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action' (2009) 15 Columbia Journal of European Law 349-407, 394.

The second reason why the CoR structure is deficient is that the objective of creating this body was not to “institutionalise the representation of the regional political power, but to link the exercise of supra-state administration with administrations at a sub-state level.”¹¹⁷² The EU’s limited interest in regions is evident from other regional policies developed since the 1980s, which have never aimed to foster cultural diversity. For example, the Regional Development Fund was established to compensate the new Member States for subsidies in the field of agriculture, which they were not otherwise entitled to receive, and to support poorer States like Greece, Portugal and Spain.¹¹⁷³ As a result of this lack of interest in the cultural diversity of the regions, neither the composition nor the powers of the CoR can be regarded as an institutionalisation of the autonomous sub-State units of the EU.¹¹⁷⁴

Although the Lisbon Treaty does not address the structural deficiencies of the CoR, the amended TEU may increase the significance and visibility of the CoR in the EU. Thus, Article 263 TFEU stipulates that the CoR now has *locus standi* before the ECJ to defend its prerogatives. In addition, Article 8(2) of Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality provides that, in accordance with the rules in Article 263 TFEU, the CoR can now monitor the application of the principle of subsidiarity by bringing actions against legislative acts it should be consulted about before their adoption by the EU legislature.¹¹⁷⁵ Arguably,

¹¹⁷² Iñigo Bullain, ‘Autonomy and the European Union’ in M Suksi (ed) *Autonomy: Applications and Implications* (Kluwer Law International, The Hague 1998) 347.

¹¹⁷³ Reetta Toivanen, ‘Saami in The European Union’ (2001) 8 *International Journal on Minority and Group Rights* 303-323, 313.

¹¹⁷⁴ Iñigo Bullain, ‘Autonomy and the European Union’ (n 1172) 347.

the CoR's monitoring of this principle, which requires that decisions be taken as close to the citizens as possible, may prevent the EU from encroaching upon the competences of sub-national authorities in autonomous regions.

Unfortunately, the utility of the CoR's monitoring role is undermined by the fact that, so far, subsidiarity has been used mainly between the Member States and the EU to delimit their competences and to prevent the EU from acting outside of its powers. Overall, the principle has failed to facilitate the involvement of sub-state authorities in the decision-making process in the EU.¹¹⁷⁶ Therefore, the application of the principle is criticised for not truly serving to “mitigate the ‘decentralization deficit’”¹¹⁷⁷ in some Member States. The current limited application of subsidiarity between the EU and Member States results from the lack of a clear division of powers among the EU, Member States *and* regional authorities.¹¹⁷⁸ Articles 2-6 TFEU focus on the division

¹¹⁷⁵ During the negotiations of the Draft Constitutional Treaty, the CoR insisted that the EU must give it a more active monitoring role (see CoR, Opinion on ‘A better division and definition of powers in the European Union’ [2003] C73/16, Preamble). The EP strongly supported this proposal and suggested that the CoR should be given the right to bring claims before the ECJ to protect its prerogatives and challenge presumed violations of subsidiarity (‘Resolution on the role of regional and local authorities in European integration’ (n 1168) para 8-10). Article III-270 of the Draft Constitutional Treaty incorporated this proposal in full and could be regarded as a “substantial empowerment of European regions”: Tove Malloy, ‘National Minority ‘Regions’ in the Enlarged European Union: Mobilizing for Third Level Politics?’ (2005) ECMI Working Paper No 24, 5.

¹¹⁷⁶ Commentators identify four potential uses of this term:

- 1) a principle to help determine the extent of Community competences in new and existing policy domains[;]
- 2) a mechanism for the firm limitation of EC competencies to protect national sovereignty;
- 3) a principle to assist in the creation and entrenchment of federal European union;
- 4) a principle with which to advance and defend sub-national autonomy and interests.

S Roach, *Cultural Autonomy, Minority Rights, and Globalization* (Ashgate Publishing, Aldershot 2005) 64.

¹¹⁷⁷ Bruno Frey, ‘A New Concept of European Federalism’ (2009) 3 LEQS Papers 1-23, 2; see also, Gabriel Toggenburg, ‘The Debate on European Values and the Case of Cultural Diversity’ (2004) 1 European Diversity and Autonomy Papers 5-24, 15.

¹¹⁷⁸ Malloy, ‘National Minority ‘Regions’ in the Enlarged European Union...’ (n 1175) 18.

of competences between the EU and Member States only, without even mentioning the sub-State units.¹¹⁷⁹

Furthermore, despite the significance of the CoR's involvement in monitoring of subsidiarity, its role is significantly limited compared to the role of national Parliaments. Under Article 6 of Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality, any national Parliament may send a reasoned opinion to the EU legislative institutions, if it considers that a piece of draft legislation does not comply with the principle of subsidiarity. If, in a national Parliament's view, an adopted act remains incompatible with the principle of subsidiarity, it has the right to bring a case before the ECJ. Although these new powers do not envision substantive input into EU legislation, they may develop into a powerful mechanism for protecting the competencies of national (and where appropriate, regional) legislators, which can now oppose a potentially excessive use of competences by the EU legislative institutions.¹¹⁸⁰ It is regrettable that the Lisbon Treaty did not confer similarly wide powers on the CoR.

Likewise, opening EU decision-making to the participation of regional ministers through direct representation in the Council has proved to have mainly symbolic significance. This is so because regions cannot genuinely promote their interests in EU law-making, because they can only represent their State as whole. Moreover,

¹¹⁷⁹ The CoR addressed this issue in its Opinion on 'A better division and definition of powers in the European Union' (n 1175). In particular, in para 1.6 of the Opinion, the CoR emphasised the significance of supplementing the principle with provisions guaranteeing respect for the competence of regions and local authorities. This proposal did not find its way either into the Draft Constitutional Treaty or the Lisbon Treaty.

¹¹⁸⁰ Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action' (n 1171) 393.

States allow only “selective and partial direct access to consultative and negotiating *fora* at European level”¹¹⁸¹ and the success of such access largely depends on the relationship between regions and central government at the domestic level. Therefore, for the EU to establish a truly multilevel governance and to address the ‘democratic deficit’, which arises because the “increasing power of EU institutions is not matched by concomitant accountability to the citizenry”¹¹⁸², further institutional reforms are needed that foster a direct link between regions and the supranational level.

Let us now turn to the ECJ’s jurisprudence involving autonomies. We will continue assessing cases involving linguistic minorities,¹¹⁸³ discussed in Chapter IV on mother-tongue education on pages 313-314. So far, the ECJ’s approach to autonomies involving the protection of minority rights seems to be implicitly sympathetic. Let us take *Angonese*¹¹⁸⁴ as an example of the ECJ’s approach to autonomy arrangements. Having failed to prove his proficiency in German by producing a certificate issued by local authorities in South Tyrol, the applicant was denied a job in a bank. Mr Angonese relied on EC law to challenge the restricted ways to prove language proficiency imposed by the regional authorities. The ECJ considered that the rule was disproportionate and, hence, violated EC law. Significantly, the language requirement itself was not contested in this case. Accordingly, the mere fact that the ECJ “stuck to

¹¹⁸¹ Woelk, ‘A Place at the Window...’ (n 1159) 140 (emphasis in original).

¹¹⁸² Roht-Arriaza, ‘The Committee on the Regions...’ (n 469) 420; see also, Stijn Smismans, ‘Vertical and Horizontal Decentralism in European Governance: Discourse, Reality and Strategy’ in R Toniatti et al (eds) *An Ever More Complex Union: The Regional Variable as a Missing Link in the EU Constitution?* (Nomos, Baden-Baden 2004) 58-60.

¹¹⁸³ Other cases concerning autonomies include Case C-88/03 *Portugal v Commission (Azores)* [2006] ECR I-07115 and Joined Cases C-428/06 to C-434/06 *Unión General de Trabajadores de la Rioja (UGT-Rioja) et al* [2008] ECR I-06747.

¹¹⁸⁴ *Angonese v Cassa di Risparmio di Bolzano SpA* (n 34).

this limited radius of examination can be read as a silent approval of policies which foster a regional minority language at the cost of the Common Market.”¹¹⁸⁵

So far, the ECJ’s decisions to prevent regional authorities from maintaining a monopoly over issuing certificates of language proficiency and to extend the right to use minority languages before national courts, coupled with the recognition of the legitimacy of minority protection in *Mutsch*¹¹⁸⁶ and *Bickel and Franz*¹¹⁸⁷ (discussed on pages 313-314), have had the positive outcome of re-balancing existing arrangements which “impose legal restrictions that are not (or no more) proportional in view of the factual and political situation at hand.”¹¹⁸⁸ However, a more minority-friendly approach could be adopted in the future based on Article 2 TEU, which may give the ECJ some backing to adopt an explicitly pro-minority approach. Following the HRC approach, under Article 27 ICCPR as a part of the general principles of EU law (discussed on pages 168-169), according to which a State “must not deny a migrant worker or a visitor membership in an existing minority merely on the basis of the temporary nature of his or her visit”,¹¹⁸⁹ may allow the ECJ to be more selective in extending benefits granted to territorial minorities to other EU citizens. Otherwise, testing privileges in autonomy regimes enacted for minority protection against

¹¹⁸⁵ Toggenburg, ‘Minority Protection in a Supranational Context...’ (n 1078) 27.

¹¹⁸⁶ *Ministere Public v Robert Heinrich Maria Mutsch* (n 579).

¹¹⁸⁷ *Bickel and Franz* (n 34).

¹¹⁸⁸ Toggenburg, ‘Minority Protection in a Supranational Context...’ (n 1078) 31. Cf, Weber, ‘Individual Rights and Group Rights...’ (n 1121).

¹¹⁸⁹ Scheinin, ‘The United Nations International Covenant on Civil and Political Rights...’ (n 17) 26.

internal market rights may result in “a gradual erosion of the competences of autonomous entities”¹¹⁹⁰ and a watering down of the benefits available to minorities.

Therefore, greater sensitivity is required from the ECJ in dealing with privileges accorded to minority groups through autonomy arrangements, depending on the rights at stake and, more significantly, the personal scope of their application. If, as in *Mutsch* and *Bickel/Franz*, the issue concerns use of a minority language before a court, extending this right to other EU citizens may not necessarily impact minorities in a negative way. Although provision of a bilingual court is costly, if it already exists, the increased number of users will raise “neither the political nor financial costs of such a ‘privilege’”.¹¹⁹¹ Conversely, where, for example, access to quotas for minority representation in public bodies is at stake, weighting them against a potential effect on market freedoms may put minority protection regimes at risk. In particular, changing the personal scope of such rules means

first, that the financial cost for the public authorities involved rises significantly (e.g., more persons entitled to privileged social housing means more costs for the respective authority); second, that political costs might be involved (e.g., opening the labor market to new groups of persons can alter the social structure and political outlook of a region); and, third, that the rule at stake might sooner or later, through an expansion of its personal scope, be led *ad absurdum* and lose its *raison d’etre* (e.g., the reservation of quotas in the public administration for a certain linguistic minority group resident in a specific region might lose its meaning if these quotas were opened to all EU citizens).¹¹⁹²

Hilpold argues that there is a danger that a dramatic increase in the number of beneficiaries of special rights may result in the withdrawal of a regime granted by

¹¹⁹⁰ Silverström, ‘The Competence of Autonomous Entities...’ (n 1133) 271.

¹¹⁹¹ Toggenburg, ‘Minority Protection in a Supranational Context...’ (n 1078) 30.

¹¹⁹² Toggenburg, ‘Minority Protection in a Supranational Context...’ (n 1078) 29-30.

States.¹¹⁹³ However, as discussed in Chapter I on page 108, States can neither unilaterally withdraw nor worsen existing autonomy arrangements. However, an increased number of beneficiaries could discourage States from expanding and strengthening existing autonomy arrangements or granting special rights to other minority groups. Therefore, the ECJ needs to take into consideration the personal scope and the rights at stake while opening minority rights systems to EU citizens in general.¹¹⁹⁴

Would these cases have a different outcome were the ECJ to decide them based on the relatively new provisions affirming EU respect for cultural diversity in Member States? Given that Article 167(1) TFEU (ex-Article 151(1) TEC) on cultural policy and Article 22 CFR on the EU commitment to respect cultural diversity seem to be targeted at protecting Member States' cultures, it seems unlikely, however. For example, even though Article 167(2) TFEU (ex-Article 151(2)) aims to encourage cooperation between Member States in *inter alia* 'improvement of the knowledge and dissemination of the culture and history of the European peoples', given the EU's commitment to respect the national identities and regional diversity of its Member States, it seems that the application of this provision is limited to States. Likewise, the explanatory report to the CFR clarifies that Article 22 is based on Article 167 TFEU, so its scope too may be limited to protecting Member States' cultures.¹¹⁹⁵ In applying

¹¹⁹³ Hilpold, 'Union Citizenship and Language Rights' (n 1083) 119.

¹¹⁹⁴ Toggenburg, 'Minority Protection in a Supranational Context...' (n 1078) 30.

¹¹⁹⁵ For example, in *Re Commission Recruitment Notices: Italy (Spain and Latvia, intervening)* (n 1073), Italy argued that by failing to publish vacancy notices for senior management posts in Italian, the Commission has infringed not only Articles 1, 3, 4 & 5 of Regulation 1/58 and Article 12 EC, but also Article 22 CFR. The ECJ, without relying on Article 22 CFR, annulled the Commission's Decision to publish the vacancy notices for senior management posts in English, French and German

these provisions, there is a risk that the EU may focus unduly on cultural diversity at the Member State level, and not include the sub-national level. However, a broad reading of the above provisions does not exclude, for example, financial or technical support by the EU to minority cultural projects.¹¹⁹⁶

Nor do the general principles of EU law fill this gap. The discretion to grant autonomy remains firmly with the Member States, a power they relatively rarely exercise out of fears of secessionist trends. The main State obligations are not to worsen or unilaterally abolish existing autonomy arrangements, as well as to allow minorities to peacefully demand greater autonomy. Nor do minority-specific instruments contain an explicit right to autonomy; however, because the collective exercise of rights cannot be easily divorced from minority protection, some implicit support for the exercise of these rights may be read in Articles 15 and 16 FCNM, as well as Articles 1 and 27 ICCPR.

Given that international instruments are silent on the right to autonomy, it is remarkable that as early as 1988, the EP advocated minimum basic principles of an effective autonomy regime, such as the highest possible institutional status within the national legal order; institutions democratically elected by the people; powers to organise their own institutions and to promote and manage the preservation of their cultural and linguistic traditions; financial autonomy; trans-frontier cooperation; and

for the period ending 1 January 2007, as well as vacancy notice COM(2005)335 for the post of Director-General of the European Anti-Fraud Office [2005] OJ C34A/3.

¹¹⁹⁶ Rachael Craufurd Smith, 'From Heritage Conservation to European Identity: Article 151 EC and the Multi-Faceted Nature of Community Cultural Policy' (2007) 32(1) *European Law Review* 48-69, 57.

participation in EU law-making in matters affecting their interests.¹¹⁹⁷ Regrettably, due to the political sensitivity of minority protection, the proposals have not been supported by other EU institutions or Member States.

4. Conclusion

The above discussion suggested that the movement towards strengthening the powers of the EU is being accompanied by the process of decentralisation in many Member States. This process is partly driven by territorial minorities aiming to preserve their identity and to be heard at the supranational level without seceding from their home State. The Scottish devolution illustrates how autonomy arrangements can allow a group to decide on matters of a particular concern to it at both national and supranational levels. This example¹¹⁹⁸ suggests that a group's identity is best protected through a combination of individual and collective rights.

¹¹⁹⁷ European Parliament, 'Resolution on Community Regional Policy...' (n 1162) para 31 (a-g). In addition, the EP emphasised that the effective participation of regions inhabited by minorities in political, economic and cultural affairs should be in line with Article 15 FCNM; such participation may entail stronger autonomy claims by minorities. The EP also proposed that the EU incorporate the Council of Europe's European Charter of Local Self-Government into the *acquis communautaire*, to ensure that the EU is constructed based on the principles of democracy and transparency, dialogue and cooperation. Such an incorporation would seal the EU's commitment to regionalisation in its Member States.

¹¹⁹⁸ For discussion of other successful examples of autonomy arrangements in EU Member States see Susanna Mancini and Bruno de Witte, 'Language Rights as Cultural Rights: A European Perspective' in F Francioni and M Scheinin (eds) *Cultural Human Rights* (Martinus Nijhoff Publishers, Leiden/Boston 2008) 257-263; see also, Anthony Alcock, 'The Protection of Regional Cultural Minorities and the Process of European Integration: The Example of South Tyrol' (1992) 11 *International Relations* 17-36; Jan Clement, 'Territoriality versus Personality' in A Verstichel et al (eds) *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* (Intersentia, Oxford 2008) 51-68; K Azopardi, *Sovereignty and the Stateless Nation: Gibraltar in the Modern European Legal Context* (Hart, Oxford 2010).

The creation of the CoR gave some impetus for participation of autonomous regions in EU affairs, although the link between the EU and sub-state authorities is still weak. Nevertheless, the new powers of the CoR to protect its prerogatives before the ECJ and partially monitor the application of the principle of subsidiarity are significant developments. Moreover, the EU's recent recognition of respect for the constitutional make-up of Member States is an important step in building multilevel governance.

However, the CoR's monitoring of the principle of subsidiarity could be further strengthened through a clearer division of competences among the EU, Member States and the regions. Furthermore, the CoR should be accorded a stronger say in the application of the principle of subsidiarity, comparable to that of national Parliaments. To make territorial minorities' presence in the EU more visible and allow them to voice their needs at the supranational level, the CoR should be restructured and include a new chamber. In addition, EU rules on culture should be tailored, not only to the protection of Member States' identities, but also to the preservation of regional characteristics. Moreover, the ECJ should show greater sensitivity in dealing with the special rights accorded to minorities in autonomous regions. While the extension of existing privileges to other EU citizens has so far only supported the viability of, for example, court proceedings in a minority language, the ECJ may need to be more selective in opening access to special rights to persons not belonging to a minority. Where the ECJ allows access by other EU citizens to existing privileges for minorities, based on Article 2 TEU and the general principles of EU law, an explicitly pro-minority approach could be adopted through endorsement of the HRC's generous approach to the definition of 'minority', which encourages migrants and even visitors to access existing special rights.

Arguably, a greater recognition and involvement of sub-state authorities in EU decision-making, both through formulating EU laws of particular concern to them and monitoring the application of subsidiarity, would benefit both minority groups and the EU. Those stronger links between the EU and territorial minorities could positively impact the implementation of EU rules, because sub-state authorities that had a greater input into policy-making would have a “greater sense of ownership of the final product.”¹¹⁹⁹ The idea of shared sovereignty could satisfy the aspirations of territorial minorities for recognition of their roles in shaping the EU.

Furthermore, institutionalisation of minority participation in EU law-making, at least in matters of particular concern to them, could be instrumental in addressing the ‘democratic deficit’ in the EU. Even though the Lisbon Treaty has increased the role of national Parliaments in EU law-making,¹²⁰⁰ as the EP convincingly argues, European political unity “must also be based on regional communities and on the recognition and enhancement of their autonomy.”¹²⁰¹ Therefore, greater political endorsement of the EP’s proposals could significantly enhance protection of minority rights in the EU, including the right to autonomy. The stronger a minority group’s domestic legal status, the better its voice may be heard at the EU level.

¹¹⁹⁹ Roht-Arriaza, ‘The Committee on the Regions...’ (n 469) 464.

¹²⁰⁰ Protocol (No 1) on the Role of National Parliaments in the European Union [2010] OJ C 83/203.

¹²⁰¹ European Parliament, ‘Resolution on Community Regional Policy...’ (n 1162) para 21.

CONCLUSIONS AND RECOMMENDATIONS: REINVENTING THE WHEEL OR JOINING FORCES?

This thesis sets out to address several interlinked research questions through four case studies on some of the most problematic aspects of minority protection. The case studies assess issues concerning political participation, freedom to manifest religion, access to mother-tongue education and autonomy arrangements in several EU Member States. The aim of the case studies is to ascertain the EU's current contribution to minority protection and whether its role in this field should increase further.

The approach of the conclusions and recommendations to this thesis is based on two arguments. First, based on the conclusions of the case-studies, Section 1 analyses the capacity of the EU to protect minority rights using existing resources in EU law. The analysis also evaluates the possibility for the development of an EU regime of minority protection, which is a possibility in the long run. As EU law stands, a generous reading of Article 2 TEU, Articles 21 and 22 CFR, and the Race Directive may be laying a foundation for a future EU regime of minority protection. However, even the combined reading of all these provisions does not confer on the EU an adequate competence. Consequently, without Treaty revisions, the EU cannot develop a coherent system of minority protection comparable to that under the FCNM.

Second, Section 2 suggests a simpler option, although not the easiest course of action, that the EU could undertake. It reviews the increasing significance of the FCNM as a

benchmark of minority protection in the EP's non-binding resolutions, and the EU's pre-accession conditionality towards countries aspiring to EU membership. Having demonstrated this penetration of the FCNM into the EU legal order, this section explores the pros and cons of EU monitoring of Member States' compliance with the FCNM, and even the possibility of EU accession to this instrument.

1. Reinventing the wheel?

This section aims to evaluate the extent of the EU's current contribution to minority protection and its capacity to construct a coherent regime that could adequately protect minority rights. As Chapter I highlighted, there are two key features of minority protection: non-discrimination and special rights. This section begins with the principle of non-discrimination in EU law as compared with international standards (1.1). It then evaluates to what extent EU law contributes to the protection of special rights of minorities in its Member States (1.2). Based on this assessment, the possibility of an EU regime of minority protection is discussed (1.3).

1.1. The principle of non-discrimination

The principle of non-discrimination is one of the essential aspects of minority protection. The principle is well established in international and regional treaties on human rights in general, and on minority rights in particular.¹²⁰² It is noteworthy that international treaties do not explicitly differentiate between direct and indirect

¹²⁰² For discussion see pages 26-28.

discrimination. The jurisprudence of international courts and quasi-judicial bodies has not always drawn a distinction between direct and indirect discrimination.¹²⁰³ For example, only relatively recently, the ECtHR started to use statistics in cases involving indirect discrimination, and highlighted the possibility of shifting the burden of proof onto a State.¹²⁰⁴ Significantly, in elaborating these principles, the ECtHR has extensively relied on the ECJ's case law and the EU Equality Directives.¹²⁰⁵

In contrast, the Race and Employment Directives are welcome exceptions. Both instruments define the terms 'direct' and 'indirect' discrimination, partly based on the ECJ's role in shaping these definitions in its case law on anti-discrimination on the grounds of sex and nationality.¹²⁰⁶ The ECJ's progressive reading of the principle of non-discrimination has made an important contribution to the development of anti-discrimination laws in the EU. Accordingly, where the principle of non-discrimination is concerned, EU anti-discrimination law seems much stronger than that found in international and regional standards.

Where the grounds of non-discrimination are concerned, the jurisprudence of international courts and quasi-judicial bodies is limited and relatively weak regarding 'membership of a national minority' or 'religion'.¹²⁰⁷ Conversely, the grounds of race

¹²⁰³ For analysis see pages 32-35.

¹²⁰⁴ For analysis see pages 36, 42-45.

¹²⁰⁵ For analysis see page 36.

¹²⁰⁶ For discussion see page 32.

¹²⁰⁷ For analysis see pages 37-42.

or ethnic origin receive much stronger protection.¹²⁰⁸ A similar hierarchy can be observed in EU law. Currently, the EU Equality Directives offer strong guarantees on non-discrimination based on racial or ethnic origin, and (to a lesser degree) on religion. In contrast, other grounds, such as ‘membership of a national minority’ or ‘language’ receive less protection. These grounds are integral parts of EU law through its general principles and the CFR, and may be used only to challenge an EU act or a Member State’s implementing measures.

In principle, were the EU to create a regime of minority protection, it already has in place strong guarantees to meet one of the essential requirements of minority protection, i.e., the principle of non-discrimination. It would need to include explicit grounds of non-discrimination based on association with a minority in Article 19 TFEU. To avoid a hierarchy of grounds, the scope of the future Equality Directives should match that of the Race Directive.

1.2. ‘Special’ rights

To construct a coherent system of minority protection, EU law would also need to introduce special minority rights (discussed in Section 2 of Chapter I on pages 53-127). Admittedly, with a view to ensuring full equality in practice, Article 5 of the Race Directive and Article 7 of the Employment Directive permit Member States to maintain or adopt specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin and religion.¹²⁰⁹ Because the requirements in these

¹²⁰⁸ For analysis see pages 42-49.

provisions are permissive and not mandatory,¹²¹⁰ they are not enough on their own to create an effective regime of minority protection. Indeed, true substantive equality cannot be effectively achieved in practice without positive State action, ranging from the creation of equality of opportunities to ensuring equality of results,¹²¹¹ aimed at creating the conditions necessary for the preservation of a minority's unique identity.

The discussion below evaluates the potential of EU rules, including the general principles of EU law, to guarantee special rights of minorities in Member States.

1.2.1. The right of minorities to political participation

As discussed in Chapter II, EU law does not contain the positive duties necessary to guarantee the right of minorities to political participation. For example, the Long-Term Residents Directive fails to remedy the situation of Russian-speaking non-citizens in Latvia, because it lacks provisions on political participation.¹²¹² Moreover,

¹²⁰⁹ See also Directive 2000/43 (Race Directive) (n 41) Preamble (Recital 17), which states that measures intended to prevent or compensate for disadvantages suffered by members of a racial or ethnic group may include organisations of persons of a particular racial or ethnic origin where their main object is the promotion of the special needs of those persons.

¹²¹⁰ Timothy Jones, 'The Race Directive: Redefining Protection from Discrimination in EU Law' (2003) 5 EHRLR 515-526, 522.

¹²¹¹ The requirement of equal opportunity may have different meanings. For example, it may be limited to removal of barriers to access of minorities to education. This in itself may not necessarily guarantee the right of minority children to education. A broader reading of this term may require States to provide resources to ensure that members of a disadvantaged minority group have access to education. Monitoring equality of results may be also appropriate in some contexts to, for example, measure the average attainment of minority children at school. For discussion see, Sandra Fredman and Sarah Spencer, 'Beyond Discrimination: It's Time for Enforceable Duties on Public Bodies to Promote Equality Outcomes' (2006) 6 EHRLR 598-606, 601. See also, Henrard, 'Equal Rights versus Special Rights?...' (n 909) 48-50.

¹²¹² For analysis see pages 208-209.

even the strong guarantee on non-discrimination in the Race Directive is unlikely to help, because the scope of the instrument does not extend to political participation.¹²¹³

The case study highlighted that the main route to EU political rights of Russian-speaking non-citizens in Latvia is currently through the acquisition of Latvian nationality. Potentially, a broad interpretation of the term ‘national’/‘nationality’ in Articles 9 TEU and 20(1) TFEU, coupled with *Micheletti* and the interpretation by the Constitutional Court of Latvia of the concept of ‘national’ under the ECHR, could remedy the restrictive citizenship laws in Latvia and lead to the acquisition of EU citizenship by Russian-speaking non-citizens, allowing their political participation at the EU level.¹²¹⁴ However, this might be the solution only to the particular problem of Russian-speaking non-citizens in Latvia, excluded from political participation through the citizenship requirement. The exclusion of minorities from political participation may take different forms and persist in other countries aspiring to the EU membership.¹²¹⁵

The question is, then, do the general principles of EU law fill this gap by requiring positive State action? Let us consider international and European standards to establish the extent of positive State action required to guarantee the right of minorities to political participation. As to the right to vote, States have to organise genuine elections and must respect the will of people expressed through them.¹²¹⁶ In addition, positive State duties include an obligation to introduce legislative changes to

¹²¹³ For analysis see page 207.

¹²¹⁴ For analysis see pages 211-216.

¹²¹⁵ For analysis see page 229.

¹²¹⁶ For analysis see page 58.

ensure political participation of minorities.¹²¹⁷ States may also be obliged to take account of the special position of minorities in their electoral systems.¹²¹⁸ However, the introduction of a differentiated electoral system, necessary to accommodate political participation of minorities in certain regions, remains at States' discretion.

Where the right to stand for elections is concerned, States have a duty to avoid disadvantaging minorities in their electoral systems. Drawing electoral boundaries and allocating votes must not act to discriminate against minorities.¹²¹⁹ In addition, States must ensure that, in administering any language tests that may be required by electoral law, procedural safeguards are guaranteed.¹²²⁰ However, because, unlike the right to vote, the right to stand for elections is an active right, there are more limitations on its exercise. For example, historic and political factors may be decisive in the assessment of State compliance with the ECHR.¹²²¹ Moreover, international courts have not supported the claims of minorities wishing to exercise their political rights through the medium of a minority language.¹²²² In addition, there is no requirement of a specific electoral system. As a result, international courts have tended to grant a wide margin of discretion to States in matters of political participation.

Consequently, even though international courts sometimes read in positive State action in their interpretation of international treaties, there are only limited duties to

¹²¹⁷ For analysis see pages 58-59.

¹²¹⁸ For analysis see page 59.

¹²¹⁹ For analysis see pages 60-61.

¹²²⁰ For analysis see pages 61-62.

¹²²¹ For analysis see pages 63-64.

¹²²² For analysis see pages 62-63.

offer special rights. In guaranteeing the right to political participation, the main emphasis remains on the principle of non-discrimination. Thus, with the more confident application of Article 14 and Protocol 12 ECHR, it appears that the ECtHR grants a narrower margin of discretion, by recently suggesting, for example, that States should use mechanisms of power-sharing that do not automatically deprive minorities of their right to political participation.¹²²³ However, even these encouraging developments are not sufficient to guarantee minority rights effectively. Currently, the only instrument that explicitly requires positive State action is the FCNM,¹²²⁴ which has not yet been recognised as a part of the general principles of EU law.

Therefore, to construct a regime of minority protection, the EU may need to adopt an explicit provision on the political participation of minorities. As the experience of Latvia's accession to the EU illustrates, such a provision would need to be applied uniformly and consistently both to current Member States and to candidate countries prior to and post accession.¹²²⁵ To be able to do this, the EU would need to initiate further Treaty revisions to acquire an explicit competence to protect minorities and an appropriate legal basis to adopt norms facilitating the political participation of minorities. Even though such a development is possible, it is highly unlikely to take place in the short term. At present, the EU's action in this field may be mainly reactive. For example, under Article 7 TEU, the EU could condemn Latvia's exclusionary practices as a serious and persistent breach of Article 2 TEU.

¹²²³ For analysis see pages 64-67.

¹²²⁴ For analysis see pages 67-68.

¹²²⁵ For analysis see pages 188-201.

1.2.2. Freedom to manifest religion

Chapter III explained that EU law does not contain any special rights of minorities which could guarantee their right to manifest their religion in publicly-funded schools. However, Articles 10 and 14 CFR contain guarantees on the freedom to manifest religion comparable to the ECHR standards in Articles 9 and P1-2.¹²²⁶ Given that the CFR provisions on freedom of religion will be interpreted in line with the ECHR,¹²²⁷ it may be useful to consider the ECtHR's jurisprudence, which also constitutes a part of the general principles of EU law.

In its jurisprudence, the ECtHR has inferred only limited positive State duties in relation to freedom of religion. First, States must be neutral towards various religions.¹²²⁸ They do not have the power to assess minorities' beliefs.¹²²⁹ However, in matters relating to the manifestation of religion, the ECtHR grants States a broad margin of discretion, largely because there is no consensus on the scope of religion in Europe.¹²³⁰ A particularly broad margin of discretion is granted in headscarf case-law, where the ECtHR has accepted political, cultural and historic arguments of States with little apparent scrutiny.¹²³¹ Moreover, based on the experience of secular States, such as France and Turkey, which generally attach great significance to the "citizen-

¹²²⁶ For analysis see pages 276-278.

¹²²⁷ Article 52(3) CFR.

¹²²⁸ For analysis see page 75.

¹²²⁹ For analysis see page 75.

¹²³⁰ For analysis see page 76.

¹²³¹ For analysis see pages 76-83.

state concept of nation and are reluctant to recognise ethnic diversity”,¹²³² the ECtHR set a very high bar for the freedom to manifest religion in the 47 Contracting Parties to the CoE. The recent jurisprudence suggests that the ECtHR is likely to maintain its restrictive reading of Article 9.¹²³³ Because the ECHR features strongly in the ECJ’s jurisprudence on fundamental rights, it is unlikely that the Court would follow the less restrictive approach of the HRC in *Hudoyberganova*.¹²³⁴

As the ECtHR’s jurisprudence does not offer much hope of a right for minorities wishing to wear religious dress in educational establishments, the matter of the manifestation of religion in EU law may be addressed through EU anti-discrimination rules. Thus, religious minorities may claim indirect discrimination under the Race and Employment Directives. Regrettably, the Employment Directive has limited scope, which does not yet extend to education.¹²³⁵ Were it to be extended to education, the proposed amendments to the Employment Directive¹²³⁶ suggest that the EU might attempt to remove itself from dealing with this matter altogether. In addition, the Employment Directive contains clauses that could limit the manifestation of religion.¹²³⁷ Consequently, even though more claims of indirect discrimination may come before national courts, the outcome of these cases will depend on a correct

¹²³² Asbjørn Eide, ‘Towards a Pan-European Instrument?’ in A Verstichel et al (eds) *Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* (Intersentia, Oxford 2008) 7.

¹²³³ For analysis see pages 81-83.

¹²³⁴ As discussed on pages 84-87, the precedential value of this case is questionable, however, because finding of a violation was partially due to the State’s failure to provide justifications under Article 18(3) ICCPR.

¹²³⁵ For analysis see pages 150, 268.

¹²³⁶ For analysis see pages 274-275.

¹²³⁷ For analysis see pages 278-279.

choice of a comparator and the justifications presented by States.¹²³⁸ However, were the Race Directive, which applies to education, to be interpreted in line with the jurisprudence of English courts, some groups, which share both a common ethnic origin and a common religion, might be able to prove indirect discrimination and thus succeed in exercising the right to wear religious dress in publicly-funded schools.¹²³⁹

In theory, the EU could be legitimately involved in the matter, because the limitations on manifesting religious dress have already acquired a trans-European character. However, an EU-wide rule permitting religious dress in schools is highly unlikely due to the lack of a legal basis and the relevant competences, as well as the opposition arising in some EU Member States.¹²⁴⁰ Nevertheless, the EU might fail to avoid the matter, because, inevitably, the Race Directive could be invoked by racial and ethnic minorities to claim equal treatment in educational establishments.

1.2.3. The right to access education in a minority language

As Chapter IV illustrated, overall, the EU right to access to education satisfies three requirements: physical accessibility, economic accessibility and non-discriminatory treatment.¹²⁴¹ Equal treatment in physical and economic accessibility has a higher prominence in EU law than under international and European instruments, even though *Förster* has slightly detracted from the previously established guarantees on

¹²³⁸ For analysis see pages 270-272, 280.

¹²³⁹ For analysis see pages 146-147 and 263-265.

¹²⁴⁰ For analysis see pages 238-243.

¹²⁴¹ For analysis see pages 289-303.

economic accessibility.¹²⁴² Equally, the ECJ has developed a strong body of case-law on non-discriminatory treatment in access to education through its generous interpretation of provisions on vocational training, non-discrimination based on nationality, free movement regimes and, more recently, EU citizenship rights.¹²⁴³ Furthermore, the Race Directive may serve as a new impetus to guarantee equal treatment of racial and ethnic minorities in education.¹²⁴⁴

Significantly, some limited positive duties to guarantee mother-tongue education can be found in Directive 77/486, which could have a beneficial impact on the educational rights of ‘new’ minorities, even though the implementation of this instrument remains weak in many Member States.¹²⁴⁵ Likewise, further special rights to education in a minority language could be inferred from the general principles of EU law. Thus, an obligation to ensure mother-tongue education may exist where a State chooses to provide primary education in a minority language.¹²⁴⁶ This State duty is likely to apply in contexts where major limitations exist on the physical accessibility of education.¹²⁴⁷ Another relevant factor may be a significant number of families who wish that their children continue education in a minority language. In addition, the parental right to educate their children in line with their pedagogical convictions might also contain some scope to protect minority rights to education.¹²⁴⁸

¹²⁴² For analysis see pages 296-301.

¹²⁴³ For analysis see pages 301-303.

¹²⁴⁴ For analysis see pages 303-305.

¹²⁴⁵ For analysis see pages 291-292.

¹²⁴⁶ For analysis see page 306.

¹²⁴⁷ For analysis see page 306-307.

Despite strong guarantees on access to education, EU rules are not specifically tailored to the needs of minorities. Provisions on the right to mother-tongue education in EU law have limited potential and could mainly benefit the children of migrant workers from other Member States. Significantly, equal treatment of racial and ethnic minorities under the Race Directive may include some linguistic component.¹²⁴⁹ This would largely depend on the context of a case and the ECJ's willingness to be creative. Similarly, any application of a positive State duty to guarantee mother-tongue education under the general principles of EU law is likely to be context specific.¹²⁵⁰

Moreover, as the case study of Belgium demonstrated, the EU is unlikely to require its Member States to guarantee access to mother-tongue education due to the limited EU competences in education, as well as to its limited powers to deal with internal situations and minority languages.¹²⁵¹ Therefore, for the EU to have a fully-fledged system of minority protection, further Treaty revisions are needed. As with political participation, current EU action in this field may be mainly reactive. For example, under the Article 7 TEU mechanism, the EU could impose sanctions on Belgium in relation to its forty years of non-implementation of the ECtHR's judgment in *Belgian Linguistics*.¹²⁵²

¹²⁴⁸ For analysis see page 306.

¹²⁴⁹ For analysis see page 304.

¹²⁵⁰ For analysis see page 307.

¹²⁵¹ For analysis see pages 309-317.

¹²⁵² For analysis see pages 317-318.

1.2.4. The right to autonomy

It is not surprising that EU law does not contain any special right of minorities to autonomy, as there is no explicit right to autonomy as such in international law.¹²⁵³ Even though autonomy arrangements have proved to be invaluable to guarantee effective participation of minorities and to preserve their unique identity, States often equate autonomy arrangements with possible secession. As the experience of many western European States illustrates, these fears are largely unfounded.

Despite the lack of explicit rules on the right to autonomy in EU law, some guidance on State duties can be derived from the general principles of EU law, based on the jurisprudence of international courts. Thus, although the discretion to grant autonomy remains with individual States, they do not possess similarly broad powers to unilaterally revoke or worsen existing autonomy arrangements.¹²⁵⁴ Moreover, States are obliged to respect peaceful calls by a minority for autonomy arrangements and recognition of its identity, provided that the means employed and the proposed changes are in line with democratic principles.¹²⁵⁵ Furthermore, there is notable support of international courts for special arrangements introduced to protect minorities. These special arrangements may include a differential electoral system or residence requirements limiting voting rights of persons not belonging to a minority.¹²⁵⁶ In addition, the right of minorities to cultural autonomy has received

¹²⁵³ For analysis see page 104.

¹²⁵⁴ For analysis see pages 108-112.

¹²⁵⁵ For analysis see pages 112-115.

strong protection through a combined reading of freedom of religion and freedom of association.¹²⁵⁷ Regrettably, the support of international courts for existing arrangements does not amount to a requirement of a positive State duty to grant autonomy. A similar lack of a positive State obligation can be observed in minority rights' instruments. Nevertheless, despite the lack of explicit provisions on the right to autonomy, both the ICCPR and the FCNM contain provisions favouring a collective dimension to minority rights.¹²⁵⁸

The lack of explicit rules on the right of minorities to autonomy is further compounded in the EU, where the link between the supranational level and sub-state authorities remains very weak.¹²⁵⁹ At the very least, the structure of the CoR should reflect the presence of territorial minorities in the Member States and allow them to voice their needs.¹²⁶⁰ Equally, the CoR's role in monitoring the application of subsidiarity should be increased to match the role of national Parliaments.¹²⁶¹ Furthermore, greater endorsement of the EP's proposals could eventually lead to the recognition of the right to autonomy in Member States.¹²⁶² Were the EU to acquire the necessary competence, it must address four deficiencies in its current approach to autonomies: (1) the EU places an emphasis on the individual rights of persons belonging to minorities, but does not recognise collective rights; (2) it does not

¹²⁵⁶ For analysis see pages 107-108.

¹²⁵⁷ For analysis see pages 108-112.

¹²⁵⁸ For analysis see pages 115-126.

¹²⁵⁹ For analysis see pages 337-339.

¹²⁶⁰ For analysis see page 348.

¹²⁶¹ For analysis see page 341.

¹²⁶² For analysis see pages 346-347.

meddle in questions of internal government in Member States; (3) it is reluctant to advocate territorial autonomy as a conflict-resolution mechanism; and last, but not least, (4) it generally limits the issue of minority protection to CEECs.¹²⁶³

1.3. An EU regime of minority protection?

In light of the above overview, let us consider the key research questions posed in this thesis: should the EU take these developments any further and play a more prominent role in protecting minorities in its Member States? Overall, as EU law stands, it has some potential to contribute to minority protection. It has a strong framework on non-discrimination and some provisions that could have limited and often indirect impact on the protection of special rights. However, to design a fully-fledged regime of minority protection, the EU must acquire the necessary competences and revise the Treaties to include a relevant legal basis. Such an attempt might be highly controversial and create political resistance from some Member States.

Significantly, were the necessary political consensus achieved, EU law contains a number of instruments and mechanisms that could lead to the establishment of an effective system of minority protection. Indeed, although each of the regimes under the ICCPR, ECHR and FCNM (discussed in Sections 1 and 2 of Chapter I) have their own strengths and weaknesses,

none of them enjoys the combination of regularity and frequency of monitoring, the relative degree of institutional and political closeness and trust between participating States, and the established mechanisms,

¹²⁶³ Michael Keating, 'Federalism and the Balance of Power in European States' (OECD, 2007) 16.

institutions and array of instruments for policy coordination and mutual learning as does the European Union system.¹²⁶⁴

Let us consider some of the benefits offered by the EU legal system. Where monitoring is concerned, the recently established EU Fundamental Rights Agency (FRA)¹²⁶⁵ has several major functions, namely, to collect data on fundamental rights in the EU, to produce expert opinions, and to promote dialogue with civil society to raise public awareness. The FRA's functions at present do not include monitoring Member States' compliance with human or minority rights. Were the EU to acquire a competence in minority rights, the FRA could be accorded that monitoring role.

Furthermore, the institutional and political closeness of EU Member States, based on their duty of sincere cooperation and mutual respect under Article 4(3) TEU,¹²⁶⁶ has proved invaluable in ensuring the effectiveness and uniform application of EU law in Member States.¹²⁶⁷ These obligations make the EU system far more effective than those of the UN or the CoE. Therefore, if the EU had the necessary competence to

¹²⁶⁴ de Búrca, 'Beyond the Charter...' (n 677).

¹²⁶⁵ Council (EC) Regulation No 168/2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L 53/2.

¹²⁶⁶ Article 4(3) TEU stipulates:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

¹²⁶⁷ See, for example, Case C-106/89 *Marleasing Sa v La Comercial Internacional* [1990] ECR I-4135; Case C-266/03 *Commission v Luxembourg* (Inland Waterways Agreement) [2005] ECR I-4805. See also, John Temple Lang, 'Developments, Issues, and New Remedies - The Duties of National Authorities and Courts under Article 10 of the EC Treaty' (2004) 27 *Fordham International Law Journal* 1904-1939.

protect the rights of minorities, Member States would be under the legal obligation to perform their duties in good faith. Failure of a Member State to fulfil its obligations under the TEU may result in infringement proceedings before the ECJ¹²⁶⁸ and lead to imposition of a penalty.¹²⁶⁹

As to the range of instruments and mechanisms, EU law often effectively combines hard law and soft law mechanisms.¹²⁷⁰ For example, the Open Method of Coordination (OMC) has been used to strengthen the provisions of EU Treaties by fostering permanent dialogue and mutual learning among Member States. The OMC is a framework for the Member States that allows convergence of national policies towards the main EU goals, and the spreading of best practices amongst Member States.¹²⁷¹ Accordingly, it is ‘soft’ policy co-ordination, “whose very innovation rests in its distance from ‘law’ traditionally understood.”¹²⁷² Convergence of policies may signify the wide identification of certain objectives, the definition of yardsticks to measure progress related to the objectives, and the creation of tools to achieve the objectives.¹²⁷³ For example, if and when the EU has the competence to protect minority rights, this mechanism could be employed to further the right of minorities to access education in a minority language. Thus, best practices from other Member

¹²⁶⁸ Articles 258 and 259 TEU.

¹²⁶⁹ Article 260 (2) and (3) TEU.

¹²⁷⁰ For detailed analysis see, P Kjaer, *Between Governing and Governance: On the Emergence, Function and Form of Europe’s Post-National Constellation* (Hart, Oxford 2010).

¹²⁷¹ Gabriel Toggenburg, ‘The EU’s evolving policies vis-a-vis minorities...’ (n 36) 17.

¹²⁷² Mark Dawson, ‘The Ambiguity of Social Europe in the Open Method of Coordination’ (2009) 34(1) *European Law Review* 55-79, 56.

¹²⁷³ Fredriksson, ‘Changes of Education Policies within the European Union...’ (n 942) 526-527.

States and peer review mechanisms could induce governments to promote this right while preserving some discretion on the matter.¹²⁷⁴

However, all these mechanisms can be used only if and when the EU acquires the necessary competence. At present, the EU could adopt a broad definition of ‘minority’ under Article 2 TEU. As argued in Chapter I on pages 130-155, such a definition should focus on the needs of minority groups, not labels. For example, Chapter II showed how States can use labels to evade their international obligations. Thus, Latvia introduced the artificially created label of ‘non-citizen’ to obfuscate the fact that, in effect, it has created statelessness, explicitly prohibited by a number of international agreements. The labels ‘racial’ or ‘ethnic’, as highlighted in Chapter III, guarantee a higher level of protection to some groups, by, for instance, prohibiting indirect discrimination in the manifestation of religion in education, as compared to the protection available to ‘religious’ minorities. Similarly, opposition to the term ‘regional’ minorities in Belgium leads to the denial of special rights in education to French-speakers in Flanders, as discussed in Chapter IV. Therefore, for the purposes of EU law, it is desirable to adopt a broad definition of ‘minority’, applied uniformly to current and future Member States, in order to ensure consistency in the EU’s approach to minorities (both internally and externally). Indeed, the Copenhagen criteria are silent on what types of minorities are protected; in its accession monitoring, the Commission too has adopted a broad approach to the definition, by

¹²⁷⁴ Martin Brusic, ‘The European Union and Interethnic Power-sharing Arrangements in Accession Countries’ (2003) 1 *Journal on Ethnopolitics and Minority Issues in Europe* 16.

including, for example, migrants.¹²⁷⁵ The required level of protection, then, should be based on a sliding scale of rights stemming from the particular needs of a group.

Overall, the EU could undoubtedly play a greater role in minority protection. However, although it may be tempting to suggest that the EU should build on the existing framework and enact its own rules on the protection of minorities, reinventing the wheel would be counterproductive for both the EU and the CoE.¹²⁷⁶ Besides, developing a comprehensive regime of minority protection may be time-consuming. Therefore, a more practical contribution of the EU to minority protection could be through supporting the implementation of the FCNM by Member States.¹²⁷⁷

The next section assesses whether the EU should combine its efforts with those of the CoE, and use the FCNM as an internal and external yardstick of minority protection.

2. Joining Forces: Convergence of EU monitoring mechanisms with the FCNM?

2.1. The FCNM's penetration into EU law and policy

¹²⁷⁵ For discussion, see pages 179-180; see also, Kristin Henrard and Robert Dunbar, 'Introduction' in K Henrard and R Dunbar (eds) *Synergies in Minority Protection: European and International Law Perspectives* (Cambridge University Press, Cambridge 2008) 12.

¹²⁷⁶ Rainer Hofmann, 'Implementation of the FCNM: Substantive Challenges' in A Verstichel et al (eds) *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* (Intersentia, Oxford 2008) 162.

¹²⁷⁷ Similarly, in her recent book, Ahmed argues that the EU may be better placed to be a promoter, rather than a protector of minority rights. T Ahmed, *The Impact of EU Law on Minority Rights* (Heart, Oxford 2010).

The question of EU involvement in minority protection is not new and has been addressed by the EP since the 1980s. However, if the initial resolutions of the EP suggested a preference for development of minority standards at the supranational level,¹²⁷⁸ recent resolutions suggest that the EP prefers the FCNM as an EU yardstick.¹²⁷⁹ Thus, in 2003, the EP issued a report with recommendations to the Commission regarding the languages of minorities in the EU.¹²⁸⁰ In this document, the EP strongly advocated coordinating action with the relevant CoE bodies, in particular the monitoring bodies of the FCNM.¹²⁸¹ In another recent resolution, the EP called on the Commission and Member States to treat linguistic minorities in the EU in accordance with the principles laid down in the FCNM.¹²⁸² The EP has also encouraged Member States to ensure effective participation of national minorities in public life as stipulated in Article 15 FCNM.¹²⁸³ In addition, the EP urged the Commission to “establish a policy standard for the protection of national minorities, having due regard to Article 4(2) [FCNM]”,¹²⁸⁴ requiring full and effective equality between persons belonging to a national minority and those belonging to the majority. Accordingly, it appears that the EP increasingly treats the FCNM as the benchmark for minority protection in the EU.

¹²⁷⁸ European Parliament (EC), ‘Resolution on measures in favour of minority languages and cultures’ [1983] OJ C68/103; ‘Resolution on a Community charter of regional languages and cultures and on a charter of rights of ethnic minorities’ [1984] OJ C287/106; ‘Resolution on the languages and cultures of regional and ethnic minorities in the European Community’ [1987] Doc.A2-150/87; ‘Resolution on linguistic and cultural minorities in the European Community’ [1994] OJ C061/110.

¹²⁷⁹ European Parliament, ‘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] 2003/2057(INI) final A5-0271/2003; Resolution 2005/2008(INI) (n 584).

¹²⁸⁰ European Parliament, Report 2003/2057(INI) (n 1279).

¹²⁸¹ European Parliament, Report 2003/2057(INI) (n 1279) paras 6, 7, 27 and 28.

¹²⁸² European Parliament, Resolution 2005/2008(INI) (n 584) para 44.

¹²⁸³ European Parliament, Resolution 2005/2008(INI) (n 584) para 48.

¹²⁸⁴ European Parliament, Resolution 2005/2008(INI) (n 584) para 6.

Likewise, in EU pre-accession policies and instruments, minority rights as stipulated in the FCNM have firmly entered EU political conditionality and EU membership obligations in several sets of EU instruments.¹²⁸⁵ For example, in the 1997 Opinions on the candidate countries' observance of the requirement of respect for and protection of minority rights under the Copenhagen criteria, the Commission based its assessments on the principles in the FCNM.¹²⁸⁶ Failure to comply with these rules resulted in the postponement of opening accession negotiations, as Slovakia experienced.¹²⁸⁷ Another instrument where the FCNM features strongly is the Accession Partnerships (APs) with the candidate countries, adopted by the Council on the Commission's proposal. The APs set the targets in areas where States aspiring to EU membership are encouraged to improve their performance. Although the early APs did not refer to the FCNM consistently, recent APs explicitly use this instrument as the yardstick to assess candidate countries' compliance with minority protection under the Copenhagen political criteria. By way of example, the 2008 Accession Partnership with Turkey insisted that the State should guarantee cultural diversity and ensure respect for and protection of minorities in accordance with the ECHR and the FCNM, and in line with best practice in Member States.¹²⁸⁸ It is remarkable that

¹²⁸⁵ Christophe Hillion, Report on The Framework Convention for the Protection of National Minorities and the European Union (2008) Conference on Enhancing the Impact of the Framework Convention.

¹²⁸⁶ See, for example, Commission, 'Agenda 2000 - Commission Opinion on Romania's Application for Membership of the European Union' [1997] DOC/97/18, 15; 'Agenda 2000 - Commission Opinion on Estonia's Application for Membership of the European Union' [1997] DOC/97/12, 18. The Commission continues this practice in recent enlargements as well. Thus, the Opinion on Croatia's application for membership commends Croatia for guaranteeing the educational rights of minorities in line with the principles contained in the FCNM: Commission, 'Opinion on Croatia's Application for Membership of the European Union' [2004] COM/2004/0257final, 25-27.

¹²⁸⁷ Commission, 'Agenda 2000 - Commission Opinion on Slovakia's Application for Membership of the European Union' [1997] DOC/97/20, 23 and 126.

candidate countries' compliance with the ECHR and the FCNM are placed on an equal footing.¹²⁸⁹ Likewise, increasing emphasis is placed on the FCNM in the Commission's regular Progress Reports, which assess the candidates' compliance with the Copenhagen criteria and the objectives of the APs. Thus, in the 2001 Progress Report on Cyprus, the Commission criticised the country on the basis of the incompatibility between Article 2 of its Constitution, which imposes a certain identity (a minority group member has to choose to belong either to the 'Greek' or to the 'Turkish' community, irrespective of their actual ethnic origin), and Article 3 FCNM, which leaves such choices with the persons belonging to a minority, as discussed in Chapter I on page 181.¹²⁹⁰ Thus, the Commission has increasingly relied on the FCNM standards in the enlargement process as the benchmark to measure candidate countries' compliance with the requirement of minority protection.

The penetration of the FCNM into the EU legal order is not, however, limited to the pre-accession conditionality requirements, which candidates have to meet before the Commission opens accession negotiations. The Commission has also relied on the FCNM while assessing whether candidate countries meet the membership conditions during the accession negotiation phase.¹²⁹¹ For example, in the accession negotiations with Croatia, in the screening report on a new Chapter 23 on 'Fundamental Rights and Judiciary', the Commission explicitly referred to minority rights in EU *acquis communautaire*:

¹²⁸⁸ Council (EC) Decision 2008/157 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC [2008] OJ L 051, 4-18.

¹²⁸⁹ Hillion, Report on The Framework Convention... (n 1285) 7.

¹²⁹⁰ Commission, '2001 Regular Report on Cyprus' Progress towards Accession' [2001] SEC(2001)1745, 18.

¹²⁹¹ Hillion, Report on The Framework Convention... (n 1285) 10.

According to Article 21 of the Charter of Fundamental Rights of the EU, members of national minorities shall not be discriminated against. Article 1 of the Framework Convention for the Protection of National Minorities confirms that human rights include minority rights. The latter include the right to non-discrimination of a person belonging to a national minority; the freedom of association, [of] assembly, of expression; the freedom of religion; the right to use one's language; and the effective participation in public affairs.¹²⁹²

Although the argument is somewhat circular, i.e.,

[s]ince minority rights are included in human rights as provided in Article 1 of the FCNM, and given that human rights are part of the EU *acquis*, then minority rights as articulated in the FCNM can also be viewed as belonging to the *acquis*[,]¹²⁹³

in effect, the Commission implicitly acknowledges the significance of minority rights as an integral part of EU *acquis*.

The above examples aim to illustrate that the FCNM features strongly in non-binding resolutions of the EP and EU enlargement policy. This is not to say that the Commission has always been consistent in its approach to candidate countries, nor to claim that its efforts have all been successful.¹²⁹⁴ The key argument here is that the FCNM has been utilised as an EU yardstick in the enlargement process. There is, however, no corresponding requirement relating to existing EU Member States. What, then, can the EU do to close the gap created by different sets of obligations of the candidate countries and existing EU Member States? One possible solution is for the EU to internalise explicitly the FCNM. This can be done either through monitoring

¹²⁹² Commission, 'Screening report: Croatia, Chapter 23 – Judiciary and fundamental rights' [2007] 3 <http://ec.europa.eu/enlargement/pdf/croatia/screening_reports/screening_report_23_hr_internet_en.pdf> accessed 12 July 2009.

¹²⁹³ Hillion, Report on The Framework Convention... (n 1285) 12.

¹²⁹⁴ For discussion see pages 193-194.

Member States' compliance with the FCNM or by the EU acceding to the instrument.¹²⁹⁵ Let us consider each of these options in turn.

2.2. EU monitoring of Member States' compliance with the FCNM

EU monitoring of Member States' compliance with the FCNM could help to ensure consistency of standards towards candidate States in the accession process to the EU, resolve remaining issues relating to minorities within the EU post-accession, and eliminate double standards between 'new' and 'old' Member States. In addition, EU monitoring could strengthen the FCNM because of the strong EU enforcement mechanisms, such as the imposition of political sanctions on a Member State under Article 7 (2) and (3) TEU if there is a clear risk of a serious and persistent breach of Article 2 TEU (for discussion see page 207). However, the possibility that this provision could entail some form of permanent monitoring of Member States, for example, based on the FCNM principles, has been rejected even by the EP, which correctly stated that Article 7 TEU could not "be invoked in support of any right to, or policy of, permanent monitoring of the Member States by the Union".¹²⁹⁶

The sensitivity of Member States towards EU monitoring of their performance in the field of human rights is also evident from the limited mandate given to the recently established FRA.¹²⁹⁷ Significantly, the FRA's tasks do not include monitoring

¹²⁹⁵ Oliver de Schutter, 'European Union Legislation and the Norms of the Framework Convention for the Protection of National Minorities' (2006) DH-MIN 019, 23.

¹²⁹⁶ European Parliament, 'Resolution on respect for and promotion of values on which the Union is based' [2004] OJ C104E/408, para 11(a).

¹²⁹⁷ Regulation No 168/2007 (n 1265).

Member States' protection of fundamental rights; nor will the FRA submit regular country reports on the state of fundamental rights protection while Member States implement EU law.¹²⁹⁸ This is not to say that the role of the FRA could not evolve in the future to include monitoring Member States' compliance with the FCNM, were the EU to acquire the necessary political consensus. This could represent an important contribution, since the EU's strong institutional machinery could improve the implementation of the FCNM. In its pre-accession monitoring reports, the Commission has already set an important precedent: the convergence of EU monitoring with CoE rules on minority protection has proved effective, at least in those states that had ratified the FCNM.

The downside of such a development could be the substitution of CoE monitoring by EU monitoring, or the duplication of effort. In the worst case scenario, "this could lead to diverging interpretations of the requirements of the relevant standards, and to the authority of the monitoring by the Council of Europe being undermined."¹²⁹⁹ Closer inter-organisational cooperation seems to be the main solution. Thus, as far as EU monitoring of Member States' compliance with the FCNM is concerned, the EU should not reinvent minority rights by supplying its own reading of the FCNM principles; rather, "any country-specific follow-up should be based, equally explicitly, on the findings of the monitoring bodies of the Council of Europe."¹³⁰⁰ Since 2001, the Commission has already followed this practice to a certain extent in the context of

¹²⁹⁸ Gabriel Toggenburg, 'The EU Fundamental Rights Agency: Satellite or Guiding Star?' (2007) 5 SWP Comments 3.

¹²⁹⁹ de Schutter, 'European Union Legislation...' (n 1295) 23; *see also* Oliver De Schutter, 'The Framework Convention on the Protection of National Minorities and the Law of the European Union' in A Verstichel et al (eds) *Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* (Intersentia, Oxford 2008) 268.

¹³⁰⁰ de Schutter, 'European Union Legislation...' (n 1295) 23.

EU enlargement policy. For example, as mentioned above, in its Regular Reports on Cyprus's progress towards accession, the Commission criticised the discrepancy between Article 2 of the Constitution, whereby all Cypriots are deemed to belong either to the Greek Community or to the Turkish Community, and Article 3 FCNM, which allows persons belonging to minorities to choose how they wish to be identified.¹³⁰¹ To substantiate this criticism, the Commission relied on the Opinion of the ACFC and the Resolution of the Committee of Ministers calling on Cyprus to address this issue.¹³⁰² This model of interaction between the EU and the FCNM monitoring bodies could serve as a guide for closer cooperation in future.¹³⁰³

Significantly, the ground for strengthening inter-institutional cooperation between the EU and the CoE has been already laid. The recent Agreement between the EC and the CoE on cooperation between the FRA and the CoE envisions the FRA's cooperation *inter alia* with the ACFC,¹³⁰⁴ aimed at avoiding duplication and ensuring the FRA and CoE monitoring bodies' activities complement each other.¹³⁰⁵

Accordingly, there is a possibility that the EU monitoring mechanism could be combined with the FCNM principles. However, despite the FCNM's increased significance in EU pre-accession policies, accession conditionality in the context of

¹³⁰¹ Commission, '2001 Regular Report on Cyprus's Progress towards Accession' (n 1290) 18; '2002 Regular Report on Cyprus's Progress towards Accession' [2002] SEC(2002) 1401, 23.

¹³⁰² 2002 Regular Report on Cyprus's Progress towards Accession (n 1301) 23.

¹³⁰³ However, as with the ECHR, the EU might expect its Member States to meet higher standards under the FCNM than those expected of other members of the CoE.

¹³⁰⁴ Agreement between the European Community and the Council of Europe on cooperation between the European Union Agency for Fundamental Rights and the Council of Europe [2008] OJ L 186/7, Article 1(b); see also, Memorandum of Understanding between the Council of Europe and the European Union [2007] CM (2007)74, paras 9-12, 21.

¹³⁰⁵ Agreement between the European Community and the Council of Europe (n 1304) Article 2.

the 2004-2007 enlargements did not include compliance with the FCNM, nor its ratification.¹³⁰⁶ For example, Latvia ratified the FCNM in 2005, i.e., one year after it joined the EU. Would, then, formal institutionalisation of the FCNM by the EU through its accession to the instrument have added value for the protection of minorities in EU Member States and candidate countries? The next section elaborates on the benefits and disadvantages of such a move.

2.3. EU accession to the FCNM

Internalisation of the FCNM would have several advantages for the EU. First, it might bring consistency as to the EU's internal and external protection of minorities. Secondly, it could require the EU institutions to take account of the FCNM when they legislate, as well as to enable an independent expert body to review EU acts "in relation to their impact on interethnic relations under the FCNM."¹³⁰⁷

This proposal could raise various objections, such as the argument that the EU is not a human rights organisation; it is outside its mandate to protect minorities internally; and there may be procedural difficulties in acceding to the FCNM. However, first, until twenty years ago, the EU had not promoted the rights of minorities externally either. The necessity of ensuring smooth enlargement induced the EU to initiate its own monitoring process in the candidate countries, despite the fact that both the CoE and the OSCE were already involved in minority protection. The aggravation of unresolved minority issues in some Member States could mobilise the necessary

¹³⁰⁶ Hillion, Report on The Framework Convention... (n 1285) 14.

¹³⁰⁷ Hofmann and Friberg, 'The Enlarged EU and the Council of Europe...' (n 35) 138.

political will within the EU to establish internal standards on minority protection. In addition, some of the new EU member states could “tilt the balance towards pushing for minority related components to enter into the legal texts of the EU, underpinning both its internal and external policies...”¹³⁰⁸ For example, during the drafting of the EU Constitutional Treaty, a Hungarian MEP proposed to insert a provision on EU accession to the FCNM; even though the proposal failed to gain sufficient support,¹³⁰⁹ it may be indicative of future developments.

As to the procedural aspects of such accession, as with the ECHR,¹³¹⁰ the CoE may be willing to accommodate the EU’s legal status and amend Article 29 FCNM to allow its accession. Concerns regarding various technical issues in the texts were raised in relation to the possible accession of the EU to the ECHR as well. This, however, did not stop Member States from incorporating a provision, first into the draft Constitutional Treaty, and later into the Lisbon Treaty, specifying the EU’s accession to the ECHR.¹³¹¹ The Venice Commission addressed concerns in relation to such accession, particularly in the light of the legally-binding CFR.¹³¹² Its findings may be indirectly relevant to the issue of the EU’s possible accession to the FCNM. Overall,

¹³⁰⁸ Hofmann and Friberg, ‘The Enlarged EU and the Council of Europe...’ (n 35) 144.

¹³⁰⁹ Hofmann and Friberg, ‘The Enlarged EU and the Council of Europe...’ (n 35) 138.

¹³¹⁰ See, Additional Protocol No 14 to the ECHR amending the control system of the Convention (2004) CETS 204, which entered into force on 06 January 2010. Article 59(2) ECHR as amended by Article 17 of Protocol 14 allows the EU to accede to the ECHR. See also, European Parliament, Institutional aspects of accession by the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2010] Resolution (2009/2241(INI)).

¹³¹¹ Article 6(2) TEU. See also Protocol Relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms [2009] OJ C/306, 155-156.

¹³¹² Venice Commission, ‘Opinion on the Implications of a Legally-binding EU Charter of Fundamental Rights on Human Rights Protection in Europe’ (2003) Opinion no 256/2003; See also, ‘Comments on the Accession of the European Union/ European Community to the European Convention on Human Rights’ (2007) CDL(2007)096.

the Venice Commission evaluated positively the co-existence of two legally binding instruments on human rights in Europe.¹³¹³ However, it acknowledged that certain divergences of interpretation could ensue due to differences in the wording, structure and scope of the ECHR (including the ECtHR's case law) and the CFR.¹³¹⁴ The solutions proposed were clearer division of competences between the ECtHR, the ECJ and national courts,¹³¹⁵ and closer inter-organisational dialogue.¹³¹⁶ As to duplication of efforts by the EU and the CoE, the Venice Commission noted that the EU's accession to the ECHR "would maintain and even reinforce the ECHR mechanism, avoid the creation of new dividing lines within Europe and enhance the credibility of the EU's policies in the field of human rights."¹³¹⁷ Accordingly, the EU's involvement in minority protection would not necessarily conflict with the CoE's efforts, provided that it is based on close institutional cooperation and a clear division of competences.

However, it is argued that the EU's potential accession to the FCNM could prove to be less useful than one may think, because some of the provisions of the FCNM are not applicable in the context of EU law. For example, Toggenburg questions the applicability of Article 12(1) FCNM to the EU.¹³¹⁸ The provision specifies that

[t]he 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.

¹³¹³ Venice Commission, Opinion no 256/2003 (n 1312) para 39.

¹³¹⁴ Venice Commission, Opinion no 256/2003 (n 1312) para 43.

¹³¹⁵ Venice Commission, Opinion no 256/2003 (n 1312) para 41.

¹³¹⁶ Venice Commission, Opinion no 256/2003 (n 1312) para 74.

¹³¹⁷ Venice Commission, Opinion no 256/2003 (n 1312) para 86.

¹³¹⁸ Toggenburg, 'Minority Protection in a Supranational Context...' (n 1078) 16.

In his view, the main stumbling block is the term ‘their national minorities’, which might create an impression that the EU has its own minorities.

As discussed in Chapter I on pages 131-133, the concept of ‘national minority’ remains undefined in Europe. The lack of a definition, however, has not prevented the development of rules on minority protection, such as in the FCNM. Given that the concept of ‘minority’ appears in EU primary law, namely Article 2 TEU and Article 21 CFR, it is likely to be only a matter of time before the ECJ will have to interpret the term in the EU context. Furthermore, the EU could follow State practice and adopt an interpretative declaration upon accession to the instrument to clarify the scope of the FCNM’s application in the EU context. In practice, such a declaration could specify which groups would benefit from the EU’s compliance with the FCNM. A broad approach to the definition, as suggested on page 186, is preferable, although, realistically, considering the opposition from some Member States to the broad definition of ‘minority’ suggested by the ACFC,¹³¹⁹ the EU may not be able to fashion new categories that fit in with the demands of EU law.

Nevertheless, the highly criticised framework nature of the FCNM and its vague wording,¹³²⁰ as some argue, might allow for its flexible application and should be

¹³¹⁹ For example, to the suggestions of the Advisory Committee to expand the scope of FCNM application (First Opinion on Italy (n 283) 19), the Italian government commented that “the possible extension of the safeguards provided by the Framework Convention to include other minorities can only be examined in the event that the Italian Parliament decides, under appropriate draft legislation, to recognise the existence of any additional minority language groups”: ‘Comments of the Government of Italy on the Opinion of the Advisory Committee on the implementation of the Framework Convention for the Protection of National Minorities in Italy’ (2002) GVT/COM/INF/OP/I(2002)007, 2.

¹³²⁰ Alfredsson, ‘A Frame an Incomplete Painting...’ (n 13); Stefan Troebst, ‘From paper to practice: The Council of Europe’s Framework Convention for the protection of national minorities’ (1999) 1 Helsinki Monitor 1-27.

viewed as strengths of the instrument.¹³²¹ Besides, not all the provisions of the FCNM are complicated. As Steketee indicates, for example, Articles 1, 3, 4 and 15 FCNM are fairly straightforward.¹³²² It is true that the jurisprudence of the HRC¹³²³ and the ECtHR¹³²⁴ cover most of these provisions, and hence constitute an integral part of the general principles of EU law. However, some of the ECtHR's case law is context-specific and led the Court to adopt a different approach in seemingly similar situations.¹³²⁵ Moreover, neither the ICCPR nor the ECHR contain an explicit catalogue of minority rights. Therefore, EU accession to the FCNM could have both symbolic and practical significance.

Overall, EU internalisation of the FCNM through consistent references to the instrument in EU enlargement policy, monitoring of Member States' compliance with the instrument, or even future accession, could bring consistency to EU internal and external actions involving minority rights. However, EU accession to the FCNM is not an easy option for developing a system of minority protection in the EU and has its own drawbacks. For example, there may be strong objections from EU Member

¹³²¹ Kinga Gál, 'The Council of Europe Framework Convention for the Protection of National Minorities and its Impact on Central and Eastern Europe' (2000) European Centre for Minority Issues 3; Francesco Palermo, 'Domestic Enforcement and Direct Effect of the Framework Convention for the Protection of National Minorities: On the Judicial Implementation of the (Soft?) Law of Integration' in A Verstichel et al (eds) *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* (Intersentia, Oxford 2008) 212.

¹³²² Frank Steketee, 'The Framework Convention: A Piece of Art or a Tool for Action?' 8 *International Journal on Minority and Group Rights* (2001) 1-15, 5.

¹³²³ *Sandra Lovelace* (n 337) (self-identification); and *Ilmari Länsman* (n 150); *Jouni Länsman* (n 150) and *Apirana Mahuika* (n 150) (participation rights), etc.

¹³²⁴ *Sejdić and Finci* (n 55) (non-discrimination in political participation); *D H and others v the Czech Republic* (n 71) and *Cyprus v Turkey* (n 290) (educational rights of minorities).

¹³²⁵ *Görzelik* (n 102) with *Sidiropoulos and others v Greece* (n 31) (the freedom of association to protect separate identity of a minority group). For analysis see Pentassuglia, 'Minority Issues as a Challenge in the European Court of Human Rights...' (n 31) 5-7.

States that have not signed the FCNM (i.e., France) or have signed but not ratified (i.e., Belgium, Greece and Luxembourg). Surely, ratification by all Member States must be an essential prerequisite for accession. Given the political opposition from the above mentioned States, however, this may be difficult to achieve in practice. Furthermore, procedural difficulties are to be expected. As noted above, Article 29 FCNM stipulates that the instrument is open to States only. In addition, accession to the FCNM would not in itself widen the EU's powers, so some Treaty amendments might be necessary to expand its competence in this field. Moreover, accession to the FCNM itself requires a valid legal basis; Article 2 TEU may not be sufficient in this respect.¹³²⁶

To conclude, because the protection of minorities in individual Member States largely depends on States' political will, arguably, it would be useful if, instead of creating another layer of rules, the EU could focus on developing implementation strategies for existing norms developed by the CoE. This can be achieved through closer cooperation of the Commission and the FRA with the supervisory bodies of the FCNM, and reinforcement of the FCNM by the EU. Such cooperation could include both short- and long-term strategies.

The short-term strategies could involve using the FCNM as a yardstick in EU enlargement policy, because the application of double standards in minority

¹³²⁶ The lack of a specific legal basis and competence on human rights prevented the EC from acceding to the ECHR: see, Opinion 2/94 on *Accession to the European Convention on Human Rights* [1996] ECR I-1759. Likewise, the ECJ confirmed that budget line B3-1006, used for promotion of regional or minority languages, had to be suspended due to the lack of an appropriate legal basis: *Case C-106/96 the United Kingdom (supported by Federal Republic of Germany, by Council of the European Union and by Kingdom of Denmark) v Commission of the European Communities, supported by the European Parliament* [1998] 98/C 234/07.

protection could encourage current¹³²⁷ and future candidate countries¹³²⁸ not to comply fully with accession criteria. Consequently, the Commission should insist that ratification and compliance with the FCNM becomes an accession condition. Moreover, the Commission itself must use the FCNM more consistently. Admitting candidates that do not fully meet the Copenhagen political criteria sends the wrong signal to States which have not resolved minority issues prior to accession, allowing them to feel at liberty to continue exclusionary practices against minorities post-accession. To address the unresolved issues post-accession, it is desirable for the EU to expand the powers of the FRA to monitor Member States' compliance with human rights, including the rights of persons belonging to minorities. It would be particularly beneficial if such monitoring was based on the FCNM principles and the ACFC's reading of the instrument to avoid contradictions in its application. The added value of FRA monitoring would also be apparent where relevant existing EU rules that could contribute to minority protection, such as the Equality Directives and Articles 21 and 22 CFR, are interpreted in a minority-friendly fashion.

The long-term EU strategy in relation to the FCNM could involve formal accession to the instrument. One of the main obstacles to such a development is the lack of EU competences to protect minorities, which can be remedied through future Treaty revisions.¹³²⁹ Once the political momentum is achieved, procedural and technical obstacles might be negotiated fairly easily. By acceding to the FCNM, the EU could

¹³²⁷ Current candidate countries are Turkey, Croatia and the Former Yugoslav Republic of Macedonia.

¹³²⁸ Albania, Bosnia and Herzegovina, Montenegro, Serbia, Kosovo and Iceland.

¹³²⁹ Toggenburg, 'Minority Protection in a Supranational Context...' (n 1078) 10. However, further treaty revisions are unlikely to take place in the near future, largely because even a small country can block any proposed changes: Petr Kratochvil and Mats Braun, 'The Lisbon Treaty and the Czech Republic: Past Imperfect, Future Uncertain' (2009) 5(3) *Journal of Contemporary European Research* 498-504, 504.

help to ensure consistency of standards in its enlargement policy and resolve outstanding issues of minorities within the EU post-accession. Despite technical difficulties and political opposition from some Member States, such an accession could have an added symbolic and practical value.

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