

The siren's call? Exploring the implications of an additional protocol to the European Convention on Human Rights on national minorities

Article (Updated Version)

Berry, Stephanie (2016) The siren's call? Exploring the implications of an additional protocol to the European Convention on Human Rights on national minorities. *International Journal on Minority and Group Rights*, 23. ISSN 1385-4879

This version is available from Sussex Research Online: <http://sro.sussex.ac.uk/id/eprint/52577/>

This document is made available in accordance with publisher policies and may differ from the published version or from the version of record. If you wish to cite this item you are advised to consult the publisher's version. Please see the URL above for details on accessing the published version.

Copyright and reuse:

Sussex Research Online is a digital repository of the research output of the University.

Copyright and all moral rights to the version of the paper presented here belong to the individual author(s) and/or other copyright owners. To the extent reasonable and practicable, the material made available in SRO has been checked for eligibility before being made available.

Copies of full text items generally can be reproduced, displayed or performed and given to third parties in any format or medium for personal research or study, educational, or not-for-profit purposes without prior permission or charge, provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

The siren's call? Exploring the implications of an additional protocol to the European Convention on Human Rights on national minorities

Article (Updated Version)

Berry, Stephanie (2016) The siren's call? Exploring the implications of an additional protocol to the European Convention on Human Rights on national minorities. *International Journal on Minority and Group Rights*, 23 (1). pp. 1-38. ISSN 1385-4879

This version is available from Sussex Research Online: <http://sro.sussex.ac.uk/id/eprint/59579/>

This document is made available in accordance with publisher policies and may differ from the published version or from the version of record. If you wish to cite this item you are advised to consult the publisher's version. Please see the URL above for details on accessing the published version.

Copyright and reuse:

Sussex Research Online is a digital repository of the research output of the University.

Copyright and all moral rights to the version of the paper presented here belong to the individual author(s) and/or other copyright owners. To the extent reasonable and practicable, the material made available in SRO has been checked for eligibility before being made available.

Copies of full text items generally can be reproduced, displayed or performed and given to third parties in any format or medium for personal research or study, educational, or not-for-profit purposes without prior permission or charge, provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

The Siren's Call?

Exploring the Implications of an Additional Protocol to the European Convention on Human Rights on National Minorities

Stephanie E. Berry*

Abstract

Calls for the adoption of an Additional Protocol to the European Convention on Human Rights (ECHR) on National Minorities have persisted within the Council of Europe despite the adoption of the Framework Convention for the Protection of National Minorities (FCNM). This article explores the potential implications of the adoption of an Additional Protocol on National Minorities to the ECHR for the FCNM. The European Court of Human Rights (ECtHR) already has several tools that would allow it to extend protection to persons belonging to national minorities. However, as the ECtHR tends to allow States a wide margin of appreciation in cases concerning persons belonging to minorities, it is argued that the adoption of an Additional Protocol on National Minorities may not be desirable, as it has the potential to undermine the progress made by the Framework Convention Advisory Committee.

1. Introduction

During the drafting of the European Convention on Human Rights (ECHR),¹ it was not thought to be necessary to adopt a provision extending additional protection to persons belonging to minorities.² Subsequent attempts to adopt both a minority rights

* Lecturer in Public Law, University of Sussex. The author would like to thank Daniel Augenstein, Christine Bell, Matyas Bodig, Elizabeth Craig, Edward Guntrip, Daithí Mac Síthigh and Steven Wheatley for their comments on previous drafts of this article. All errors and omissions remain the author's own.

¹ European Convention on Human Rights *opened for signature* 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. No. 5 (*entered into force* 3 September 1953) [ECHR].

² P. Thornberry and M.A. Martin Estébanez, *Minority Rights in Europe: A Review of the Work and Standards of the Council of Europe* (Council of Europe Publishing, Strasbourg, 2004) p. 40; G. Pentassuglia, *Minorities in International Law – An Introductory Study* (Council of Europe Publishing, Strasbourg, 2002) pp. 119–20.

provision³ and, in the 1990s, an Additional Protocol to the European Convention on Human Rights on National Minorities (‘Additional Protocol on National Minorities’) proved unsuccessful.⁴ Instead, two independent regimes developed within the Council of Europe, the European Convention on Human Rights (ECHR), supervised by the European Court of Human Rights (ECtHR) and the Framework Convention for the Protection of National Minorities (FCNM),⁵ supervised by the Framework Convention Advisory Committee (AC-FCNM). However, the perceived superiority of justiciable rights has meant that the prospect of an Additional Protocol on National Minorities has remained on the agenda.⁶ Since 2009, renewed calls have been made within the Parliamentary Assembly of the Council of Europe (PACE) for the adoption an Additional Protocol on National Minorities,⁷ further driven by accusations that the FCNM is weak, ineffective and inadequate.⁸

³ Parliamentary Assembly to the Council of Europe (PACE), Recommendation 285 (1961) Rights of National Minorities, 28 April 1961, <assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta61/EREC285.htm>, visited on 27 January 2015; PACE Committee on Legal Affairs, ‘Report on Rights of National Minorities’ Doc. 1299, 26 April 1961; Report of the Committee of Experts on Human Rights to the Committee of Ministers, ‘Rights of National Minorities’ 1973 DH/Exp (73) 47.

⁴ PACE, Recommendation 1134 (1990) on the rights of minorities, 1 October 1990, <assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15168&lang=en>, visited on 27 January 2015; PACE, Recommendation 1177 (1992) on the rights of minorities, 5 February 1992 <assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta92/EREC1177.htm>, visited on 27 January 2015; PACE, Recommendation 1201 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights, 1 February 1993, <assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta93/EREC1201.htm>, visited 27 January 2015; PACE, Recommendation 1492 (2001) on the rights of minorities, 23 January 2001 <assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta01/EREC1492.htm>, visited on 27 January 2015.

⁵ Framework Convention for the Protection of National Minorities CETS No 157, entered into force 1 February 1998 [FCNM].

⁶ G. Alfredsson, ‘A Frame an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures’ 7: 4 *International Journal on Minority and Group Rights* (2000) pp. 291–304.

⁷ PACE, ‘Drafting an additional protocol to the European Convention for Human Rights: basic standards for national minorities, Motion for a recommendation presented by Mr Frunda and others’, Doc. 11897, 5 May 2009, <assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=12229&Language=EN>, visited on 27 January 2015; PACE, Resolution 1994 (2012) on an additional protocol to the European Convention on Human Rights on national minorities, 9 March 2012, <www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18071&lang=en>, visited on 27 January 2015; PACE, Resolution 1866 (2012), on an additional protocol to the European Convention on Human Rights on national minorities, 9 March 2012, <www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=18074&lang=en>, visited on 27 January 2015.

⁸ PACE, ‘Report on an additional protocol to the European Convention on Human Rights and national minorities’, drafted by the Committee on Legal Affairs and Human Rights, Rapporteur:

Whilst acknowledging the potential benefits of an Additional Protocol on National Minorities, in particular the creation of justiciable minority rights standards within Europe, in this article it is argued that such a development may not be desirable, as an Additional Protocol on National Minorities has the potential to undermine the progress made by the AC-FCNM. Although the ECHR does not currently extend special protection to persons belonging to minorities,⁹ this article submits that the ECtHR already has a number of tools at its disposal that would allow it to pursue the two pillars of minority rights protection, namely, the preservation of minority identity and equality and non-discrimination.¹⁰ Yet, by affording States a wide margin of appreciation in cases concerning the preservation of minority identity under articles 8 and 9 ECHR, the ECtHR has not fully employed these tools to protect the identity of persons belonging to minorities. Furthermore, the ECtHR has been reluctant to utilise article 14 ECHR, the prohibition on discrimination, particularly on the grounds of “association with a national minority” and is loath to consider statistical evidence of widespread discrimination.¹¹

As the ECtHR has hitherto failed to employ the tools at its disposal to protect persons belonging to national minorities, this article asserts that this approach is likely

Mr György Frunda, Doc. 12879, 23 February 2012, <www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=13083&lang=en> , visited on 27 January 2015, paras. 3, 5, 19, 34 [hereinafter PACE Report].

⁹ *G. and E. v. Norway*, (1983) 35 DR 30, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-74157>, visited 27 January 2015, p. 35; *Noack and Others v. Germany*, (ECHR) 2000-VI <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-5981>, visited 27 January 2015. The ECtHR has recognised that they may be evidence of an emerging European consensus in relation to the special needs of minorities, however, this line of jurisprudence is insufficiently established to determine whether this will be consistently recognised in the ECtHR’s jurisprudence: *Chapman v. United Kingdom*, (ECHR) 2001-I <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59154>, visited 27 January 2015, paras. 93–94, 98; *Gorzelik and Others v. Poland*, (ECHR) 2004-I, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61637>, visited on 27 January 2015, para. 68; *D.H. and Others v. the Czech Republic* (ECHR) 2007-IV <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83256>, visited 27 January 2015, para. 181.

¹⁰ *Minority Schools in Albania* PCIJ Series A/B. Advisory Opinion of 6 April 1935, p. 17.

¹¹ See *McShane v. United Kingdom* (ECHR) Application No 43290/98, Merits and Just Satisfaction, 28 May 2002 <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60484>, visited 27 January 2015, para. 135; *DH and Others v. the Czech Republic* (ECHR) Application No 57325/00, Merits, 7 February 2006, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72317>, visited 27 January 2015, para. 52; *V.C. v. Slovakia* (ECHR) Application No 18968/07, Merits and Just Satisfaction, 8 November 2011, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107364>, visited 27 January 2015, para. 177. Cf. *DH and Others v. the Czech Republic*, *supra* note 9, para. 188; *Horváth and Kiss v. Hungary* (ECHR) Application No 11146/11, Merits and Just Satisfaction, 29 January 2013, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-116124>, visited 27 January 2015, paras. 107, 110–111.

to continue even if an Additional Protocol on National Minorities is adopted. The ECtHR's jurisprudence on minority issues has the potential to conflict with the work of the AC-FCNM. Therefore, possible alternative mechanisms that would facilitate the creation of justiciable minority rights standards within the Council of Europe warrant exploration.¹²

First, the justifications given for the adoption of an Additional Protocol on National Minorities will be considered. Second, the extent to which an Additional Protocol on National Minorities would expand the substantive rights in the ECHR and, thus, enhance the ability of the ECtHR to protect the rights of persons belonging to national minorities will be examined. Third, the interpretation of analogous rights by the ECtHR and AC-FCNM will be compared, focusing on the right of persons belonging to religious minorities and travellers to preserve their identity and non-discrimination in relation to travellers. This comparison will enable the identification of any divergence in the interpretation of similar rights by the two bodies. Finally, possible alternative mechanisms by which justiciable minority rights standards in Europe could be achieved will be identified.

2. The Justifications for an Additional Protocol on National Minorities

The 2011 Parliamentary Assembly 'Report on an Additional Protocol to the European Convention on Human Rights and National Minorities' ('2011 PACE Report') identifies a number of justifications for the adoption of an Additional Protocol on National Minorities. While a number of these justifications are legitimate, others appear to be based on misconceptions about the FCNM and the willingness of member States of the Council of Europe to accept binding minority rights standards.

Historically, member States of the Council of Europe have not supported the adoption of justiciable minority rights¹³ or individual rights in the cultural field.¹⁴

¹² This article does not intend to pit the ECtHR against the AC-FCNM but rather acknowledges that a large degree of divergence in the interpretation of analogous rights by these two bodies already exists and that this is unlikely to change following the adoption of an Additional Protocol on National Minorities.

¹³ *Supra* notes 2–4. Report of the Committee of Experts on Human Rights to the Committee of Ministers, *supra* note 3; Committee of Ministers, 'Reply adopted by the Committee of Ministers on 19 January 1999 at the 656th meeting of the Ministers' Deputies on the rights of minorities -

While the FCNM established binding European minority rights standards, the instrument was felt to be a compromise, as it did not create justiciable standards.¹⁵ Notably, the 2011 PACE Report points to the fact that the FCNM has not been signed and/or ratified by a number of member States of the Council of Europe.¹⁶ However, it is unclear how the adoption of an Additional Protocol on National Minorities would remedy this situation. States such as France and Turkey have consistently resisted minority rights standards and have not adopted the FCNM, which was formulated in a manner calculated to encourage widespread ratification.¹⁷ These States are, thus, even less likely to adopt an Additional Protocol on National Minorities that creates precisely worded and justiciable standards.¹⁸ The failure of Protocol 12 to the ECHR on the prohibition of discrimination¹⁹ to gain ratifications from the majority of Council of Europe member States,²⁰ further illustrates the reluctance of States to extend their obligations under the ECHR, in an area that would benefit persons belonging to national minorities. Thus, an Additional Protocol on National Minorities is not guaranteed widespread ratification.

Similarly to the proposed Additional Protocol on National Minorities, the FCNM contains rights pertaining to the preservation of cultural identity, the right to

Parliamentary Assembly Recommendation 1134 (1990)' CM/AS(99)Rec1134finalE /, <[wcd.coe.int/ViewDoc.jsp?Ref=CM/AS\(99\)Rec1345&Language=lanEnglish&Ver=final&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](http://wcd.coe.int/ViewDoc.jsp?Ref=CM/AS(99)Rec1345&Language=lanEnglish&Ver=final&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864)>, visited on 27 January 2015.

¹⁴ E. Craig, 'A Right to Cultural Identity in a UK Bill of Rights?' 19:4 *European Public Law* (2013) p. 702.

¹⁵ Alfredsson, *supra* note 6, pp. 292, 304.

¹⁶ PACE Report, *supra* note 8, paras. 6–7, 14–15. This includes both States that are unwilling to extend additional protection to persons belonging to minorities, including Belgium, France, Greece and Turkey, and States that do not believe that they are ethnic diverse enough to justify the adoption of such measures, including, Andorra, Iceland, Luxembourg and Monaco.

¹⁷ Council of Europe, Framework Convention for the Protection of National Minorities and Explanatory Report (February 1995) H(1995)010 para. 11; A. Phillips, 'The 10th Anniversary of the Framework Convention for the Protection of National Minorities' 1 *Europäisches Journal für Minderheitenfragen* (2008) p. 184.

¹⁸ Notably, France has also attempted to avoid obligations under article 27 of the International Covenant on Civil and Political Rights by entering an interpretative declaration. United Nations Treaty Collection, International Covenant on Civil and Political Rights, <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec>, visited on 2 October 2014.

¹⁹ Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms - Prohibition of Discrimination CETS No 177, entered into force 1 April 2005.

²⁰ Council of Europe Treaty Office, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms CETS No 177.; <www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=7&DF=12/12/2013&CL=ENG>, visited on 2 October 2014.

use minority languages and political rights, including freedom of association and effective participation in public life.²¹ Yet the formulation of the FCNM's binding provisions has been the subject of criticism.²² The FCNM elaborates programmatic rights that establish "objectives which the Parties undertake to pursue". However, they are not "directly applicable" and "leave the States concerned a measure of discretion in the implementation of the objectives which they have undertaken to achieve".²³ Furthermore, the insertion of qualifications into a number of provisions, such as "as far as possible", "where appropriate" and "within the framework of their legal systems", arguably permits States a wider degree of discretion than is desirable.²⁴ As a result, the 2011 PACE Report asserts that "[b]ecause of its flexibility this legal instrument can be adapted to the situation of the states parties, but it is not incisive enough to afford effective protection to minorities".²⁵ An Additional Protocol on National Minorities has been asserted to be a panacea for the deficiencies of the FCNM.²⁶

Nonetheless, Phillips has submitted that "it is widely accepted today that some of the 'weaknesses' in the language of the Framework Convention are in fact 'strengths' as practice has developed and civil society has become engaged".²⁷ The AC-FCNM considers State Reports, Shadow Reports²⁸ and statistical evidence in addition to undertaking State visits, in order to objectively ascertain the situation of minorities in the State and to formulate its Opinions on States Reports. As noted by Brems, the approach of monitoring State practice in the context of progressive human rights standards, utilising "indicators and benchmarks" leads to the maximization of human rights standards as States "commit themselves to gradually realising these

²¹ Articles 5, 7, 9, 10, 11, 14, 15 FCNM. Cf. PACE Report, *supra* note 8, para. 6. The PACE report also recommends the adoption of a right to autonomy for persons belonging to national minorities, which is considered in further detail in s. 3.

²² S. Troebst, 'From Paper to Practice: The Council of Europe's Framework Convention for the Protection of National Minorities' 10:1 *Helsinki Monitor* (1999) p. 22; Alfredsson, *supra* note 6, p. 293; K. Drzewicki, 'Advisability and Feasibility of Establishing a Complaints Mechanism for Minority Rights' 21:2 *Security and Human Rights* (2010) p. 101.

²³ Council of Europe, *supra* note 17, para. 11.

²⁴ Alfredsson, *supra* note 6, pp. 293–94.

²⁵ PACE Report, *supra* note 8, para. 21.

²⁶ *See generally* PACE Report, *supra* note 8.

²⁷ Phillips, *supra* note 17, p. 183. *See also*, Drzewicki, *supra* note 22, p. 102.

²⁸ Civil society actors and the representative organisations of national minorities provide Shadow Reports in order to provide a counter perspective to official State reports.

rights, their available resources determining the precise extent of their obligations”.²⁹ It has, in fact, been suggested the AC-FCNM’s Opinions on State Reports have gradually achieved the status of “soft jurisprudence”.³⁰ Consequently, the programmatic nature of the rights contained in the FCNM has enabled the AC-FCNM to take a “robust” approach to interpretation of standards and, thus, has led to “an organic growth” in minority rights protection.³¹

While the FCNM contains progressive rights, the ECHR contains minimum standards. The ECtHR does not monitor the overall implementation of the rights contained in the ECHR but, rather, hears individual cases and takes a violations approach. Consequently, the ECtHR establishes the borderline at which individual rights have been violated, rather than striving to achieve higher standards.³² Although the *less restrictive alternative* test adopted by the ECtHR when ascertaining the proportionality of limitations on Convention rights has the potential to prevent a minimalist approach to human rights standards being taken,³³ this is not necessarily the case in practice.³⁴ The ECtHR focuses on individual complaints of rights violations and affords States Parties a margin of appreciation in the event of “a pressing social need”.³⁵ The margin of appreciation has the potential to defer to a majoritarian position³⁶ and, thus, as will be explored later in this article, has the potential to inhibit the protection of the rights of persons belonging to national minorities by the ECtHR.³⁷ Furthermore, States tend to view the minimum standards

²⁹ E. Brems, ‘Human Rights: Minimum and Maximum Perspectives’ 9:3 *Human Rights Law Review* (2009) pp. 354–55.

³⁰ R. Hofmann, ‘The Impact of International Norms on the Protection of National Minorities in Europe: The Added Value and Essential Role of the Framework Convention for the Protection of National Minorities’ DH-MIN (2006)018, Strasbourg 5 December 2006, p. 27.

³¹ Phillips, *supra* note 17, p. 184. See, further Drzewicki, *supra* note 22, p.102.

³² Brems, *supra* note 29, p. 353.

³³ *Ibid.*, p. 359.

³⁴ *Ibid.*, p. 365.

³⁵ H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff, Dordrecht, 1996) p. 192; M.D. Evans, ‘Freedom of Religion and the European Convention on Human Rights; Approaches, Trends and Tensions’ in P. Cane *et al.* (eds.), *Law and Religion in Theoretical and Historical Context* (Cambridge University Press, Cambridge, 2008) p. 303.

³⁶ G. Letsas, ‘Two Concepts of the Margin of Appreciation’ 26:4 *Oxford Journal of Legal Studies* (2006) p. 729.

³⁷ S. Wheatley, ‘Minorities under the ECHR and the Construction of a “Democratic Society”’ *Public Law* (2001) p. 771; B. Cilevičs, ‘The Framework Convention within the Context of the Council of Europe’ in Council of Europe, *Filling the Frame: Five Years of Monitoring the Framework Convention for the Protection of National Minorities* (Council of Europe, Strasbourg, 2004) p. 33.

contained in the ECHR to be the full extent of their obligations. The adoption of an Additional Protocol on National Minorities may lead to resistance to the AC-FCNM's interpretation of the aspirational rights contained in the FCNM if a divergence develops between the interpretation of minority rights standards by the ECtHR, on the one hand, and the AC-FCNM, on the other.

Perhaps the most attractive justification for the adoption of an Additional Protocol on National Minorities would be the provision of justiciable minority rights standards. The AC-FCNM is not empowered to consider individual cases and, therefore, the rights contained in the FCNM are not justiciable and remedies are not available to the victims of rights violations.³⁸ Specifically, the programmatic and imprecise formulation of rights may inhibit the FCNM from becoming justiciable in the future.³⁹ Drzewicki suggests that "it would be legally difficult to render the whole Framework Convention susceptible to the procedure before the European Court. Among the provisions of the FCNM there are still many rules with insufficient legal maturity (non-self-executing rules) for direct applicability in the Court".⁴⁰ Thus, the adoption of an Additional Protocol on National Minorities would create justiciable and more clearly defined minority rights standards.

3. Substantive Differences: The Benefit of an Additional Protocol on National Minorities

The ECHR does not contain minority specific standards and, notably, in *G and E v. Norway*, the European Commission on Human Rights noted that "the Convention does not guarantee specific rights to minorities".⁴¹ However, Scheinin submits that the purpose of minority rights protection is to ensure the equal application of human rights standards to persons belonging to minorities, rather than to afford additional

See generally S.E. Berry, 'A Tale of Two Instruments: Religious Minorities and the Council of Europe's Rights Regime' 30:1 *Netherlands Quarterly of Human Rights* (2012) pp. 10–39.

³⁸ Alfredsson, *supra* note 6, p. 298; PACE Report, *supra* note 8, paras. 18, 63–67.

³⁹ G. Gilbert, 'Soft Solutions to a Hard Problem: Justiciable Minority Rights?' 10 *European Yearbook of Minority Issues* (2011) p. 191.

⁴⁰ Drzewicki, *supra* note 22, p. 100.

⁴¹ *G. and E. v. Norway*, *supra* note 9, p. 35.

rights.⁴² Accordingly, in *Young, James and Webster v. United Kingdom* the ECtHR recognised that persons belonging to minorities may be subject to the tyranny of the majority and, therefore, “democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position”.⁴³

Traditionally, the two pillars of minority rights protection have been understood to comprise the right of persons belonging to minorities to preserve their identity and non-discrimination and equality.⁴⁴ Although the ECHR does not contain an express right to preserve a minority identity, rights such as freedom of religion,⁴⁵ freedom of expression⁴⁶ and freedom of assembly and association⁴⁷ are particularly pertinent. Additionally, article 8 ECHR, the right to a private life, includes the right to preserve a way of life: “under Article 8, a minority group is, in principle, entitled to claim the right to respect for the particular life style it may lead as being ‘private life’, ‘family life’ or ‘home’”.⁴⁸ Furthermore, article 14 ECHR and Protocol 12 ECHR pursue the second pillar of minority rights protection, equality and non-discrimination. Both prohibit discrimination on the grounds of “association with a national minority”, in addition to religion and race. Thus, the rights contained in the ECHR combined with the recognition of the danger of the tyranny of the majority, indicates that the ECtHR does have some of the tools necessary to protect the rights of persons belonging to national minorities. Notably, in response to the work of PACE on an Additional Protocol on National Minorities, the Committee of Ministers observed that it “does not consider that there is a need for new normative work in this field”.⁴⁹

⁴² M. Scheinin, ‘Minority rights: Additional Rights or Added-Protection?’ in M. Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden – Essays in Honour of Asbjørn Eide* (Martinus Nijhoff, Leiden, 2003) p. 487.

⁴³ *Young, James and Webster v. United Kingdom*, (1981) Series A no 44, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57608>, visited on 27 January 2015, para. 63.

⁴⁴ *Minority Schools in Albania*, *supra* note 10, p. 17.

⁴⁵ Article 9 ECHR.

⁴⁶ Article 10 ECHR.

⁴⁷ Article 11 ECHR.

⁴⁸ *G. and E. v. Norway*, *supra* note 9, p. 35.

⁴⁹ PACE, ‘An Additional Protocol to the European Convention on Human Rights on National Minorities Reply to Recommendation 1994 (2012) Committee of Ministers’, Doc. 13097, 21 January 2013, <assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19267&Language=EN>, visited on 27 January 2015, para. 2.

Nonetheless, the Additional Protocol on National Minorities proposed in the 2011 PACE report would also establish political rights for persons belonging to national minorities including “representation in public bodies, at both national and regional level”.⁵⁰ As has been noted by the AC-FCNM: “[a]rticles 15 [effective participation], 4 [equality and non-discrimination] and 5 [preservation of minority identity] can be seen as the three corners of a triangle which together form the main foundations of the Framework Convention”.⁵¹ In contrast, the right to political participation in the ECHR is currently narrowly construed. Article 1 Protocol 3 ECHR only establishes the right to vote and stand for election to the legislature.⁵² Thus, an Additional Protocol on National Minorities may extend the rights of national minorities in Europe in this respect.

The absence of a right to autonomy in the FCNM has been a source of criticism.⁵³ While the 2011 PACE Report foresees the inclusion of additional rights within an Additional Protocol on National Minorities, the proposed right to cultural autonomy and “the right to make decisions on different forms of autonomy”⁵⁴ are likely to be problematic. Given that States were unwilling to include these rights within the “weak” FCNM and non-binding UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,⁵⁵ it is even more unlikely that they would be willing to support the adoption of such rights in a binding and justiciable form. If States are to be convinced to ratify an Additional

⁵⁰ PACE Report, *supra* note 8, para. 17.

⁵¹ Council of Europe, Framework Convention Advisory Committee, Commentary on The Effective AC, *Commentary on The Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs* adopted on 27 February 2008 ACFC/31DOC(2008)001, <rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800bc7e8>, visited on 27 January 2015, para. 13 [hereinafter Commentary on Effective Participation].

⁵² *Booth-Clibborn and Others v. United Kingdom* (1985) 43 DR 26 <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-74861>, visited on 27 January 2015; *Habsburg-Lothringen v. Austria* (1990) 64-A DR 210 <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-1149>, visited on 27 January 2015.

⁵³ W. Kymlicka, *Multicultural Odysseys – Navigating the New International Politics of Diversity* (Oxford University Press, Oxford, 2007) pp. 213–15.

⁵⁴ PACE Report, *supra* note 8, para. 74.

⁵⁵ Commentary on Effective Participation, *supra* note 51 para. 133; UN Commission on Human Rights, Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (4 April 2005) U.N. Doc. E/CN.4/Sub.2/AC.5/2005/2 <daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/133/85/PDF/G0513385.pdf?OpenElement>, visited on 27 January 2015, para. 20.

Protocol on National Minorities, then a right to autonomy is likely to, at best, suffer from some of the same deficiencies as the rights contained in the FCNM and be non-self-executing, or, at worst, entirely omitted.

4. Approaches to the Preservation of Minority Identity and Non-Discrimination – Divergence in Practice

In order to consider the likely impact of the adoption of an Additional Protocol on National Minorities, it is informative to examine the extent to which the ECtHR has utilised the tools available to it to guarantee the two pillars of minority rights protection; the preservation of minority identity and equality and non-discrimination.

Religious minorities and travellers, although not traditionally considered to be ‘national minorities’, are singled out for consideration in this section. Although the ECtHR has considered the rights of a number of ‘national minorities’⁵⁶ it has only developed a comprehensive body of jurisprudence in respect of religious minorities and travellers. As the AC-FCNM has also considered the rights of these groups, this facilitates the consideration of the ECtHR’s interpretation of the rights of persons belonging to minorities and the extent to which this aligns with the approach taken by the AC-FCNM.⁵⁷ The right of travellers to preserve their way of life and the right to manifest religion by wearing religious attire are of specific relevance to the preservation of minority identity, the first pillar of minority protection. Furthermore, the approach of the ECtHR and AC-FCNM to discrimination against travellers, under article 14 ECHR and article 4 FCNM, is elaborated.⁵⁸

⁵⁶ *E.g., G. and E. v. Norway*, *supra* note 9; *Noack and Others v. Germany*, *supra* note 9; *Gorzelik and Others v. Poland*, *supra* note 9.

⁵⁷ Notably, persons belonging to minorities have derived protection under the ECHR, in relation to claims disclosing serious rights violations that appear to have been motivated by the applicants’ minority identity. However, these claims do not fall within the two pillars of minority protection. See *e.g., Velikova v. Bulgaria* (ECHR) 2000-VI <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58831>, visited on 27 January 2015; *Anguelova v. Bulgaria* (ECHR) 2002-IV, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60505>, visited on 27 January 2015; *Nachova and Others v. Bulgaria* (ECHR) 2005-VII <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69630>, visited on 27 January 2015; *V.C. v. Slovakia* *supra* n 11; *Winterstein v. France* (ECHR) Application No 27013/07, Merits, 17 October 2013 <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-127539>, visited 27 January 2015.

⁵⁸ The minorities considered, travellers and religious minorities, do not fall within the traditional understanding of “national minority”. Historically the term “national minority” has been

4.1. *The Rights of Religious Minorities to Preserve Their Identity*

Article 9 ECHR and article 7 FCNM establish a right to freedom of religion, whereas article 8 FCNM establishes a specific right to manifest religion “and to establish religious institutions, organisations and associations”. Article 9 ECHR is a general right and, thus, applies to wider society. However, this right is of particular relevance to the preservation of the identity of religious minorities, as historically the right of religious minorities to manifest their religion has been subject to restriction.

The ECtHR initially construed the margin of appreciation under article 9 extremely narrowly, as “freedom of thought, conscience and religion is one of the foundations of a ‘democratic society’”.⁵⁹ However, article 9(2), the limitation clause, has increasingly been employed by the ECtHR and, as a result, the margin of appreciation has become progressively more significant.⁶⁰

understood to imply a connection to a kin-State, “a larger nation already constituted in a state or in a federated entity within a federal state”. (F. Benoit-Rohmer, *The Minority Question in Europe – Texts and Commentary* (Council of Europe, Strasbourg, 1996) p. 15.) However, in the absence of a common understanding of ‘national minority’ amongst States, (*ibid.*; T. Malloy, *National Minority Rights in Europe* (Oxford University Press, Oxford, 2005) p. 21.), the AC-FCNM has adopted a liberal interpretation of the term and has considered the rights of both religious minorities and travellers during the State reporting process. R. Hofmann, ‘The Framework Convention for the Protection of National Minorities: An Introduction’ in M. Weller (ed.), *The Rights of Minorities, A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford University Press, Oxford, 2005) p. 16. See Council of Europe, Framework Convention Advisory Committee, Opinion on Denmark (22 September 2000) ACFC/INF/OP/I(2001)005, <www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_1st_OP_Denmark_en.pdf>, visited on 27 January 2015, paras. 14–15; Council of Europe, Framework Convention Advisory Committee, Opinion on Finland (22 September 2000) ACFC/INF/OP/I(2001)002, <www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_1st_OP_Finland_en.pdf> visited on 27 January 2015, paras. 12–13; Council of Europe, Framework Convention Advisory Committee, Opinion on Germany (1 March 2002) ACFC/INF/OP/I(2002)008, <http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_1st_OP_Germany_en.pdf>, visited on 27 January 2015, paras. 14–15; Council of Europe, Framework Convention Advisory Committee, Opinion on Sweden (25 August 2002) ACFC/INF/OP/I(2003)006, <www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_1st_OP_Sweden_en.pdf>, visited on 27 January 2015, paras. 14–16.

⁵⁹ *Kokkinakis v. Greece* (1993) Series A no 260-A, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57827>, visited on 27 January 2015, para. 31.

⁶⁰ Evans, *supra* note 35.

The wearing of religious clothing has been widely accepted as a legitimate manifestation of religion,⁶¹ and may form part of the identity of religious minorities.⁶² The ECtHR has considered the extent to which the right to wear religious clothing can be limited under article 9(2) in relation to teachers, students and pupils in State institutions,⁶³ in order to uphold gender equality,⁶⁴ secularism⁶⁵ and pluralism and tolerance.⁶⁶ Furthermore, the ECtHR has considered State interference with this right for identification purposes⁶⁷ and the objective of ‘living together’,⁶⁸ as well as private interference in order “to communicate a certain image of the company”.⁶⁹ However, the Court’s use of the margin of appreciation in cases concerning State interference with the manifestation of religion by wearing religious clothing has been subject to criticism due to its alleged negation of the proportionality test and uncritical acceptance that limitations of this manifestation are legitimate.⁷⁰

⁶¹ *Dahlab v. Switzerland* (ECHR) 2001-V, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22643>, visited 27 January 2015; *Şahin v. Turkey* (ECHR) 2005-XI, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70956>, visite don 27 January 2015.

⁶² N. Ghanea, ‘Religious or Minority? Examining the Realisation of International Standards in Relation to Religious Minorities in the Middle East’ 36:3 *Religion, State & Society* (2008) p. 310; UN Commission on Human Rights, *supra* note 55, para. 6.

⁶³ *Dahlab v. Switzerland*, *supra* note 61; *Şahin v. Turkey*, *supra* note 61, para. 99; *Köse and 93 Others v. Turkey* (ECHR) 2006-II, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90405>, visited on 27 January 2015; *Dogru v. France* (ECHR) Application No 27058/05, Merits, 4 December 2008, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90039>, visited on 27 January 2015, para. 60.

⁶⁴ *Dahlab v. Switzerland*, *supra* note 61; *Şahin v. Turkey*, *supra* note 61, para. 109.

⁶⁵ *Dahlab v. Switzerland*, *supra* note 61; *Şahin v. Turkey*, *supra* note 61, paras. 109–10, 114; *Dogru v. France*, *supra* note 63, para. 72; *Aktas v. France* (ECHR) Application No 43563/08, Admissibility, 30 June 2009, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-93697> , visited 27 January 2015.

⁶⁶ *Dahlab v. Switzerland*, *supra* note 61; *Şahin v. Turkey*, *supra* note 61, para. 114; *Dogru v. France*, *supra* note 63, paras. 72, 75; *Aktas v. France*, *supra* note 65.

⁶⁷ *Karaduman v. Turkey* (1993) 74 DR 93, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-86170>, visited on 27 January 2015; *Phull v. France* (ECHR) 2005-I <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-77018>, visited 27 January 2015; *El Morsli v. France* (ECHR) Application No 15585/06, Admissibility, 4 March 2008, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-117860>, visited on 27 January 2015; *Mann Singh v. France* (ECHR) Application No 24479/07, Admissibility, 13 November 2008, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-89848>, visited on 27 January 2015.

⁶⁸ *SAS v. France* (ECHR) Application No 43835/11, Merits and Just Satisfaction, 1 July 2014, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145466>, visited on 27 January 2015 .

⁶⁹ *Eweida and Others v. United Kingdom* (ECHR) Application Nos. 48420/10, 36516/10, 51671/10, 59842/10, Merits and Just Satisfaction, 15 January 2013, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881>, visited on 27 January 2015, para. 93.

⁷⁰ C. Evans, ‘The “Islamic Scarf” in the European Court of Human Rights’ 7:1 *Melbourne Journal of International Law* (2006) p. 65; T. Lewis, ‘What Not to Wear: Religious Rights, the European Court and the Margin of Appreciation’ 56:2 *International and Comparative Law Quarterly* (2007) p. 409; Evans, *supra* note 35, p. 307; S. Berry, ‘Freedom of Religion and Religious Symbols:

In *Mann Singh v. France*, the ECtHR considered the right of a Sikh man to manifest his religion by wearing a turban on a photograph affixed to an identification document.⁷¹ The ECtHR acknowledged that the requirement that the applicant appear without his turban in the photograph affixed to his driving license constituted an interference with the right to manifest religion. However, the ECtHR accepted that the restriction was justified on the grounds of ‘public safety’ and ‘public order’ under article 9(2) ECHR. Notably, the ECtHR deferred to the discretion of the State and, thus, did not examine the legitimacy of the State’s assertion that the removal of the turban was necessary to allow the identification of the driver and to avoid fraud.⁷² In an analogous case, the UN Human Rights Committee (HRC) found a violation of the applicant’s freedom of religion as the justifications given by France for the restriction did not evidence its necessity.⁷³ Arguably, the wide margin of appreciation employed by the ECtHR inhibits adequate scrutiny of the necessity of interferences with the rights to manifest religion.

The ECtHR has also been willing to accept that restrictions of the right of religious minorities are legitimate, on the basis of justifications that arguably represent the prejudice of the majority. Restrictions on the *hijab* have been justified by reference to the presumption that “Muslim women are oppressed”⁷⁴ and, therefore, it is necessary to restrict the wearing of the *hijab* in order to guarantee gender equality.⁷⁵ The ECtHR has inferred a meaning to the *hijab*, which affirms a commonly held belief in Europe: “that the *Qur'an* and Islam are oppressive to women”, rather than considering the applicants’ motivations and the extent to which

Same Right – Different Interpretation?’ *EJIL-Talk!*, 10 October 2013, <www.ejiltalk.org/freedom-of-religion-and-religious-symbols-same-right-different-interpretation/> visited on 2 October 2014.

⁷¹ *Mann Singh v. France*, *supra* note 67.

⁷² In *SAS v. France*, *supra* note 68, para. 139 the ECtHR exercised a higher level of scrutiny of the justifications given for the imposition of a blanket ban placed on religious clothing.

⁷³ UN Human Rights Committee, *Ranjit Singh v. France* Communication no 1876/2009, UN doc CCPR/C/102/D/1876/2009, 27 September 2011, <tinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f102%2fD%2f1876%2f2009&Lang=en>, visited on 27 January 2015, para. 8.4; UN Human Rights Committee, *Mann Singh v. France*, Communication no 1928/2010, UN doc CCPR/C/108/D/1928/2010 para. 9.4, 26 September 2013, <tinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f108%2fD%2f1928%2f2010&Lang=en>, visited on 27 January 2015.

⁷⁴ A. Timmer, ‘Towards an Anti-Stereotyping Approach for the European Court of Human Rights’ 11:4 *Human Rights Law Review* (2011) pp. 708–09.

⁷⁵ *Dahlab v. Switzerland*, *supra* note 61; *Şahin v. Turkey*, *supra* note 61, para. 109.

this presumption holds true.⁷⁶ Judge Tulkens, in her dissenting opinion in *Şahin*, thus, noted, “[i]t is not the Court’s role to make an appraisal of this type – in this instance a unilateral and negative one – of a religion or religious practice, just as it is not its role to determine in a general and abstract way the signification of wearing the headscarf or to impose its viewpoint on the applicant”.⁷⁷ By basing its decision on the presumption that the *hijab* is contrary to gender equality, rather than the specific circumstances of the applicant, the ECtHR, in these cases, has failed to consider the proportionality of the restriction placed on the applicant’s right to manifest religion, as required by article 9(2) ECHR.⁷⁸ Thus, the “mere worries or fears”⁷⁹ of the majority have been prioritised over the Convention rights of persons belonging to religious minorities.⁸⁰

In *SAS v. France*, the ECtHR accepted that the blanket ban placed on covering the face in public did not constitute a violation of article 9 ECHR as it pursued the legitimate aim of “respect for the minimum requirements of life in society” or “living together”.⁸¹ In particular, the ECtHR accepted that the practice of wearing the *burqa* or *niqab* was “deemed incompatible, in French society, with the ground rules of social communication and more broadly the requirements of ‘living together’”. However, an Islamophobic undercurrent in the debates that preceded the adoption of the law was noted by the ECtHR.⁸² Additionally, it stressed that the State had an obligation to encourage tolerance, whereas “a legislative process of this kind takes the risk of contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the expression of intolerance”.⁸³ Despite these not inconsiderable concerns, the ECtHR permitted France a wide margin of appreciation

⁷⁶ Evans, *supra* note 70, p. 65.

⁷⁷ *Şahin v. Turkey*, *supra* note 61, Judge Tulkens Dissenting Opinion para. 12.

⁷⁸ Although the case of *Şahin* concerned restrictions on the *hijab* in Turkey, a Muslim-majority state, the wearing of the headscarf is a minority practice that has been subject to restriction on the basis of State secularism and the concerns of the majority.

⁷⁹ *Şahin v. Turkey*, *supra* note 61, Judge Tulkens Dissenting Opinion para. 5.

⁸⁰ *SAS v. France* marks a significant departure from the ECtHR’s jurisprudence in the *hijab* cases. In the context of the French ‘*burqa* ban’, the ECtHR held that ‘a State Party cannot invoke gender equality in order to ban a practice that is defended by women’. Yet, this apparent shift in approach may also be explained by the disproportionate nature of the blanket ban in this case and it is yet to be seen if the ECtHR will continue with this improved line of reasoning. *SAS v. France* *supra* note 68, para. 119.

⁸¹ *Ibid.*, para. 157.

⁸² *Ibid.*, para. 149.

⁸³ *Ibid.*, para. 149.

as the law in question had been adopted following a democratic process.⁸⁴ Consequently, the ECtHR did not consider whether the prejudice present in public debates had influenced the adoption of the law. Neither did it examine whether the law facilitates ‘living together’ or whether, on the contrary, it further ostracises the Muslim minority in France. The ECtHR’s judgment was criticised by in the dissenting opinion of Judges Nussberger and Jäderblom on the basis that “[w]hile it is perfectly legitimate to take into account the specific situation in France, especially the strong and unifying tradition of the “values of the French Revolution” as well as the overwhelming political consensus which led to the adoption of the Law, it still remains the task of the Court to protect small minorities against disproportionate interferences”.⁸⁵ The concept of ‘living together’, which allows the majority to dictate the terms of co-existence, pursues a distinctly assimilationist agenda.⁸⁶ By accepting the ‘living together’ rationale, the ECtHR elevated the concerns of the majority above the concrete rights of a minority.

Similarly, in *Dogru v. France*, in the context of restrictions placed on the wearing of the *hijab* in State schools in order to uphold the principle of secularism, the ECtHR established “in France... secularism is a constitutional principle, and a founding principle of the Republic, to which the entire population adheres and the protection of which appears to be of prime importance”.⁸⁷ The ECtHR indicated that those who dissent from the established consensus may not be able to benefit from the right to manifest religion.⁸⁸ In accordance with article 9(2) ECHR, restrictions on the right to manifest religion must be “necessary in a democratic society”. Yet, the ECtHR has not, in fact, considered whether the applicants in these cases posed a sufficient threat to the constitutional principle of secularism to justify a restriction of their right to manifest religion.⁸⁹ Democracy, and the protection of minorities from the tyranny of the majority, hinges on the ability of citizens to dissent from

⁸⁴ *Ibid.*, para. 154–55.

⁸⁵ *SAS v. France*, *supra* note 68, Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom para. 20.

⁸⁶ S. Berry, ‘SAS v France: Does Anything Remain of the Right to Manifest Religion’ . *EJIL-Talk!*, 2 July 2014, <www.ejiltalk.org/sas-v-france-does-anything-remain-of-the-right-to-manifest-religion/> , visited on 2 October 2014.

⁸⁷ *Dogru v. France*, *supra* note 63, para. 72.

⁸⁸ *Ibid.*

⁸⁹ M. Borovali, ‘Islamic Headscarves and Slippery Slopes’ 30:6 *Cardozo Law Review* (2009) p. 2594; *Şahin v Turkey*, *supra* note 61 at Judge Tulkens Dissenting opinion para. 5.

mainstream opinion.⁹⁰ However, the ECtHR fails to protect those who do not subscribe secularist values but equally do not pose a direct threat to the political order. Thus, while the ECtHR has protected the right to manifest religion by wearing religious attire on limited occasions,⁹¹ the ECtHR's uncritical acceptance of the justifications given by States for the limitation of article 9 ECHR, in the majority of cases, has the potential to inhibit the preservation of minority identity.

The AC-FCNM has considered the wearing of religious attire under articles 7 and 8 FCNM. It has expressed concern at intolerance of Muslims wearing the *hijab*, noting in particular that such hostility is not only discriminatory⁹² but also, has the potential to infringe the right to manifest religion.⁹³ The most detailed consideration by the AC-FCNM concerned a proposed restriction on the wearing of the *niqab* in British schools, justified by the State on the grounds of security.⁹⁴ In noting the importance of allowing minorities to wear religious clothing, the AC-FCNM expressed concern that new guidance relating to school uniforms may lead to the banning of the *niqab* in schools and the restriction of the right to manifest religion.⁹⁵ The AC-FCNM recommended that educational authorities and schools consult religious minorities, "when decisions are taken or policies adopted which may affect the rights of minority ethnic pupils to manifest their religion and/or belief at school".⁹⁶ The government of the United Kingdom rebutted the concerns of the AC-

⁹⁰ Berry, *supra* note 37, p. 30.

⁹¹ *Eweida and Others v. United Kingdom*, *supra* note 69, paras. 94–95; *Arslan and Others v. Turkey* (ECHR) Application No 41135/98, Merits and Just Satisfaction, 23 February 2010, <[www.hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97380](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97380)>, visited on 27 January 2015, paras 48–52.

⁹² Council of Europe, Framework Convention Advisory Committee, *Third Opinion on the Russian Federation* (24 November 2011) ACFC/OP/III(2011)010, <www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_3rd_OP_RussianFederation_en.pdf>, visited on 27 January 2015, para. 91; Council of Europe, Framework Convention Advisory Committee, *Third Opinion on Spain* (22 March 2012) ACFC/OP/III(2012)003, <www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_3rd_OP_Spain_en.pdf>, visited on 27 January 2015, para. 75.

⁹³ *Third Opinion on the Russian Federation*, *supra* note 92, para. 151.

⁹⁴ Council of Europe, Framework Convention Advisory Committee, *Second Opinion on the United Kingdom* (26 October 2007) ACFC/OP/II(2007)003, <www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_2nd_OP_UK_en.pdf>, visited on 27 January 2015, paras. 158, 161.

⁹⁵ *Ibid.*, para. 158.

⁹⁶ *Ibid.*, para. 161.

FCNM,⁹⁷ highlighting the potential for the aspirational rights in the FCNM to facilitate the preservation of minority identity.⁹⁸

The approach hinted at in the AC-FCNM's Second Opinion on the United Kingdom indicates the potential for divergence between the approaches of the AC-FCNM and ECtHR to the right to manifest religion by wearing religious attire. Although the ECtHR in *Dogru*, noted the attempted consultation of the applicant⁹⁹ it has not required the consultation of minority representatives prior to the adoption of rules or policies that impact the preservation of religious identity.¹⁰⁰ In contrast, the AC-FCNM has required that States consult and engage with persons belonging to minorities in the event that restrictions are to be placed on the freedom to manifest religion.¹⁰¹

Minority rights standards support measures to aid the integration but not unwanted assimilation of persons belonging to minorities.¹⁰² The AC-FCNM has invited "the [Spanish] authorities to pursue and strengthen their efforts to combat ... Islamophobia, to promote the integration of immigrants and respect for cultural and religious diversity".¹⁰³ This stands in stark contrast to the acceptance by the ECtHR that the assimilationist concept of 'living together' justifies the restriction of the rights of persons belonging to minorities. Although the ECtHR recognised in *SAS* that

⁹⁷ Council of Europe, *Comments of the Government of the United Kingdom on the Opinion of the Advisory Committee on the Implementation of the Framework Convention for the Protection of National Minorities in the United Kingdom* (26 October 2007) GVT/COM/II(2007)003, <www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_2nd_Com_UK_en.pdf>, visited on 27 January 2015, p. 21.

⁹⁸ Berry, *supra* note 37, pp. 35–36.

⁹⁹ *Dogru v. France*, *supra* note 63, para. 74.

¹⁰⁰ *Cf. Noack and Others v. Germany*, *supra* note 9; *Hatton and Others v. United Kingdom*, (ECHR) 2003-VIII, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61188>, visited on 27 January 2015, para. 99.

¹⁰¹ Notably, the AC has stressed that minority concerns must be 'duly taken into consideration in governmental decision-making', (Council of Europe, Framework Convention Advisory Committee, *Opinion on the Netherlands* (25 June 2009) ACFC/OP/I(2009)002, <www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_1st_OP_TheNetherlands_en.pdf>, visited on 27 September 2015, para. 41.) In order to increase the legitimacy of the decision-making process, the AC has also emphasised that in the event that the recommendations of minority consultative bodies are not followed by the authorities, it is good practice that reasons be given. (Council of Europe, Framework Convention Advisory Committee, *Opinion on Romania* (6 April 2001) ACFC/INF/OP/I(2002)001, <www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_1st_OP_Romania_en.pdf>, visited on 27 January 2015, para. 66.)

¹⁰² UN Commission on Human Rights, *supra* note 55, paras. 20–22, 66; Council of Europe, *supra* note 17, paras. 45–46.

¹⁰³ *Third Opinion on Spain* *supra* note 92, para. 80.

negative discourse had surrounded the adoption of the law, it did not recognise that such discourse may in fact inhibit ‘living together’. Notably, the AC-FCNM has suggested that negative public discourse contributes to “[a] feeling of exclusion from mainstream society ... among the Muslim ... populations”.¹⁰⁴

The difference in the identified approaches of the AC-FCNM and ECtHR can in part be explained by the fact that the ECHR contains minimum standards, whereas the FCNM contains aspirational standards. However, article 9 ECHR provides the ECtHR with the tools to facilitate the preservation of religious minority identity. Yet, the ECtHR appears to have given preference to the unsubstantiated concerns of the majority in cases concerning religious attire, as opposed to ensuring the preservation of minority identity. This raises concerns that the ECtHR would allow States a similarly wide margin of appreciation to limit the rights contained in an Additional Protocol on National Minorities and, thereby, undermine the progressive stance previously taken by the AC-FCNM when interpreting analogous rights. In contrast to the ECtHR, the AC-FCNM has required that States evidence that measures that restrict the rights of minorities are justified and have only been adopted following consultation with affected groups.

4.2. The Right of Travellers to Preserve their Way of Life

The AC-FCNM has considered the right of travellers to maintain their itinerant way of life under article 5 FCNM, which provides that “[t]he parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity ...”. Although the ECHR does not contain a comparable right, the ECtHR has recognised that article 8 ECHR protects the right of travellers to preserve their itinerant lifestyle: “since the traditional Gypsy lifestyle involved living in caravans and travelling, the

¹⁰⁴ Council of Europe, Framework Convention Advisory Committee, *Opinion on the United Kingdom* (30 November 2001) ACFC/INF/OP/I(2002)006, <www.coe.int/t/dghl/monitoring/minorities/3_FCNDocs/PDF_1st_OP_UK_en.pdf>, visited on 27 January 2015, para. 18.

applicant's 'private life' and 'family life' were also concerned".¹⁰⁵ Furthermore, the ECtHR has recognised that travellers may be more vulnerable to rights violations as a result of their itinerant lifestyle.¹⁰⁶ Thus, the ECtHR has not only recognised that the itinerant way of life of travellers finds protection under article 8 ECHR but also that members of these communities may require additional protection in order to ensure that they are able exercise this right in practice. As the ECtHR is able to consider cases concerning the preservation of the traveller lifestyle under article 8 ECHR, the existence of this right is not in question. Rather the extent to which States are able to justify limitations on this right under article 8(2) ECHR is of interest.

The ECtHR was willing to accept that there had been an interference with article 8 ECHR in *Buckley v. United Kingdom*, a case concerning the refusal of planning permission for the positioning of caravans on a plot of land owned by the applicant.¹⁰⁷ However, the ECtHR also recognised that the State had a wide margin of appreciation in planning matters.¹⁰⁸ As "proper regard was had to the applicant's predicament both under the terms of the regulatory framework, which contained adequate procedural safeguards protecting her interest under Article 8 (art. 8), and by the responsible planning authorities when exercising their discretion in relation to the particular circumstances of her case",¹⁰⁹ the ECtHR found that the case did not disclose a violation of article 8 ECHR.

By permitting the United Kingdom a wide margin of appreciation, it is arguable that the ECtHR did not fully consider the proportionality of the interference with the applicant's right. Specifically, Judge Repik, in a partly dissenting judgment, expressed concern that "the Court ... has not taken into account all the relevant matters ... and was too hasty in invoking the margin of appreciation left to the

¹⁰⁵ *Buckley v. United Kingdom* (ECHR) 1996-IV, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58076>>, visited on 27 January 2015, para. 53.

¹⁰⁶ *Chapman v. United Kingdom* *supra* note 9, para. 96.

¹⁰⁷ *Buckley v. United Kingdom*, *supra* note 105, para. 51.

¹⁰⁸ *Ibid.*, paras. 74–76. The ECtHR has also recognised that States have a wide margin of appreciation in planning matter under article 9 ECHR in relation to the right to build places of worship. *See, e.g., ISKCON and 8 Others v. United Kingdom* (ECHR) Application No 20490/92, Admissibility, 8 March 1994, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-2550>, visited on 27 January 2015; *Vergos v. Greece* (ECHR) Application No 65501/01, Merits and Just Satisfaction, 24 June 2004, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-66404>, visited on 27 January 2015, paras. 40–41. *See also*, Berry, *supra* note 37, pp. 22–25.

¹⁰⁹ *Buckley v. United Kingdom*, *supra* note 105, para. 84.

State”.¹¹⁰ In contrast to the majority, the dissenting judgments in *Buckley* did not accept the State’s assertion that alternative stopping sites were suitable¹¹¹ and stressed that government policy should not automatically override the applicant’s rights.¹¹²

Of particular concern is the failure of the ECtHR to fully assess the legitimacy of the justifications given by the Planning Inspector for the interference with the right of the applicant:

“It is ... clear in my mind that a need exists for more authorised spaces. ... Nevertheless, I consider it important to keep concentrations of sites for gypsies small, *because in this way they are more readily accepted by the local community*. ... [T]he concentration of gypsy sites in Willingham has reached the desirable maximum and I do not consider that the overall need for sites should, in this case, outweigh the planning objections”.¹¹³

Sandland has submitted that “[f]ormal and structured regimes to limit the numbers of any other racial group in a given area on the basis that their presence, as outsiders, is objected to by the local community, would clearly be discriminatory and unjustified, if not unthinkable”.¹¹⁴ The ECtHR was willing to subordinate the rights of the applicant despite the lack of appropriate authorised spaces,¹¹⁵ and the apparent discriminatory attitudes displayed during the planning process. Similarly to the cases concerning religious minorities, the ECtHR was willing to defer to the “mere worries and fears” of the majority, rather than affording priority to rights.

The ECtHR departed slightly from the *Buckley* decision, in the subsequent case of *Chapman v. United Kingdom*. Specifically, the ECtHR expressly recognised the impact of the problems and prejudice faced by travellers on their way of life: “the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant

¹¹⁰ *Ibid.*, Partly Dissenting Opinion of Judge Repik.

¹¹¹ *Ibid.*, Partly Dissenting Opinion of Judge Repik and Dissenting Opinion of Judge Pettiti.

¹¹² *Ibid.*, Dissenting Opinion of Judge Pettiti.

¹¹³ *Ibid.*, para. 80. [emphasis added].

¹¹⁴ R. Sandland, ‘Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of Human Rights’ 8:3 *Human Rights Law Review* (2008) p. 483.

¹¹⁵ *Buckley v. United Kingdom*, *supra* note 105, Dissenting Opinion of Judge Pettiti.

regulatory planning framework and in reaching decisions in particular cases”.¹¹⁶ This shift may be attributable to the fact that the ECtHR acknowledged “an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle”.¹¹⁷ Nonetheless, the ECtHR was “not persuaded that the consensus is sufficiently concrete for it to derive any guidance”.¹¹⁸

Although in *Chapman* the ECtHR recognised the need to carry out proportionality analysis in order to ascertain whether the restriction on article 8 ECHR was justifiable, it also gave a wide margin of appreciation to the authorities “who are evidently better placed to make the requisite assessment”.¹¹⁹ Despite recognising the vulnerability of travellers to rights violations, the majority in *Chapman* did not consider the lack of alternative site for the applicant to be relevant.¹²⁰ In contrast, the dissenting judges opined that “it is ... disproportionate to take steps to evict a Gypsy family from their home on their own land in circumstances where there has not be shown to be any other lawful, alternative site reasonably open to them”.¹²¹ Had the majority in the ECtHR considered the proportionality of the restriction on the applicant’s rights, in particular, the legitimacy of restriction, the validity of the State’s arguments and the likely impact of the interference on the enjoyment of Convention rights, it may have found that the State had not acted reasonably. Indeed, in his dissenting opinion, Judge Bonello asserted that “a public authority which is in breach of its legal obligations should not be allowed to plead that it is acting ‘in accordance with the law’”.¹²²

By accepting that the State has a wide margin of appreciation in cases concerning the way of life of travellers, the ECtHR failed to carry out proportionality analysis. Thus, although the ECtHR has accepted that article 8 ECHR affords protection to the way of life of travellers, by allowing States a wide margin of appreciation, the ECtHR has effectively denied the applicants “a practical and

¹¹⁶ *Chapman v. United Kingdom*, *supra* note 9, para. 96.

¹¹⁷ *Ibid.*, para. 93.

¹¹⁸ *Ibid.*, para. 94.

¹¹⁹ *Ibid.*, para. 104.

¹²⁰ *Ibid.*, para. 111.

¹²¹ *Ibid.*, Joint Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach and Casadevall para. 5.

¹²² *Ibid.*, Opinion of Judge Bonello para. 5.

effective opportunity” to exercise this right.¹²³ The assertions of the State have been prioritised by the ECtHR over the protection of the article 8 ECHR right of members of a minority, contrary to the principle of priority to rights.

It has been suggested that in *Connors v. United Kingdom*,¹²⁴ the ECtHR departed from its earlier decisions concerning travellers, by finding a violation of article 8 ECHR in a case concerning the eviction of the applicant from a local authority run traveller site.¹²⁵ Referring back to its jurisprudence in *Buckley and Chapman*, the ECtHR noted that “[i]t would rather appear that the situation in England as it has developed, for which the authorities must take some responsibility, places considerable obstacles in the way of gypsies pursuing an actively nomadic lifestyle while at the same time excluding from procedural protection those who decide to take up a more settled lifestyle”.¹²⁶

However, the ECtHR distinguished between *Connors*, on the one hand, and *Buckley and Chapman*, on the other hand, as *Connors* “is not concerned with matters of general planning or economic policy but with the much narrower issues of the policy of procedural protection for a particular category of persons”.¹²⁷ Specifically, the seriousness of the interference and the failure of the State to provide reasons for the applicant’s eviction led to the finding of a violation.¹²⁸ The ECtHR compared the situation of *Connors* with others in an objectively similar situation and noted that “such problems also occur on local authority housing estates and other mobile home sites and in those cases the authorities make use of a different range of powers and may only proceed to evict subject to independent court review of the justification for the measure”.¹²⁹ Thus, as *Connors* had been subject to a different procedure than non-travellers living in local authority sites, whereas *Buckley and Chapman* were subject

¹²³ *Ibid.*, Joint Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach and Casadevall para. 9.

¹²⁴ *Connors v. United Kingdom* (ECHR) Application No 66746/01, Merits and Just Satisfaction, 27 May 2004, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61795>, visited on 27 January 2015.

¹²⁵ Sandland, *supra* note 114, pp. 493–96.

¹²⁶ *Connors v. United Kingdom*, *supra* note 124, para. 94

¹²⁷ *Ibid.*, para. 86.

¹²⁸ *Ibid.*, paras. 92, 95; D. Farget, ‘Defining Roma Identity in the European Court of Human Rights’ 19:3 *International Journal on Minority and Group Rights* (2012) p. 311.

¹²⁹ *Connors v. United Kingdom*, *supra* note 124, para. 89.

to the same planning restrictions as the majority, the cases are not directly comparable.

Nonetheless, the *Connors* decision is encouraging for a number of reasons. The ECtHR more generally recognised that the accommodation of the way of life of travellers in the UK was insufficient, citing both the failure of local authorities to adopt written gypsy/traveller accommodation policies and, referring to *Chapman*, “there are no special allowances made for gypsies in the planning criteria applied by local authorities”.¹³⁰ Nonetheless, to date, the level of protection of the way of life of travellers under the ECHR has been insufficient to facilitate the preservation of their identity, in the absence of a particularly serious interference with article 8 ECHR.¹³¹

In contrast to the approach of the ECtHR, under article 5 FCNM the AC-FCNM has repeatedly expressed concern at the lack of provision of legal stopping sites for Roma/Gypsies and Irish Travellers in the UK.¹³² Furthermore, the AC-FCNM recognised the impact this has on the ability of such groups to preserve their identity: “this has contributed to many Roma / Gypsies and Irish Travellers having to give up their travelling life-style”.¹³³ In addition to the lack of stopping sites, the AC-FCNM also noted that “a range of legislative and administrative measures have the effect of inhibiting nomadism and effectively denying travellers the right to maintain and preserve or develop one of the important elements of their culture and identity, namely travelling”.¹³⁴ Therefore, in contrast to the ECtHR in *Buckley* and *Chapman*, the AC-FCNM has recognised that planning laws are not necessarily neutral measures and may in fact favour the cultural practices of the majority.

In 2011, the AC-FCNM expressed “deep concern” at the insufficient provision of stopping places for travellers in the UK as “[i]n all of the regions that the Advisory

¹³⁰ *Ibid.*, para. 90.

¹³¹ Notably, in *Yordanova and others v. Bulgaria* and *Winterstein v. France*, the ECtHR found that the mass expulsion of the Roma from land that they had inhabited for a significant period of time constituted a violation of article 8 ECHR. *Yordanova and others v. Bulgaria* (ECHR) Application No 25446/06, Merits and Just Satisfaction, 24 April 2012, hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110449, visited on 27 January 2015; *Winterstein v France*, *supra* n 57.

¹³² *Opinion on the United Kingdom* *supra* note 104, para. 40; *Second Opinion on the United Kingdom*, *supra* note 94, paras. 17, 98; Council of Europe, Framework Convention Advisory Committee, *Third Opinion on the United Kingdom* (30 June 2011) ACFC/OP/III(2011)006, <www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_3rd_OP_UK_en.pdf>, visited on 27 January 2015, paras. 16, 96–98.

¹³³ *Opinion on the United Kingdom*, *supra* note 104, para. 41.

¹³⁴ *Ibid.*, para. 42.

Committee visited, it found out that resistance by local authorities, reflecting also attitudes in the majority population, is a major obstacle to the provision of new sites and that, where a need to provide sites has been identified, the authorities often do not take steps to meet this need”.¹³⁵ The AC-FCNM inadvertently highlighted the danger of the ECtHR’s wide margin of appreciation in planning matters. Local authorities are political bodies and as a result their decisions may be influenced by the prejudice of the majority. Consequently, the AC-FCNM required that “training should be offered to local authorities on the specific needs of Gypsies and Travellers so as to develop awareness and leadership at local level on these issues”.¹³⁶

The deference of the ECtHR to the margin of appreciation of States parties has led to differing results under the monitoring processes of the ECHR and FCNM. Again, the nature of the rights contained in the two instruments to some extent explains this divergence. The approach of the ECtHR has the potential to lead to a minimalist interpretation of the rights contained in an Additional Protocol on National Minorities,¹³⁷ and undermine the work of the AC-FCNM, which has consistently encouraged States to take steps to achieve the aspirational rights contained in the FCNM. While the approach of the ECtHR superficially recognises the vulnerability of travellers to rights violations, it does not recognise that the structures in place inherently favour the majority’s way of life and that additional protection may be needed in order to ensure that persons belonging to minorities are able to exercise their rights on equal terms with the majority.

4.3. Non-Discrimination and the Protection of Travellers

The second pillar of minority rights protection, equality and non-discrimination, is embodied in article 4 FCNM, article 14 ECHR and Additional Protocol 12 to the ECHR.¹³⁸ Both article 14 ECHR and Protocol 12 ECHR prohibit discrimination on

¹³⁵ *Third Opinion on the United Kingdom*, *supra* note 132, para. 87.

¹³⁶ *Ibid.*, para. 96.

¹³⁷ Hofmann, *supra* note 30, pp. 25–26; *D.H. and Others v. the Czech Republic*, *supra* note 11. Cf. *D.H. and Others v. the Czech Republic*, *supra* note 9.

¹³⁸ Notably, however, Protocol 12 has not been widely ratified or utilised and has been interpreted in a manner consistent with the ECtHR’s article 14 jurisprudence. *Sejdić and Finci v. Bosnia and Herzegovina* (ECHR) Application Nos. 27996/06, 34836/06, Merits and Just Satisfaction, 22

the grounds of “association with a national minority” and, thus, further evidence that the ECtHR already has some of the tools necessary to protect persons belonging to national minorities. However, this ground of discrimination has generally been avoided by the ECtHR, which has preferred to decide cases on the grounds of “race” or “religion”^{139, 140}.

Article 14 ECHR and Protocol 12 ECHR have been used successfully to protect the rights of persons belonging to minorities.¹⁴¹ However, the ECtHR has historically been hesitant to utilise non-discrimination in cases concerning travellers, even when violations of substantive Convention rights have been found.¹⁴² As noted above, the ECtHR has recognised that travellers are vulnerable to rights violations and that there may be a need to accommodate their way of life within “the relevant regulatory planning framework”.¹⁴³ This conforms with established ECtHR case law, as “[t]he right not to be discriminated against ... is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different”.¹⁴⁴

Yet, in practice the ECtHR has not considered whether cases concerning the way of life of travellers disclosed a violation of article 14 ECHR in conjunction with article 8 ECHR. This approach led Judge Lohmus in his Partly Dissenting Opinion in

December 2009, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96491>, visited on 27 January 2015, paras. 55–6.

¹³⁹ *D.H. and Others v. the Czech Republic*, *supra* note 11, paras. 32, 45, 48, 52. *See also*, K. Henrard, *Equal Rights versus Special Protection – Minority Protection and the Prohibition of Discrimination* (European Communities, Luxembourg, 2007) p. 37; D. Harris *et al.* (eds.), *Harris, O’Boyle and Warbrick: Law of the European Convention on Human Rights* (2nd edn, Oxford University Press, Oxford, 2009) pp. 602–03.

¹⁴⁰ This may indicate the general reluctance of the ECtHR to engage with the questions raised by the definition of the term “national minority”. *Gorzelik and Others v. Poland*, *supra* note 9, para. 67.

¹⁴¹ Case “*Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*” *v. Belgium* (1968) Series A no 6, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57525>, visited on 27 January 2015; *Sejdić and Finci v. Bosnia and Herzegovina*, *supra* note 138.

¹⁴² *Buckley v. United Kingdom*, *supra* note 105, para. 88–9; *Chapman v. United Kingdom*, *supra* note 9, paras. 129–30; *Connors v. United Kingdom*, *supra* note 124, para. 97; *Balogh v. Hungary* (ECHR) Application No 47940/99, Merits and Just Satisfaction, 20 July 2004, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-6193>, visited on 27 January 2015, paras. 74–9 (2004). Cf. *Nachova and Others v. Bulgaria*, *supra* note 57, paras. 160–68. *See further* Sandland, *supra* note 114, pp. 496–507; M. Möschel, ‘Is the European Court of Human Rights’ Case Law on Anti-Roma Violence “Beyond Reasonable Doubt”?’ 12:3 *Human Rights Law Review* (2012) pp. 479–507.

¹⁴³ *Buckley v. United Kingdom*, *supra* note 105, para. 53; *Chapman v. United Kingdom*, *supra* note 9, para. 96.

¹⁴⁴ *Thlimmenos v. Greece* (ECHR) 2000-IV, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58561>, visited on 27 January 2015, para. 44.

Buckley to complain that “[i]t may not be enough to prevent discrimination so that members of minority groups receive equal treatment under the law. In order to establish equality in fact, different treatment may be necessary to preserve their special cultural heritage”.¹⁴⁵ This aligns with the approach suggested by the AC-FCNM: “The authorities should in particular raise awareness that developing special measures to improve the situation of Gypsies and Travellers should not be considered as discriminating the majority population”.¹⁴⁶ Notably, in relation to *Buckley*, Sandland has submitted:

“Although the Court did pay lip service to what it described as ‘the special needs of the applicant as a Gypsy following a traditional lifestyle’, in truth this judgment systematically fails to recognise the difference that a travelling lifestyle constitutes, and B was treated as any other citizen seeking to act against the general will, as expressed in local planning policy, would have been. Here, there is no significant difference between what is deemed ‘necessary in a democratic society’ and the ‘tyranny of the majority’”.¹⁴⁷

Even in *Connors*, despite recognising that the applicant had been treated differently to those in a directly comparable position, the ECtHR declined to consider whether the case disclosed a violation of article 14 ECHR.¹⁴⁸ The approach of the ECtHR contrasts with the approach of the AC-FCNM, which has expressed concern about discrimination against travellers in the UK, and the failure to provide adequate stopping sites under article 4 FCNM.¹⁴⁹ Thus, while the ECHR contains a prohibition on discrimination, this has not been utilised by the ECtHR in situations that have been recognised as discriminatory by the AC-FCNM.

¹⁴⁵ *Buckley v. United Kingdom*, *supra* note 105, Partly Dissenting Opinion of Judge Lohmus.

¹⁴⁶ *Third Opinion on the United Kingdom*, *supra* note 132, para. 96.

¹⁴⁷ Sandland, *supra* note 114, p. 483.

¹⁴⁸ *Connors v. United Kingdom*, *supra* note 124, para. 97.

¹⁴⁹ *Opinion on the United Kingdom*, *supra* note 104, para. 29; *Second Opinion on the United Kingdom*, *supra* note 94, paras. 75, 78–9; *Third Opinion on the United Kingdom*, *supra* note 132, paras. 59, 62.

The failure of the ECtHR to find discrimination in cases concerning widespread discrimination against travellers, have been attributed in part to the ECtHR's self-imposed 'beyond reasonable doubt' test.¹⁵⁰ The 'beyond reasonable doubt' test makes it virtually impossible for persons belonging to minorities to establish discrimination in the absence of conclusive evidence of discriminatory intent, despite evidence that breaches of substantive rights contain a racially-aggravated element.¹⁵¹ However, the ECtHR has also historically expressed an unwillingness to consider statistical evidence of widespread discrimination.¹⁵² While this position has shifted,¹⁵³ such evidence must be undisputed and official.¹⁵⁴ Consequently, while the consideration of statistical evidence would allow the ECtHR to identify discriminatory practices against persons belonging to minorities, the test of "undisputed official statistics" relies on the existence and availability of such statistics to the applicant.¹⁵⁵

The potential for the ECtHR's hesitance to consider statistical evidence to lead to differing interpretations of analogous rights in the ECHR and FCNM is highlighted by the Chamber decision in *D.H. and Others v. the Czech Republic*. The Chamber was unwilling to consider statistical evidence that Roma children had been disproportionately placed in 'Special' Schools and, therefore, did not find a violation of article 14 taken in conjunction with article 2 of Protocol 1 ECHR.¹⁵⁶ In contrast, the AC-FCNM, a year prior to the Chamber's decision had expressed concern that "[a]ccording to non official estimates, Roma account for up to 70% of pupils in these schools, and this – having regard to the percentage of Roma in the population – raises doubts concerning the tests' validity and the relevant methodology followed in

¹⁵⁰ Sandland, *supra* note 114, p. 497.

¹⁵¹ Möschel, *supra* note 142, pp. 484–93.

¹⁵² See, e.g., *McShane v. United Kingdom*, *supra* note 11, para. 135; *D.H. and Others v. the Czech Republic*, *supra* note 11, para. 52. Cf. *Manoussakis and Others v. Greece*, (ECHR) 1996-IV, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58071>, visited on 27 January 2015, para. 48; *Zarb Adami v. Malta* (ECHR) 2006-VII, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-75934>, visited on 27 January 2015, para. 76.

¹⁵³ *D.H. and Others v. the Czech Republic*, *supra* note 9, para. 188. See also, *Zarb Adami v. Malta*, *supra* note 152, para. 77–8; *Hoogendijk v. the Netherlands*, (ECHR) Application No 58641/00, Admissibility, 6 January 2005, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68064>, visited on 27 January 2014.

¹⁵⁴ *Hoogendijk v. the Netherlands*, *supra* note 153.

¹⁵⁵ *Ibid.*

¹⁵⁶ *D.H. and Others v. the Czech Republic*, *supra* note 11, para. 52.

practice”.¹⁵⁷ The Chamber’s decision, notably, led Hofmann, the former Chairperson of the AC-FCNM to suggest that:

“This judgment also confirms the opinion that the monitoring system established under the Framework Convention is better equipped to achieve the ultimate *raison d’être* of international minority rights protection, namely to contribute, by means of protecting and promoting the distinct identity of persons belonging to national minorities, to the prevention of tensions between majority and minority populations with a risk to develop into a threat to peace and security, than judicial procedures based upon individual applications”.¹⁵⁸

The Chamber’s decision in *D.H. and Others* was, however, overturned by the Grand Chamber in an encouraging judgment, which found a violation of article 14 in conjunction with article 2 Protocol 1 ECHR. The ECtHR accepted that discrimination may be either direct or *indirect*.¹⁵⁹ Furthermore, the ECtHR recognised that in cases concerning indirect discrimination it would apply “less strict evidential rules”¹⁶⁰ and, in particular, in the event that the applicant “establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State”.¹⁶¹ Most importantly, the ECtHR expressly accepted that “when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the *prima facie* evidence the applicant is required to produce”.¹⁶²

While the Grand Chamber’s decision in *D.H. and Others* appears to indicate a shift in the ECtHR’s approach to cases disclosing indirect discrimination, its

¹⁵⁷ Council of Europe, Framework Convention Advisory Committee, *Second Opinion on the Czech Republic* (24 February 2005) ACFC/INF/OP/II(2005)002, <www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_2nd_OP_CzechRepublic_en.pdf>, visited 27 January 2015, para. 146.

¹⁵⁸ Hofmann, *supra* note 30, p. 26.

¹⁵⁹ *DH and Others v. the Czech Republic*, *supra* note 9, para. 184.

¹⁶⁰ *Ibid.*, para. 186.

¹⁶¹ *Ibid.*, para. 189.

¹⁶² *Ibid.*, para. 188.

subsequent decisions in cases concerning the forced sterilisation of Roma women highlight that this approach may not be adhered to. Möschel has noted that “[i]n *V.C.*, the different treatment which Roma women had been subjected to consisted in sterilisation and no justification for the targeting of mainly Roma women had been presented”.¹⁶³ Thus, despite finding violations of articles 3 and 8 ECHR in *V.C. v. Slovakia*, the ECtHR was unwilling to accept that it disclosed a violation of article 14 ECHR.¹⁶⁴ Specifically, it held that “notwithstanding the fact that the applicant’s sterilisation without her informed consent calls for serious criticism, the objective evidence is not sufficiently strong in itself to convince the Court that it was part of an organised policy or that the hospital staff’s conduct was intentionally racially motivated”.¹⁶⁵ This approach was singled out for specific criticism by Judge Mijovic in her dissenting opinion:

“Finding violations of Articles 3 and 8 alone in my opinion reduces this case to the individual level, whereas it is obvious that there was a general State policy of sterilisation of Roma women under the communist regime (governed by the 1972 Sterilisation Regulation), the effects of which continued to be felt up to the time of the facts giving rise to the present case ... The fact that there are other cases of this kind pending before the Court reinforced my personal conviction that the sterilisations performed on Roma women were not of an accidental nature, but relics of a long-standing attitude towards the Roma minority in Slovakia”.¹⁶⁶

As the ECtHR did not accept that forced sterilisations primarily impacted Roma women, it was not able to find a violation of article 14 ECHR in the absence of an explicit admission from the State Party that a discriminatory policy existed.

Again the AC-FCNM had previously expressed concern, under article 4 FCNM, about “*de facto* discrimination against Roma women in health care facilities, including allegations of sterilisation of Roma women without their prior free and

¹⁶³ Möschel, *supra* note 142, p. 501.

¹⁶⁴ *V.C. v. Slovakia supra* note 11.

¹⁶⁵ *Ibid.*, para. 177.

¹⁶⁶ *Ibid.*, dissenting opinion Judge Mijovic.

informed consent”.¹⁶⁷ Specifically, the AC-FCNM recognised that despite legislative moves to remedy the situation that “the legislative provisions in question have not been consistently applied in practice”,¹⁶⁸ and the State was entreated to provide appropriate training for Medical staff to ensure that free, prior and informed consent was gathered from Roma women prior to sterilisation.¹⁶⁹ Furthermore, both the HRC and the Committee on the Elimination of Racial Discrimination (CERD) had also expressed concern about the forced sterilisation of Roma women in Slovakia.¹⁷⁰ In particular, the CERD highlighted that the practice raised questions of intersectional discrimination on the grounds of both race and gender.¹⁷¹

Despite the concern expressed by the AC-FCNM and UN human rights bodies about the forced sterilisation of Roma women, by placing the burden of proof on the victims of rights violations to evidence discrimination, the ECtHR has made discrimination virtually impossible to prove. As suggested by Möschel, it would appear to be appropriate to shift “the burden of proving that event was not ethnically induced to the government ‘when a member of a disadvantaged minority group suffers harm in an environment where racial tensions are high and impunity of State

¹⁶⁷ Council of Europe, Framework Convention Advisory Committee, *Third Opinion on the Slovak Republic* (28 May 2010) ACFC/OP/III(2010)004, <www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_3rd_OP_SlovakRepublic_en.pdf>, visited on 27 January 2015, para. 53.

¹⁶⁸ *Ibid.*, para. 54.

¹⁶⁹ *Ibid.*

¹⁷⁰ UN Human Rights Committee, *Concluding Observations of the Human Rights Committee – Slovakia* (20 August 2003) U.N. Doc. CCPR/CO/78/SVK, <tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fCO%2f78%2fSVK&Lang=en>, visited on 27 January 2015, para. 12; UN Committee on the Elimination of Racial Discrimination, *Concluding Observations on Slovakia* (10 December 2004) U.N. Doc. CERD/C/65/CO/7, <tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2f65%2fCO%2f7&Lang=en>, last accessed 27 January 2015, para. 12; UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination – Slovakia* (25 March 2010) U.N. Doc. CERD/C/SVK/CO/6-8, <tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fSVK%2fCO%2f6-8&Lang=en>, visited on 27 January 2014, para. 18; UN Human Rights Committee, *Concluding Observations of the Human Rights Committee – Slovakia* (20 April 2011) U.N. Doc. CCPR/C/SVK/CO/3, <tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fSVK%2fCO%2f3&Lang=en>, visited on 27 January 2014, para. 13; UN Committee on the Elimination of Racial Discrimination, *Concluding Observations on Slovakia* (17 April 2013) U.N. Doc. CERD/C/SVK/CO/9-10, <tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fSVK%2fCO%2f9-10&Lang=en>, visited on 27 January 2015, para. 13 [hereinafter CERD (2013)].

¹⁷¹ CERD (2013), *supra* note 170, para. 13.

offenders is epidemic”¹⁷². The current approach adopted by the ECtHR does not serve to protect persons belonging to minorities from discriminatory practices and highlights that the ECtHR has not utilised the tools available to it to guarantee Convention rights for national minorities.

4.4. Differing Approaches to Analogous Rights?

The right to a private life and freedom of religion under the ECHR are capable of providing a basis for the claims of persons belonging to national minorities relating to the preservation of their identity. However, in cases concerning the rights of religious minorities and travellers, the ECtHR has permitted States a wide margin of appreciation. By failing to balance the interference with the rights of persons belonging to minorities against the wider societal concerns offered by States as justification for the interference with these rights, the ECtHR has not fully assessed the legitimacy of restrictions on Convention rights. Thus, by permitting States a wide margin of appreciation, the ECtHR has, in fact, deferred to the prejudice of the majority. In practice this has already led to different interpretations of seemingly comparable rights under the ECHR and FCNM. While the ECtHR’s margin of appreciation does not result in the limitation of the rights of persons belonging to minorities in every instance,¹⁷³ the prioritisation of the concerns of the majority, in the cases considered, has led to the restriction of the rights of persons belonging to minorities.

Similarly, the ECtHR has rarely found violations of article 14 ECHR and Protocol 12 ECHR in cases regarding persons belonging to minorities, even when widespread discrimination has previously been identified by other human rights mechanisms, including the AC-FCNM. The differing nature of the monitoring mechanisms of the ECHR and FCNM may make it easier for the AC-FCNM to identify systematic or widespread discrimination and engage in a dialogue with States

¹⁷² Möschel, *supra* note 142, p. 500, citing *Anguelova v. Bulgaria*, (ECHR) 2002-IV Judge Bonello dissenting para. 18.

¹⁷³ See e.g., *United Communist Party of Turkey and Others v. Turkey*, (ECHR) 1998-I, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58128>, visited on 27 January 2015; *Socialist Party and Others v. Turkey*, (ECHR) 1998-III, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58172>, visited on 27 January 2015.

parties to the FCNM. However, the reluctance of the ECtHR to consider statistical evidence and the self-imposed ‘beyond reasonable doubt’ test also inhibit the effectiveness of the prohibition on discrimination in the ECHR.

There is no reason to believe that the approach of the ECtHR would change following the adoption of an Additional Protocol on National Minorities. The nature of the rights contained in the ECHR and FCNM and the differing mandates of their monitoring bodies have the potential to result in the evolution of different interpretations of analogous rights. Were an Additional Protocol on National Minorities to be adopted, it is likely that the ECtHR would interpret minority rights standards more restrictively than the AC-FCNM. This would lead to inconsistent standards and has the potential to undermine the progress made by the AC-FCNM towards fleshing out the content of the programmatic rights contained in the FCNM.

Notably, the liberal interpretation of the term ‘national minority’ adopted by the AC-FCNM is unlikely to be adopted by the ECtHR,¹⁷⁴ as a number of States have consistently resisted this approach.¹⁷⁵ This in turn increases the possibility that the AC-FCNM and ECtHR will diverge in their interpretation of minority rights standards. Thus, an Additional Protocol on National Minorities may not extend the protection available to persons belonging to national minorities in Europe and, in fact, has the potential to undermine the protection available under the FCNM.

5. The Way Forward

¹⁷⁴ PACE Report, *supra* note 8, para. 43. *See also, Recommendation 1201 (1993), supra* note 4.

¹⁷⁵ *See e.g.*, Council of Europe, ‘List of Declarations Made With Respect to Treaty No. 157 Framework Convention for the Protection of National Minorities’, <conventions.coe.int/treaty/Commun/ListeDeclarations.asp?NT=157&CV=1&NA=&PO=999&C N=999&VL=1&CM=9&CL=ENG> visited on 2 October 2014; Council of Europe, Framework Convention Advisory Committee, *Report Submitted by Denmark Pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities* (6 May 1999) ACFC/SR(1999)009, <www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_1st_SR_Denmark_en.pdf>, visited on 27 January 2015, p. 11; Council of Europe, Framework Convention Advisory Committee, *Second Report Submitted by Germany Pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities* (13 April 2005) ACFC/SR/II(2005)002, <www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_2nd_SR_Germany_en.pdf>, visited on 27 January 2015, paras. 4–9.

The FCNM does not contain justiciable rights and the programmatic and qualified nature of the rights contained in the FCNM has been the source of concern.¹⁷⁶ While the proposed Additional Protocol on National Minorities would alleviate these concerns it is also likely to reduce the standard of protection available to persons belonging to national minorities in Europe. There is a clear disparity between the interpretation of analogous rights in the ECHR and FCNM, which in part can be attributed to the wide margin of appreciation employed by the ECtHR, but also to the programmatic nature of the rights in the FCNM.

Although States do not agree with all of the Opinions of the AC-FCNM, over time they have gradually become more receptive to these and willing to engage in dialogue.¹⁷⁷ An Additional Protocol on National Minorities may reduce the receptiveness of States to the liberal approach adopted by the AC-FCNM to the interpretation of the programmatic rights in the FCNM. As States tend to perceive the bottom-line position of the ECtHR to constitute the full scope of Convention rights rather than a minimum standard, the adoption of an Additional Protocol may lead to a regressive position being adopted by States in relation to their obligations under the FCNM. Furthermore, the adoption of a narrower margin of appreciation by the ECtHR appears to be an unrealistic prospect at this juncture, following the express recognition of the “margin of appreciation” in Protocol 15 ECHR.¹⁷⁸

The Committee of Ministers, in rejecting the PACE Recommendation for the adoption of an Additional Protocol on National Minorities, emphasised “that the implementation of existing obligations of the member States should be strengthened”.¹⁷⁹ It may be appropriate to foster cooperation between the ECtHR and AC-FCNM, in particular in circumstances where the AC-FCNM is aware, through its work, of widespread and systematic discrimination against persons belonging to national minorities. Gilbert has recommended that “National Minority Sensitive

¹⁷⁶ Kymlicka, *supra* note 53, pp. 213–15.

¹⁷⁷ Phillips *supra* note 17, p. 183; E. Craig, ‘The Framework Convention for the Protection of National Minorities and the Development of a “Generic” Approach to the Protection of Minority Rights in Europe’ 17:2 *International Journal on Minority and Group Rights* (2010) pp. 317–24.

¹⁷⁸ Article 1 Protocol 15 ECHR amending the Convention on the Protection of Human Rights and Fundamental Freedoms CETS No 213. Protocol 15 opened for ratification on 24 June 2013 and will enter into force upon ratification by all Contracting parties to the ECHR in accordance with article 7.

¹⁷⁹ PACE, *supra* note 49, para. 3.

Guidelines’ that cover each provision of the ECHR and its Protocols so as to alert the Court to the broader context than simple individual claims may well be more effective and will inevitably be useable sooner than any new Protocol”.¹⁸⁰ Such Guidelines would be based on the work of the AC-FCNM.¹⁸¹

However, as considered above, the ECtHR is frequently aware of the context of minority claims in cases concerning the preservation of minority identity and discrimination. In *Chapman*, the ECtHR acknowledged “an emerging international consensus ... recognising the special needs of minorities”.¹⁸² Furthermore, the ECtHR has also referred to the work of the AC-FCNM in cases raising minority concerns.¹⁸³ However, despite recognising the vulnerability of minorities to rights violations and the work of the AC-FCNM, the ECtHR has not adopted a consistent approach to minority claims. The adoption of ‘National Minority Sensitive Guidelines’, as proposed by Gilbert, may help to overcome the inconsistent approach hitherto adopted by the ECtHR. Nonetheless, the programmatic nature of the rights contained in the FCNM and the maximalist approach adopted by the AC-FCNM may inhibit the ECtHR from fully utilising the work of the AC-FCNM. The wide margin of appreciation afforded to States in cases with a minority element is also likely to inhibit the effectiveness of such ‘soft solutions’.

Even if the issues identified can be overcome, a number of practical issues persist in relation to the adoption of an Additional Protocol on National Minorities, including, the backlog of cases faced by the ECtHR, admissibility criteria including the reluctance of the ECtHR to consider cases brought by minority representative organisations¹⁸⁴ and the hitherto reluctance of States to adopt binding and justiciable minority rights standards, with the exception of the weakly worded article 27 ICCPR.¹⁸⁵ Thus, it may be preferable to seek a solution to the problem of justiciable minority rights standards in Europe away from the framework of the ECHR.

¹⁸⁰ Gilbert, *supra* note 39, p. 196.

¹⁸¹ *Ibid.* pp. 195–99.

¹⁸² *Chapman v. United Kingdom*, *supra* note 9, para. 93.

¹⁸³ See e.g., *DH and Others v. the Czech Republic*, *supra* note 9, paras. 192, 200.

¹⁸⁴ *Noack and Others v. Germany*, *supra* note 9; *Ouardiri and Ligue des Musulmans de Suisse and others v. Switzerland*, Application Nos 65840/09 and 66274/09, Admissibility, 8 July 2011, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105619>, visited on 27 January 2015. Gilbert, *supra* note 39, pp. 186–87.

¹⁸⁵ See generally, Gilbert, *supra* note 39, p. 185.

Drzewicki has submitted that a collective complaints model under the FCNM may be a more suitable mechanism for upholding the rights of persons belonging to minorities, than the individual complaints model utilised under the ECHR.¹⁸⁶ This would require the reform of the monitoring mechanism of the FCNM and potentially the rights contained in the FCNM itself. It has been argued that the programmatic nature of the rights contained in the FCNM may inhibit them from being justiciable.¹⁸⁷ However, a number of these rights, not least freedom of religion, freedom of expression and freedom of association are comparable to justiciable human rights standards.¹⁸⁸ Furthermore, while the rights contained in the FCNM may currently lack sufficient “legal maturity”,¹⁸⁹ this may change over time. The progressive rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁹⁰ were until recently, not thought to be justiciable. While it has been possible to adopt a monitoring mechanism under the ICESCR,¹⁹¹ it is yet to be seen how effective this mechanism will be in practice. Nonetheless, lessons can potentially be learnt from the ICESCR in this respect.

Another alternative would be the adoption of an Additional Protocol to the FCNM establishing both a monitoring mechanism and corresponding justiciable minimum standards to bolster the programmatic rights contained in the FCNM. This could be modelled on the proposed Additional Protocol to the ECHR on National Minorities and would complement the rights contained in the FCNM.¹⁹² As proposed by PACE, justiciable minimum standards should include the right to self-identify as a member of a national minority, the right to cultural identity and cultural autonomy and the right to use a minority language in private and public.¹⁹³ Additionally, the two

¹⁸⁶ Drzewicki, *supra* note 22, pp. 104–05; PACE Report, *supra* note 8, at 14 FN 57. Gilbert has also suggested the adoption of Advisory Opinions by the ECtHR in order to encompass a collective element to minority complaints: *Ibid.*, p. 193.

¹⁸⁷ Alfredsson, *supra* note 6, pp. 293–94, 304; Drzewicki, *supra* note 22, p. 100; Gilbert, *supra* note 39, p. 191.

¹⁸⁸ Article 7 and 8 FCNM cf. Article 9 ECHR; article 7 and 9 FCNM cf. article 10 ECHR; article 7 FCNM cf. article 11 ECHR.

¹⁸⁹ Drzewicki, *supra* note 22, p. 100.

¹⁹⁰ International Covenant on Economic, Social and Cultural Rights 993 UNTS 3, entered into force 3 January 1976.

¹⁹¹ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights UN doc A/63/435, entered into force 13 May 2013.

¹⁹² PACE Report, *supra* note 8, p. 45.

¹⁹³ *Ibid.* A broader right to autonomy as recommended in the PACE report has been omitted due to the recognised difficulties.

pillars of minority rights protection must also be included: the right to non-discrimination and equality and the right to maintain and develop the religious, linguistic and cultural identity of the minority.

By establishing justiciable minority rights standards, in addition to a monitoring mechanism within the framework of the FCNM, this alternative would avoid the problem of the justiciability of the programmatic rights contained in the FCNM. It would have the advantage of no backlog, no margin of appreciation, be amenable to group claims and would, to the largest degree possible, be able to ensure consistency of interpretation of the programmatic rights contained in the FCNM with the justiciable minimum standards contained in an Additional Protocol to the FCNM.

However, these two suggestions are also problematic. The AC-FCNM has made significant progress in the interpretation of the programmatic rights contained in the FCNM by engaging with States, in a non-adversarial manner. The adoption of an adversarial mechanism, whereby the AC-FCNM accuses States of breaching their minority rights obligations has the potential to inhibit State receptiveness to further engagement and dialogue with the AC-FCNM and may, in turn, undermine the progress hitherto made by the AC-FCNM.¹⁹⁴ Lessons again could be learnt from the UN treaty bodies regarding the performance of dual monitoring and judicial functions. Furthermore, the composition, funding and sitting time of the AC-FCNM would have to be revisited in the event a judicial function were to be added to its mandate.

There are no obvious answers to the quest for justiciable minority rights standards. The dangers associated with the adoption of an Additional Protocol to the ECHR on National Minorities outweigh the benefits. However, a number of other possibilities exist that warrant further exploration before the project is entirely dismissed.

6. Conclusion

When critiquing the then, newly adopted FCNM, Alfredsson submitted “[m]argins of appreciation, cultural particularities or similar consideration must not result in

¹⁹⁴ The author would like to thank Steven Wheatley for drawing this to her attention.

discriminatory treatment against significant parts of State populations”.¹⁹⁵ It is now to be feared this this would be the result of the adoption of an Additional Protocol on National Minorities.

Although the ECtHR has emphasised that the ECHR does not currently extend special protection to persons belonging to minorities,¹⁹⁶ this article has evidenced that the ECtHR already has many of the tools necessary to safeguard the two pillars of minority rights protection. Yet, the ECtHR’s decisions in cases concerning the rights of persons belonging to minorities under articles 8, 9 and 14 ECHR indicate that it may not be willing to fully utilise these tools. Notably, a divergence in the approach of the ECtHR and the AC-FCNM in respect of comparable rights can be observed in relation to the preservation of the way of life of travellers and the right to manifest religion by religious minorities. Despite recognising the vulnerability of minorities to rights violations, the ECtHR has afforded States a wide margin of appreciation under articles 8 and 9 ECHR. Furthermore, the ECtHR has failed to recognise evidence of widespread discrimination against travellers. In all instances the AC-FCNM had raised concerns over the treatment of the minorities concerned. As noted by Gilbert “[t]here is no straightforward way to ensure that the rights of national minorities and persons belonging to national minorities will be appropriately addressed by the European Court of Human Rights”.¹⁹⁷ Nonetheless, it is clear that further cooperation between the AC-FCNM and the ECtHR would be beneficial, if the human rights of persons belonging to national minorities are to be secured.

It appears that an Additional Protocol on National Minorities may not be desirable if the rights of persons belonging to national minorities are to be guaranteed in Europe. There is no reason to believe that the approach of the ECtHR to the rights of minorities would change following the adoption of an Additional Protocol on National Minorities. Consequently, it is to be feared that an Additional Protocol on National Minorities would undermine the progress made by the AC-FCNM towards improving the protection of national minorities in Europe. Alternative mechanisms, including ‘National Minority Sensitive Guidelines’ and a complaints mechanism

¹⁹⁵ Alfredsson, *supra* note 6, p. 303.

¹⁹⁶ *G. and E. v. Norway*, *supra* note 9, p. 35; *Noack and Others v. Germany* *supra* note 9.

¹⁹⁷ Gilbert, *supra* note 39, p. 199.

under the FCNM, warrant further exploration and would appear to be preferable to an Additional Protocol to the ECHR on National Minorities.