

## PART A: ARTICLES

# A TALE OF TWO INSTRUMENTS: RELIGIOUS MINORITIES AND THE COUNCIL OF EUROPE'S RIGHTS REGIME

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### *Abstract*

*The European Court of Human Rights (ECtHR) has increasingly deferred to States' margin of appreciation when considering interferences with the right to manifest religion under Article 9 of the European Convention on Human Rights (ECHR). In contrast, the Advisory Committee (AC) on the Framework Convention on National Minorities (FCNM), despite originally being feared to be a highly politicised body, has allowed States very little room for manoeuvre when considering the implementation of Convention rights. In order to explore these seemingly contradictory positions, this article examines the approaches of the ECtHR and the AC towards two controversial manifestations of religion: the right to construct places of worship and the right to wear religious clothing. It argues that the ECtHR, by developing minimum standards that defer to the prejudices of the majority, is in danger of undermining the progress made by the AC towards establishing consistent minority rights standards throughout Europe.*

**Keywords:** freedom of religion; margin of appreciation; minority rights; European Convention on Human Rights; Framework Convention on National Minorities

## 1. INTRODUCTION

The European Court of Human Rights' (ECtHR) deference to States' margin of appreciation has been subject to increasing criticism particularly in relation to Article 9 of the European Convention on Human Rights (ECHR)<sup>1</sup> concerning the

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<sup>1</sup> Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 4 November 1950, CETS No. 005.

freedom of religion.<sup>2</sup> This politicisation of the decision-making process of the ECtHR gives precedence to ‘the moralistic preferences of the majority’<sup>3</sup> and has arguably led to decisions weighted against religious minorities. In contrast, the Advisory Committee (AC) on the Framework Convention on National Minorities (FCNM),<sup>4</sup> despite originally being feared to be a highly politicised body,<sup>5</sup> has gradually established progressive standards to protect the rights of minorities through a system of State Reports, quiet diplomacy and consultations with minorities and NGOs.<sup>6</sup> The focus of the FCNM is on the rights of national minorities; however, it contains a number of provisions relating to freedom of religion.<sup>7</sup> Consequently, while much less is known about the stance of the AC regarding this right, as compared to the ECtHR, it has increasingly challenged the treatment of religious minorities by State Parties.

This article argues that the ECtHR is in danger of undermining the progress made by the AC towards establishing consistent minority rights standards throughout Europe. By developing minimum standards that defer to the prejudices of the majority, the ECtHR has arguably interpreted Article 9 to constitute ‘protection *from* religion’ rather than freedom *of* religion,<sup>8</sup> thus, undermining the purpose of the

<sup>2</sup> See, for example, Evans, M. D., ‘Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions’, in: Cane, P., Evans, C., and Robinson, Z. (eds.), *Law and Religion in Theoretical and Historical Context*, CUP, Cambridge, 2008, pp. 291–314; Gibson, N., ‘Faith in the Courts: Religious Dress and Human Rights’, *Cambridge Law Journal*, Vol. 66, No. 3, 2007, pp. 657–697; Evans, C., ‘The “Islamic Scarf” in the European Court of Human Rights’, *Melbourne Journal of International Law*, Vol. 7, No. 1, 2006, pp. 52–73; Cumper P., and Lewis, T., ‘“Taking Religion Seriously”? Human Rights and *Hijab* in Europe – Some Problems of Adjudication’, *Journal of Law and Religion*, Vol. 24, No. 2, 2008–2009, pp. 599–627; Evans, M. and Petkoff, P., ‘A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights’, *Religion, State & Society*, Vol. 36, No. 3, 2008, pp. 205–223; Lewis, T., ‘What Not to Wear: Religious Rights, the European Court and the Margin of Appreciation’, *International and Comparative Law Quarterly*, Vol. 56, No. 2, 2007, pp. 395–414.

<sup>3</sup> Letsas, G., ‘Two Concepts of the Margin of Appreciation’, *Oxford Journal of Legal Studies*, Vol. 26, No. 4, 2006, pp. 705–732, at p. 729.

<sup>4</sup> Council of Europe, Framework Convention for the Protection of National Minorities, adopted 1 February 1995, CETS No. 157.

<sup>5</sup> Alfredsson, G., ‘A Frame and Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures’, *International Journal on Minority and Group Rights*, Vol. 7, No. 4, 2000, pp. 291–304; Pentassuglia, G., ‘Monitoring Minority Rights in Europe: The Implementation Machinery of the Framework Convention for the Protection of National Minorities – With Special Reference to the Role of the Advisory Committee’ (1999) 6 *International Journal on Minority and Group Rights*, Vol. 6, No. 4, 1999, pp. 417–462.

<sup>6</sup> Hofmann, R., ‘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, at p. 27.

<sup>7</sup> Arts. 7 and 8 FCNM.

<sup>8</sup> Evans, M. and Petkoff, P., *loc.cit.*, note 2, at p. 216. See also, for example, Tulkens, F., ‘The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism’, *Cardozo Law Review*, Vol. 30, No. 6, 2009, pp. 2575–2591, at p. 2587; Evans, M. D., *loc.cit.* note 2, at p. 303.

right. Accordingly, the standards established in the FCNM and by the AC to protect freedom of religion now confer a higher level of protection on religious minorities than Article 9 ECHR. To fully consider this, first, the relationship between the ECHR and FCNM will be elaborated upon, focusing on how it was originally envisaged that the two instruments would coexist and interact. Second, the provisions of both the FCNM and ECHR relating to freedom of religion will be considered, as will the purpose of the margin of appreciation deployed by the European Commission on Human Rights and the ECtHR ('the Strasbourg institutions'). Third, the interpretation of freedom of religion by the respective monitoring bodies will be compared, focusing on two particularly contentious examples: the right to construct places of worship and cemeteries and the right to manifest religion through the wearing of religious apparel. Finally, the paper will conclude by considering the extent to which the jurisprudence of the ECtHR has the potential to undermine the standards established under the FCNM and, thereby, also the existing rights of religious minorities within Council of Europe Member States.

## 2. THE RELATIONSHIP BETWEEN ECHR AND FCNM

Before considering the scope of the freedom to manifest religion within the ECHR and FCNM, it is necessary to consider how these two instruments were intended to interact with one another. The ECHR predates the FCNM by 45 years and efforts to introduce a minority rights protocol have been unsuccessful.<sup>9</sup> As a result, the earlier instrument, the ECHR, makes no mention of the FCNM.

Further, it should be recognised that the two conventions have differing scopes of application; while the ECHR provides generally applicable human rights, the rights contained in the FCNM are only applicable to 'national minorities'.<sup>10</sup> However, Article 6 FCNM provides a more general obligation on States to:

encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media.

<sup>9</sup> Drzewicki, K., 'Advisability and Feasibility of Establishing a Complaints Mechanism for Minority Rights', *Security and Human Rights*, Vol. 21, No. 2, 2010, pp. 93–108.

<sup>10</sup> 'National minorities' is frequently interpreted to mean 'old' or 'traditional' minorities which have a kin-State. See, for example, Hofmann, R., 'The Framework Convention for the Protection of National Minorities', in: Weller, M., (ed.) *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, OUP, Oxford, 2005, pp. 1–24, at p. 16.

Hence, Article 6 has been utilised by the AC as a catch-all provision<sup>11</sup> when States have taken a narrow view of the personal scope of application of the Convention,<sup>12</sup> and, specifically have attempted to exclude ‘new’ religious minorities from the protection of the FCNM.<sup>13</sup> While the AC has taken a wide view of the scope of application of the FCNM, the focus remains the rights of minorities, and specifically their protection from the majority. Therefore, it is clear that the purpose and aim of the FCNM differs from that of the ECHR.

Nevertheless, the ECtHR has referred to and occasionally relied upon comments made by the AC in a limited number of cases with a distinct minority element,<sup>14</sup> and is considered to be slowly evolving its own minority rights jurisprudence.<sup>15</sup> However, this has not consistently been ‘minority-friendly’, as States have frequently been afforded a wide margin of appreciation by the Strasbourg institutions, as will be considered later.<sup>16</sup>

The FCNM contains two provisions which address the relationship between the two instruments. Article 19 refers to the ‘limitations, restrictions or derogations which

<sup>11</sup> Second Opinion on Denmark, ACFC/INF/OP/II(2004)005 para. 76: ‘The Advisory Committee recalls that Article 6 of the Framework Convention has a wide personal scope of application, covering, among others, asylum seekers and persons belonging to other groups that have not traditionally inhabited the country concerned’. For further information, see Gilbert, G., ‘Article 6’ in Weller (ed.) *op.cit.*, note 10, at pp. 177–191.

<sup>12</sup> Report Submitted by Denmark, ACFC/SR(1999)009, p. 11. See also, Second Report submitted by the Federal Republic of Germany, paras. 4–9; Ringelheim, J., ‘Minority Rights in a Time of Multiculturalism – The Evolving Scope of the Framework Convention on the Protection of National Minorities’, *Human Rights Law Review*, Vol. 10, No. 1, 2010, pp. 99–128, at p. 116.

<sup>13</sup> Hofmann, R., ‘The Work of the Advisory Committee under the Framework Convention for the Protection of National Minorities, with Particular Emphasis on the Case of Germany’ in Scheinin, M., and Toivanen, R. (eds), *Rethinking Non-Discrimination and Minority Rights*, Institute for Human Rights Åbo Akademi University and Deutsches Institut für Menschenrechte, Turku and Berlin, 2004, pp. 51–96, at p. 64; Hofmann, *op.cit.*, note 6, pp. 11–12.

<sup>14</sup> ECtHR, *DH and Others v. Czech Republic*, 7 February 2006 (Appl. no. 57325/00), at paras. 26–27; ECtHR, *DH and Others v. Czech Republic* (Grand Chamber), 12 November 2007 (Appl. no. 57325/00), at paras. 67–76, 134, 192, 200; ECtHR, *Nachova and Others v. Bulgaria* (Grand Chamber), 6 July 2005 (Appl. nos. 43577/98 and 43579/98), at para. 78; ECtHR, *Chapman v. the United Kingdom* (Grand Chamber), 18 January 2001 (Appl. no. 27238/95), paras. 93–98.

<sup>15</sup> Packer, J., ‘Situating the Framework Convention in a Wider Context: Achievements and Challenges’, in: Council of Europe, *Filling the Frame: Five Years of Monitoring the Framework Convention for the Protection of National Minorities*, Council of Europe Publishing, Strasbourg, 2004, pp. 43–51, at p. 48; Marko, J., ‘Constitutional Recognition of Ethnic Difference – Towards an Emerging European Minimum Standard?’, in: Verstichel, A., *et al.* (eds), *The Framework Convention for the Protection of National Minorities: a Useful Pan-European Instrument?*, Intersentia, Oxford, 2008, pp. 19–31, at p. 29; Gilbert, G., ‘The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights’, *Human Rights Quarterly*, Vol. 23, No. 3, 2002, pp. 736–780; Cilevičs, B., ‘The Framework Convention Within the Context of the Council of Europe’ in Council of Europe, *above*, pp. 28–37, at p. 33.

<sup>16</sup> Wheatley, S., ‘Minorities Under the ECHR and the Construction of a “Democratic Society”’, *Public Law*, No. 4, 2007, pp. 770–792; Cilevičs, *ibidem*, at p. 33. See also *Chapman v. the United Kingdom*, *supra*, note 14; ECtHR, *Beard v. the United Kingdom* (Grand Chamber), 18 January 2001 (Appl. no. 24882/94), and more recently *DH and Others v. Czech Republic* (2006), *supra*, note 14.

are provided for in international legal instruments, in particular the Convention for the Protection of Human Rights and Fundamental Freedoms', establishing that these are the only applicable limitations to the FCNM. Also, Article 23 provides that in the event that provisions of the FCNM correspond with provisions of the ECHR, the former should be read to conform with the latter.<sup>17</sup> There has been some discussion over the significance of these provisions to the work of the AC, especially in relation to the extent to which the AC should take cognisance of ECtHR jurisprudence when forming its opinions.<sup>18</sup> A number of the provisions of the FCNM correspond with provisions in the ECHR, including freedom of religion.<sup>19</sup> While the development of differing standards by two supervisory bodies within the Council of Europe would appear to be undesirable and potentially problematic, the ECtHR's judgments only bind State Parties to the specific case.<sup>20</sup> Therefore, the ECtHR's judgments are merely persuasive for the AC when considering the application of the FCNM by States Parties. Nevertheless, as Henrard has noted, 'in view of the general broad wording of the ECHR, it would seem incongruous not to take into account how these provisions have been interpreted and been given more concrete context by its supervisory body'.<sup>21</sup> Therefore, while the jurisprudence of the Strasbourg institutions may not be directly applicable to the FCNM, it should not be completely disregarded.

It would, indeed, seem logical to have a degree of consistency between the two instruments, however, the ECHR and the FCNM pursue different aims and the ECtHR performs a very different function to that of the AC.<sup>22</sup> The ECtHR focuses on individual complaints of rights violations and affords State Parties a margin of appreciation in the event of 'a pressing social need'.<sup>23</sup> This 'pressing social need' under Article 9, freedom of religion, includes, 'the protection of public [...] morals, or for the protection of the rights and freedoms of others'.<sup>24</sup> The use of the margin of appreciation, as will be considered later, may work against the rights of minorities, if the views, particularly the moral views, of the majority are taken into account by the

<sup>17</sup> These two provisions will be considered together, as the permissible limitations to the ECHR appear to have informed the scope of the substantive rights.

<sup>18</sup> Henrard, K., 'The Added Value of the Framework Convention for the Protection of National Minorities (II) – The Two Pillars of an Adequate System of Minority Protection Revisited', in: Verstichel and others (eds.), *op.cit.*, note 15, at pp. 91–118, at p. 97; Drzewicki, *loc.cit.*, note 9, at p. 102.

<sup>19</sup> Arts. 7 and 8 FCNM, cf. Art. 9 ECHR.

<sup>20</sup> Art. 46 ECHR. See also Spiliopoulou Åkermark, S., 'The Added Value of the Framework Convention for the Protection of National Minorities (I)', in: Verstichel *et al.* (eds.), *op.cit.*, note 15, at pp. 69–90, at p. 78.

<sup>21</sup> Henrard, *loc.cit.*, note 18, at p. 97.

<sup>22</sup> Hilpold, P., 'Article 23', in: Weller (ed.), *op.cit.*, note 10, at pp. 561–570, at pp. 567–68; Spiliopoulou Åkermark, *loc.cit.*, note 20, at p. 83; Gilbert, *loc.cit.*, note 15, at p. 780.

<sup>23</sup> Yourow, H.C., *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Martinus Nijhoff Publishers, London, 1996, at p. 192; Evans, M.D., *loc.cit.*, note 2, at p. 303.

<sup>24</sup> Art. 9(2) ECHR.

ECtHR when considering permissible limitations to Convention rights.<sup>25</sup> While the Strasbourg institutions have on occasion recognised the dangers of deferring to the preferences of the majority,<sup>26</sup> Wheatley has observed: ‘The Court has recognised the legitimacy of claims by minorities to distinctiveness in the face of cultural homogeneity but abrogated any responsibility to intervene in majority/minority disputes’.<sup>27</sup>

In contrast to the approach of the Strasbourg institutions, the AC seeks to protect the interests of the minority from the majority. Machnyikova has noted the importance of this approach: ‘Different religious beliefs and traditions are often a hallmark that distinguishes national minorities from the majority of the population, and as such their moral precepts can be quite different from those of the majority’.<sup>28</sup> Consequently, while the Strasbourg institutions have recognised the dangers of taking an overly majoritarian approach, the margin of appreciation still has the potential to undermine the FCNM if used to give primacy to ‘the moralistic preference of the majority’.<sup>29</sup> Therefore, a strict interpretation of Article 23 FCNM could defeat the very purpose of the instrument.<sup>30</sup>

Furthermore, the role of the ECtHR inevitably results in a rather unclear view of which manifestations of religion fall within Article 9 and, instead, provides a catalogue of which manifestations are not provided for or the circumstances in which States may limit this right. In contrast, the AC takes a more investigative approach and considers the implementation of the provisions of the FCNM by the State Parties, utilising information from a number of sources, including NGOs, intergovernmental organisations and minority organisations, as well as the States themselves.<sup>31</sup> This approach enables the AC to consider the situation of specific minority groups as a whole, rather than individual grievances. Accordingly, the ‘soft jurisprudence’<sup>32</sup> of the AC’s Opinions provides a comprehensive overview of the manifestations of religion that should be protected by the State Parties. Arguably, this approach ensures that State Parties are not able to justify rights violations on a case-by-case basis as they can under the ECHR, and, thus, enables minorities to diverge from the consensus.

<sup>25</sup> See for example, ECtHR, *Şahin v. Turkey* (Grand Chamber), 10 November 2005 (Appl. no. 44774/98), at para. 109; ECtHR, *Otto-Preminger-Institut v. Austria*, 20 September 1994 (Appl. no. 13470/87), at para. 50; Letsas, *loc.cit.*, note 3.

<sup>26</sup> ECtHR, *Young, James and Webster v. United Kingdom*, 13 August 1981 (Appl. no. 7601/76; 7806/77), at para. 63; ECtHR, *Gorzelik v. Poland* (Grand Chamber), 17 February 2004 (Appl. no. 44158/98), at para. 68, 92; ECtHR, *Sidiropoulos v. Greece*, 10 July 1998 (Appl. no. 26695/95), at para. 41.

<sup>27</sup> Wheatley, *loc.cit.*, note 16, at p. 771.

<sup>28</sup> Machnyikova, Z. ‘Article 8’, in: Weller (ed.), *op.cit.*, note 10, at pp. 225–261, at pp. 243–44.

<sup>29</sup> Letsas, *loc.cit.*, note 3.

<sup>30</sup> Art. 31(1) Vienna Convention on the Law of Treaties, adopted 23 May 1969, 1155 UNTS 331.

<sup>31</sup> Phillips, A., *The Framework Convention for the Protection of National Minorities: A Policy Analysis*, Minority Rights Group International, Policy Paper, 2002, at p. 6; Phillips, A., ‘The 10<sup>th</sup> Anniversary of the Framework Convention for the Protection of National Minorities’, *Europäisches Journal für Minderheitenfragen*, Vol. 1, No. 3, 2009, pp. 181–189, at pp. 181–182.

<sup>32</sup> Hofmann, *op.cit.*, note 6, at p. 27.

The AC has also facilitated progress towards the achievement of Convention rights by encouraging dialogue between States and minority groups.<sup>33</sup>

Spiliopoulou Åkermark has summarised the differences between the purpose and practice of the FCNM and AC, stating:

One could say that the relevant provisions in the FCNM and the ECHR are different in content, in aim, in scope, in logic and that there is therefore never a true “correspondence of provisions” nor a risk of real conflict between the pronouncements of the two organs responsible for the evaluation of their respective implementation.<sup>34</sup>

Therefore, whilst the ECtHR’s jurisprudence may provide useful guidance to the AC when considering State Parties’ implementation of the FCNM, it is not obliged to follow the lead of the Court. Indeed, when the AC has considered similar situations to the ECtHR, a different result has occasionally eventuated,<sup>35</sup> particularly when the AC has reviewed situations which impact the ability of minorities to maintain their distinct identity.<sup>36</sup>

Furthermore, despite the ECHR being given primacy in Article 19, regarding permissible limitations, reference is also made to other ‘international legal instruments’, and consequently, the extent of the limitations permitted under the UN International Covenant on Civil and Political Rights (ICCPR)<sup>37</sup> must also be considered.<sup>38</sup> The purpose of Article 23 has been interpreted as ‘prevent[ing] past achievements in this field from being watered down’.<sup>39</sup> Nevertheless, if the Human Rights Committee (HRC) were to interpret permissible limitations to Convention rights more restrictively than the ECtHR, this would result in a higher standard of protection under the ICCPR than the ECHR. It would, therefore, seem contradictory if Article 23 imposed the obligation to follow the ECtHR’s interpretation of rights strictly. As the HRC considers both individual complaints and State Reports, its approach can be compared to both the Strasbourg institutions and the AC.

Whilst Article 23 establishes that corresponding provisions in the FCNM should ‘conform to’ the ECHR, this should be read to impose a minimum standard rather than requiring absolute conformity. Furthermore, Article 19, the limitations provision, should be read restrictively, so as to ensure that standards established under

<sup>33</sup> *Ibidem*, at p. 26.

<sup>34</sup> Spiliopoulou Åkermark, *loc.cit.*, note 20, at p. 83.

<sup>35</sup> Hofmann, *op.cit.*, note 6, at pp. 25–26; Wheatley, *loc.cit.*, note 16, at pp. 779–80; *DH and Others v. Czech Republic* (2006), *supra*, note 14, at paras. 26–27; ECtHR, *Noack v. Germany* (admissibility decision), 25 May 2000 (Appl. no. 46346/99). See also *DH and Others v. Czech Republic* (2007), *supra*, note 14, at para. 52.

<sup>36</sup> *DH and Others v. Czech Republic* (2006), *supra*, note 14; Hofmann, *op.cit.*, note 6, at p. 26; *Chapman v. United Kingdom*, *supra*, note 14.

<sup>37</sup> UN International Covenant on Civil and Political Rights, adopted 16 December 1966, 999 UNTS 171.

<sup>38</sup> Hannikainen, L., ‘Article 19’ in Weller (ed.), *op.cit.*, note 10, at pp. 517–534, at pp. 520, 528.

<sup>39</sup> Hilpold, *loc.cit.*, note 22, at p. 561.



international legal instruments are equally not watered down. This could, however, lead to a higher standard of protection under the FCNM than the ECHR.

It is generally agreed that the ECHR provides a minimum standard, in respect of analogous rights;<sup>40</sup> although, this does not, and has not, prevented States or the AC from interpreting the provisions of the FCNM in a more progressive manner.<sup>41</sup> The differing purpose of the Conventions and roles of the respective monitoring bodies explain, to some extent, any divergence in the interpretation of seemingly analogous rights. Nonetheless, it is far from ideal that corresponding provisions may result in different standards, as both instruments fall within the auspices of the Council of Europe.

### 3. FREEDOM OF RELIGION AND THE COUNCIL OF EUROPE

#### 3.1. THE RIGHT TO FREEDOM OF RELIGION IN THE ECHR AND FCNM

Both the ECHR and FCNM contain standalone freedom of religion provisions. Article 9(1) of the ECHR establishes:

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

Prior to the adoption of binding minority rights standards within the Council of Europe, the freedom to manifest religion afforded essential protection to religious minorities against intolerance from the majority.<sup>42</sup> While no derogation from or limitation of the *forum internum* is permitted under Article 9, the *forum externum* may be limited in accordance with Article 9(2). As discussion will focus on the limitation of Article 9(1) and the margin of appreciation, the consideration of the jurisprudence of the Strasbourg institutions will be limited to the *forum externum*.

Limitations to the *forum externum* must be prescribed by law, pursue one of the legitimate aims identified within the provision and be ‘necessary in a democratic society’.<sup>43</sup> The legitimate aims or ‘pressing social needs’ identified in Article 9(2) are ‘in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others’. Any limitation of Article 9(1) must

<sup>40</sup> Machnyikova, Z. ‘Article 7’, in: Weller (ed.), *op.cit.*, note 10, at pp. 193–222, at p. 199; Hannikainen, *loc.cit.*, note 38, at p. 528; Hilpold, *loc.cit.*, note 22, at pp. 563, 567.

<sup>41</sup> Machnyikova, *idem*.

<sup>42</sup> Evans, M. D., *Religious Liberty and International Law in Europe*, CUP, Cambridge, 1997, at p. 182.

<sup>43</sup> Art. 9(2) ECHR.



be proportionate to the objective pursued. While, under Article 9(1), the applicant is under an onus to prove interference with the right, once an interference is established, it follows that the State bears the burden of proof and must demonstrate that the interference was justifiable under Article 9(2). Further, the ECtHR has established the principle that ‘exemptions to a Convention right must be narrowly construed’,<sup>44</sup> thus outlining the principle of ‘priority to rights’.<sup>45</sup>

Consequently, although Article 9(1) may be limited, the protection of the right itself must still take precedence. The Strasbourg institutions have also developed a number of principles to assist in the assessment of whether a restriction of a right was proportionate, including the *less restrictive alternative doctrine*, which establishes that a State may be required to take an alternative course of action, if it achieves the same legitimate aim but does not interfere to the same extent with the rights of the individual.<sup>46</sup> It is necessary to consider the interpretation of the permissible limitations to Article 9 by the Strasbourg institutions in more detail, in order to ascertain the potential impact of the margin of appreciation on the rights of minorities.

The FCNM distinguished between the *forum internum* and *forum externum* by placing them in separate provisions. Article 7 primarily establishes the right to believe, the *forum internum*, whereas Article 8 FCNM provides: ‘The Parties undertake to recognise that every person belonging to a national minority has the right to manifest his or her religion or belief and to establish religious institutions, organisations and associations.’ The provision protects two elements of the *forum externum*: the right to manifest religion; and the right to establish religious institutions, organisations and associations. Machnyikova maintains that the inclusion of Article 8 in the FCNM, when a general right to freedom of religion is provided in Article 7 ‘highlights the essential role that the profession of religion plays in preserving a minority group’s identity and existence’.<sup>47</sup> However, Article 8, arguably, is subject to the same limitations as Article 9 ECHR.<sup>48</sup> In addition to Articles 7 and 8, as previously noted, the AC has also considered freedom of religion in relation to ‘new’ minorities under Article 6 FCNM. Hence, the AC has taken a sympathetic stance in its interpretation of the scope of application of the FCNM and rather than focusing on the possible limitations to manifestations of religion, in line with its approach of ‘constructive dialogue between all actors concerned’,<sup>49</sup> has gently encouraged States to adhere to minority rights standards.

<sup>44</sup> Evans, C., *Freedom of Religion under the European Convention on Human Rights*, OUP, Oxford, 2001, at p. 137.

<sup>45</sup> Greer, S., *The European Convention on Human Rights: Achievements, Problems and Prospects*, CUP, Cambridge, 2006, at pp. 203–13.

<sup>46</sup> Arai-Takahashi, Y., *The Margin of Appreciation and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, Oxford, 2002, at p. 15.

<sup>47</sup> Machnyikova, *loc.cit.*, note 28, at pp. 259–260.

<sup>48</sup> Art. 19 FCNM.

<sup>49</sup> Hofmann, R., ‘Implementation of the FCNM: Substantive Challenges’ in Verstichel and others (eds), *op.cit.*, note 15, at pp. 159–185, at p. 185.

While, following the first set of State Reports, it was noted that the ‘provision on the freedom to manifest one’s religion has so far been of only minor relevance for the monitoring activities of the Advisory Committee’,<sup>50</sup> the AC has increasingly considered the scope of the right in its ‘Opinions on the Second and Third rounds of State Reports’. As a result, the Opinions of the AC on State Reports provide significant elaboration on the content of the right to manifest religion. The AC’s elaboration of Article 8 primarily focuses on issues such as the registration of religious organisations and associations;<sup>51</sup> the restitution of religious property;<sup>52</sup> religious intolerance and hatred;<sup>53</sup> and religious education,<sup>54</sup> all areas where no divergence from the practice of the Strasbourg institutions can be observed.<sup>55</sup> However, divergence in practice can be observed in relation to two controversial manifestations of religion: the ability to gain planning permission for places of worship and cemeteries; and the wearing of religious attire. These will be considered in more detail later in this article.

### 3.2. THE MARGIN OF APPRECIATION

The ‘margin of appreciation’ has been employed differently by the AC and Strasbourg institutions. While the FCNM was initially criticised for the programmatic nature of its rights,<sup>56</sup> arguably this has been one of its strengths as it has allowed the AC to flesh out the content of rights beyond minimum standards. Further, the programmatic nature of rights in the FCNM has also ensured that States have been permitted a measure of discretion regarding how best to achieve minority rights standards in light of the

<sup>50</sup> Hofmann, *loc.cit.*, note 13, at p. 76.

<sup>51</sup> For example, Opinion on Azerbaijan, ACFC/INF/OP/I(2004)001, paras. 46–8; Opinion on Estonia, ACFC/INF/OP/I(2002)005, para. 34; Second Opinion on Estonia, ACFC/INF/OP/II(2005)001, paras. 79–82; Opinion on Georgia, ACFC/OP/I(2009)001, para. 92.

<sup>52</sup> For example, Second Opinion on Albania, ACFC/OP/II(2008)003, paras. 123–4; Third Opinion on Armenia, ACFC/OP/III(2010)006, para. 21; Opinion on Georgia ACFC/OP/I(2009)001 paras. 93, 96–7; Second Opinion on Russia ACFC/OP/II(2006)004, paras. 171, 174.

<sup>53</sup> For example, Opinion on Armenia, ACFC/INF/OP/I(2003)001, para. 43; Opinion on UNMIK Kosovo, ACFC/OP/I(2005)004, para. 63; Opinion on the Netherlands, ACFC/OP/I(2009)002, para. 37; Second Opinion on Denmark, ACFC/INF/OP/II(2004)005, paras. 20, 77, 80.

<sup>54</sup> For example, Second Opinion on Bosnia and Herzegovina, ACFC/OP/II(2008)005, para. 124; Opinion on Norway, ACFC/INF/OP/I(2003)003, para. 40; Second Opinion on Norway, ACFC/OP/II(2006)006, para. 96; Second Opinion on the United Kingdom, ACFC/OP/II(2007)003, paras. 155–6.

<sup>55</sup> See, for example, ECtHR, *Sfântul Vasile Polonă Greek Catholic Parish v. Romania*, 7 April 2009 (Appl. no. 65965/01); ECtHR, *Grzelack v. Poland*, 15 June 2010 (Appl. no. 7710/02); ECtHR, *Hasan and Eylem Zengin v. Turkey*, 9 October 2007 (Appl. no. 1448/04); ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, 13 December 2001, (Appl. no. 45701/99); ECtHR, *Masaev v. Moldova*, 12 May 2009 (Appl. no. 6303/05); ECtHR, *Verein der Fredunde der Christengemeinschaft and Ors v. Austria*, 26 February 2009 (Appl. no. 76581/01); ECtHR, *Religionsgemeinschaft der Zeugen Jehovas and Ors v. Austria*, 31 July 2008 (Appl. no. 40825/98); ECtHR, *Church of Scientology Moscow v. Russia*, 5 April 2007 (Appl. no. 18147/02); ECtHR, *Moscow Branch of the Salvation Army v. Russia*, 5 October 2006, (Appl. no. 72881/01).

<sup>56</sup> Alfredsson, *loc.cit.*, note 5, at p. 293.

specific situation prevailing within their territory.<sup>57</sup> However, despite being permitted a margin of appreciation by the AC regarding how best to implement rights, States are not permitted to deviate from established standards, nor limit the right itself.

The margin of appreciation has primarily been utilised by the Strasbourg institutions when applying the proportionality test and, in effect, shifts the burden of proof to favour the State, moving away from the principle of ‘priority to rights’. As the margin of appreciation cannot be found in the ECHR or in its *travaux préparatoires*, it can be described as a judicial construct and, hence, is not easily defined.<sup>58</sup> Although, broadly speaking, it has been defined as the ‘room for manoeuvre’ or discretion afforded to State Parties, when justifying limitations to Convention rights,<sup>59</sup> little consensus has been reached regarding a precise definition.<sup>60</sup>

Letsas has, nevertheless, identified the two instances where the Strasbourg institutions have utilised the term ‘margin of appreciation’. The *substantive* concept of the doctrine relies on the limitation clauses found in the second paragraphs of Articles 8–11 and the balancing of individual rights with collective goals.<sup>61</sup> In contrast, the *structural* concept of the margin of appreciation, relies on the principle of State sovereignty and the underlying tenet that the Strasbourg institutions are not Courts of Fourth Instance.<sup>62</sup> The margin of appreciation has, therefore, primarily been utilised in cases concerning Article 15, the derogation provision. However, the *structural* margin of appreciation has also been utilised in cases involving denial of planning permission.<sup>63</sup> Thus, while the ECtHR uses the same term to refer to instances of deference to States, in fact, two separate conceptions of the doctrine have been employed.

Although the concept of the margin of appreciation may, *prima facie*, seem justifiable given the principle of State sovereignty, it is primarily the Strasbourg institutions’ application of this doctrine that has been called into question. In particular, it has been argued that deference to the margin of appreciation may obscure the true basis for the

<sup>57</sup> Phillips (2009), *loc.cit.*, note 31, at pp. 183–4.

<sup>58</sup> Yourow, *op.cit.*, note 23, at p. 13.

<sup>59</sup> Greer, *op.cit.*, note 45; *idem*.

<sup>60</sup> See generally, Yourow, *op.cit.*, note 23, at p. 13; Greer, *op.cit.*, note 45; Arai-Takahashi, *op.cit.*, note 46; Greer, S., *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Human Rights Files No. 1, Council of Europe Publishing, Strasbourg, 2000; Letsas, G., *A Theory of Interpretation of the European Convention on Human Rights*, OUP, Oxford, 2007; Letsas, *loc.cit.*, note 3; Kratochvíl, J., ‘The Inflation of the Margin of Appreciation by the European Court of Human Rights’ *Netherlands Quarterly of Human Rights*, Vol. 29, No. 3, 2011, pp. 324–357.

<sup>61</sup> Letsas (2007), *ibidem*, at p. 85.

<sup>62</sup> Letsas, *ibidem*, at pp. 90–1; Yourow, H, *op.cit.*, note 23.

<sup>63</sup> ECtHR, *Buckley v. United Kingdom*, 25 September 1996 (Appl. no. 20348/92), at para 75; ECtHR, *Sporrong and Lönnroth v. Sweden*, 23 September 1982 (Appl. nos. 7151/75); 7152/75; EComHR, *Chater v. United Kingdom* (admissibility decision), 7 May 1977 (Appl. no. 11723/85); Letsas, *ibidem*, at p. 92.

Court's decision.<sup>64</sup> Further, despite the burden of proof under Article 9(2) falling on the State, the margin of appreciation, in some instances, may shift the burden to the applicant. In other cases, the Strasbourg institutions, in deferring to the margin of appreciation, can be seen to simply presume that the interference was 'necessary in a democratic society', without considering the proportionality of the interference in the given circumstances.

By allowing States to justify limitations without carrying out the proportionality test, the Strasbourg institutions prioritise the 'pressing social need' ahead of the right itself, contrary to the principle of 'priority to rights'. However, when the 'pressing social need', justified by the State, represents the concerns of the majority, this has the potential to be used to limit the rights of minorities. The ECtHR recognised this danger in *Young, James and Webster v. United Kingdom*:

[P]luralism, tolerance and broadmindedness are hallmarks of a "democratic society" [...] Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.<sup>65</sup>

Hence, the Strasbourg institutions should, when applying the margin of appreciation, consider the potential impact of any interference with rights on any relevant minority group to ensure that the majority is not abusing its dominant position.

In relation to Article 9, the Strasbourg institutions initially construed the margin of appreciation extremely narrowly, as 'freedom of religion, including religious tolerance and pluralism, represents one of the most foundational rights in European democracy'.<sup>66</sup> However, Article 9(2) has increasingly been employed by the ECtHR and, as a result, the margin of appreciation has become progressively more significant.<sup>67</sup> Given that in democratic States, the State represents the majority perspective, this is a potentially worrying development for religious minorities, particularly those perceived by the majority to be a threat. As a result, Evans has criticised the Strasbourg institutions' use of the margin of appreciation in Article 9 cases, arguing:

<sup>64</sup> Singh, R., Hunt, M., and Demetriou, M., 'Is There a Role for the "Margin of Appreciation" in National Law After the Human Rights Act?', *European Human Rights Law Review*, Vol. 1, No. 1, 1999, pp. 15–22. See also, Greer, *op.cit.* note 60, at p. 14; Greer, *op.cit.*, note 45, at p. 277; Arai-Takahashi, *op.cit.*, note 46, at p. 234; Van Dijk P., and Van Hoof, G. J. H., *Theory and Practice of the European Convention on Human Rights*, Kluwer, Deventer, 1990, at pp. 585–6 and 604–5; Harris, D. J., O'Boyle, M., and Warbrick, C., *Law of the European Convention on Human Rights*, Butterworths, London, 1995, at p. 298.

<sup>65</sup> *Young, James and Webster v. United Kingdom*, *supra*, note 26, para. 63.

<sup>66</sup> Arai-Takahashi, *op.cit.*, note 46, at p. 100. See also, ECtHR, *Kokkinakis v. Greece*, 25 May 1993, (Appl. no. 14307/88), at para. 31.

<sup>67</sup> Letsas, *op.cit.*, note 60; Evans, M. D., *loc.cit.*, note 2.

it has become increasingly apparent that this is no longer understood to mean so much as respect by others *for* religion but respect *by* religions for others. The result is that religious manifestation is seen as permissible only to the extent that this is compatible with the underpinnings of the ECHR system, these being democracy and human rights. The court today seems to identify democracy and human rights with tolerance and pluralism, and is apt to construe any forms of religious manifestation which do not manifest those virtues as posing a threat to its core values.<sup>68</sup>

It is this claim that will be investigated in the light of the margin of appreciation and by contrasting the approach of the Strasbourg institutions with that of the AC, which has as its core purpose the protection of minorities and their rights.

### 3.3. THE INTERPRETATION OF FREEDOM OF RELIGION BY MONITORING BODIES IN THE COUNCIL OF EUROPE

The Strasbourg institutions and the AC have developed extensive jurisprudence in relation to the right to manifest religion. However, as noted above, this article will focus on two examples of where the Strasbourg institutions have utilised the margin of appreciation: planning permission to build places of worship and cemeteries and permissible restrictions on religious dress. A significant disparity can be observed in the former instance between the practice of the Strasbourg institutions and the AC, whereas the latter reveals considerable potential for divergence. Therefore, it is necessary to examine these controversial manifestations of religion in the light of the 'soft law' of the AC and the jurisprudence of the ECtHR in order to consider the potential negative impact of the ECtHR's margin of appreciation on the rights of minorities.

#### 3.3.1. *Places of Worship and Planning Permission*

##### 3.3.1.1. *Places of Worship and the ECHR*

The right to manifest religion includes the right to establish places of worship and, consequently, if a State limits this right, it is likely to constitute an interference with Article 9(1).<sup>69</sup> However, as the Strasbourg institutions are not permitted to review administrative decisions, they have considered cases involving planning permission to fall outside their mandate,<sup>70</sup> and have allowed States a wide margin of appreciation.

<sup>68</sup> Evans, M. D., *ibidem* (footnotes omitted), at p. 303.

<sup>69</sup> ECtHR, *Johannische Kirche and Peters v. Germany* (admissibility decision), 10 July 2001 (Appl. no. 41754/98); ECtHR, *Vergos v. Greece*, 24 June 2004 (Appl. no. 65501/01), at para. 32; EComHR, *ISKCON and 8 Others v. United Kingdom* (admissibility decision), 8 March 1994 (Appl. no. 20490/92). See also, Human Rights Committee, General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18) UN Doc. CCPR/C/21/Rev.1/Add.4, para. 4.

<sup>70</sup> *Sporrong and Lönnroth v. Sweden*, *supra*, note 63; *Chater v. United Kingdom*, *supra*, note 63.

A number of cases have been brought under Article 9 in this respect, varying from the ability of a religious community to gain authorisation for the change in usage of a pre-existing property<sup>71</sup> to planning permission to construct purpose built places of worship and cemeteries.<sup>72</sup> In all cases, the Strasbourg institutions have accepted that the refusal to grant such authorisation or planning permission constituted an interference with the right of the applicants to manifest their religion.<sup>73</sup> Accordingly, the Strasbourg institutions have decided whether the cases disclosed violations of Article 9 on the basis of whether the interference with the applicants' freedom of religion was justifiable under Article 9(2).

In three of the cases brought under Article 9, *ISKCON and 8 Others v. United Kingdom*, *Johannische Kirche and Peters v. Germany* and *Vergos v. Greece*, the Strasbourg institutions did not consider the proportionality of the interference with the applicants' rights. Planning matters were considered to be prescribed by law and to pursue a legitimate policy aim. However, aside from the identification of the aim under Article 9(2), very little attention was paid to how the restriction on the applicants' rights would pursue such an aim and whether the restriction was 'necessary in a democratic society'. In particular, in *ISKCON and 8 Others v. United Kingdom*, the European Commission on Human Rights considered that the restrictions placed on the applicant were necessary for the 'protection of the rights and freedoms of others', in this instance the residents of a nearby village, and that 'an element of protection of public order or health in the aim of the interference, in that planning legislation is generally accepted as necessary in modern society to prevent uncontrolled development'.<sup>74</sup> Furthermore, it held that 'the Commission does not consider that Article 9 of the Convention can be used to circumvent existing planning legislation, provided that in the proceedings under that legislation, adequate weight is given to freedom of religion'.<sup>75</sup> Therefore, the State did not need to prove the necessity of the measures to protect 'the rights and freedoms of others' or whether they were proportionate to the aims pursued.

In *Vergos v. Greece*, the Court appeared to reverse the burden of proof under Article 9(2), and, instead of requiring the State to provide a 'pressing social need' to justify the interference with the right, accepted that the applicant had not sufficiently established the 'social need' for a 'True Orthodox Christian' place of worship in his town.<sup>76</sup> The Strasbourg institutions, in their consideration of these three cases, have deferred to 'the wide margin of appreciation of the Contracting States in planning

<sup>71</sup> *ISKCON and 8 Others v. United Kingdom*, *supra*, note 69; ECtHR, *Manoussakis and Others v. Greece*, 26 September 1996 (Appl. no. 18748/91).

<sup>72</sup> *Johannische Kirche and Peters v. Germany*, *supra*, note 69; *Vergos v. Greece*, *supra*, note 69.

<sup>73</sup> *Idem*; *ISKCON and 8 Others v. United Kingdom* *supra*, note 69; *Manoussakis and Others v. Greece*, *supra*, note 71.

<sup>74</sup> *ISKCON and 8 Others v. United Kingdom*, *idem*.

<sup>75</sup> *Idem*.

<sup>76</sup> *Vergos v. Greece*, *supra*, note 69, at paras. 40–41.

matters'.<sup>77</sup> This has led to the prioritisation of the 'pressing social need' to uphold planning decisions over the right to freedom of religion, without fully considering whether the restriction on Article 9 was proportionate.

### 3.3.1.2. ECtHR and Discrimination in Planning Decisions

The wide margin of appreciation given to States in planning matters, however, has the potential to prevent the ECtHR from considering whether a pattern of discrimination against a religious community exists in planning decisions. In *Manoussakis and Others v. Greece*, a Jehovah's Witness had not been granted authorisation to use a hired room for religious purposes, and was subsequently arrested and convicted for using the room for religious purposes in the absence of authorisation. In finding a violation of Article 9, the ECtHR noted:

It appears from the evidence and from the numerous other cases cited by the applicants and not contested by the Government that the State has tended to use the possibilities afforded by the above-mentioned provisions to impose rigid, or indeed prohibitive, conditions on practice of religious beliefs by certain non-Orthodox movements, in particular Jehovah's Witnesses.<sup>78</sup>

Despite noting the pattern of discrimination against Jehovah's Witnesses in planning matters in Greece, the case turned on the disproportionate nature of the criminal prosecution and conviction of the applicant for using the room as a place of worship.<sup>79</sup>

Were the Strasbourg institutions to review the proportionality of planning decisions, rather than deferring to the alleged 'pressing social need', it would be possible to identify instances of systematic discrimination. Although the Strasbourg institutions have historically expressed an unwillingness to consider statistical evidence of widespread discrimination,<sup>80</sup> in recent cases concerning discrimination, the ECtHR has displayed a willingness to consider statistical evidence,<sup>81</sup> providing that such evidence is undisputed and official.<sup>82</sup> Consequently, while the consideration of statistical evidence would allow the ECtHR to identify instances where minorities

<sup>77</sup> *Johannische Kirche and Peters v. Germany* *supra*, note 69; *Idem; ISKCON and 8 Others v. United Kingdom* *supra*, note 69.

<sup>78</sup> *Manoussakis and Others v. Greece*, *supra*, note 71, at para. 48.

<sup>79</sup> *Ibidem*, at paras. 51–3.

<sup>80</sup> See for example, ECtHR, *McShane v. United Kingdom*, 28 May 2002 (Appl. no. 43290/98), at para. 135; *DH and Others v. Czech Republic* (2006), *supra*, note 14, at para. 52. Cf. *Ibidem*, at para. 48; ECtHR, *Zarb Adami v. Malta*, 20 June 2006 (Appl. no. 17209/02), at para. 76; *DH and Others v. Czech Republic* (2007), *supra*, note 14.

<sup>81</sup> *DH and Others v. Czech Republic* (2007), *supra*, note 14, para. 188. See also, *Zarb Adami v. Malta*, *ibidem*, paras. 77–78; ECtHR, *Hoogendijk v. the Netherlands* (admissibility decision), 6 January 2005 (Appl. no. 58641/00).

<sup>82</sup> *Hoogendijk v. the Netherlands*, *idem*.



have consistently been denied planning permission on discriminatory grounds, the test of ‘undisputed official statistics’ relies on the existence and availability of such statistics to the applicant.<sup>83</sup> Further, it is unclear whether the ECtHR would consider statistical evidence in cases concerning planning permission given the State’s wide margin of appreciation in such matters.

Additionally, in *Vergos v. Greece*, the State’s submissions hinted at a discriminatory undercurrent in the planning decision, justifying the lack of ‘social need’ for a ‘True Orthodox Christian’ place of worship on the grounds that a suitable place of worship existed in the neighbouring town; the land was not suitable for such a building; and *the building of a place of worship could exacerbate the religious feelings of other Christians and lead to disorder*.<sup>84</sup> Nevertheless, the ECtHR did not consider this point further and deferred to the wide margin of appreciation of the State in planning matters.<sup>85</sup> Therefore, it would seem that a violation was found in *Manoussakis and Others v. Greece* as the interference complained of struck at the heart of the right, as it not only prevented the applicant from establishing a place of worship but also resulted in his criminal conviction. Subsequent practice would seem to indicate that a wide margin of appreciation in planning matters will prevail unless an extremely serious violation of Article 9 is found.

### 3.3.1.3. *Places of Worship and the FCNM*

As noted above, the AC and the Strasbourg institutions perform different functions. Although the Strasbourg institutions have considered whether individual cases disclose interference with a right and, if so, whether the interference was legitimate, the AC monitors State implementation of the rights contained in the FCNM and highlights issues of concern.

The ability of religious communities to build places of worship and access appropriate cemeteries has been of particular concern to the AC in relation to the implementation of Article 8 FCNM. Primarily, the AC has focused on obstacles to minority communities gaining permission to build or reconstruct places of worship, as well as access to appropriate burial sites on a non-discriminatory basis. The ability of the AC to review the situation generally prevailing in a State enables the identification of systematic discrimination, which may not be easily identifiable on a case-by-case basis. Notably, when reviewing the situation in Georgia, the AC observed:

The obstacles impeding their efforts to acquire, build or apply for the restitution of places of worship are another serious concern to the persons belonging to minorities. The Armenians, for instance, report reluctance, or even refusal, by certain local authorities to grant permission for the building of new churches, as well as tensions generated by these

<sup>83</sup> *Idem*.

<sup>84</sup> *Vergos v. Greece*, *supra*, note 69, at para. 14.

<sup>85</sup> *Ibidem*, at paras. 40–41.

procedures. They also mention attempts by the Georgian Orthodox Church to appropriate property belonging to the Armenian churches, as well as acts of provocation and defamatory language against them. The Azeris report particular difficulties in their efforts to build and maintain mosques, as well as manifestations of hostility by both the Georgian Orthodox Church and the population of the Georgian Orthodox faith. The Assyrians and Yezidi have also faced strong opposition, including violent attacks and petitions signed by members of the Georgian Orthodox population, when they were seeking to set up an appropriate place of worship.<sup>86</sup>

The AC can be seen in this instance to recognise the importance of being able to establish places of worship to the manifestation of religion. The identification of a widespread denial of this right to minorities ensures that States are not able to justify such practices on a case-by-case basis. Similar difficulties gaining planning permission for the building of places of worship by minority communities have also been identified by the AC in Bosnia and Herzegovina,<sup>87</sup> Russia,<sup>88</sup> Slovenia<sup>89</sup> and Spain.<sup>90</sup>

While the AC reviews the implementation of Convention rights at a national level, rather than issuing legal judgments, the identification of discrimination by the AC in its Opinions on State Reports frequently encourages States to engage with minorities and enables a mutually acceptable agreement to be reached. For example, in relation to the situation of Muslims in Denmark, the AC noted under Article 6 that '[t]he Advisory Committee is also aware that a solution has still not been found for the opening of the first full-scale mosque in Denmark, a matter that risks undermining intercultural dialogue with persons belonging to the Muslim faith'.<sup>91</sup> It further recommended that the authorities 'make further efforts to find a solution'.<sup>92</sup> Subsequently, planning permission was granted for two mosques to be built in Copenhagen.<sup>93</sup> The relevance of the AC's intervention to the resolution of this issue is unclear, however, the Third Danish State Report did stress that progress had been made in relation to the proposals for the two mosques.<sup>94</sup>

<sup>86</sup> Opinion on Georgia, ACFC/OP/I(2009)001, at para. 93.

<sup>87</sup> Opinion on Bosnia and Herzegovina, ACFC/INF/OP/I(2005)003, at para. 75.

<sup>88</sup> Second Opinion on Russia, ACFC/OP/II(2006)004, at para. 173.

<sup>89</sup> Opinion on Slovenia, ACFC/INF/OP/I(2005)002, at para. 46; Second Opinion on Slovenia, ACFC/INF/OP/II(2005)005, at para. 98.

<sup>90</sup> Second Opinion on Spain, ACFC/OP/II(2007)001, at para. 110.

<sup>91</sup> Second Opinion on Denmark adopted on 09 December 2004 ACFC/INF/OP/II(2004)005 at para. 88.

<sup>92</sup> *Ibidem*, at para. 93.

<sup>93</sup> Buhl Andersen, P., 'København er stort skridt tættere på moske', *Politiken*, 17 January 2011, available at: [politiken.dk/indland/ECE1169886/koebenhavn-er-stort-skridt-taetere-paa-moske/](http://politiken.dk/indland/ECE1169886/koebenhavn-er-stort-skridt-taetere-paa-moske/); 'Stort flertal stemmer for stormoske i København', *Politiken*, 16 April 2010, available at: [politiken.dk/indland/article949032.ece](http://politiken.dk/indland/article949032.ece); 'Vejen er banet for to moskeer i København', *Politiken*, 25 February 2010 available at: [politiken.dk/politik/article910841.ece](http://politiken.dk/politik/article910841.ece).

<sup>94</sup> Third Report Submitted by Denmark pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities, ACFC/SR/III(2010)004, at pp. 23–24.

In relation to the allocation of cemeteries to religious minorities, the AC has also taken a firm stance given the importance of burial rites to religious communities. Specifically, the AC recommended that '[a]n acceptable solution should be found in response to the Tatar community's request for a Muslim cemetery in Chisinau' in its Opinion on Moldova's Second Report.<sup>95</sup> The AC has also noted that minorities have experienced difficulties in Finland finding burial sites at a non-discriminatory cost<sup>96</sup> and a lack of sensitivity for burial customs in Montenegro.<sup>97</sup>

#### 3.3.1.4. *Differing Approaches to Planning Permission*

By deferring to the *structural* margin of appreciation in planning permission cases, the ECtHR has attempted to avoid the accusation that it acts as a Court of Fourth Instance. However, as highlighted by the AC, and in *Manoussakis and Others v. Greece*, discrimination in planning matters is of particular concern regarding religious minorities. If the ECtHR continues to defer to a wide margin of appreciation in these cases, and does not consider the proportionality of the interference with Article 9, then it cannot assess whether the facts of the case disclose discrimination or whether the limitation was arbitrary. Consequently, the Strasbourg institutions appear to have prioritised the role of planning permission in society on the grounds that it is necessary in a democratic society for the protection of the rights and freedoms of others,<sup>98</sup> public order<sup>99</sup> and public health,<sup>100</sup> above the right to manifest religion.

While the AC has a different role to the Strasbourg institutions, by highlighting instances where minorities have consistently been refused planning permission, the AC has contributed to the finding of a mutually acceptable solution. This is not to say that the consideration by the Strasbourg institutions of whether the facts of *Vergos v. Greece* revealed systematic discrimination would have altered the outcome of the case. However, it is vital that the ECtHR fully carry out the proportionality test rather than simply deferring to the State's wide margin of appreciation in planning matters especially where discriminatory attitudes have been hinted at.

The ECtHR must be seen to come to its conclusion on the basis of a full appraisal of the facts of the case in order for justice to both be done and be seen to be done.<sup>101</sup> If the margin of appreciation is deferred to too readily there is potential for intolerance by the majority of the minority, which could potentially influence planning decisions at a national level, to go unchecked. This, in turn, could undermine the progress made

<sup>95</sup> Second Opinion on Moldova, ACFC/INF/OP/II(2004)004, at para. 84.

<sup>96</sup> Second Opinion on Finland, ACFC/OP/II(2006)003, at para. 90.

<sup>97</sup> Opinion on Montenegro, ACFC/OP/I/2008)001, at para. 66.

<sup>98</sup> *ISKCON and 8 Others v. United Kingdom*, *supra*, note 69; *Vergos v. Greece*, *supra*, note 69, at para. 32; *Johannische Kirche and Peters v. Germany*, *supra*, note 69.

<sup>99</sup> *ISKCON and 8 Others v. United Kingdom*, *idem*; *Vergos v. Greece*, *idem*.

<sup>100</sup> *ISKCON and 8 Others v. United Kingdom*, *idem*.

<sup>101</sup> Arai-Takahashi, *op.cit.*, note 46, at p. 16.

by the AC towards achieving consistent minority rights standards. The monitoring bodies of human rights conventions should afford ‘priority to rights’ rather than priority to the interests of States.

### 3.3.2. *Permissible Restrictions on Religiously Prescribed Clothing*

#### 3.3.2.1. *Religiously Prescribed Clothing and the ECHR*

The wearing of religiously prescribed attire has been widely accepted as a legitimate manifestation of religion.<sup>102</sup> Although the jurisprudence of the ECtHR regarding this right has evolved significantly in recent years, the purpose of this section is not to fully review the Strasbourg institution’s judgments in these cases,<sup>103</sup> but instead to consider the deployment of the margin of appreciation and the extent to which this has impacted the rights of religious minorities.

The ECtHR has primarily considered the extent to which the right to wear religiously prescribed clothing can be limited under Article 9(2) in relation to the wearing of the *hijab* by teachers, students and pupils in State institutions.<sup>104</sup> For example, in *Dahlab v. Switzerland*,<sup>105</sup> the ECtHR affirmed the State’s claim that the wearing of a “powerful” religious symbol’, such as a headscarf, by a teacher in a State school could not be reconciled with the principle of State neutrality and, therefore, the limitation on the right to manifestation was legitimate on the grounds of ‘the protection of the rights and freedoms of others, public safety and public order’.<sup>106</sup> In holding the claim inadmissible, the Court commented:

<sup>102</sup> ECtHR, *Dahlab v. Switzerland* (admissibility decision), 15 February 2001 (Appl. no. 42393/98); *Şahin v. Turkey*, *supra*, note 25. Cf. EComHR, *Karaduman v. Turkey* (admissibility decision), 3 May 1993 (Appl. no. 16278/90).

<sup>103</sup> For a review of the case law concerning the right to wear religious attire, see further: Evans, M. D., *loc.cit.*, note 2; Gibson, *loc.cit.*, note 2; Evans, C., *loc.cit.*, note 2; Cumper and Lewis, *loc.cit.*, note 2; Evans and Petkoff, *loc.cit.*, note 2; Lewis, *loc.cit.*, note 2; McGoldrick, D., *Human Rights and Religion – The Islamic Headscarf Debate in Europe*, Hart, Oxford, 2006; Vakulenko, A., ‘Islamic Headscarves’ and the European Convention on Human Rights: An Intersectional Perspective’, *Social Legal Studies*, Vol. 16, No. 2, 2007, pp. 183–199; Borovali, M., ‘Islamic Headscarves and Slippery Slopes’, *Cardozo Law Review*, Vol. 30, No. 6, 2009, pp. 2593–2611; Evans, M. D., ‘From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression before the European Court of Human Rights’, *Journal of Law and Religion*, Vol. 26, No. 1, 2010–2011, pp. 345–270, at pp. 264–270.

<sup>104</sup> *Dahlab v. Switzerland*, *supra*, note 102. *Karaduman v. Turkey*, *supra*, note 102; *Şahin v. Turkey*, *supra*, note 25, para. 99; ECtHR, *Köse and 93 Others v. Turkey* (admissibility decision), 24 January 2006 (Appl. no. 26625/02); ECtHR, *Dogru v. France*, 4 December 2008 (Appl. no. 27058/05), para. 60; ECtHR, *Aktas v. France*, *Bayrak v. France*, *Gamaleddyn v. France*, *Ghazal v. France*, (admissibility decision), 17 July 2009 (Appl. nos. 43563/08, 14308/08, 18527/08, 29134/08).

<sup>105</sup> *Dahlab v. Switzerland*, *idem*. *Karaduman v. Turkey*, *supra*, note 102 preceded *Dahlab*, however, the case was decide under art. 9(1) and, consequently, the margin of appreciation was not considered.

<sup>106</sup> *Dahlab v. Switzerland*, *idem*.

It [...] appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.

Accordingly, weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony, the Court considers that, in the circumstances of the case and having regard, above all, to the tender age of the children for whom the applicant was responsible as a representative of the State, the Geneva authorities did not exceed their margin of appreciation and that the measure they took was therefore not unreasonable.<sup>107</sup>

This approach was reaffirmed in *Şahin v. Turkey*, which concerned a ban on headscarves in Turkish universities. In this case, the Court emphasised the importance of ‘national traditions’ and ‘the specific domestic context’ and, accordingly, held that the interference was necessary in order to ensure gender equality, the democratic system and the secularism of the State.<sup>108</sup> A similar approach by the ECtHR can be observed in relation to the wearing of religious attire by school pupils in France and Turkey.<sup>109</sup> However, the Court’s use of the margin of appreciation in these cases has been subject to much criticism due to its alleged negation of the proportionality test and uncritical acceptance that limitations of this manifestation are legitimate in order to uphold gender equality,<sup>110</sup> secularism<sup>111</sup> and pluralism and tolerance.<sup>112</sup>

In particular, the ECtHR has been criticised for accepting the justification in *Şahin* that the limitation on the right to wear the *hijab* was permissible as it is ‘hard to reconcile with the principle of gender equality’.<sup>113</sup> Lewis maintains that ‘[t]he argument centred not on the individual’s behaviour but on the reactions of others – what those around her would read into her clothes’.<sup>114</sup> Therefore, it has been claimed that the conduct of the applicants in these cases was not necessarily contrary to gender equality.<sup>115</sup> The ECtHR has inferred a meaning to the *hijab*, which affirms a commonly held belief in Europe: ‘that the *Qur’an* and Islam are oppressive to women’, rather than considering the applicants’ motivations and the extent to which this presumption holds true.<sup>116</sup>

<sup>107</sup> *Idem.*

<sup>108</sup> *Şahin v. Turkey*, *supra*, note 25, at paras. 109, 116.

<sup>109</sup> *Köse and 93 Others v. Turkey*, *supra*, note 104; *Dogru v. France*, *supra*, note 104; *Aktas v. France*, *Bayrak v. France*, *Gamalededdin v. France*, *Ghazal v. France*, *Jasvir Singh v. France*, *Ranjit Singh v. France*, *supra*, note 104.

<sup>110</sup> *Dahlab v. Switzerland*, *supra*, note 102; *Şahin v. Turkey*, *supra*, note 25, at para. 109.

<sup>111</sup> *Dahlab v. Switzerland*, *idem*; *Şahin v. Turkey*, *ibidem*, at para. 109–10, 114; *Dogru v. France*, *supra*, note 104, at para. 72; *Aktas v. France*, *supra*, note 104. See also, *Refah Partisi (The Welfare Party) v. Turkey*, 31 July 2001 (Appl. nos. 41340/98, 41342/98, 41343/98 and 41344/98), at para. 93.

<sup>112</sup> *Dahlab v. Switzerland*, *idem*; *Dogru v. France*, *ibidem*, at paras. 72, 75; *Şahin v. Turkey*, *ibidem*, at para. 114; *Aktas v. France*, *idem*.

<sup>113</sup> *Şahin v. Turkey*, *ibidem*, at para. 111.

<sup>114</sup> Lewis, *loc.cit.*, note 2, at p. 409. See also Vakulenko, *loc.cit.*, note 103.

<sup>115</sup> *Idem.*

<sup>116</sup> Evans, C., *loc.cit.*, note 2, at p. 65.

Therefore, the majority's perception that the *hijab* is contrary to gender equality was prioritised over the freedom of religion of the applicant by the ECtHR.

Further, in justifying the application of the margin of appreciation in these cases, the ECtHR has established that the principle of secularism is 'consistent with the values underpinning the Convention',<sup>117</sup> specifically in relation to democracy<sup>118</sup> and pluralism and tolerance in schools.<sup>119</sup> Therefore, if a manifestation of religion is perceived to be a threat to these principles, limitations to Article 9 may be justified on the grounds that they are necessary 'for the protection of the rights and freedoms of others' and 'public order'.<sup>120</sup> In a number of cases: "The Court reiterates that an attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention".<sup>121</sup> Additionally noting in *Dogru v. France*:

that in France, as in Turkey or Switzerland, secularism is a constitutional principle, and a founding principle of the Republic, to which the entire population adheres and the protection of which appears to be of prime importance, in particular in schools.<sup>122</sup>

Consequently, the ECtHR, in these cases, views dissent from the established consensus as a threat to democracy. While Article 17 establishes that the Convention does not protect those seeking to destroy the rights and freedoms of others, the Strasbourg institutions did not consider whether the applicants in fact posed a threat to democracy. Democracy hinges on the ability of citizens to dissent from mainstream opinion. However, the ECtHR fails to protect those who do not subscribe to the view that it is necessary to impose limitations on the right to manifest religion in order to ensure State neutrality but equally do not pose a direct threat to democracy. Evans has argued:

This is a serious distortion of the structure of the individual protection since it suggests that failing to respect the principle of secularism might deny an activity of its very character as a manifestation. A system of human rights protection of religious belief which fails to embrace manifestations which challenge secularist approaches to public life is a truncated vision of the freedom of religion.<sup>123</sup>

<sup>117</sup> *Şahin v. Turkey*, *supra*, note 25, at para. 114.

<sup>118</sup> *Idem*.

<sup>119</sup> *Köse and 93 Others v. Turkey*, *supra*, note 104.

<sup>120</sup> *Şahin v. Turkey*, *supra*, note 25, at para. 99; *Dogru v. France*, *supra*, note 104, at para. 60.

<sup>121</sup> *Dogru v. France*, *ibidem*, at para. 72. See also, *Refah Partisi (The Welfare Party) v. Turkey*, *supra*, note 111, at para. 93; *Şahin v. Turkey*, *ibidem*, at para. 114; *Aktas v. France*, *supra*, note 104.

<sup>122</sup> *Dogru v. France*, *ibidem*, at para. 72.

<sup>123</sup> Evans, M. D., *loc.cit.*, note 2, p. 307.

It is no coincidence that cases involving the prohibition of religious symbols in public institutions have increased as European States have become more secular<sup>124</sup> and religious minorities, especially Muslims, are experiencing increasing intolerance and discrimination.<sup>125</sup> While, on the one hand, the Strasbourg institutions have stressed:

freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.<sup>126</sup>

On the other hand, Evans has noted that ‘[i]n the headscarf cases, the Court [...] does not probe for an anti-Muslim agenda; it does not raise the question the elevated position of secularism’.<sup>127</sup> Religious freedom was originally considered by the Strasbourg institutions to be one of the foundations of democracy and central to pluralism;<sup>128</sup> however, in the recent judgments of the ECtHR, its position appears to have been usurped by ‘secularism’.<sup>129</sup> Even though secularism has been equated with democracy by the Strasbourg institutions, this does not lead to the conclusion that it should be prioritised above freedom of religion. In particular, Greer has noted: ‘it must surely be more than a matter of semantics that the Strasbourg system is concerned with the protection of human rights in a democratic context, rather than with the protection of democracy in a human rights context’.<sup>130</sup>

Ironically, while the ECtHR has justified the wide margin of appreciation in relation to secularism on the basis that it is fundamental to democracy and necessary to ensure tolerance and pluralism in society,<sup>131</sup> the elimination of visible difference in the public sphere is likely to have the opposite effect and increase intolerance of minorities.<sup>132</sup> Martínez-Torrón argues:

<sup>124</sup> See, for example, Parliamentary Assembly of the Council of Europe, ‘Recommendation 1804 (2007)’ available at: [assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1804.htm](http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1804.htm). See also, Calo, Z.R., ‘Pluralism, Secularism and the European Court of Human Rights’, *Journal of Law and Religion*, Vol. 26, No. 1, 2010–2011, pp. 261–280 at pp. 268–269.

<sup>125</sup> European Union Agency for Fundamental Rights (FRA), ‘Data in Focus Report 2 – Muslims’ available at: [fra.europa.eu/fraWebsite/research/publications/publications\\_per\\_year/2009/pub\\_dif2\\_en.htm](http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/2009/pub_dif2_en.htm).

<sup>126</sup> *Kokkinakis v. Greece*, *supra*, note 66, at para. 31. See also, *Serif v. Greece*, 14 December 1999 (Appl. no. 38178/97); *Şahin v. Turkey*, *supra*, note 25.

<sup>127</sup> Evans, C., ‘Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture’, *Journal of Law and Religion*, Vol. 26, No. 1, 2010–2011, pp. 331–343, at p. 336.

<sup>128</sup> *Kokkinakis v. Greece*, *supra*, note 66, at para. 31. See also, *Serif v. Greece*, *supra*, note 126.

<sup>129</sup> *Dogru v. France*, *supra*, note 104, at paras. 72, 75; *Şahin v. Turkey*, *supra*, note 25, at para. 114; *Aktas v. France*, *supra*, note 104; *Dahlab v. Switzerland*, *supra*, note 102.

<sup>130</sup> Greer, *op.cit.*, note 60, at p. 26.

<sup>131</sup> *Idem.*

<sup>132</sup> Evans, *loc.cit.*, note 127, at p. 342.



As long as teachers respect the students' belief and do not attempt to proselytise them, the evidence of religious pluralism could be more consistent with a neutral attitude of the State, and more educative for the students, than a fictional absence of religion on the part of the school personnel.<sup>133</sup>

In addition to inferring the meaning of religious clothing, the ECtHR did not consider the importance of the manifestation of religion to the applicants in these cases,<sup>134</sup> the likely impact of the restriction on the applicants,<sup>135</sup> or the proportionality of the restriction. Notably, the Court has been criticised for its reasoning in *Şahin* on the grounds that instead of requiring proof of the need to limit the manifestation it proceeded on the 'likelihood of future (in their view) undesirable events'<sup>136</sup> based on 'little more than an assertion'.<sup>137</sup> Consequently, the ECtHR did not consider whether the applicant, in fact, posed a threat to secularism, democracy or pluralism and tolerance and, therefore, was not able to adequately consider whether the limitation satisfied the proportionality requirement under Article 9(2).<sup>138</sup>

Furthermore, in *Aktas v. France*, the applicant had suggested that wearing a hat, bandana or continuing to wear a headscarf but removing it at the entrance to classrooms may provide a compromise solution.<sup>139</sup> This was deemed unacceptable by the authorities as it would still demonstrate her religious affiliation.<sup>140</sup> Despite recognising that '[p]luralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals which are justified in order to maintain and promote the ideals and values of a democratic society',<sup>141</sup> the ECtHR deferred to the State's margin of appreciation without considering whether the restriction was proportionate. In particular, the ECtHR shifted the burden of proof from the State and did not consider whether the restriction on the applicant's ability to cover her hair in school constituted the *least restrictive alternative*. While a wide margin of appreciation in these cases may be appropriate, the principle that the margin of appreciation 'goes hand in hand with a European supervision' still prevails.<sup>142</sup> The absence of the proportionality test in the ECtHR's reasoning, in this case, leads to the conclusion that the ECtHR abrogated its

<sup>133</sup> Martínez-Torrón, J., 'Limitations on Religious Freedom in the Case Law of the European Court of Human Rights', *Emory International Law Review*, Vol. 19, No. 2, 2005, at pp. 587–636, at p. 622.

<sup>134</sup> Evans, *loc.cit.*, note 127, at p. 341. The same approach can be observed in: *Köse and 93 Others v. Turkey*, *supra*, note 104; *Dogru v. France*, *supra*, note 104; *Aktas v. France*, *supra*, note 104.

<sup>135</sup> *Idem*.

<sup>136</sup> Borovali, *loc.cit.*, note 103, p. 2594.

<sup>137</sup> Evans, M. D., *loc.cit.*, note 2. See also *Şahin v. Turkey*, *supra*, note 25, Judge Tulkens Dissenting Opinion, at para. 5.

<sup>138</sup> *Şahin v. Turkey*, *ibidem*, Judge Tulkens Dissenting Opinion.

<sup>139</sup> *Aktas v. France*, *supra*, note 104.

<sup>140</sup> *Idem*.

<sup>141</sup> *Idem*; *Dogru v. France*, *supra*, note 104, at para 62; *Şahin v. Turkey*, *supra*, note 25, at para. 108.

<sup>142</sup> ECtHR, *Vogt v. Germany* (Grand Chamber), 26 September 1995 (Appl. no. 17851/91), at para. 52; *Şahin v. Turkey*, *ibidem*, at para 110, Judge Tulkens Dissenting Opinion, at para. 3, 5.

duty to ensure that the restriction on the applicant's rights was proportionate to the aim pursued.

While the ECtHR has allowed States a wide margin of appreciation in cases involving religiously prescribed attire, this discretion is not unlimited. The recent case of *Ahmet Arslan and Others v. Turkey*, in which the ECtHR held that the prosecution and criminal conviction of the applicants for wearing religious attire in public constituted a violation of Article 9, appears to have established the limits of the secularism justification.<sup>143</sup> However, it is unclear the extent to which the ECtHR's judgment was influenced by the disproportionate actions of the State in criminally prosecuting the applicants.<sup>144</sup>

Furthermore, although *Ahmet Arslan and Others v. Turkey* may seem to limit the instances in which a State may interfere with this manifestation of religion on the grounds of secularism, this judgment does not lead to the conclusion that the bans on *burqas* in public in France<sup>145</sup> and Belgium<sup>146</sup> constitute violations of Article 9. Given the 'powerful normative status' of gender equality in international human rights law,<sup>147</sup> it seems likely that France and Belgium would be able to argue that a limitation on the right to wear the *burqa* in public falls within the State's margin of appreciation on the grounds that it is necessary to promote gender equality.<sup>148</sup> Therefore, the ECtHR's judgment in *Ahmet Arslan* does not necessarily establish the limits of the State's margin of appreciation in relation to the right to manifest religion by wearing religious attire, as alternative justifications may be cited.

Allowing States a margin of appreciation to restrict the right to manifest religion by wearing religious attire may be justifiable in order to protect democracy and the principle of State neutrality in exceptional circumstances.<sup>149</sup> However, this cannot justify the extension of the ECtHR's judgment in *Şahin* to cases in France where neither democracy nor the principle of secularism can be considered to be in a tenuous position.<sup>150</sup> In permitting States a wide margin of appreciation in relation to the wearing of religiously prescribed attire on the grounds of gender equality, tolerance and pluralism and secularism, the Strasbourg institutions prejudge the motivation of the applicant for wearing a particular item and, accordingly, do not carry out the

<sup>143</sup> ECtHR, *Ahmet Arslan and Others v. Turkey*, 23 February 2010 (Appl. no. 41135/98). See also, ECtHR, *Kavakçı v. Turkey*, 5 April 2007 (Appl. no. 71907/01).

<sup>144</sup> *Ahmet Arslan and Others v. Turkey*, *ibidem*, at para. 25.

<sup>145</sup> *Circulaire du 11 mars 2011 relative à la présentation des dispositions relatives à la contravention de dissimulation du visage dans l'espace public* NOR: JUSD1107187C.

<sup>146</sup> *Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage*, 1 June 2011, article 563bis le Code pénal.

<sup>147</sup> McGoldrick, D., 'Multiculturalism and its Discontents', *Human Rights Law Review*, Vol. 5, No. 1, 2005, pp. 27–56, at p. 53. *Dahlab v. Switzerland*, *supra*, note 102; *Şahin v. Turkey*, *supra*, note 25, at paras. 111, 115; *Dogru v. France*, *supra*, note 104, at para. 64.

<sup>148</sup> Evans, C., *loc.cit.*, note 2, at pp. 65–69.

<sup>149</sup> Greer, *op.cit.*, note 45, at p. 98. See also, Letsas, *op.cit.*, note 60, at p. 126.

<sup>150</sup> Martínez-Torrón, *loc.cit.*, note 133.

proportionality test required under Article 9(2). The rhetoric employed by States and the Strasbourg institutions alike, regarding the incompatibility of Islamic traditions with democracy, pluralism and the ECHR, echoes the rhetoric utilised by States seeking to limit the rights of other minorities.<sup>151</sup> This approach of the Court towards specific religious minorities has been affirmed by Judge Tulkens:

In the case law of the Court today, I also observe that the main limitations to the right of religious freedom (and also the freedom of thought or conscience) are motivated by the need to protect democratic societies from the danger of Islam and sects.<sup>152</sup>

Consequently, the Strasbourg institutions appear to give preference to ‘the moralistic preferences of the majority’ in these cases.<sup>153</sup>

### 3.3.2.2. *Religiously Prescribed Clothing and the FCNM*

The AC has only considered the wearing of religious apparel on one occasion.<sup>154</sup> However, given that this instance concerned the wearing of the *niqab*, a full face veil in schools – an extreme manifestation of Islam – and the potential limitation was justified by the State on the grounds of security – an area where the Strasbourg institutions have awarded an extremely wide margin of appreciation<sup>155</sup> – it is possible to ascertain whether the approach of the AC to the right of minorities to wear religiously prescribed clothing differs significantly from that of the Strasbourg institutions.

In noting the importance of allowing minorities to wear religiously prescribed clothing, the AC, in its Opinion on the United Kingdom’s Second State Report, expressed concern that new guidance relating to school uniforms may lead to the banning of the *niqab* in schools.<sup>156</sup> It further noted:

that the governing boards of schools in England already had the right to set their own regulations concerning school uniform and that most have opted for a permissive approach. There is a risk that the new guidance may be interpreted by schools in a way that restricts the right of every person belonging to a national minority to manifest his or her religion and/or belief.<sup>157</sup>

<sup>151</sup> See, for example, *Metropolitan Church of Bessarabia and Others v. Moldova*, *supra*, note 55, at para. 111; *Moscow Branch of the Salvation Army v. Russia*, *supra*, note 55, at para. 15.

<sup>152</sup> Tulkens, *loc.cit.*, note 8, at p. 2587.

<sup>153</sup> Letsas, *loc.cit.*, note 3.

<sup>154</sup> Second Opinion on the United Kingdom ACFC/OP/II(2007)003, at paras. 158, 161.

<sup>155</sup> Letsas, *op.cit.*, note 60, at p. 91.

<sup>156</sup> Second Opinion on the United Kingdom, *supra*, note 154, at para. 158.

<sup>157</sup> *Idem*.

In particular, the AC recommended:

Educational authorities and schools must take the necessary steps to inform and consult with minority ethnic communities when decisions are taken or policies adopted which may affect the rights of minority ethnic pupils to manifest their religion and/or belief at school.<sup>158</sup>

Despite the fact that such measures were being considered ‘on grounds of security, safety or learning concerns’,<sup>159</sup> the United Kingdom was expected to engage in a dialogue and compromise with religious minorities. This approach is consistent with the view that the manifestation of religion is particularly important for the maintenance of a minority’s identity and, as a result, should not be limited, unless absolutely necessary.

In the specific instance outlined above, the government of the United Kingdom was quick to rebut the concerns of the AC,<sup>160</sup> further indicating the influence of the Opinions of the AC on the practice of States. Hence, the State did not attempt to justify the legitimacy of such action, instead choosing to appease the AC.<sup>161</sup>

Although the position of the AC on the wearing of religious clothing only applies to a school environment, it is clear that it favours an accommodative approach, and sees dialogue and tolerance as crucial elements of minority rights protection.<sup>162</sup> Consequently, the approach hinted at in the AC’s Second Opinion on the United Kingdom indicates the potential for divergence between the approaches of the AC and Strasbourg institutions to the right to manifest religion by wearing religious attire. Further, in order to ensure tolerance and pluralism in society, the AC and FCNM advocate that minorities must be able to manifest their difference, and States must ‘take effective measures to promote mutual respect and understanding [...] in particular in the fields of education, culture and the media’.<sup>163</sup> Were Belgium, France or Turkey to ratify the FCNM, it is likely that the AC would consider the limitation

<sup>158</sup> *Ibidem*, at para. 161.

<sup>159</sup> *Ibidem*, at para. 158.

<sup>160</sup> 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, GVT/COM/II(2007)003, at p. 21.

<sup>161</sup> The AC did not raise the question of a number of cases in the UK concerning the right of pupils to wear religiously prescribed attire to school. See, for example, *R (on the application of Begum (by her litigation friend, Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High School (Appellants)* [2006] UKHL 15 (22 March 2006) and *R (on the Application of X) v. Y School & Ors* [2007] EWHC 298 (Admin) (21 February 2007). This can be explained in part by the weight the English Courts placed on consultation by the schools with local ethnic minority communities in these cases, and the availability of alternative schools where the pupils would have been able to manifest their religion.

<sup>162</sup> Second Opinion on the United Kingdom, *supra*, note 154, at para. 161. See also, Art. 6(1) FCNM.

<sup>163</sup> Art. 6(1) FCNM. Hofmann, *op.cit.*, note 6, at p. 25.

of the right to wear religiously prescribed attire in State institutions without prior consultation with the minority community as overly restrictive.

### 3.3.2.3. *Religiously Prescribed Clothing and the UN HRC*

The approach of the AC is also consistent with the approach of the HRC in *Hudoyberganova v. Uzbekistan*,<sup>164</sup> which concerned the exclusion of a student from a university for wearing the *hijab*.<sup>165</sup> While the HRC recognised that academic institutions may in certain instances limit this right, given the failure of the State Party to provide a justification for the limitation of the applicant's right, a violation of Article 18(2) of the ICCPR was found.<sup>166</sup> This approach is also supported by the HRC's General Comment No. 22 which states: 'The observance and practice of religion or belief may include [...] the wearing of distinctive clothing or headcoverings'.<sup>167</sup>

The HRC has consistently interpreted the permissible limitations to the right to freedom of religion more narrowly than the Strasbourg institutions.<sup>168</sup> Notably, it is firmly established that limitations on the freedom to manifest religion under Article 18 ICCPR must be 'strictly interpreted [...] Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated'.<sup>169</sup> This is particularly pertinent as the HRC considers both individual complaints and State Reports, and, therefore, can be compared to both the ECtHR and AC.

The different approach of the HRC can be explained, in part, by the inclusion of a minority rights provision, Article 27, in the ICCPR, which explicitly provides for the right of religious minorities to 'practise their own religion'. Furthermore, the HRC is not dominated by experts drawn from any one religious or cultural background.<sup>170</sup> In contrast, Evans has noted the ECtHR's 'general reluctance to acknowledge the value and religious importance of many religious practices outside of Christianity'.<sup>171</sup> Consequently, while the HRC has established, that 'the concept of morals should not be drawn exclusively from a single tradition',<sup>172</sup> the ECtHR by allowing States a wide

<sup>164</sup> UN HRC, *Raihon Hudoyberganova v. Uzbekistan*, 5 November 2004, Communication no. 931/2000, UN Doc. CCPR/C/82/D/931/2000 (2004).

<sup>165</sup> *Ibidem*, at para. 6.2.

<sup>166</sup> *Idem*.

<sup>167</sup> General Comment No. 22, *loc.cit.*, note 69, at para. 4. See also, *Ranjit Singh v. France*, 22 July 2011, Communication no. 1876/2009, UN Doc. CCPR/C/102/D/1876/2009, at paras. 8.3 and 8.4.

<sup>168</sup> *Idem*; UN HRC, *Singh Bhinder v. Canada*, 9 November 1989, Communication no. 208/1986, UN Doc. CCPR/C/37/D/208/1986, at para. 6.2.

<sup>169</sup> General Comment No. 22, *loc.cit.*, note 69, para. 8; *Singh Bhinder v. Canada*, *idem*; *Ranjit Singh v. France*, *supra*, note 167, at para. 8.4.

<sup>170</sup> Boyle, K., 'Freedom of Religion in International Law' in Rehman, J., and Breaux, S. C., (eds.) *Religion, Human Rights and International Law: a Critical Examination of Islamic State Practices*, Martinus Nijhoff Publishers, Leiden, 2007, pp. 21–51, at p. 43.

<sup>171</sup> Evans, C., *loc.cit.*, note 2, at p. 56.

<sup>172</sup> Boyle, *loc.cit.*, note 170.

margin of appreciation permits the ‘the moralistic preferences of the majority’ to be prioritised over the rights religious minorities.

#### 3.3.2.4. *Differing Approaches to Religiously Prescribed Clothing?*

As both the AC and HRC interpret the permissible limitations on rights narrowly and do not permit States a wide margin of appreciation, the decision of the HRC in *Hudoyberganova v. Uzbekistan* appears to indicate the possibility of divergent practice between the AC and the ECtHR in the future. As the purpose of Article 23 FCNM has been interpreted as ‘prevent[ing] past achievements in this field from being watered down’,<sup>173</sup> it would seem contradictory if this article imposed the obligation to follow the ECtHR’s interpretation of Article 9 to the letter, as this would impose a lower standard than has been established under the ICCPR. Hence, the AC should endeavour to uphold the standards established by HRC rather than reducing the standard of protection by allowing States a wide margin of appreciation in politically sensitive cases.

The differing nature of the monitoring procedures of the ECHR and FCNM has the potential to result in different conclusions in similar cases. As the AC considers the implications of particular policies for the minority, in addition to the prevailing situation, this leads to more comprehensive protection of the rights of religious minorities. However, as indicated by the approach of the HRC to individual complaints, the divergence between the ECtHR and AC is not inevitable.

In particular, the focus of the AC on dialogue and compromise in relation to the potential ban on the *niqab*, and the necessity of the limitation of freedom to manifest religion, stands in stark contrast to the practice of the Strasbourg institutions, which have given States an extremely wide margin of appreciation in cases involving the wearing of religious attire. Specifically, the Strasbourg institutions have refused to consider whether compromises suggested by the applicant would constitute *less restrictive alternatives*, despite noting the importance of compromise and dialogue.

Further, the AC and the Strasbourg institutions have taken diametrically opposing approaches towards ensuring tolerance and pluralism in society. While the Strasbourg institutions have allowed States to eliminate religious difference in the public sphere in the name of State secularism, the FCNM has encouraged States to ‘promote mutual respect and understanding’,<sup>174</sup> and take steps to foment inter-cultural knowledge.<sup>175</sup>

The shift in the burden of proof and the failure of the Strasbourg institutions to afford ‘priority to rights’ also highlights the utility of the AC’s examination of the general application of freedom of religion without the consideration of justifiable limitations. In fact, while the AC tends to acknowledge that States may justifiably wish

<sup>173</sup> Hilpold, *loc.cit.*, note 22, at p. 561.

<sup>174</sup> Art. 6(1) FCNM.

<sup>175</sup> Art. 12(1) FCNM.

to restrict a right, dialogue, compromise and the continued protection of the right are preferred to a sweeping limitation.

Freedom of religion is fundamental to ensure pluralism in society. The ECtHR's recent practice of giving States a wide margin of appreciation on the grounds of secularism and gender equality is in danger of deferring to the majority's intolerance and prejudices the applicant's motivations for wearing a specific item. The elimination of difference in the public sphere may in fact lead to increasing intolerance of religious minorities, as awareness is key to tolerance. This, in turn, may undermine the work of the AC towards achieving tolerance of minorities.

#### 4. CONCLUSION

In its Opinions on State Reports, the AC has interpreted the right of freedom to manifest religion to include the right to build places of worship, access appropriate cemeteries, and wear religious clothing. By reviewing the general situation prevailing in a State, the AC is able to identify instances of systematic discrimination and draw these instances to States' attention. By encouraging dialogue between the State and the minority in question, the AC has, in some cases, been able to prevent discrimination. Furthermore, the AC has considered States' justifications that restrictive measures are necessary for security reasons. However, while States may be given a margin of appreciation in relation to how to implement freedom to manifest religion under Article 8, this does not justify interference with the right, particularly when *less restrictive alternatives* are available. The HRC has taken a similarly restrictive approach to permissible limitations to freedom of religion, thus, indicating that it is not necessary to afford States a wide margin of appreciation when considering individual complaints.

In contrast, the Strasbourg institutions have allowed States a wide *structural* margin of appreciation in relation to planning matters and a wide *substantive* margin of appreciation in relation to the right to manifest religion by wearing religiously prescribed attire. In both instances, the Strasbourg institutions have failed to award 'priority to rights' and have reduced the onus on the State to prove that interference with Article 9 is both as a result of 'a pressing social need' and proportionate. This approach has prevented the ECtHR from considering whether planning decisions disclose systematic discrimination in relation to the right to construct places of worship. Further, by interpreting religious clothing as contrary to secularism, democracy and pluralism, the ECtHR has legitimised the majority's misconceptions about religious minorities.

Additionally, the ECtHR has accepted the view that it may be necessary to eliminate difference in the public sphere in order to ensure tolerance and pluralism. However, this approach is at odds with the approach of the AC, which considers dialogue, compromise and awareness to be key factors in maintaining a tolerant, pluralist



society. The ‘secular fundamentalism’<sup>176</sup> of some European States and the Strasbourg institutions may, in fact, increase intolerance of religious minorities. Therefore, in order to prevent differing standards from evolving within the Council of Europe in relation to the treatment of religious minorities, it would seem preferable that the ECtHR consider the approach of the AC towards pluralism in more detail.

The use of the margin of appreciation by the Strasbourg institutions so extensively in cases concerning religious minorities has the potential to undermine the progress made by the AC towards achieving consistent minority rights standards throughout Europe. Human rights standards are universal and should not be influenced by ‘the moralistic preferences of the majority’.<sup>177</sup> European States are obliged to ‘ensure that the competing groups tolerate each other’.<sup>178</sup> Consequently, the ECtHR should not use the margin of appreciation to abrogate its supervisory function and instead should ‘ensure [...] the fair and proper treatment of minorities’.<sup>179</sup>

Minorities are more vulnerable to human rights abuses than members of the majority and the right to freedom of religion has historically played an important role in the protection of minorities. As the AC has considerable expertise in relation to the situation of national minorities in Europe, it seems reasonable that the ECtHR should refer to the AC’s Opinions when considering individual complaints concerning the rights of religious minorities. Further, it seems preferable that the ECtHR adopt the restrictive approach of the AC and HRC to permissible limitations of Convention rights rather than undermining the purpose of freedom of religion by deferring to the prejudice of the majority in cases involving the rights of minorities. Indeed, as Evans asserts: ‘If rights are to be meaningful, they must at times lead public opinion and grant protection to those who need it most – the very groups most ignored, despised, or marginalized by the broader society’.<sup>180</sup>

<sup>176</sup> Evans, M.D., *loc.cit.*, note 2, at p. 312; Gibson, *loc.cit.*, note 2, at pp. 688–689.

<sup>177</sup> Letsas, *loc.cit.*, note 3.

<sup>178</sup> *Serif v. Greece*, *supra*, note 126, at para. 53.

<sup>179</sup> *Young, James and Webster v. United Kingdom*, *supra*, note 26, at para. 63.

<sup>180</sup> Evans, *op.cit.*, note 44, at p. 198.