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A Right to Cultural Identity in a UK Bill of Rights?

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Abstract: This article considers the possible inclusion of a right to cultural identity in a UK Bill of Rights, highlighting the centrality of culture to debates about the accommodation of diversity in the UK as well as the increased recognition of the importance of cultural rights under international human rights law. The article argues that the inclusion of a minimal minority rights guarantee based on Article 27 of the International Covenant on Civil and Political Rights 1966 would be an innocuous step that would provide the impetus needed for greater cultural sensitivity in decision-making processes in a way that acknowledges the centrality of culture to people's identities and everyday lives. It claims that the inclusion of such a right alongside a freestanding right to equality would provide a useful addition to the rights currently recognised as 'Convention rights' under the UK Human Rights Act 1998. This is argued on the basis of both international and domestic case law on culture identity, including opinions of the UN Human Rights Committee, developments in European human rights law and experiences in other jurisdictions.

1. INTRODUCTION

To what extent can, and should, a contemporary Bill of Rights recognise and accommodate ethno-cultural and ethno-national diversity? This is a question that has been the subject of much academic debate¹ in light of what Lindhal has referred to as the 'cultural and national turn of the foundations of

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¹ E.g. James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press 1995).

democratic legitimacy'.² It has also proved of considerable practical significance in the development of new bills of rights both in the 'Westminster world'³ and in the context of divided societies in transition.⁴ It is a question that is clearly pertinent to current debates in the UK about the future of the Human Rights Act 1998, the prospect of a UK Bill of Rights and the future of the Northern Ireland Bill of Rights process. This article builds on the work of other academics engaged in these debates, who have raised questions about different approaches to constitutionalism (pragmatic and ideological),⁵ the role of state-based 'liberal nationalism' in grounding rights⁶ and the process of translating rights from the universal to the particular.⁷ It does this by focusing on culture, identity and language issues, issues that have to a large extent been neglected within the context of the debates that have taken place so far about the possible content of a UK Bill of Rights.⁸

It is argued in the first part of this article that the neglect of such issues to date has been unfortunate given (a) the centrality of culture to debates about the accommodation of diversity in UK, (b) the increased recognition of the importance of cultural rights within international human rights law and (c) the lack of cultural and group sensitivity often shown in the courts. The article considers whether the inclusion of a right to cultural identity or a provision analogous to the minority rights guarantee in Article 27 of the International Covenant on Civil and Political Rights 1966 (ICCPR) would be appropriate

² Hans Lindahl, 'Recognition as Domination: Constitutionalism, Reciprocity and the Problem of Singularity' in Neil Walker, Jo Shaw and Stephen Tierney (eds), *Europe's Constitutional Mosaic* (Hart Publishing 2011).

³ David Eros, *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (Oxford University Press 2010).

⁴ Sujit Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press 2008).

⁵ Christopher McCrudden, 'Northern Ireland and the British Constitution Since the Belfast Agreement' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (Sixth edn, Oxford University Press 2007).

⁶ Colin Harvey, 'Taking the Next Step? Achieving Another Bill of Rights' (2011) *European Human Rights Law Review* 24 (2011).

⁷ Christine Bell, *Bills of Rights and Devolution: From the Universal to the Particular* <http://ukconstitutionallaw.org/2011/11/15/christine-bell-bills-of-rights-and-devolution-from-the-universal-to-the-particular/> (accessed 13 April 2013).

⁸ Work focusing on other categories of rights includes: Sandra Fredman, 'New Horizons: Incorporating Socio-Economic Rights in a British Bill of Rights' (2010) *Public Law* 297 (2010) and Ole W. Pedersen, 'A Bill of Rights, Environmental Rights and the UK Constitution' (2011) *Public Law* 577 (2011).

options in the UK context. It is submitted that the inclusion of a minimal minority rights guarantee rather than an express right to cultural identity in a UK Bill of Rights would provide a useful way of giving full effect to the UK's obligations under international and European minority rights law and in ensuring the cultural needs of those belonging to minority groups in the UK are adequately addressed within domestic decision-making processes. It is asserted that the inclusion of such a provision would be an innocuous step that nevertheless would provide the impetus needed for greater cultural sensitivity amongst decision makers in a way that acknowledges the centrality of culture to people's identities and everyday lives.

In developing the arguments made, the article draws in particular on case-law and judicial understandings of culture and identity in the UK and other common law jurisdictions, notably Canada, New Zealand and South Africa, as well as relevant jurisprudence of the UN Human Rights Committee. The article adopts a view of culture as a 'shared system of meaning that people use to make sense of the world', which is expressed in a variety of ways, including through religious and national rituals, language, clothing and symbols.⁹ According to Ross, '[a]ttention to symbols, rituals and the narratives that members of a group use to make sense of the world is key to understanding how culture shapes their lives and their collective behaviors.'¹⁰ The International Committee on Economic, Social and Cultural Rights also adopts a broad approach to culture. It recognizes culture as 'a broad, inclusive concept encompassing all manifestations of human existence', should not be seen 'as a series of isolated manifestations or hermetic compartments, but as an interactive process, whereby individuals and communities, while preserving their specificities and purposes, give

⁹ See Marc Howard Ross, *Cultural Contestation in Ethnic Conflict* (Cambridge University Press 2007) 2, who draws upon Geertz's definition of culture as "an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and their attitudes toward life" (Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books 1973) 89).

¹⁰ *Ibid.*

expression to the culture of humanity.¹¹ This approach is less subjective and perhaps does not sufficiently acknowledge that culture is often contested.¹² The international legal framework does however recognise culture as ‘a living process, historical, dynamic and evolving, with a past, a present and a future.’¹³ The article begins by considering the neglect of culture within the context of the debates that have taken place so far on a UK Bill of Rights, before considering earlier debates about the accommodation of diversity in the UK and the developing requirements of international human rights law.

2. SETTING THE CONTEXT: THE REPORT OF THE UK COMMISSION ON A BILL OF RIGHTS

The terms of reference of the UK Commission on a Bill of Rights, which recently reported to the UK Government,¹⁴ included investigating ‘the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights (ECHR), ensures that these rights continue to be enshrined in UK law, and protects and extend our liberties’.¹⁵ The neglect of cultural issues within the current debates can be linked to the preoccupation to date with the idea of ‘British’ values and ‘British’ rights. The focus on the desirability of a ‘UK’ rather than a ‘British’ Bill of Rights in the Commission’s work is therefore to be welcomed.¹⁶ However, the majority’s suggestion that a UK Bill of Rights might depart from the text of the ECHR using language which reflects ‘the distinctive history and

¹¹ CESCR, *General Comment No. 21: Article 15(1)(a) The Right of Everyone to Take Part in Cultural Life* (21 December 2009) UN Doc. E/C.12/GC/21, paras. 11 and 12.

¹² On culture and cultural contestation generally, see Marc Howard Ross, ‘Cultural Contestation and the Symbolic Landscape’ in Marc Howard Ross (ed) *Culture and Belonging in Divided Societies: Contestation and Symbolic Landscapes* (University of Pennsylvania Press, 2009) ch 1, p 1, at 3-6.

¹³ *Ibid.*, para. 11.

¹⁴ Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us, Vol 1*, (December 2012). The process has been widely criticised, see in particular the opinion attached by Baroness Kennedy and Professor Philippe Sands (at pp. 221-230).

¹⁵ Commission on a Bill of Rights, *Terms of Reference*, <http://www.justice.gov.uk/about/cbr> (accessed 13 April 2013).

¹⁶ On the reasons why the former is undesirable, implying as it does a link with citizenship, see Joint Committee on Human Rights, *A Bill of Rights for the UK? 29th Report of Session 2007-08*, 21 July 2008, ch. 3.

heritage of the countries within the United Kingdom'¹⁷ will cause alarm to many who have argued that the provisions of the Convention be retained in their current form.¹⁸

Less problematic are the rights identified as extra 'indigenous' rights that might be included in a UK Bill of Rights 'in the sense of rights and freedoms which have attained a status of fundamental importance in this country's traditions and which therefore merit inclusion in any catalogue of the rights, freedoms and values which are considered to be constitutive of this country's identity.'¹⁹ Rights that have been consistently mentioned in this regard include the right to equality, the right to trial by jury and the right to administrative justice.²⁰ Whilst there appears to have been strong support for the inclusion of children's rights, socio-economic and environmental rights in the responses to the Commission's two rounds of public consultation,²¹ the Commission's report makes it clear that the majority of its members did not advocate the inclusion of such rights at this stage.²² The Commission's clear support for the inclusion of 'the right to equality and non-discrimination currently enshrined in the Equality Act 2010 and Protocol 12 of the European Convention on Human Rights', described as the 'most obvious candidate', is therefore significant.²³ The UK's ratification of Protocol 12 and the addition of a freestanding right to non-discrimination in the list of Convention Rights in Schedule 1 of the Human Rights Act 1998 would appear to be an obvious first step. Although the prospect of the Coalition agreeing that individuals should be able to enforce such a right before the European Court of Human Rights appears unlikely in the current climate,²⁴ this does not mean that the case should not continue to be made. However, this article goes further by

¹⁷ Commission on a Bill of Rights, *supra* n. 14, para. 12.11.

¹⁸ E.g. Liberty, *Liberty's Response to the Second Consultation of the Commission on a Bill of Rights*, (September 2012), paras. 10-16.

¹⁹ Joint Committee on Human Rights, *supra* n. 16, para. 99.

²⁰ Joint Committee on Human Rights, *supra* n. 16, ch 4 and Commission on a Bill of Rights, *supra* n. 14, Overview, paras. 91 and 92.

²¹ Commission on a Bill of Rights, *supra* n. 14, Overview, para. 53 and para. 8.11.

²² Commission on a Bill of Rights, *supra* n. 14, ch 12, in particular paras. 12.20-12.21.

²³ Commission on a Bill of Rights, *supra* n. 14, Overview, para. 91.

²⁴ E.g. the recent announcement by Damien Green MP that there would be no formal response to the Commission's final report (Hansard, HC Deb, 22 January 2013, c215w).

arguing that the inclusion of a cultural rights provision should also be considered.

It has been increasingly recognized within international human rights law that the right to non-discrimination needs to be accompanied by 'special measures' to protect and promote minority identities.²⁵ The idea of cultural and/or national identity being fundamental to well-being and individuals having an interest (and corresponding right) in preserving their culture as a context of choice is associated with what is often referred to as 'the politics of difference', a position linked to the work of individuals such as Charles Taylor,²⁶ James Tully²⁷ and Will Kymlicka.²⁸ Although there are considerable differences between their respective positions, what they share is an attempt to challenge the 'politics of universalism', associated with the 'difference-blind' approach advocated by liberals such as Brian Barry, and the recognition of the need for special rights for those belonging to minority groups.²⁹

It was initially envisaged that the question of '*the balance to be struck between acquiescence in minority religious and cultural practices (e.g. Sharia law)... and on the other hand the positive promotion of citizenship and shared values*' would be part of the national Bill of Rights debate.³⁰ However, the section of the Commission's report dealing with minorities or vulnerable groups focuses primarily on older people, transsexuals and same-sex couples with cultural minorities only mentioned indirectly in the context of a discussion of the need to protect women and children from forced marriage and female genital mutilation.³¹ This can be contrasted with the approach of

²⁵ e.g. Kristin Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (Martinus Nijhoff Publishers 2000).

²⁶ Charles Taylor, 'The Politics of Recognition' in Amy Gutmann (ed), *Multiculturalism: Examining the Politics of Recognition* 25 (Princeton University Press 1994).

²⁷ Tully, *supra* n. 1.

²⁸ Will Kymlicka, *Liberalism, Community and Culture* (Clarendon Press 1989) and *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press 1995).

²⁹ Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Polity Press 2001).

³⁰ Northern Ireland Office, *A Bill of Rights for Northern Ireland: Next Steps*, (November 2009), para. 6.4.

³¹ Commission on a Bill of Rights, *supra* n. 14, paras. 6.92-6.97.

the Joint Committee on Human Rights in its 2008 Report on the options for a UK Bill of Rights, which called for specific consultation on the question of whether there should be specific rights for religious, linguistic and ethnic minorities and migrant workers.³² Once again therefore the emphasis is not on the need to protect such minorities but rather on the incompatibility of certain cultural practices with 'British' values. It is clear from the Commission's report that the inclusion of new cultural or minority rights is not on the agenda. This is perhaps unsurprising in light of the widespread (mis)perception of the flourishing of particular minority groups as a threat to 'British' or 'European' values.³³ It remains nonetheless regrettable in light of recent debates about the accommodation of diversity in the UK as well as the UK's undertakings under international human rights law.

3 THE CENTRALITY OF CULTURE TO DEBATES ABOUT THE ACCOMMODATION OF DIVERSITY IN THE UK

The centrality of culture is often emphasised by those writing specifically in relation to the accommodation of ethnic and religious minorities in the UK³⁴ as well as in relation to the 'home nations' and devolution.³⁵ The idea of ethnicity as relating to culture³⁶ was given official backing in the judgment of Lord Fraser in the case of *Mandla v Dowell Lee*,³⁷ which identified certain characteristics as essential for a group to constitute an 'ethnic' group for the purposes of the Race Relations Act 1976. These include: '(1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; and (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily

³² Joint Committee on Human Rights, *supra* n. 16, para. 145.

³³ This perception is evident even in the words 'which may not be consistent with European law and culture', which have been omitted from the above quote, and the inclusion of an additional question as to how minorities should relate to the wider community (Northern Ireland Office, *supra* n. 29, para. 6.4).

³⁴ Bhikhu Parekh, 'Equality in a Multicultural Society' (1998) 2 *Citizenship Studies* 397, 408-411 (1998).

³⁵ Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press 1999).

³⁶ Perry Keller, 'Re-thinking Ethnic and Cultural Rights in Europe' 18 *OJLS* 29, 36 (1998).

³⁷ [1983] 2 AC 548

associated with religious observance'.³⁸ Although the Race Relations Act 1976 was not intended to cover groups defined exclusively by religion, this case illustrates the problems with trying to dissociate the two.³⁹ In this regard it is significant that the UK has adopted a very inclusive approach under the Council of Europe's Framework Convention for the Protection of National Minorities in relation to the term 'national minority'. Despite claiming its approach is ostensibly based on a definition of the term 'racial group' under the Race Relations Act, its reports have, for example, covered the situation of Muslims in the UK, who do not meet the criteria of a racial group for the purposes of the Act.⁴⁰

A general policy of cultural pluralism in relation to ethno-cultural groups based on integration and equality of opportunity can be traced back to the 1960s with cultural accommodation generally taking the form of the 'norm and exemption' approach.⁴¹ A more radical approach was advocated in the Parekh Report on the Future of Multi-Ethnic Britain, published in 2000.⁴² The Commission on the Future of Multi-Ethnic Britain had been established to provide 'a comprehensive review of British identity and race relations' and was lauded as 'the first report to try to get to grips with discrimination over cultural or religious difference, not simply "biological" race, as a form of racism.'⁴³ The Report adopted the starting point that Britain was both 'a community of citizens and a community of communities, both a liberal and a multicultural society' and stressed the need to 'find ways of nurturing diversity while fostering a common sense of belonging and a shared identity among its

³⁸ *Ibid.*, 562.

³⁹ E.g. Titia Loenen, *Framing Headscarf and Other Multicultural Issues as Religious, Cultural, Racial or Gendered: The Role of Human Rights Law*, 30 *Netherlands Quarterly of Human Rights* 472 (2012) and Katayoun Alidadi and Mare-Claire Foblets, *Framing Multicultural Challenges in Freedom of Religion Terms*, 30 *Netherlands Quarterly of Human Rights* 388 (2012).

⁴⁰ On the wider implications of the UK's broad approach to the Framework Convention's scope of application, see Elizabeth Craig, *The Framework Convention for the Protection of National Minorities and the Development of a 'Generic' Approach to the Protection of Minority Rights in Europe?*, 17 *International Journal on Minority and Group Rights*, 307 (2010).

⁴¹ Sebastian Poulter, *Ethnicity, Law and Human Rights: The English Experience* (Clarendon Press 1998).

⁴² Commission on the Future of Multi-Ethnic Britain, *The Future of Multi-Ethnic Britain: The Parekh Report* (2000).

⁴³ Jaggi, Maya 'The Guardian Profile: Bhikhu Parekh' *The Guardian*, 21 October 2000 <http://www.guardian.co.uk/books/2000/oct/21/philosophy> (accessed 13 April 2013).

members.⁴⁴ Like Yael Tamir, the authors of the report viewed the nation (in this instance Britain) as an 'imagined community', stressing the need for a rethinking of the 'national story and national identity'.⁴⁵ Most controversial was the highlighting of the racist connotations sometimes associated with 'Britishness' and references to colonialism and imperialism,⁴⁶ although this only formed a small section of the chapter entitled 'Rethinking the National Story'.⁴⁷ Other themes identified that are of potential relevance to the Bill of Rights debates included an understanding that 'all identities are in a process of transition'; the need for a balance between 'cohesion, equality and difference'; the elimination of racism; reduction of inequalities and the development of 'a pluralistic human rights culture'.⁴⁸ The authors themselves advocated an approach that was both liberal and pluralistic,⁴⁹ notably requiring recognition of diversity in the public sphere.⁵⁰ It was clear from the rest of the report that it was envisaged that this would include 'recognition of the rights people have as members of religious, cultural and linguistic groups' such as 'the right to worship, to bear religious insignia, to express cultural identity, and to transmit language and culture to the next generation'.⁵¹

Unsurprisingly given the imminent coming into force of the Human Rights Act 1998, aimed at giving greater effect to rights in the ECHR under domestic law, the chapter in the report on the development of a pluralistic human rights culture focuses primarily on the need for individual rights to be interpreted in a culturally sensitive way and on the development of a broader human rights culture.⁵² Other instruments such as the UN Convention on the Elimination of All Forms of Racial Discrimination, the Council of Europe's Framework Convention for the Protection of National Minorities and the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and

⁴⁴ The Parekh Report, *supra* n. 42.

⁴⁵ *Ibid.*, 15-23.

⁴⁶ BBC News 'No to Rethink on National Identity', 11 October 2000 <http://news.bbc.co.uk/1/hi/uk/966629.stm> (accessed 13 April 2013).

⁴⁷ The Parekh Report, *supra* n. 42, ch. 2, see in particular paras. 2.17, 2.19 and 2.22.

⁴⁸ *Ibid.*, xiv.

⁴⁹ *Ibid.*, ch 4, Cohesion, Equality and Difference.

⁵⁰ *Ibid.*, 48.

⁵¹ *Ibid.*, 91.

⁵² *Ibid.*, ch. 7.

Linguistic Minorities are referred to in passing.⁵³ The ECHR is however notoriously weak in this area, lacking even a minimal minority rights guarantee, as discussed further below.

There is however another aspect to the UK debate on culture, which relates to the indigenous minorities and in particular the Welsh, the Scots and the Irish. The term 'liberal nationalism' is often used to describe the UK's approach to accommodating these minorities.⁵⁴ The term is particularly associated with the work of Yael Tamir, who places particular emphasis on the role of culture within national movements.⁵⁵ Tamir herself perceives cultural identity as both chosen and constitutive and argues that 'the right to culture is meant to allow individuals to live within the culture of their choice, to decide on their social affiliations, to re-create the culture of the community they belong to, and to redefine its borders' but stresses that the communal features of culture and membership also require recognition of a right 'to a public sphere in which individuals can share a language, memorise their past, cherish their heroes, live a fulfilling national life.'⁵⁶ Her approach to nationhood is based on Anderson's idea of the 'imagined community', which would appear to justify an inclusive approach given the difficulties of drawing clear delineations between nations and other cultural communities.⁵⁷ This is in line with the approach adopted in this article which proposed a more generic right rather than one specifically focused on the home 'nations'.

The liberal national approach attempts above all to reconcile the universal with the particular, which is especially relevant in the area of human rights.⁵⁸ MacCormick, whose work was intended to apply a liberal national approach to the debates on devolution in Scotland, Wales and Northern Ireland, suggested that 'everyone is entitled to particularistic rights', although his primary focus was on 'the right to participate in a self-determining national

⁵³ *Ibid.*, 92-94.

⁵⁴ Harvey, *supra* n. 6, 28. See also MacCormick, *supra* n. 35.

⁵⁵ See, in particular, Yael Tamir, *Liberal Nationalism* (Princeton University Press 1993).

⁵⁶ *Ibid.*, 8.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.* See chapter 4 on 'particular narratives and general claims'.

community.⁵⁹ Indigenous language rights for Scotland, Wales and Northern Ireland could also be included in this category and would be entirely compatible with, but not required by, the more generic right being proposed here. However, such rights should be in addition to, rather than instead, such a generic rights guarantee. It is significant in this regard that the Good Friday Agreement of 1998 emphasised the importance of 'respect, understanding and tolerance in relation to linguistic diversity, including in Northern Ireland, the Irish language, Ulster-Scots and the languages of the various ethnic communities, *all of which are part of the cultural wealth of the island of Ireland*' (emphasis added).⁶⁰ It is clear that recognition of such a right might have particular significance in the Northern Ireland context, where issues relating to flags,⁶¹ emblems,⁶² parades⁶³ and language⁶⁴ continue to cause considerable controversy.⁶⁵ However, it is submitted that the case can also be made on the basis of the centrality of culture to more general debates about the accommodation of diversity in the UK as well as on the basis of recent developments suggesting increased international recognition of the importance of cultural rights as an integral part of human rights.

4 INCREASED INTERNATIONAL RECOGNITION OF THE IMPORTANCE OF CULTURAL RIGHTS AS AN INTEGRAL PART OF HUMAN RIGHTS?

Although cultural rights were largely sidelined within international human rights law in the post World War II era, the situation has changed in recent years. Most prominent is Article 27 of the ICCPR, which provides that: 'In

⁵⁹ *Ibid.*, 131.

⁶⁰ See paras. 3-5 of section on Economic, Social and Cultural Issues, Agreement Reached in Multi-Party Negotiations (Belfast, 10 April 1998).

⁶¹ E.g. the recent fall-out from the decision of Belfast City Council on 3 December 2012 to stop flying the Union flag daily at Belfast City Hall (see Belfast Union Flag Dispute is Lightning Rod for Loyalist Disaffection' 6 January 2013 <http://www.guardian.co.uk/uk/2013/jan/06/belfast-union-flag-dispute-loyalist> (accessed 13 April 2013). On the flags issue more generally, see Dominic Bryan and Clifford Stevenson, 'Flagging Peace: Struggles over Symbolic Landscape in the New Northern Ireland' in Ross (ed), *supra* n. 13, ch. 4, 68.

⁶² See Alex Schwartz, *Symbolic Equality: Law and National Symbols in Northern Ireland*, 19 International Journal on Minority and Group Rights 339 (2012).

⁶³ See Ross, *supra* n. 9, ch. 4.

⁶⁴ See Verona Ni Dhrisceoil, *Revisiting the Language Rights Debate in Northern Ireland Public Law* (forthcoming, 2013).

⁶⁵ For a more general discussion of issues of ongoing cultural contestation, see Joanne McEvoy, *Managing Conflict in Post-Conflict Societies*, 6 Contemporary Social Science 55 (2011).

those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.’ Meanwhile Article 15(1) of the International Covenant on Economic, Social and Cultural Rights recognises the right of *everyone* to take part in cultural life. The relationship between the two has been described as ‘reciprocally reinforcing’ and the increased emphasis by the Committee on Economic, Social and Cultural Rights on cultural appropriateness in its analysis of other rights provisions helps strengthen the cultural rights framework.⁶⁶

During the drafting of Article 27, it had been noted that a negative formulation seemed to imply ‘that the obligations of States would be limited to permitting the free exercise of the rights of minorities.’⁶⁷ However, the stance adopted by the UN Human Rights Committee is that ‘positive measures of protection’ against acts both of the State and of third parties are required⁶⁸ and that the rights therein ‘depend in turn on the ability of the minority group to maintain its cultural, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members....’⁶⁹ This is in line with the positive obligations approach to civil and political rights recognised under the ECHR.⁷⁰ Such measures will not be considered discriminatory if aimed at correcting conditions which prevent enjoyment of Article 27 rights, provided the differentiation is legitimate and if

⁶⁶ Christian Groni, *Background Paper, Day of General Discussion: The Right to Take Part in Cultural Life* (9 May 2008) UN Doc. E/C.12/40/3, 11-12. See also Roger O’Keefe, *The Right to Take Part in Cultural Life under Article 15 of the ICESCR*, 47 ICLQ 904 (1998).

⁶⁷ Commission on Human Rights, 9th Session, 1953 in Marc J. Bossuyt, *Guide to the ‘Travaux Préparatoires of the International Covenant on Civil and Political Rights*, 496 (Martinus Nijhoff, 1986). Special Rapporteur Capotorti also noted that the stance adopted within the Sub-Commission was that States were obliged to allow individuals enjoyment of their culture, practice of their religion and use of the own language, ‘but that did not imply that members of minorities had the right to demand that the State should adopt positive measures.’ (Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, para. 212 (UN, 1979).

⁶⁸ HRC *General Comment No. 23, Article 27 (Rights of Minorities)* (8 April 1994) UN Doc. CCPR/C/21/Rev.1/Add.5, para. 6.1.

⁶⁹ *Ibid.*, para. 6.2.

⁷⁰ e.g. Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004).

they are ‘based on reasonable and objective criteria.’⁷¹ The overall aim is to ensure ‘the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.’⁷²

Although Article 27 is generally recognized as providing the higher level of protection,⁷³ the HRC’s General Comment on Article 27 is relatively short⁷⁴ with much more detailed elaboration of a human rights approach to ‘culture’ in the Committee on Economic, Social and Cultural Rights’ General Comment on the Right of Everyone to Take Part in Cultural Life.⁷⁵ The General Comment identifies specific legal obligations in relation to the obligation on the State to respect, protect and fulfill the right to take part in cultural life⁷⁶ including respect for the rights ‘to freely choose their own cultural identity, to belong or not to belong to a community, and have their choice respected’ and ‘to have access to their own cultural and linguistic heritage and to that of others.’⁷⁷ It will be recalled that its view of culture is ‘broad and inclusive ... encompassing all manifestations of human existence. The expression “cultural life” is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future.’⁷⁸

A lot of the individual communications considered by the HRC in relation to Article 27 have involved indigenous peoples⁷⁹ and are therefore not particularly revealing about the significance of the possible inclusion of a right to cultural identity in a UK Bill of Rights. The General Comment on Article 27 says very little about religion or language, apart from stressing that the right to use a minority language under Article 27 relates to the language of the

⁷¹ HRC, *supra* n. 68, para. 6.

⁷² *Ibid.*, para. 9.

⁷³ Groni, *supra* n. 66, 23.

⁷⁴ 3 pages (HRC, *supra* n. 68).

⁷⁵ CESCR, *supra* n. 11.

⁷⁶ *Ibid.*, paras. 48-52

⁷⁷ *Ibid.*, para. 49

⁷⁸ *Ibid.*, para. 11.

⁷⁹ Cases concerning indigenous peoples where the HRC has found a violation of Article 27 include *Lovelace v Canada* (concerning right of ‘Maliseet Indian’ to live on a reserve) Communication No 24/1977: Canada. 30/07/81 CCPR/C/13/D/24/1977, *Chief Bernard Ominayak and the Lubicon Lake Band v Canada* (concerning exploitation of territory) Communication No 167/1984: Canada. 10/05/90 CCPR/C/38/D/167/1984 and *Poma Poma v Peru* Communication No 1457/2006: Peru. 24/04/09. CCPR/C/95/D/1457/2006.

individual's choice, unlike the more specific right in Article 14(3)(f) which confers a right to interpretation only where the individual concerned cannot understand or speak the language used.⁸⁰ The General Comment is also quite vague in relation to culture, recognising that it manifests itself in many forms and that it might include 'a particular way of life' with the examples given particularly relevant to indigenous people such as the use of land resources, fishing, hunting and the right to live in reserves.⁸¹ The HRC has however stressed that enjoyment of such rights (to culture) 'may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.'⁸²

There have been a number of cases where applicants have been unsuccessful in their attempts to use Article 27 but have succeeded under other articles, raising questions about what protection Article 27 really adds for members of minority groups other than indigenous peoples.⁸³ Although there are recent signs of Article 27 being given more serious consideration, the jurisprudence on other types of cultural, linguistic and religious minorities remains underdeveloped. The HRC has stressed its distinctiveness to other rights in the ICCPR⁸⁴ and found a violation of both Article 19 and Article 27 with Article 2 (requirement to ensure rights recognised without discrimination) in the case of *Mavlonov and Sa'di v Uzbekistan*⁸⁵ concerning the denial of re-registration of a newspaper published almost exclusively in the Tajik language, a newspaper also distributed to schools. The HRC made the finding of a violation of Article 27 with Article 2 both on the basis that 'education in a minority language is a fundamental part of minority culture' and on the basis that 'the use of a minority language as means of airing issues of significance

⁸⁰ HRC, *supra* n. 68, para. 5.3

⁸¹ *Ibid.*, para. 7

⁸² *Ibid.*

⁸³ *Ballantyne, Davidson and McIntyre v Canada* Communication Nos. 359/1989 & 385/1989: Canada. 05/05/93 CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (English-speaking applicant challenged prohibition of commercial advertising in language other than French in Quebec, the HRC found violation of Art 19 on freedom of expression) and *Waldman v Canada* Communication No. 694/1996: Canada. 11/05/1999. CCPR/C/67/D/694/1996 (Jewish applicant challenged the preferential funding arrangements for Catholic schools, the HRC found violation of Art 26 on equality and non-discrimination).

⁸⁴ HRC, *supra* n. 68, para. 5.3.

⁸⁵ Communication 1334/2004: Uzbekistan. 29/4/09. CCPR/C/95/D/1334/2004.

and importance ... is an essential element of the Tajik minority's culture.⁸⁶ Meanwhile in the case of *Prince v South Africa*⁸⁷ the HRC considered separately whether or not the failure to grant Rastafarians an exemption to the general prohibition of the possession and use of cannabis was a violation of Articles 18 (on religion), 27 and 26 (on non-discrimination). It concluded that the restriction of the right to freedom of religion was justified, that a general prohibition did not constitute 'an unreasonable justification' for interference with his Article 27 rights and that the prohibition was based on 'objective and reasonable grounds' and therefore not discriminatory.⁸⁸ There is however a notable lack of consistency in the HRC's approach. In a case concerning the unlawful eviction of a Roma family and the unlawful demolition of their home the Committee concluded that there was a violation of Articles 17 (privacy, family, home or correspondence), 23 (protection of the family) and 27 primarily on the basis of the allegations having been sufficiently established, so through a factual rather than legal analysis.⁸⁹ In comparison the HRC in *Rahiman v Latvia*, having found a violation of Article 17 in the changing of the name of the applicant (a Latvian national who belonged to the Jewish and Russian-speaking minorities) to the non-Russian, non-Jewish form, due to the arbitrary nature of the interference, did not find it necessary to address the separate issue of whether or not there was also a violation of Articles 26 and 27.⁹⁰

A case could not therefore be made for the inclusion of a cultural rights provision in a UK Bill of Rights solely on the basis of the two cultural rights provisions in the International Human Rights Covenants. There are however other developments that should be taken into account that have led some to speculate about the possible development of a separate human right to cultural identity.⁹¹ For example, the UNESCO Declaration on Race and Racial Prejudice 1978 recognises the right of both individuals and groups 'to

⁸⁶ *Ibid.*, para. 8.7

⁸⁷ Communication No 1474/2006: South Africa. 14/11/07. CCPR/C/91/D/1474/2006

⁸⁸ *Ibid.*, paras. 7.3-7.5.

⁸⁹ *Georgopoulos, Georgpoulou and their seven children v Greece* Communication No 1799/2008. 14/09/10. CCPR/C/99/D/1799/2008, paras. 7.2-7.3.

⁹⁰ Communication No 1621/2007, Latvia. 30/11/10. CCPR/C/100/D/1621/2007, paras. 8.2-8.4.

⁹¹ Yvonne Donders, *Towards a Right to Cultural Identity?* (Intersentia 2002)

be different, to consider themselves as different and to be regarded as such' (Art 2) and the right to maintain cultural identity' (Article 3). Subsequent developments include the adoption of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992, which according to the Preamble was 'inspired' by the principles behind Article 27, and the Council of Europe's Framework Convention for the Protection of National Minorities 1995, discussed further below. Meanwhile Article 22 of the EU Charter on Fundamental Rights provides specifically that 'The Union shall respect *cultural*, religious and linguistic diversity' (emphasis added). An exclusive focus on the HRC's approach to Article 27 would therefore be problematic in light of the developments that have taken place in relation to the recognition of cultural rights as 'an integral part of human rights' over the last two decades.⁹²

The minority rights instruments developed in the early 1990s impose new obligations on States in relation to group identity. For example, Article 1 of the UN Declaration on Minorities requires States to 'protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories', to 'encourage conditions for the promotion of that identity' and to 'adopt appropriate legislative or other measures to achieve those ends.' Meanwhile the requirement in Article 5 of the Framework Convention is 'to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of that identity, namely their religion, language, traditions and cultural heritage.' The latter is probably the more significant as the UK is a State Party to the Framework Convention and therefore subject to the associated periodic reporting system. The Framework Convention imposes a number of positive obligations on States in areas such as education, the media and in public affairs.⁹³

Significantly, the proposal to draft an additional protocol to the ECHR

⁹² This assertion is made specifically in Art 5 UNESCO Declaration on Cultural Diversity 2001.

⁹³ For further information about the obligations in the Framework Convention and the development of the approach of the Framework Convention Advisory Committee, see Elizabeth Craig, *From Security to Justice? The Development of a More Justice-Oriented Approach to the Realisation of European Minority Rights Standards*, 30 NQHR 40 (2012).

guaranteeing individual rights in the 'cultural field' made at the same time as the proposal for a framework convention on national minorities was not taken forward. The requirement was that the proposed rights should be fundamental, should correspond to a real need and should be justiciable. Rights considered included the right to cultural identity, the right to choose to belong to a group, the protection of cultural and scientific heritage, the right to participate in cultural activities and the right to set up cultural and educational institutions as well a number of language rights.⁹⁴ A right to cultural identity was rejected on the grounds that the concept was too broad and that aspects of cultural identity were covered under other rights provisions.⁹⁵ In the end the list was narrowed down to the right to a name, freedom to use the language of one's choice, the right to learn the language of one's choice and the right to establish cultural institutions.⁹⁶ An important factor in the subsequent decision to suspend work on the drafting was that such rights would not add much to provisions of the ECHR.⁹⁷ Particularly relevant in this regard would appear to be Articles 8 to 11 of the ECHR as well as Article 2 of the First Protocol on educational rights.⁹⁸ However, the European Court of Human Rights has in the past accused of lacking cultural sensitivity,⁹⁹ with cases involving religious groups often the focus of particular attention in this regard.¹⁰⁰

5 A CURRENT LACK OF CULTURAL SENSITIVITY IN THE COURTS?

The assessment of Thornberry and Martín Estébanez in 2004 was that the

⁹⁴ Donders, *supra* n. 91, 263-267

⁹⁵ *Ibid.*, 263.

⁹⁶ *Ibid.*, 267.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*, 263-267.

⁹⁹ E.g. Patrick Thornberry, 'Article 12' in Marc Weller (ed.) *The Rights of Minorities: A Commentary on the Framework Convention for the Protection of National Minorities*, 365, 390-391 (OUP, 2005). On recent trends, and challenges facing international bodies in addressing cultural diversity more generally, see, Gaetano Pentassuglia, *Minority Groups and Judicial Discourse in International Law* ch 6 (Martinus Nijhoff 2009) and Tove Malloy, 'Standards to Eliminate Compounded Discrimination: The Case of the Intersectionality of "Minorities within Minorities" Or, why Universal Legal Standards Must Engage with the Concept of Culture' in Kristin Henrard (ed) *Double Standards Pertaining to Minority Protection* 259 (Martinus Nijhoff, 2010).

¹⁰⁰ E.g. *Refah Partisi (The Welfare Party) and Others v Turkey*, GC 13th Feb. 2003. For more recent critiques of the European approach to religious freedom cases, see Kristin Henrard, *Minority Specific Rights: A Protection for Religious Minorities Going Beyond the Freedom of Religion*, European Yearbook on Minority Issues 5 (2009) and Stephanie Berry, *Religious Minorities and the Council of Europe's Rights Regime*, 30 NQHR 10 (2012).

European Court of Human Rights was ‘in the process of sharpening its sensitivity to “ethnic” issues’¹⁰¹ and there was certainly some evidence of this at that time.¹⁰² Other research has focused on subsequent developments and on the impact that specific judgments of the European Court of Human Rights in cases brought by individuals from minority and marginalized groups have had at domestic level.¹⁰³ The focus in this section is specifically on the approach of UK courts. The fact remains that there are specific cultural rights in other human rights instruments which have not been transposed into domestic law through the Human Rights Act 1998. This makes the meaningful realization of cultural rights difficult. It has furthermore been claimed that multiculturalism is now in retreat and that we are living in a new ‘post-multicultural’ era with a more aggressive assertion of basic liberal principles and values.¹⁰⁴ This is the context within which the UK Bill of Rights debates are taking place, as illustrated in the flavour and content of the debates and proposals so far.

The wider implications of such trends can be subtle, often hidden by persuasive legal analysis and reasoning. This can be illustrated by looking some of the cases heard in UK courts involving religious minorities, such as the case of *R (Begum) v Headteacher and Governors of Denbigh High School*.¹⁰⁵ In that case the school’s rules on school uniform, which permitted the wearing of the ‘shalwar kameeze’ but not the ‘jilbab,’ had been developed in consultation with parents, staff and students as well as the local mosques.¹⁰⁶ The view of Shabina Begum’s family was that the shalwar kameeze ‘originated as a Pakistani cultural dress without any particular

¹⁰¹ Patrick Thornberry and María Amor Martín Estébanez, *Minority Rights in Europe* (Council of Europe Publishing 2004).

¹⁰² See, for example, *Sidiropoulos and others v Greece* 10 July 1998, *Gorzelik and others v Poland* GC 17 Feb. 2004 and *Connors v UK* 27 May 2004. See more recently also *DH and others v Czech Republic* GC 13 Nov. 2007.

¹⁰³ E.g. Dia Anagnostou and Susan Millns, *Individuals from Minority and Marginalized Groups before the Strasbourg Court: Legal Norms and State Responses from a Comparative Perspective* 16 *European Public Law* 397 (2010) and other articles in the same issue.

¹⁰⁴ Christopher McCrudden, ‘Multiculturalism, Freedom of Religion, Equality and the British Constitution: The JFS Case Considered’ 9 *IJCL* 200 (2011) and Christian Joppke, ‘The Retreat of Multiculturalism in the Liberal State: Theory and Policy’ (2004) 55 *The British Journal of Sociology* 237 (2004).

¹⁰⁵ *R (SB) v Governors of Denbigh High School* [2005] EWCA Civ 199; [2005] 1 WLR 3372.

¹⁰⁶ *Ibid.*, para 11.

religious foundation' and the argument made was that her own religious belief was that Shari'a required fuller coverage for women over 13.¹⁰⁷ There was evidence of some Muslim opinion to support this, leading Lord Justice Brooke in the Court of Appeal to distinguish on this basis between 'very strict' and 'liberal' Muslims, albeit recognising that the appropriateness of these labels might be challenged by the relevant experts.¹⁰⁸ He proceeded to identify the former as a 'minority view' not forming part of 'mainstream opinion among South Asian Muslims'.¹⁰⁹ Begum's own family was of Bangladeshi origin. The Court of Appeal recognised that departmental guidance was provided advising sensitivity to different *cultures*, races and religions¹¹⁰ and found a violation of Article 9 of the ECHR on the grounds that the school did not attribute sufficient weight to her beliefs in terms of the decision-making process in relation to her request for an exemption to the general uniform policy, which should have addressed the specific requirements of Article 9.¹¹¹

The House of Lords, however, held that there had not been a violation of Article 9 on the grounds that there had not been an interference with her right to manifest her religious belief as there were other options available to her and that, in any case, the legitimate objective of protecting the rights and freedoms of others was served.¹¹² The House of Lords did not consider the cultural aspect to the same extent, querying the fact that she had changed her mind in relation to what her religion required of her.¹¹³ This case has been cited as an example of 'self-defined cultural groups making widespread and (at least to some extent) successful efforts to assert and preserve what they see as their cultural distinctiveness in a political society, and to achieve public recognition and validation of this distinctiveness'¹¹⁴ and to illustrate the role of law 'as a medium and site of communication in relation to multiculturalism.'¹¹⁵

¹⁰⁷ *Ibid.*, para. 14.

¹⁰⁸ *Ibid.*, para. 31.

¹⁰⁹ *Ibid.*, para. 48.

¹¹⁰ *Ibid.*, para. 22.

¹¹¹ *Ibid.*, paras. 75 and 78.

¹¹² *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100.

¹¹³ *Ibid.*, para. 92 (Baroness Hale).

¹¹⁴ Roger Cotterell, *The Struggle for Law: Some Dilemmas of Cultural Legality*, 4 *International Journal of Law in Context* 373, 374 (2008).

¹¹⁵ *Ibid.*, 381.

The same author argues judicial opinions have a key role to play in communicating to particular 'cultural constituencies'.¹¹⁶ It is relevant in this regard that the House of Lords' decision has been criticised for the lack of consideration of multicultural ideals¹¹⁷ and it is clear this would be facilitated to a much greater extent if courts were required to take account the more associational cultural aspects when considering such a case.

Another case considered to illustrate the role of law as a site of cultural communication is the case of *R (E) v Governing Body of JFS and another (United Synagogue and others intervening)*.¹¹⁸ In that case the UK Supreme Court found that the application by a Jewish school of the criteria for being recognised as Jewish adopted by the Office of the Chief Rabbi directly discriminated against the applicant who did not meet the Orthodox Jewish criteria on racial grounds. McCrudden argues that this case is reflective of this new 'post-multicultural' era, where tensions between core liberal principles and faith-based multiculturalism are openly debated, with the latter often constrained by the former.¹¹⁹ However, he claims further that there is a general trend towards focusing on the religious dimension of 'ethno-cultural practices'.¹²⁰ The inclusion of a right to culture in a UK Bill of Rights would perhaps go some way to redressing the balance. The right would remain essentially an individual right,¹²¹ the implications of which are explored further in the next section. This is particularly important in light of the desire of many groups for 'associational self-realisation', which often takes the form of defining their own 'normative world' or 'universe'.¹²²

6 WHAT ROLE CAN CULTURAL RIGHTS PLAY IN A BILL OF RIGHTS?

¹¹⁶ *Ibid.*, 382.

¹¹⁷ E.g. Susan Edwards, *Imagining Islam ... of Meaning and Metaphor Symbolising the Jilbab – R (Begum) v Headteacher and Governors of Denbigh High School* Child and Family Law Quarterly 247.

¹¹⁸ [2009] UKSC 15; [2010] 2 AC 728

¹¹⁹ McCrudden, *supra* n. 104.

¹²⁰ *Ibid.*

¹²¹ The individual nature of the right was stressed from the outset with individuals retaining the freedom to choose whether to accept or renounce special measures of protection (Capotorti, *supra* n. 67, para. 573).

¹²² Robert M. Cover, *Nomos and Narrative*, 97 Harvard Law Review 4, 25, at 31-32 (1983-1984).

The conclusion reached by Donders in 2002 was that ‘the concept of cultural identity is too broad and vague to be translated into a separate human right’¹²³ and is at risk of abuse in the sense of being used to justify restrictions on individual rights and freedoms.¹²⁴ Her basic premise was that other rights provisions have a key role to play in the protection of cultural identity¹²⁵ and that the protection of cultural identity could be ‘read’ into existing rights and ‘serve as an underlying principle’ for such rights.¹²⁶ However, she was assessing the case for the articulation of a separate right to cultural identity in addition to the right to participate in cultural life and the right to enjoy one’s culture in community, rights already established under international human rights law. These are not rights currently justiciable under UK law. The next section considers the lessons that can be learnt from experiences in other common law jurisdictions, notably New Zealand, Canada and South Africa. It is submitted that these experiences suggest that the inclusion of a minimal minority rights guarantee along the lines of Article 27 of the ICCPR would be a fairly innocuous measure that would nevertheless address the tendency of UK courts to neglect the cultural dimension in cases concerning minority groups.

New Zealand

To some extent the New Zealand Bill of Rights provides the most obvious model for the UK to follow, particularly in light of the history of the UK Human Rights Act and parallels with the New Zealand Bill of Rights Act 1990.¹²⁷ Unlike the UK Human Rights Act, the New Zealand Bill of Rights lists the rights themselves in the main text, rather than in an Appendix, also including a general limitation clause in s. 5, which provides that ‘the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic

¹²³ Donders, *supra* n. 91, 337.

¹²⁴ *Ibid.*, 338.

¹²⁵ *Ibid.*, 331-334.

¹²⁶ *Ibid.*, 336.

¹²⁷ E.g. the general provisions in Part I, which include an interpretative obligation, provide for the preservation of parliamentary sovereignty and require pre-legislative scrutiny as well as defining scope of application with reference to public functions, and the rights in Part II, which are all civil and political rights with the ICCPR used as the base document rather than the ECHR.

society.’ Section 20, the minority rights provision, is virtually identical to Article 27 of the ICCPR. However, the heavy reliance on the approach of the HRC in the relevant policy guidance¹²⁸ and the emphasis on the use of s. 20 by indigenous peoples in the literature¹²⁹ means that it is difficult to glean from the New Zealand experience what might be gained from the inclusion of such a right in a UK Bill of Rights. The evidence suggests that section 20 has had little impact in the case-law, even in relation indigenous peoples,¹³⁰ and that the rights in section 20 continue to be regarded primarily as ‘liberty’ rights.¹³¹ For example, in the case of *Mendelssohn v Attorney-General*¹³² the Court of Appeal treated section 20, and in particular the right to profess or practice one’s religion in community with others, as a liberty right modelled on Article 18 of the ICCPR, the freedom of religion clause which includes the freedom to manifest one’s religion or belief in community with others, stating that both sections 15 and 20 did not impose positive duties on the State and fell within the category of ‘negative freedoms’.¹³³ The examples of Canada and South Africa however provide a more positive illustration of the impact that the inclusion of such a provision in a UK Bill of Rights might have.

Canada

It might seem odd to focus on s. 27 of the Canadian Charter of Fundamental Rights and Freedoms, known as the ‘multiculturalism’ clause. This is an interpretative obligation, which provides that: ‘This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage in Canada.’ Multiculturalism was of course the official policy of the Trudeau government and the charter itself, perceived as

¹²⁸ Ministry of Justice (NZ) ‘Introduction to sections 19-20: Non-Discrimination and Minority Rights’ <http://www.justice.govt.nz/publications/global-publications/t/the-guidelines-on-the-new-zealand-bill-of-rights-act-1990-a-guide-to-the-rights-and-freedoms-in-the-bill-of-rights-act-for-the-public-sector/introduction-to-sections-19-20-non-discrimination-and-minority-rights> (accessed 13 April 2013).

¹²⁹ Paul Rishworth and others, *The New Zealand Bill of Rights* (Oxford University Press 2003), ch. 15 and Paul Rishworth, ‘Minority Rights to Culture, Language and Religion for Indigenous Peoples: the Contribution of a Bill of Rights’ (2003) [http://www.iclrs.org/docs/Canberra%20Paper\[final\].pdf](http://www.iclrs.org/docs/Canberra%20Paper[final].pdf) (accessed 13 April 2013).

¹³⁰ Rishworth and others, *supra* n. 129, 402.

¹³¹ *Ibid.*, 399.

¹³² [1999] 2 NZLR 268-277.

¹³³ *Ibid.*, at p. 273.

'integrationist' rather than 'accommodationist'¹³⁴ in its approach to diversity, was criticised for its approach to the provinces and to difference generally, linked as it was to the overall aim which was 'to recognise and affirm a unifying Canadian constitutional identity.'¹³⁵ However, this provision is significant because it was included particularly at the request of other 'ethno cultural communities' and with regard to the weaknesses of Article 27 as a negatively formulated right aimed at protecting cultural identity with some uncertainty over its potential scope of application.¹³⁶ There are also lessons that can be learnt from the Canadian experience. The Canadian courts have, for example, drawn a clear distinction between the official language rights regime in the Charter and ss. 15 (right of everyone to equality before the law) and 27.¹³⁷ This is useful in the context of debates in the UK given the developing language rights regimes in Scotland, Wales and Northern Ireland.¹³⁸

Section 27 has been described as a 'flexible but unpredictable tool' and criticised for its lack of coherency, and much of the literature focuses on its under-utilised potential.¹³⁹ There are nevertheless some indications in the case-law of how a provision focused on the more collective aspects of culture, language and religion might be used to strengthen relevant individual rights guarantees. One example is the case of *R v Videoflicks Ltd*,¹⁴⁰ which concerned challenges to convictions relating to retail activity on a Sunday contrary to section. 2 of the Retail Business Holidays Act 1980 adopted by the Province of Ontario and the issue of whether or not section 2 itself was compatible with the Charter. The Ontario Court of Appeal, having found that the Act itself was passed for secular rather than religious purposes, focused in particular on the situation of those who closed their business on some other

¹³⁴ Sujit Choudhry, 'Does the World Need More Canada? The Politics of the Canadian Model in Constitutional Politics and Political Theory' in Sujit Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press 2008).

¹³⁵ Tully, *supra* n. 1, 11.

¹³⁶ Joseph Eliot Magnet, 'Multiculturalism and Collective Rights' in Gérald A. Beaudoin and Errol Mendes (eds), *The Canadian Charter of Rights and Freedoms* (LexisNexis Butterworths 2005).

¹³⁷ *Mahé v Alberta* [1990] 1 SCR 342, p 30

¹³⁸ Ni Dhricceoil, *supra* n. 64.

¹³⁹ E.g. Natasha Bakht, 'Reinvigorating Section 27: An Intersectional Approach' (2009) 6 *Journal of Law and Equality* 135 (2009).

¹⁴⁰ [1984] CanLII 44 (ON CA)

day of the week as part of their Sabbath observance.¹⁴¹ Having particular regard to section 27 and religion as ‘one of the dominant aspects of a culture’ that it was intended ‘to preserve and enhance’,¹⁴² the Court of Appeal found that the conclusion that the law infringed the right to freedom of religion of an Orthodox Jewish shop-owner under s. 2 of the Charter:¹⁴³

‘is supported by the fact that such a law does not help to preserve and certainly does not serve to enhance or promote that part of one’s culture which is religiously based. Section 27 determines that ours will be an open and pluralistic society which must accommodate the small inconveniences that might occur where different religious practices are recognised as permissible exceptions to otherwise justifiable homogenous requirements.’¹⁴⁴

Although there were some exemptions to s. 2 of the Act, it was considered by the Court that these did not go far enough in accommodating differences between religions on this issue.¹⁴⁵ The Supreme Court adopted a similar approach but found that restrictions on the right of ‘Saturday observers’ were ‘reasonably and demonstrably justified in a free democratic society’, with the Lord Chief Justice in his judgment focusing particular attention on the scope of the legislative exemption in s. 3(4).¹⁴⁶ This was in comparison to the federal Lord’s Day Act 1970, which was intended to compel universal observance of a religious day of rest and was found incompatible with s. 2 of the Charter as well as contrary to the expressed provisions of s. 27.¹⁴⁷

¹⁴¹ *Ibid.*, p. 22.

¹⁴² *Ibid.* p 26.

¹⁴³ *Ibid.*, p. 26.

¹⁴⁴ *Ibid.*, p. 27.

¹⁴⁵ *Ibid.*, p. 27.

¹⁴⁶ *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, in particular paras. 62-70; 110-117, 121-151. However, note the partial dissent of Justice Wilson, who relies more heavily on s.27 and argues that the exemption is problematic because it does not recognise the group right of all members of the group, only some (paras. 203-218 in particular paras. 206-207).

¹⁴⁷ *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, see para. 99 on s. 27.

The limited impact of s. 27 can perhaps be partly attributed to some of the difficulties and controversies associated with the term 'multicultural' itself.¹⁴⁸ For the majority in *Adler v Ontario*¹⁴⁹ s. 27 made no difference to the outcome of an unsuccessful claim that the funding only of secular and Roman Catholic schools and not of Jewish private religious schools was unconstitutional under ss. 2(1) and 15 of the Charter. Meanwhile the two dissenting judges differed in their approach to the requirements of a multicultural approach. The view of Justice L'Heureux-Dubé was that s. 27 supported the view that the preservation and continuance of the communities in question were interests fundamental to the purposes of the Charter¹⁵⁰ and that the interference was not proportionate.¹⁵¹ In comparison Justice McLachlin (only partly dissenting) adopted the stance that the decision to deny funding to such school was intended 'to foster a strong secular public school system attended by students of all cultural and religious groups'¹⁵² and concluded that 'the encouragement of a more tolerance harmonious multicultural society constitutes a pressing and substantial objective capable...of justifying the infringement of s. 15.'¹⁵³ Whilst the inclusion of a reference to multiculturalism in a UK Bill of Rights would be highly controversial given recent debates over its future and usefulness and is not being advocated here, it is worth reiterating that the provision inspired by Article 27 of the ICCPR is actually an interpretative clause in the Canadian Charter of Rights and Freedoms rather than a separate minority rights guarantee. The South African case-law therefore provides a clearer example of the added value that such a cultural rights provision might bring.

South Africa

The South African Bill of Rights notably includes a right to cultural identity similar to that found in Article 27 of the ICCPR (section 31) *and* a right to

¹⁴⁸ On the early stages of the European retreat from multiculturalism, see Joppke, *supra* n. 104.

¹⁴⁹ [1996] 3 SCR 609.

¹⁵⁰ *Ibid.*, para. 85.

¹⁵¹ *Ibid.*, para. 112..

¹⁵² *Ibid.*, pp. 117-118.

¹⁵³ *Ibid.*, p. 119. This was followed by a finding of proportionality (p 119-123).

participate in cultural life similar to that found in Article 15 of the ICESCR (section 30). Only the latter was included in the Interim Constitution of 1993 and section 30 now provides that: 'Every person shall have the right *to use the language* and to participate in the cultural life *of his or her choice*' (emphases added). This right is subject to the limitation that 'no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.' According to Devenish, the specific inclusion of such a right played an important symbolic role in satisfying the concerns of minorities in post-apartheid South Africa but was essentially covered by section 15 on freedom of association.¹⁵⁴ Its inclusion therefore appears superfluous, particularly given the inclusion of a minority rights provision along the lines of Article 27 of the ICCPR. Section 31 is clearly modelled on Article 27 except that there is again an express limitation clause providing that the rights therein 'may not be exercised in a manner inconsistent with any provision of the Bill of Rights', the term 'community' is used instead of the term 'minority' and the adjective 'cultural' rather than 'ethnic'.¹⁵⁵ It also contains an additional right 'to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.'

Both sections 30 and 31 of the South African Bill of Rights were considered in the case of *MEC for Education: Kwa Zulu-Natal and Others v Pillay Case*.¹⁵⁶ The case was actually brought as a case of unfair discrimination under the Equality Act of 2000, which was passed to give effect to sections 9(3) and (4) of the Constitution with both religion and culture included as prohibited grounds of discrimination. The case concerned the school's refusal to permit Ms Pillay's daughter, Sunali, to wear a nose stud at school. The Court noted that the right to non-discrimination was distinct from the protection provided by sections 15 and 30 but that the two might overlap 'where the discrimination in question flows from an interference with a person's religious or cultural practices.'¹⁵⁷ The court therefore had to establish firstly whether or not there

¹⁵⁴ George Edwin Devenish, *A Commentary on the South African Bill of Rights* (Butterworths 1999).

¹⁵⁵ On the history of the minority and language rights regime generally in South Africa, see Kristin Henrard, 'Language Rights and Minorities in South Africa' (2001) 3 *International Journal on Multicultural Societies* 78.

¹⁵⁶ CCT 51/06 [2007] ZACC 21.

¹⁵⁷ *Ibid.*, para. 46.

was such an interference, applying a similar approach to sections 15 and 30.¹⁵⁸ What is particularly interesting about the judgment is the lengthy discussion of the relationship between culture and religion¹⁵⁹ with the former regarded as more personal, the latter more related to community based traditions and beliefs.¹⁶⁰ It was accepted that the wearing of a nose stud was a voluntary practice but one that Sunali considered formed an important part of her South Indian Tamil Hindu religion and culture¹⁶¹ and one that required protection in conformity with the affirmation of diversity in the South African Constitution.¹⁶² The finding of the court was that there was discrimination on the grounds of both religion and culture and that this discrimination was unfair. The Court took into account the extensive consultation of the school in producing the school uniform code¹⁶³ but stressed that this did not protect the decision against subsequent review.¹⁶⁴ It was found that exemptions would also have an educational advantages in 'a multicultural South Africa where vastly different cultures exist side-by-side'.¹⁶⁵

Justice O'Regan in her judgment also made reference to section 31 and stated that the constitutional references to culture made it clear that it was conceived as involving 'associative practices and not individual beliefs'¹⁶⁶ and that associative practices should therefore be treated differently.¹⁶⁷ Whilst Chief Justice Langa's judgment was very much focused on the subjective experiences of Sunali, O'Regan's view was that the question should have been whether the practice was pursued by a particular cultural community rather than forming part of an individual's sincerely held beliefs.¹⁶⁸ In her view the concept of culture adopted was that which refers 'to the way of life of a particular community'¹⁶⁹ but that recognises, citing Benhabib, that cultures are

¹⁵⁸ *Ibid.*

¹⁵⁹ See CJ Langa, *ibid.*, para. 47 ff.

¹⁶⁰ *Ibid.*, para. 47.

¹⁶¹ *Ibid.*, para. 60.

¹⁶² *Ibid.*, para. 65.

¹⁶³ *Ibid.*, para. 82.

¹⁶⁴ *Ibid.*, para. 83.

¹⁶⁵ *Ibid.*, para. 102.

¹⁶⁶ *Ibid.*, para. 144.

¹⁶⁷ *Ibid.*, para. 146.

¹⁶⁸ *Ibid.*, para. 147.

¹⁶⁹ *Ibid.*, para. 149.

also dynamic and contested.¹⁷⁰ Her approach is more communitarian and focused on the need for solidarity between different communities rather than mere tolerance¹⁷¹ and the need to approach diversity through the lens of dignity¹⁷² in the sense that cultural practices are valued 'because they afford individuals the possibility and choice to live a meaningful life'.¹⁷³ Her conclusion was that the wearing of the nose-study was 'a matter of associative cultural significance' rather than part of her religious and personal belief.¹⁷⁴ She argued further that there was more of a need for a focus on procedures to process applications for exemptions as well as on processes for dealing with disputes.¹⁷⁵

Whilst the wearing of a the jilbab raises more challenging questions about the balancing of the rights of the individual with the rights and freedoms of others, the increased cultural awareness demonstrated here is striking. This is also illustrated through a comparison of the cases of *Christian Education South Africa v Minister of Education*¹⁷⁶ and *R (Williamson and Others) v Secretary of State for Education and Employment*.¹⁷⁷ The claimants in both cases were teachers and parents involved in private education who believed that corporal punishment should be administered in the teaching and educational context in appropriate circumstances in accordance with their Christian faith. The key issue in both cases was whether a legislative ban on corporal punishment in schools violated their rights as parents whether under Article 9 and Article 2 of the First Protocol to the ECHR in the UK or under s. 15 (individual right to religious freedom) and s. 31 in South Africa.

The Court of Appeal in the UK found there was no interference with the parents' rights, noting the punishment could be carried out instead by the

¹⁷⁰ *Ibid.*, para. 154.

¹⁷¹ *Ibid.*, para. 155.

¹⁷² *Ibid.*, para. 156.

¹⁷³ *Ibid.*, para. 157.

¹⁷⁴ *Ibid.*, para. 162.

¹⁷⁵ *Ibid.*, para. 173.

¹⁷⁶ Case CCT 4/00 [2000] ZACC 11

¹⁷⁷ [2005] UKHL 15; [2005] 2 AC 246

parents at home.¹⁷⁸ Lord Justice Rix in the Court of Appeal had however expressed regret at the narrow focus of the argument before that Court focusing on the issue of interference, which meant that the court didn't have to address the issue of the balancing of different rights and interests, making specific reference¹⁷⁹ to the case of *Christian Education South Africa v Minister of Education*.¹⁸⁰ The South African Constitutional Court in that case had proceeded on the assumption that both rights were at issue following an extensive discussion of the significance of s. 31 and the emphasis on the practice of religion in community with others.¹⁸¹ The Court's main focus was on the general limitation clause in section 36 and the issue of whether or not the failure to accommodate such beliefs and practice could be accepted 'as reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality.'¹⁸² The rights of the parents were balanced against the rights of the child and the dignity clause¹⁸³ and the overall conclusion was that the interference was not disproportionate to the overall aim¹⁸⁴

The House of Lords in *Williamson* focused on the limitations of the right in Article 9(2). Although the same overall conclusion that there was no violation was reached, more attention was clearly given in the South African case to the group dimension and the cultural aspect. Meanwhile Lord Walker referred to the 'more nuanced and contextual' approach to the issue of limitations on religious rights by the South African Constitutional Court 'even if that sort of approach has some tendency to blur rigid distinctions between the issues of engagement, interference, and justification.'¹⁸⁵ It is clear that the South African Constitution has a very different historical and social context.¹⁸⁶ It is submitted nonetheless that lessons can be learnt by the greater cultural sensitivity shown by the South African Constitutional Court.

¹⁷⁸ *R (Williamson and others) v Secretary of State for Education and Employment* [2002] EWCA Civ 1926; [2003] QB 1300.

¹⁷⁹ *Ibid.*, para. 116.

¹⁸⁰ Case CCR 4/00 [2000] ZACC 11

¹⁸¹ *Ibid.*, paras 20- 27.

¹⁸² *Ibid.*, para. 32.

¹⁸³ *Ibid.*, para. 15.

¹⁸⁴ *Ibid.*, paras. 50-52.

¹⁸⁵ House of Lords, *supra* n. 177, para. 68.

¹⁸⁶ *Ibid.*, para. 67.

7 CONCLUSION: IS THE INCLUSION OF A RIGHT TO CULTURAL IDENTITY IN A UK BILL OF RIGHTS THE WAY FORWARD?

It has been argued here the neglect of debates about the accommodation of diversity and difference in the UK Bill of Rights process to date has been regrettable. This contrasts significantly with the Northern Ireland Bill of Rights process, where issues relating to culture, identity and language were at the forefront of the debates.¹⁸⁷ Perhaps unsurprisingly in the current anti-European political climate,¹⁸⁸ the focus so far amongst many who might have been expected to raise such issues has been on safeguarding the rights guarantees and the rights protection framework of the Human Rights Act 1998. Whilst it is clear that this debate will continue, the fact that the Commission on a Bill of Rights declined to advocate the inclusion of economic and social rights in a UK Bill of Rights means that there is now the opportunity for more debates around a common heritage and in relation to culture, identity and language issues. Such issues have been central to debates about the accommodation of diversity in UK in the past and the UK has been a party to the Framework Convention for the Protection of National Minorities, a Council of Europe treaty that addresses many of the issues most pressing for those belonging to minority groups, since 1999. The inclusion of a provision analogous to Article 27 of the ICCPR in a UK Bill of Rights would appear to be an obvious next step in relation to the State's undertakings in relation to those belonging to minorities. The fact that Article 27 is included in the sister document to the ECHR focused on civil and political rights ensures that a case can be made for its inclusion separate to the ongoing debates over the inclusion of other 'categories of rights in such a bill. This certainly appears to be the view of the UN Human Rights Committee, which has noted that there are rights in the ICCPR excluded from the ECHR and called for all such rights

¹⁸⁷ E.g. Elizabeth Craig, *The Framework Convention for the Protection of National Minorities and the Northern Ireland Bill of Rights Process*, 60 NILQ 201 (2009) and *From Soft to Hard Law: Culture, Identity and Language Issues within the Northern Ireland Bill of Rights Process*, 56 Focaal 35 (2010).

¹⁸⁸ This is not just anti-EU (e.g. debate around Prime Minister David Cameron's commitment to a referendum on continued EU membership by 2017) but also anti-ECHR (e.g. Theresa May [British Home Secretary at the time of writing]: Tories to Consider Leaving European Convention on Human Rights' 9 March 2013 <http://www.bbc.co.uk/news/uk-politics-21726612> (accessed 13 April 2013) with the two often conflated in political debate.

to be protected and given effect in UK law,¹⁸⁹ including Articles 26 (the equality guarantee) and 27 and with same levels of protection as other civil and political rights.¹⁹⁰ Only minor modifications to the Human Rights Act 1998 would be required to facilitate this. Meanwhile Special Rapporteur Capotorti, in his report on Article 27, had argued that a universally applicable, indeed desirable, approach to the implementation of Article 27 was for the rights to culture and language to be recognised in domestic laws.¹⁹¹

The unpredictability surrounding the legal transplantation process is well known.¹⁹² We do however have the advantage of being able to look to other jurisdictions as well as to the HRC's own case-law on Article 27, which provide no indication of a threat to 'European' values or to the rights and freedoms of individuals. A right based on the formulation of Article 27 of the ICCPR is included in both the New Zealand Bill of Rights Act (s. 20) and the South African Bill of Rights (s. 31). The evidence presented here suggests that the inclusion of such a right ensures that the importance of cultural identity to individual well-being is sufficiently recognised and that the more communal aspects of culture, religion and language are not completely sidelined. As with other rights in these instruments, the rights are limited and should not therefore be seen as constituting a threat to social cohesion or as a means of encouraging extremism. The issue of how to ensure a balance between protecting and promoting cultural identity and ensuring social cohesion has been the subject of considerable international attention. The inclusion of such a provision in a UK Bill of Rights would hopefully result in greater cultural awareness in the courts and would sit well alongside an right to equality and/or non-discrimination in any future UK Bill of Rights.

¹⁸⁹ HRC, *Concluding Observations: UK*, 30/07/08, CCPR./C/GBR/CO/6), para. 6.

¹⁹⁰ HRC, *Concluding Observations: UK*, 05/11/01, CCPR/CO/73/UK, para. 7.

¹⁹¹ Capotorti, *supra* n. 67, para. 570.

¹⁹² E.g. Pierre Legrand, "The Impossibility of "Legal Transplants"" (1997) 4 Maastricht Journal of European and Comparative Law 111 (1997) and Bill Bowring, 'Rejected Organs? The Efficacy of Legal Transplantation, and the Ends of Human Rights in the Russian Federation' in Esin Özücü (ed), *Judicial Comparativism in Human Rights Cases* (The United Kingdom National Committee of Comparative Law 2003) 159.

