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A Case Study on the Protection of Human Rights.

Human Rights and Legal Wrongs: the Roma in

Europe

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ABSTRACT

This thesis critically examines the implementation of international human rights standards through a study of the situation of Europe’s Roma minority. The foundations of the human rights standards as they apply to minorities are considered from a theoretical perspective to be deficient. The need to respect the collective aspects of identity as well as the individual dimensions has been recognised by many theorists but has not been translated into human rights norms.

The consequences of the individualist emphasis are explored with respect to the rights of citizenship and education. The former suggests that a focus centred only on the individual can legitimise discriminatory treatment in the name of assimilation. When looking at the right to education it is apparent that the denial of minority culture and values in the education process has contributed to the lack of school achievement and educational disillusionment. Promising initiatives form the European Union place a greater emphasis on the need to support rather than diminish minority cultural values.

An alternative approach stressing the importance of minority identity is considered by analysing the Hungarian system of minority self-government. The system, still in its infancy, recognises the collective interests of minority groups as well as the individual rights of group members.

In conclusion it is argued that the present emphasis on the individual does little to protect the rights of members of marginalised minority groups. This realisation does not necessarily entail the prioritisation of collective over individual rights. Rather, it is argued that collective and individual rights be viewed as supplemental and interdependent.

257 words
Dedication

I would like to dedicate this thesis to George who gave me more than I could ever return. She unfiled my filing and practised typing on the furniture but always showed interest and enthusiasm. Sadly she never quite made it to see the final copy. May you shine in your sleep as you did in my life (6.9.99).

Acknowledgements

The completion of this thesis has been a long and sometimes arduous process during which there have been inevitable times of personal alienation and distraction. The dedication of Roma rights activists, both Roma and Gadjo, is inspiring. Now that my thesis is completed I hope to have time enough to support some of these individuals in their efforts of obtaining justice for Roma individuals and their communities.

On a personal note I would like to thank my family and friends for their continuing support over the last five years. My personal supervisor, Fiona Cownie, has read and re-read drafts with attention to the minutest of detail. She never doubted in my ability to complete the task (or if she did, she never let on!) and has maintained an enthusiasm for the thesis which has provided constant encouragement. My gratitude is also extended to Professor Malcolm Shaw who has bought his incredible expertise to the material on international law. I would also like to thank my new colleagues at the University of North London for their support and encouragement.

Finally, I must thank one individual that has probably experienced the worst of the thesis-blues. My new husband, Kimberlin, has heard it all and has never once suggested that I take the easy option and give it up.
## CONTENTS

**Chp. One** The Treatment of Roma in Europe: 'A litmus test for civil society'  

**Chp. Two** Theoretical Aspects of the Protection of Groups in International Human Rights Discourse  

**Chp. Three** The Protection of Minorities Through Individual Rights  

**Chp. Four** Citizenship in the Czech Republic  

**Chp. Five** The Education of Roma and Traveller Children in Europe: The Development of a New Pedagogy  

**Chp. Six** Minority Rights Provisions in International law  

**Chp. Seven** Extending Group Rights: The Roma Nation, Self-determination and Minority Autonomy  

**Chp. Eight** Conclusion  

**Appendix 1** The Number of Roma/Gypsies in Selected European Countries  

**Appendix 2** Roma/Gypsy Organisations  

**Bibliography**
It is apparent that the problem of anti-Roma prejudice and discrimination, whilst more acutely felt in Central and Eastern Europe, is by no means confined to this region.

Recent estimates place the Romany/Gypsy population of Europe at somewhere between seven and eight and a half million people, making it Europe's largest minority group. The most concentrated numbers are in Eastern and Central Europe, with up to two and a half million Roma in Romania. Due to the comparatively high birth rate of the Roma the figure could now be as many as ten or even twelve million people. Most are living in conditions of poverty and deprivation in some of the richest countries in the world among multi-ethnic societies that have embraced the principles of democracy and the fundamental importance of human rights for all.

This thesis aims to examine the level of exclusion in the light of the principal human rights standards and their implementation. A contrasting focus on collective rights using the example of Hungarian minority self-government will be considered. Finally, there will be scope for assessing the development of future programmes and policies aimed at achieving genuine equality of treatment and opportunity in the light of an integrated Europe.

**Origins of Roma In Europe: what's in a name?**

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4 See Appendix 1
6 Kawczynski, R suggests twelve million in "Europe's Roma demand recognition as a minority" Nov. 19th 1998 Agence France Presse
The Roma are one of the oldest surviving minorities in Europe. Linguists\textsuperscript{7} have demonstrated that the Rom descended from North Indian castes that left to migrate across Europe between 500 and 1000\textsuperscript{8}. The migration across Europe saw their arrival in small groups in Turkey in the eleventh century and then by the fifteenth century in Sweden, Germany and Belgium. The first record of their arrival in England is dated 1514, with further movements into Scandinavia in the sixteenth century\textsuperscript{9}.

The name ‘Gypsy’ derives from the term ‘Egyptian’\textsuperscript{10}. When Gypsies began to arrive in England from Egypt they were identified by the colour of their skin and dress as different on account of their Egyptian origins. The term Gypsy and associated labels such as ‘Cygani’ and the Spanish ‘Gitano’ can thus be seen as inaccurate and pejorative descriptions which are not accepted across Europe. The term Rom or Roma (in the plural) is generally preferred\textsuperscript{11}, although in British travelling communities ‘Gypsy’ and ‘traveller’ are still the most common identity tags.

The European Roma are clearly a heterogeneous community with many different cultural values as well as linguistic and religious diversity. Nevertheless the common ancestry of the Rom can be used to provide evidence of an underlying core of values and traditions, some of which have since been eroded or altered on account of the need to adapt to the conditions of the host state.

**Finding an Appropriate Terminology**

\textsuperscript{7} For discussion see Kenrick, D *Gypsies: From India to the Mediterranean* Gypsy research Centre-CRDP Midi-Pyrenees Interface Collection Toulouse 1994.


\textsuperscript{9} Liégeois and Gheorghe (1996) supra n 5 at 7.

\textsuperscript{10} Fraser (1992) supra n8 at 46-8.

Overshadowing much of the debate about the rights of travelling people is the issue of appropriate terminology. If one is to consider extending human rights protection to those designated Roma or travellers as a minority, a suitable label must be identified. However, it is difficult to find any such accepted label which does not either depend on the exclusion of certain sub-units or encompass a variety of geographically dispersed groups with no common ancestry or traditions. Even amongst English Gypsies, as Thomas Acton has shown, there is considerable ethnic diversity attributed to different historical experiences.

The ideal situation would be of course to ask each individual whether they would prefer the title Gypsy/Rom/traveller or ‘traditional traveller’ and this would be likely to yield every combination of response. Each of the possible terms may be seen as problematic for different reasons and the absence of a core group in a geographically defined territory means that such responses will vary depending on the particular host state. Furthermore, the practice of nomadism, by which many Gadje characterise the Gypsies of England, is no longer a characteristic of Roma in other European states.

Beverly Nagel Lauwagie has examined the ethnic classifications of travelling peoples and was able to identify several main groups with different historical origins. Her

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13 See for example, Chp 5 on the experiences of the Czech Roma, Liégeois, J.P Gypsies. An Illustrated History (1986) Al Saqi, London at 50-57 notes that “Not all Gypsies are nomads, and not all nomads are Gypsies”. However, he goes on to stress that nomadism is still an important factor underscoring the identity of the ‘Gypsy’: “Nomadism is a state of mind more than a state of fact. Its existence and importance are psychological more than geographical”. Liégeois could be accused himself of romanticism in this respect, but it is apparent that many aspects of the culture still found in sedentary Romani and Gypsy communities indicate the psychological significance of movement. The recent migrations to Canada and the West of apparently sedentarised Roma from the Czech and Slovak Republics give credence to this argument.
14 Lauwagie, B “Ethnic boundaries in modern states: Romano lavo-lil Revisited” (1979) AJS Vol.85 No 2 p310-337. At 318 the author notes that the major groups which consider themselves as Rom are Kalderash, the Lowara, the Tshurara and the Macvaya. Under the heading ‘Gypsies and travellers’ she places a number of closely related groups such as the Yenische in Germany and the Scottish travellers as well as the Irish travellers (at 319).
examination of the circumstances of the groups in question however reveal striking similarities:

All are engaged in occupations which are irregular and unpredictable and often marginal to the economy in which they reside. In all cases there is a strong sense of territoriality. All the groups, including the non-Rom, have their own language or dialect different from that of the host society. All are organised into a larger extended family of lineage group, with smaller groups acting as economic units. All groups seem to be extraordinarily prolific...Most important, in each case a distinct ethnic boundary is maintained. The major difference between the groups appears to be in the extent to which they observe cleanliness rituals and taboos.\(^5\)

It is unfortunate then that the unformulated, yet commonly interpreted characteristics of a minority for the purposes of international law, as discussed in Chapter Six, demand that distinctions of ethnicity are made. Human rights should protect all, irrespective of ethnicity. However any notion of group-based rights necessitates the drawing of ethnic boundaries in a way which cannot mirror the reality of the groups concerned.

Ideologies of assimilation demand categorisations which enable the exclusion of those defined as undeserving outsiders. Acton notes that the ‘true-Gypsy’ stereotype provides a useful avenue for discrimination by officials which can be directed at social deviants rather than a racial group.\(^6\) This can be clearly seen with respect to the very recent remarks made by the Home Secretary, Jack Straw, regarded the British travelling community:

*Many of these so-called travellers seem to think that it’s perfectly o.k for them to cause mayhem in an area, to go burgling, thieving, breaking into vehicles, causing all*

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\(^5\) Ibid. at 331.

kinds of other trouble, including defecating in the doorways of firms and so on, and getting away with it17.

Straw rejected allegations of racism by making the fictitious distinction between those of an itinerant lifestyle and the law-abiding true Romany-Gypsy.

Similarly, Jean-Pierre Liégeois observes that when the goal is assimilation, Roma become defined as ‘persons of nomadic origin’:

These Gypsies—now deprived, by this description, of roots and identity—then represent a ‘social problem’ of ‘re-adaptation’ that must be solved in order to absorb them into the rest of society...Gypsies are not defined as they really are, but as socio-political requirements say they have to be18.

Strategies of assimilation and integration have been remarkably unsuccessful in destroying the identity of the travellers in almost every country. Yet cultural distinctions have emerged between travellers of different groups and between different borders. In Eastern Europe the term Rom is clearly preferred to the term ‘Gypsy’ which is regarded as pejorative19. Many British Gypsies prefer to use the description ‘traditional travellers’ to distinguish themselves from newer groups of travellers, although the protection of the Race Relations Act will apply to groups known as Gypsies but not groups of travellers unless it can be shown that the travellers envisaged are of Gypsy origin20.

This thesis will be taking a European perspective on the treatment of travelling people, as a result it is necessary to adopt the term which is preferred by the majority of the group in Europe whilst noting that it may still include those who do not identify

17 Guardian "Straw's travellers gaffe misconstrued" 20th August 1999 p5
18 Liégeois (1986) supra n13 at 139
20 CRE v Dutton (1989) QB 7; (1989) 1 ALL ER 306
specifically with this term but share similar cultural values. Thus the label Roma will
generally be used when referring to the group across Europe, to include those
commonly classified as Gypsies and traditional travellers\textsuperscript{21}. It is noted by Liégeois that
this corresponds to the sociocultural reality and political will of the groups in Central
and Eastern Europe which amount to 70\% of those identified as Gypsies in Europe\textsuperscript{22}.
The application of the group-based rights debate to newer travelling groups as well as
some traditional, indigenous travelling groups such as the Irish travellers, will thus be
limited. There may, however, be separate grounds for an argument based on the
minority status of each of these groups and thus some of the arguments will be
relevant. The author does not want to encourage further exclusion, but does not wish
to be faced with limitless enquiries as to the cultural similarities of the different
groups. Acton prefers to describe the English Gypsies as a continuity of culture rather
than a community of culture. Furthermore, he argues that myths of racial purity are as
much a fiction for the Gypsies as they are with any other people of the world\textsuperscript{23}. There
are plenty of sociologists, anthropologists and linguists that may be able to provide
interesting insights on this topic\textsuperscript{24}. For the purpose of this thesis however, I am keen to
include those people commonly considered, and considering themselves to be, of
Gypsy or Romani origin.

\textbf{A History of Prejudice}

\textsuperscript{21} When referring to Roma in specific regions where the term is not well-used I shall use the more
accepted term.
\textsuperscript{22} Liégeois (1994) supra n11
\textsuperscript{23} Acton (1974) supra n12 at 19.
\textsuperscript{24} See for example the contrasting approaches of Acton supra n12 and Okely, \textit{J The Traveller-
Gypsies} (1983) Cambridge University Press \textit{passim}. 
The adaptation of the Roma and the survival of much of their cultural identity has been described as an amazing feat given the climate of prejudice in which they often live. In the introduction to his historical account, Angus Fraser reflects: “When one considers the vicissitudes they have encountered - one has to conclude that their main achievement is to have survived at all”.

Such adaptation has inevitably led to the diversification that we see today and the inability of traditional constructs of ‘minority’ and ‘community’ to accurately describe the current situation of the group. Nomadism is the clearest example of this diversity. In Britain the Gypsy community is often described as a mobile group, moving for economic and social reasons to find new work and make contact with other family members. For centuries legislation has sought to eradicate nomadism as a perceived threat to important societal values such as home ownership and wage labour. The Caravan Sites Act introduced in 1968 sought to provide authorised camp sites for the Gypsies in Britain and in doing so has created a partly sedentarised community. The recent introduction of the Criminal Justice and Public Order Act 1994 adds to the pressure to settle, imposing criminal penalties on those travelling people who occupy unauthorised encampments without the consent of the owner. Nevertheless a substantial number of travelling families do continue to exist, albeit on the edge of society dodging the sanctions of the criminal law, and events such as the Stow and Appleby fairs still command impressive turnouts.

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25 For example, Hawes and Perez comment that Gypsies “Accommodate each new threat be it extermination or assimilation, with a degree of equanimity to be envied”, in The Gypsy and the State SAUS, Bristol (1995) at 126.

26 Fraser supra n8 at p1.

27 Okely (1993) supra n24 Ch 8

28 s77 Criminal Justice and Public Order Act (1994)
In Eastern and Central Europe the situation is very different. Largely as a result of economic coercion and the Communist industrial drives, the overwhelming majority of the Roma now live on the fringes of the cities and towns, usually in concentrated groups. Their housing conditions are generally extremely poor and the implementation of a free market economy has enabled employers to reject Rom applicants on nebulous grounds, creating a high level of unemployment and poverty reinforced by a climate of discrimination and hostility.

This picture of a diverse ‘multicultural’ mosaic of people poses difficulties for a unified collective rights account and suggests difficulties for the Roma elite who seek to define themselves as a homogeneous, ethnic group. Acton and Gheorghe note that such historic diversity creates a serious constraint on the formalisation and codification of Romani culture and such issues will need to be settled if there is to be any adequate minority rights protection.

The Situation of the Roma in Europe Today

Council of Europe Rapporteur Josephine Verspaget has highlighted the position of disadvantage in which most Roma find themselves:

The position of many groups of Gypsies can be compared to the situation in the third world: little education, bad housing, bad hygienic situation, high birth rate, high infant mortality, no knowledge or means to improve the situation, low life

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29 In 1994 when the Criminal Justice and Public Order Act (1994) was introduced, 32% of Gypsies did not have an authorised caravan site (D/E Count of Gypsy Caravans 1994)
31 ibid.
expectancy...If nothing is done, the situation for most Gypsies will only worsen in the next generation. In 1994 the Organisation for Security and Co-operation in Europe (hereafter OSCE) and the Council of Europe held the first international seminar on the situation of the Roma in Europe. This reflected a new international awareness of the extent of social, economic and political marginalisation that Roma suffer routinely in all European countries. In his opening speech, the Deputy Secretary of the Council of Europe noted several factors which gave rise to the current level of concern. He described a community of people who were victims of economic insecurity; who often found themselves to be stateless as a consequence of the division of certain multi-national states; and who were victims of institutionalised prejudice and widespread intolerance. Despite increased international awareness of the extent of marginalisation, these stark realities continue to exist across Europe.

Violence and Discrimination

The history of the Rom in Europe has been a history of oppression, violence and discrimination culminating in the Nazi holocaust or ‘porajmos’ where between 200,000 and 500,000 Roma were executed. In recent times, state policies of sterilisation and forced adoption have been highlighted in several European countries,
with an aim of restricting the birth-rate and eliminating the reproduction of those considered 'social undesirables'. Compulsory name-changing policies were introduced in Bulgaria to undermine the Muslim identity of the Bulgarian Rom.

The collapse of Communism and consequent economic instability has awakened fears amongst the people of Eastern Europe. The level of violence towards foreigners, specifically Roma, has increased from isolated incidents to widespread, group attacks with the apparent acquiescence of the police and local community. Several Roma have been murdered in racially motivated attacks across the region and violence has been mounted on entire Roma communities by fellow villagers. The most serious incident occurred in the Burgenland region of Austria in 1995 when four Roma were murdered by a bomb which had been attached to a sign outside a Roma settlement. The sign read 'Roma zurück nach Indien' (translated as 'Roma back to India'). Initial reports in the Austrian press suggested that the deaths were attributable to an internal Roma feud and the police searched the settlement for evidence of arms and drugs smuggling.

The Austrian police arrested one man in connection with the incident in October 1997 with press reports suggesting that he may have had funding and support from a larger cell. In 1998, a bomb was thrown into a Roma house in Fechenheim, Germany.

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35 Human Rights Watch reported the sterilisation of Czech Roma women, often without full consent: HRW Struggling For Ethnic Identity: Czechoslovakia's Endangered Gypsies (1992) HRW, NY at 19. See also Ofner, Paul “Sterilisation practice in Czechoslovakia” O'Drom April 1990 p33-39. This practice, which contravenes the 1948 Genocide Convention, has also been acknowledged by Norwegian officials in International Helsinki Federation Annual Report (1997) at 194. The seizure and forced adoption of Roma children in Italy and Switzerland has also been recorded, Puxon Roma: Europe's Gypsies (1987) Minority Rights Group, London at 6 and 8.

36 Tanja, J “To change a Gypsy into a Bulgarian” O'Drom April 1990 p31-2 at 31.


38 ERRC Divide and Deport: Roma and Sinti in Austria (ERRC, Budapest Sept.1996)

Christian Democratic Union's district leader was quick in attributing involvement to the Roma occupants\textsuperscript{40}.

There are numerous reports of anti-Roma pogroms throughout the region. The events of Bacu, Romania in January 1995 are sadly not extraordinary in this respect\textsuperscript{41}. A confrontation involving a rifle resulted in serious injuries to three of the Romany residents and two others. The following evening, villagers called together by the ringing of the church bell, raised the other Romany houses to the ground. These houses belonged to long-standing residents who had not been involved in the dispute, the opportunity being seized upon to rid the town of the entire Roma community\textsuperscript{42}.

\textit{Human Rights Watch} have identified that in many such incidents there is evidence of complicity from the local authorities and an unwillingness on the part of the police to bring perpetrators to justice\textsuperscript{43}. Furthermore, an opinion poll commissioned by the Romanian paper Evenimentul Zilei in 1994, indicated that 77\% of respondents expressed resentment towards ‘Gypsies’\textsuperscript{44}. The journalist who reported on the poll added: “these sentiments were expressed by people who are at least university graduates, some of them closely associated with the academic world”\textsuperscript{45}

The most recent information available on the level of right-wing extremists attacks on people identified as being of Romany origin suggests that the violence is increasing.

Data collected by the European Roma Rights Centre in Budapest, reveals an alarming

\textsuperscript{40} Romnews Correspondent “The atmosphere in the district of Fechenheim has been strained for a long time” 27th Nov. 1998 \textit{Roma National Congress}.

\textsuperscript{41} Romania has seen some thirty similar incidents since December 1989. In the Giurgiu district alone four such incidents occurred between April and May 1991. The perpetrators of the violence have not been bought to justice; Liégeois and Gheorghe \textit{supra} n 5 at 14.

\textsuperscript{42} For details see Liégeois and Gheorghe \textit{supra} n5 at 14. See also UNHCR \textit{Background paper on Romania Refugees and Asylum Seekers} Geneva Nov. 1994,

\textsuperscript{43} Human Rights Watch \textit{Lynch Law: Violence Against Roma in Romania}, Vol. 6 No 17 (Nov. 1994).

\textsuperscript{44} Reported in the Ottawa Citizen 13th July 1994.
number of serious attacks on school children and families. Police records indicate that
the perpetrators are rarely detained\textsuperscript{46}.

For many Roma the only alternative to violence and discrimination is to leave their
homes and move to the West, particularly, and somewhat ironically given the history
of Nazi persecution\textsuperscript{47}, Germany. However, the reunification of Germany bought with
it a ten-fold increase in racist attacks particularly directed towards immigrants and
refugees\textsuperscript{48}. The German authorities are clearly concerned about the number of
migrants attempting to enter Germany\textsuperscript{49} and in 1992 a bilateral treaty was signed with
Romania in order to repatriate those immigrants assumed to be of Romanian origin\textsuperscript{50}.

In return for their co-operation the Romanian Government were offered a favourable
loan of one thousand-million DM\textsuperscript{51}. Anti-Roma prejudice is widespread in Germany.
In 1998, the Deutsche Volksunion, who already have seats in two West German state
parliaments, received 13\% of the popular vote in the Saxony-Anhalt state. The party’s
leader, Gerhard Frey, has been criticised for his anti-Semitic views. However, his
‘tirades’ over fake asylum seekers and Gypsies have received widespread support
outside Saxony\textsuperscript{52}.

Police complicity in the anti-Roma violence sweeping Eastern Europe is a common
allegation. The European Roma Rights Centre have revealed particularly disturbing

\textsuperscript{45} Ibid.

\textsuperscript{46} See for example the ERRC Newsletters Spring, Summer and Winter 1998 - particularly the
sections entitled “Snapshots from around Europe”.

\textsuperscript{47} supra n34 and Fraser supra n8 at 257-275.

\textsuperscript{48} Hockenos, P \textit{Free to Hate} (1993) Routledge, NY at 28-9 and 39.

\textsuperscript{49} For details on the extent of problems facing the Roma generally in Germany see Roma National

\textsuperscript{50} Reported in Open Media Research Institute Daily Digest, 3rd Nov. 1992.

\textsuperscript{51} The European Parliament have expressed disapproval at the treaty in the European Parliament
Session Documents “Agreement between Germany and Romania on the Forced Repatriation of
cases of raids without warrants on Roma settlements\textsuperscript{53} and police violence in Austria\textsuperscript{54} and Hungary where the power of arrest has been used to abuse and racially taunt Roma\textsuperscript{55}.

As well as police complicity there is also a problem of inadequate investigations by the police and prosecuting authorities, with the majority of offenders never being prosecuted. In one such case research conducted by a human rights organisation following the deaths of three Rom in Hadareni, Romania concluded that the Chief Prosecutor had identified the killers but had refrained from arresting them due to fear of retaliation in the community\textsuperscript{56}.

It would appear that there is a certain amount of political popularity to be found in discriminatory, inflammatory language, both in Eastern Europe and in the West. A recent poll in Slovakia revealed that 85\% of Slovaks believed that there was no discrimination against the Roma\textsuperscript{57}, despite comments by the Slovak Prime Minister, Mr Meciar, that Slovakia was under threat from the 'extended reproduction of the socially unadaptable population' of whom he had earlier publicly stated '...if we don't deal with them now, then they will deal with us in time...'\textsuperscript{58}. In the United Kingdom, anti-Gypsy sentiment was frequently expressed by politicians during the passage of

\textsuperscript{52}Fleck, F "Munich publisher Frey buys way into East Germany" Reuters 26.4.98.
\textsuperscript{54}ERRC (1996) supra n 38
\textsuperscript{55}ERRC Press Release \textit{Police Brutality in Hungary} 26th March 1997 (ERRC, Budapest).
\textsuperscript{57}FOCUS agency “Current problems in Slovakia” Bratislava, Dec. 1994 p84.
\textsuperscript{58}\textit{Associated Press} 8th Sept. 1993.
the Criminal Justice and Public Order Act, one member of parliament describing them as 'mobile spivs'\textsuperscript{59}.

**Economic Insecurity**

Housing and employment conditions indicate the extent of Roma poverty across Europe. In Eastern and Central Europe, Roma tend to occupy settlements on the outskirts of cities and towns. They are commonly over-crowded with poor facilities in 'temporary' accommodation. In the Czech Republic this has meant that many are unable to establish permanent residence in order to satisfy citizenship criteria\textsuperscript{60}.

Homelessness and unemployment is a common problem among the 350,000 Greek Roma\textsuperscript{61}. The situation of the Roma in the Greek town of Ano Liosia has recently been highlighted by the European Roma Rights Centre. The Roma settlement in the town was forcibly liquidated in April 1997, the small minority who were in possession of valid residence permits were relocated to a settlement of 'temporary' housing without running water and adequate sanitation. Following the relocation the site was enclosed by a wire fence and armed guards were stationed at the only exit\textsuperscript{62}.

In socialist Spain there have been violent outbursts following the Government's attempts to provide housing for the Roma\textsuperscript{63} and in Italy, discrimination and violence

\textsuperscript{59} Mr Gwilym Roberts M.P (Bedfordshire South) HC Debates 1994 Official Reports Series 6 Vol 248 col.1965

\textsuperscript{60} See Ch. 4 p134


\textsuperscript{62} ERRC “Letter to the prime minister of Greece concerning recent events in the Roma community in Ano Liosia” May 23rd 1997.

remain big obstacles to the realisation of secure encampments. One-third of Gypsy families who do not have a legal place of abode in the United Kingdom face similar difficulties. Struggles such as inadequate sanitation, no running water, limited access to health care and education as well as daily intolerance, are commonplace.

**Statelessness**

Statistics on the number of Roma who have migrated to the West are unavailable. Many are afraid to reveal their Romani identity for fear of persecution and identity papers are often surrendered as a condition of transit. However, Bosnian, ex-Yugoslavian, Romanian, Macedonian and Turkish asylum seekers entering Austria are considered to include a significant number of Roma. The ERRC note a clear tightening of restrictions since 1993 and human rights observers estimate that between 90 and 95% of those seeking asylum in Austria are declared illegal. Many of these people will be deported to Hungary; others may spend up to six months in Schubhaft, a prison aimed at preventing illegal residence.

The situation of stateless Roma has also been raised by the Czech Citizenship Law, examined in Chapter Four. Roma who have forfeited their Slovak identity in order to unsuccessfully obtain Czech identity have found themselves stateless with neither Czech nor Slovak identity papers. In the Ostrava district, the authorities have even

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65 O’Nions *supra* n59
66 For example, in certain areas of the former Yugoslavia there appears to have been clear persecution on account of Romani identity ERRC (1996) *supra* n38
offered to pay two-thirds of the travel costs for prospective émigrés\textsuperscript{68}. In response to international criticism, the Czech premier called a press conference urging ‘thousands’ of Roma preparing to emigrate to reconsider their decision\textsuperscript{69}.

**Why Human Rights?**

**The International Language of Empowerment and Equality.**

The use of human rights language to improve the treatment of minority and disadvantaged groups has become increasingly popular in the latter half of the twentieth century\textsuperscript{70}. There has been a rapid growth in the number of Romani non-governmental organisations, particularly since the collapse of Communism in Eastern Europe\textsuperscript{71}. The ‘Romani issue’ has now been firmly placed on the agenda at both regional and international levels\textsuperscript{72}.

Roma activists are comparatively new to politics and international human rights language. Initial reluctance to formulate such demands stemmed from the absence of formal political organisation, formal education and a certain amount of mistrust for Gadje channels of communication\textsuperscript{73}. Industrialisation, the development of modern technology and the rising tide of ethnic violence across Europe has forced the Roma, along with other traditionally-inclined groups, to define a ‘political space’ and

\textsuperscript{68} Sliva, J “Gypsies seek good life in Canada” Associated Press, August 13th 1997


\textsuperscript{70} The first international World Romani Congress was held in 1971 and was attended by delegates from 14 countries. For details on this growth see Liégeois (1994) supra n11 p249-266.

\textsuperscript{71} See App. 2


\textsuperscript{73}ibid. at 72.
familiarise themselves with international discourse that could serve to improve their situation\textsuperscript{74}.

New as they are to international politics, the Roma elite have suffered criticism for the absence of a unified stance. The language of human rights appears to have been embraced however, as a real opportunity to improve the situation of their people throughout the world. There have been several international conferences and seminars which have helped to forge alliances of different cultural factions. Following extensive lobbying by academics and activists, particularly over the last seven years\textsuperscript{75}, the Council of Europe\textsuperscript{76} and the OSCE have funded numerous initiatives and have established mechanisms to increase awareness of the problems faced by the Roma community. A contact point has been established in Warsaw\textsuperscript{77} to provide information and debate and within the community itself there have been efforts to standardise the Romani language and to create a Romani dictionary\textsuperscript{78}.

Such recognition has been mirrored in the United Nations. In 1992 the Commission on Human Rights accepted Sub-Commission Resolution 65/1992 on the Protection of Roma and Gypsies\textsuperscript{79}. Perhaps the greatest recognition of the development of international Roma political organisation came in 1993 when the Economic and

\begin{flushright}
\textsuperscript{74} ibid.
\textsuperscript{76} The Council of Europe publishes a regular newsletter Activities on Roma/Gypsies which details and reports on recent C/E events in the field.
\textsuperscript{77} The Contact Point for Roma and Sinti Issues (CPRSI) produces a quarterly journal funded by the ODIHR in the CSCE; similarly the Council of Europe fund the Interface journal which provides up to date information on educational initiatives for Gypsies and travellers.
\textsuperscript{78} “Romani Dictionaries” 1996 Interface 23 p13-16
\textsuperscript{79} Roma National Congress Supra n49 at 14 Germany has refused to accept that Roma are a national minority in Germany as they are not confined to a specific area as they claim not to be affected by the resolution, Jansen, M “Sinti and Roma: An ethnic minority in Germany” in Packer and Myntti (eds) The Protection of Ethnic and Linguistic Minorities in Europe 1993 (Abo Akademi University) at 199.
\end{flushright}
Social Council of the United nations upgraded the status of the International Romani Union to Category II Observer status\textsuperscript{80}.

Increasingly, the use of the law to empower the Roma at a grass roots level can also be seen, although there are often considerable obstacles such as police reticence to contend with. In the first case of its kind in the Hungarian courts, Mr Gorman, a 31yr old Rom, was awarded damages from a bar owner who had refused to serve him on account of his race. Following the verdict, Mr Gorman commented "...if I were the president now of a Gypsy organisation I would know how to help other Gypsies...Maybe now, with this penalty, people will think twice"\textsuperscript{81}. In this respect the work of the European Roma Rights Centre\textsuperscript{82} has been particularly significant, with the use of expert lawyers to advise and represent clients in the region, many of whom would probably have been deterred from taking such action.

Over-riding theme of exclusion

Exclusion is the common theme behind the prejudice exhibited towards the Roma. The feeling that Roma exist outside of society and do not deserve to be included within it can be seen with respect to the following discussions on Czech citizenship and education policies as well as in the rising tide of violence. Recent statistics indicate the prevalence of exclusionary policies; for example an estimated fifteen

\textsuperscript{80} Liégeois \textit{supra} n11 at 260.

\textsuperscript{81} Roddy, M "Hungarian Gypsy’s court victory hailed" The Globe and Mail, Canada pA9 27th August 1997.

\textsuperscript{82} See App. 2
thousand former Czechoslovak citizens are still without Czech citizenship and there are some one hundred and thirty-two separate Romani schools operating in Hungary\(^8^3\).

Reliable statistics on the number of Rom and other travelling peoples in Europe are notoriously elusive. In a country with a population of over one million Roma, President Ceaucescu was able to comment: “Don’t talk to me about Gypsies, there are no Gypsies in Romania”\(^8^4\).

**Minority vs. Individual rights**

Whilst the Romani elite have embraced human rights discourse, debate over the best strategy for securing rights for the Roma people of Europe has often been fractious and fragmented. As a result several strands of debate have emerged as the most effective ways of improving human rights protection, but none command universal support. The first part of the debate centres on the realisation of collective versus individual rights. In Chapters Four and Five it will be argued that the individual emphasis on human rights advocated by international law fails to meet the needs of the most disadvantaged communities by underplaying the importance of communal values to the individual rights-bearer.

It can be seen that much of the concern about increasing the rights of groups per se centres on the perceived threat to state security that this would entail. There has clearly been an increased recognition of the Roma as a minority group and there has been no threat to state stability posed by such recognition. Demands for territorial

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\(^8^3\) As detailed in the report of the OSCE Romani Human Rights in Europe of July 21st 1998.

\(^8^4\) Tanja, J “More than a million Gypsies in Romania” O’ Drom April 1990 p14-16 at 15. The same article notes that estimates as to the number of Roma in Romania vary from 650,000 to over two million, at 14.
independence are obviously at odds with the geographical and cultural diversity of many Roma communities so this is not an issue in this case. Thus there is in principle no political reason why a state should be unwilling to recognise the Roma as a minority group.

 Whilst the need for a collective dimension to human rights protection is gradually being recognised particularly in the European arena\textsuperscript{85}, the extent to which collective rights are, or could be, justiciable is problematic. Acknowledging the ineffective, relativist stance of individual human rights does not necessarily entail support for justiciable collective rights. Chapter Seven discusses possible ways of developing minority-based rights as complimentary rather than alternatives to individual rights.

 Support for collective rights is seen by many as the only viable solution to problems of minority conflict and discrimination. Minority rights can thus be viewed as one part of the commitment to democracy and the rule of law. Andre Erdos argues:

\textit{The progress of democracy must be accompanied in every country by the implementation of a sound, sensible and generous national minorities policy which excludes all kinds of nationalism and chauvinism either on the part of the majority or the minorities}\textsuperscript{86}.

Methods of Collective Rights Recognition

A recognition of a collective identity is necessary for the protection of the Roma as a national minority. Such an approach has received support from the Council of Europe and the OSCE, but it is clear that the Roma do not fit easily within the definition of

\textsuperscript{85} The OSCE although only a politically rather than legally binding document, has clearly progressed into the realm of collective rights, see for example The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 29th 1990 reprinted in HRLJ 232 (1990), Part IV deals specifically with minority rights. Recognising them as 'an essential factor for peace, justice, stability and democracy in the participating State'.

\textsuperscript{86} Erdos, A “Minority rights” New Hungarian Quarterly 1987 28 (106) p131-135 at 132
national minority. In the UN the focus is on 'ethnic, religious or linguistic' minorities, widening the net to non-territorial groups such as the Roma.

The emphasis on the individual 'in community with other members of the group' in both regional and international documents is addressed in Chapter Three. It will be seen that international law at present situates rights in members of minority groups rather than the group per se and as a result it is unclear whether a group could demand the necessary resources to improve the situation of their people.

The need to fit within the construct of a national minority has led some Roma activists to strive to present a unified homogeneous community with a common cultural identity. This process of ethnogenesis has led to a growth in Romani ethnonationalism. The very words 'national minority', although not specifically defined in international documents, presuppose the existence of a national identity and perhaps even a homeland, forcing the construction of a separate nationality. It has further been argued that an emphasis on ethnic distinction and separatism enables states to evade responsibility to minority groups by reinforcing the validity of the nation-state.

In a powerful critique, Nicolae Gheorghe contends:

*The discourse of national minorities is another way to reproduce and to reinforce the nation-state. The fact that the nation-states are so generous now to these 'minorities' is just one device to reinforce the legitimacy of these states as ethnic states, states which actually belong to an ethnic 'majority'.*

A growth of nationalism of any size is at odds with the fundamental importance of human rights for all and such a consequence will need to be seriously considered in an

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87 See below Chp 6. p257-258
88 For further discussion see Gheorghe, N "The social construction of Romani identity" in Acton (ed.) *Gypsy Politics and traveller Identity* (1997) Univ. of Hertfordshire Press at p160
89 Acton and Gheorghe *supra* n30 at 32-40.
account advocating increased support for minority rights. The emphasis on ‘ethnic, religious and linguistic minorities’ in Article 27 of the International Covenant on Civil and Political Rights may avoid this potential problem but the language increasingly being favoured in European documents such as the Framework Convention on the Rights of Persons Belonging to National Minorities, shows clear preference for ‘national minorities’.

This has prompted some Romani intellectuals and activists to call for a new status as a legally recognised transnational minority. A status that would be afforded irrespective of citizenship and residence. The Roma National Congress draw attention to their unique history as a non-territorial minority confronted with racism and persecution and advocate a ‘European Charter on Romani Rights’ to provide a firm legal status for Roma throughout Europe. The Charter envisaged by the RNC would include: the right to political representation as an ethnic minority and the right to operate an autonomous education system as well as more traditionally inclined rights to protect against discrimination and violence. The general principles of the recently established ‘Roma Participation Program’ of the Open Society Institute, Budapest echoes the need to draw on transnational perspectives:

As a de facto non-territorial minority in Europe, the Roma occupy a unique position, both historically and politically. Their situation is analogous with that of European Jewry, except that the Roma do not have the option of claiming political sovereignty as an independent state. Efforts to improve the situation of Roma must acknowledge this unique position.

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90 Gheorghe supra n88 at 160.
91 Roma National Congress supra n49 at 1.
94 Roma Participation Program “About the RPP” Reporter - see App. 2
Whilst this may be an appropriate description of the Roma today, it sits uneasily with the traditionally conceived view of human rights as well as with the primacy of the state as evidenced through the importance of territorial integrity characteristic of international legal documents. Newly emerging concepts of national minority intrinsically favour loyalty to the state over any minority identity. Thus, such a claim will be unlikely to receive support from the major actors, the member states, who will regard their territorial integrity as under threat.

**Concluding Remarks**

The Roma voice, stifled for centuries, is getting louder. Demands for increased political representation accompany the wider debate on the Charter for Romani Rights. To be effective, such demands must involve some sort of affirmative action strategy or collective rights recognition.

If a strategy based on the recognition of the collective nature of rights is deemed inappropriate, it remains to be seen how far the rights of Roma can be redressed through the individualist emphasis. A challenge is clearly presented for the human rights theorist: what use are such rights if they cannot protect the most vulnerable and weakest members of civil society?

In a recent statement to the OSCE, the Legal Director of the European Roma Rights Centre presented data on the systematic abuse of human rights across Europe. The documented abuse is demonstrated by police, officials, politicians, social workers, educationalists and the neo-Nazi movement in Europe, it derives credibility from
public acquiescence and, in many cases, public participation. The evidence of the
ERRC, supported by the other delegates, was presented with the statement:

I hope I do not overstate matters when I tell you that the ill-treatment of Roma is
perhaps the most important human rights concern in Europe today, and the problem
is getting worse."  

As a litmus test, the present treatment of Roma in Europe is indicative of societies far
from civil. The ideals of tolerance and equality lying behind the movement for
universal human rights protection, now in place for half a century, are not protecting
the most vulnerable citizens of Europe. It perhaps comes back to the old adage that
human rights words alone cannot force a society to respect human rights.
Nevertheless, societies respectful of the rule of law and democracy must be seen to
promote this respect, through education and tolerance. Such respect must start from
the top and work down. When it comes to the Roma however, it would not be an
exaggeration to suggest that such respect is absent at all levels. The civil society, to
which Havel alludes, is a distant vision for Europe’s fastest growing minority.

95 Goldston, James speaking at OSCE (1998) supra n83 at 12.
CHAPTER TWO

THEORETICAL ASPECTS OF THE PROTECTION OF GROUPS IN INTERNATIONAL HUMAN RIGHTS DISCOURSE.

Introduction

This chapter focuses on the theoretical arguments underpinning the debate on the most effective ways of improving access to justice for the Romani communities of Europe. In assessing the value of affirmative action strategies and special group-based rights, the discussion necessarily entails an analysis of the individual versus collective rights debate. It will become clear that the individualist emphasis, still predominant in international human rights law, does not meet the demands of this universally marginalised group. In recent times ethnic mobilisation has led to calls for recognition of the Roma as a transnational minority group1. Such a proposition, while alien to the language of international law at present, is regarded as essential to redress entrenched prejudices and empower the Roma as a community. Alternatively, it could be argued that this label may promote enforced homogeneity and necessitate the exclusion of groups such as settled Roma and New Travellers or Irish Travellers. Perpetuating the myth of the ‘true-blooded’ Romany, such a label may in fact lead to greater exclusion and marginalisation.

This chapter will endeavour to find a way around this disruptive, antagonistic dichotomy. To meet this objective, the various approaches to minority protection are
discussed and a preference for internal, localised self-determination is expressed. This may serve to improve the situation of all Roma, Gypsies and travellers at a regional level. On a global level, many of the problems faced by those identified as Roma are similar to those faced by other travellers. They arise out of intolerance and a mutual lack of understanding between Romani and gadjo communities. Such issues could be addressed more successfully on an international level, with the affirmation of common values and traditions. The establishment of cultural institutions and information centres may in turn serve to empower those at a local level. Such issues will be explored in later chapters.

The Language of Liberalism and Human Rights

An examination of the individual emphasis of human rights law in Chapter Three, reveals the paradox of limited group rights recognition within the individualist framework. The drafters of the United Nations Charter and Declaration were proud to leave behind the language of minority rights endorsed by the League of Nations regime. Nevertheless it is apparent that many of the positive rights in the International Covenants of 1966 have collective dimensions; without acknowledgement of the group these rights are largely meaningless. Such is the case with freedom of religion and association, both of these rights hold a collective element. However, the way that these rights are framed in both the United Nations Covenants and in the European Convention on Human Rights and Fundamental Freedoms (hereafter ECHR) is abstract, applying only to the individuals who comprise the groups in question. This abstraction is also applicable to the minority rights provision in Article 27 of the

International Covenant on Civil and Political Rights (hereafter referred to as the ICCPR) which vests in ‘members of minorities’. In his analysis of group rights claims, Ian Macdonald notes the importance of abstraction of the individual in the liberal tradition:

*The development and extension of standard liberal rights has been to abstract from the particular conditions of groups*.3

In keeping with this abstraction is an unwillingness to define a minority for the purpose of Article 27 of the ICCPR, discussed in detail in Chapter six. Even the recently drafted Council of Europe Framework Convention on the Protection of National Minorities4 avoided the difficulty of arriving at a definition. The task is further complicated by the different types of minorities that attract protection in the various international documents. Article 27 of the ICCPR refers to ‘ethnic, religious or linguistic minorities’ whereas the regional provisions such as the Helsinki Final Act and the Framework Convention prefer instead the term ‘national minority’. The application of the following theoretical discussion to the Romani minority, if indeed there is such a thing, will be examined in Chapter six. One of the purposes of this chapter is to situate the claims for a transnational status in a theoretical context, thus helping to analyse their potential for inclusion into human rights norms.

**Academic Debate on the Nature of Group Rights**

The discussion on group based rights is a relatively modern phenomena. Its popularity can be traced back to the writings of the German legal theorist, Otto Von Gierke (1841-1921) who opposed the Roman theory which understood groups as nothing

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2 See Chp.6 p224
more than the sum of their constituent parts. Gierke’s work was translated into English by F.W Maitland (1850-1906) and thus the tradition of English Pluralism developed. Writers such as R.M MacIver and J.N Figgis argued that citizenship does not reflect all the societal interests of individuals. The state was considered to represent one of many claims on an individuals’ loyalty. G.H Cole developed this approach, arguing that groups could be sovereign within the functional sphere which concerns them. Cole’s discussion regards the state as sovereign only in areas of national concern, such as national security; it has no jurisdiction over the interests of groups.

The group rights which so interested the English pluralists were mainly centred on voluntary associations, formed for a variety of purposes, such as leisure and work. The relevance of the debate to specific ethnic or national minorities had been touched upon by thinkers such as J.S Mill, who advocated national self-determination as a prerequisite to the realisation of political freedom. However, it appears to have received little theoretical development until the post war emphasis on the internationalisation of political theory.

The topic of group or collective rights fell out of favour with academics and lawyers following the collapse of the League of Nations regime and the rise of National Socialism in Germany. Protection of group rights was seen by many as synonymous

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7 MacIver, R M “Society and state” The Philosophical Review, XX (1911) at 41

8 Figgis, J N “Respublica christiana” (1910) reprinted in Stapleton *supra* n6 at 38.

9 Cole, G D H “Conflicting social obligations” (1915) reprinted in Stapleton *supra* n6 at 94.

10 Stapleton *supra* n6 at xiii.

11 Mill, J.S *Considerations on Representative Government* 1861 (1958) Liberal Arts Press, New York Ch. XVI.

12 See Chapter 6 passim.
with a violation of individual rights; the major rights critique provided by Marxist thought received little credibility during the post-war years. In recent times however, as discussed in Chapter Six, there has been increasing international recognition that the traditional liberal focus on the individual is failing to protect the liberty of members of groups, particularly ethnic minorities. Blindness to group difference, once viewed as essential to respect the sanctity of the individual, promotes the false assumption that societies are homogeneous, glossing over serious ethnic inequalities that permeate many Western nations, serving to promote lack of understanding and intolerance.

Much of the academic debate on the group versus individual rights continuum has been circular and repetitive. There are those who contend that some form of collective rights is necessary for the full realisation of human rights (such as Margalit and Raz, Kymlicka, Vander Wal and Young,) and there are those who argue by contrast that only individual rights should be recognised by international law (such as Waldron and Donnelly). However, much of this ostensibly necessary dichotomy between the two perspectives is misleading and has probably contributed to the reluctance, evidenced in international treaties, to recognise group-based claims.

The value of community

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13 In Rawls’s *Theory of Justice*, widely regarded as the cornerstone of liberal political theory, the focus is purely on justice for individuals- *Rawls, A Theory of Justice* (1973) OUP, Oxford


15 Ibid. at 50 argues “Individualism, combined with the usual stress on personal merit, is destructive of cultures other than the majority or dominant culture”.


A confusion in terms has perpetuated much of the dichotomy, particularly with the terms ‘group rights’ and ‘collective rights’ which are often used interchangeably. The starting point with the group rights school appears to be a belief in the value of cultural membership to the individual. Avishai Margalit and Joseph Raz state:

*It may be no more that a brute fact that our world is organised in a large measure around groups with pervasive cultures. But it is a fact with far-reaching consequences. It means, in the first place, that membership of such groups is of great importance to individual well-being, for it greatly affects one’s opportunities, one’s ability to engage in the relationships and pursuits marked by the culture. Secondly, it means that the prosperity of the culture is important to the well-being of its members. If the culture is decaying, or it is persecuted or discriminated against, the options and opportunities open to its members will shrink, become less attractive, and their pursuit less likely to be successful.*

The value of cultural identity is also stressed by others concerned with group-based rights, such as Darlene Johnston, Iris Marion Young, Michael Hartney, Yoram Dinstein, Johan Degenaar, Vernon Van Dyke and Charles Taylor to name but a few. Membership and allegiance to a particular group is not simply a significant element of a person’s life, it is considered to frame individual personality. The demand for recognition, Taylor argues is fundamental to our understanding of

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18 *supra* n16 at 87.
19 Ibid. Kymlicka at 13
20 Young *supra* n 16 at 166; “Towards a critical theory of justice” Social Theory and Practice Vol.7 No.3 (Fall 1981) p280-302
23 Degenaar, J “Nationalism, liberalism and pluralism” in Butler, Elphick and Welsh (eds.) *Democratic Liberalism in South Africa* Wesleyan Univ. press, Connecticut at 247
ourselves\textsuperscript{27}. The attitude of the enveloping society towards our culture has profound effects on our identity:

*The thesis is that our identity is partly shaped by recognition or its absence, often by misrecognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves*\textsuperscript{28}.

As a result, Michael Walzer argues, the state should not interfere with the private sphere of personal life which includes cultural membership: “For support and comfort and a sense of belonging, men and women look to their groups; for freedom and mobility, they look to the State”\textsuperscript{29}. Some writers, it will be seen, take a different view, arguing that the state cannot remain indifferent to the plight of these cultural groups.

As far as the Roma are concerned, an individual’s identity appears emmeshed in the group. Liégeois writes:

*The individual is that which his belonging to a given group makes him. He is neither known nor recognised as an individual, but by the situation within the group, which determines his identity both for himself- his self-designation - and for others: the ways in which he will be seen by them, and see them in turn. Hence the significance, when people meet, of employing linguistic and cultural elements and designations, enabling the individuals in question to define themselves and each other, to differentiate themselves and yet feel a common bond*\textsuperscript{30}.

The positive recognition and protection of identity is advocated by Michael Sandel, who espouses the view that hatred is flourished by an anomic, mass society that does not support cultural identity and group rights: “Intolerance flourishes most where


\textsuperscript{28} Ibid 25.

\textsuperscript{29} Walzer, M “Pluralism: a political perspective” in Kymlicka (1995a.) *supra* n 16 at p139-154 at 148.

\textsuperscript{30} Liégeois, J. P Roma, Gypsies, Travellers (1994) C/E at 63.
forms of life are dislocated, roots unsettled, traditions undone"31. Sandel's 'communitarian' perspective is the extreme point of recognition of the importance of the collectivity; rejecting the political discourse of rights altogether and demanding that the State actively promotes the identity of the group.

However, the importance of cultural identity is not generally dismissed by the individualist theorists32. Macdonald is critical of the view of the group as merely an aggregate of individuals but argues that notions of group rights are unnecessary to enable groups to develop and flourish. Jeremy Waldron argues against the notion that Liberals necessarily reject all social dimensions of a person's identity33.

Chandran Kukathas similarly emphasises the importance of group membership to the individual but believes that the liberal language of individualism is the only way that such competing group claims can be treated fairly34. This can clearly be seen in his elevation of the individual right to exit the group over the interests of the group to self-preservation35. Indeed, even the arch-individualist, anti-liberalist writings of thinkers such as Frederick Nietzsche36 and Martin Heidegger37 recognise the significance of group membership in the formation of the person. The implications of such theories is

32 There are some notable exceptions, particularly the Cosmopolitan Alternative advocated by Jeremy Waldron. He criticises Kymlicka and other theorists who treat cultural membership as necessary to the individuals well-being, arguing that such cultural identity is not necessary for rational meaning and choice: "In general there is something artificial about a commitment to preserve minority cultures. Cultures live and grow, change and sometimes wither away; they amalgamate with other cultures, or they adapt themselves to geographical or demographic necessity" (Waldron, J supra n $17 at 109).
34 Kukathas, C "Are there and group rights?" in Kymlicka (1995a) supra n17 at 230.
35 Ibid. at 238
far from an endorsement of collective rights but serves to caution against the notion of the Self as a purely atomical, isolated unit removed from its surroundings and history.

From this point on the two perspectives begin to drift apart; the individualist approach focuses on the protection of cultural identity from a non-discrimination angle, possibly extending to an understanding of group rights in the form of affirmative action; whereas the collective rights proponents look for a solution in special minority rights.

The importance of the group to the individual

The distinction lies in the extent to which group membership is considered important to the individual and the best way to give effect to this through human rights standards. Some theorists refuse to accept that any human rights can or should have a collective dimension. Jack Donnelly contends that unless human rights rest solely in individuals they are meaningless: "If we are serious about the idea of human rights, there is no alternative to holding firm on the principle that they are the rights of individuals, and of individuals only."38. It is considered that the application of rights based on group status will inevitably threaten individual rights by promoting ‘a separatist mentality that elevates ethnic identity over universal human identity’39.

Within this approach, it is argued that the interests of the members of minority groups do not require special protection over and above that which can be provided by an enlightened interpretation of the non-discrimination standards codified in international documents, coupled with the recognition of other substantive rights such as freedom of association and expression40. Such an argument receives support from the absence of

38 Donnelly, J supra n 17 at 45.
39 Rockefeller “Comment” in Gutmann (ed.) supra n27 at 89
40 Rodley, N S “Conceptual problems in the protection of minorities: international legal developments” HRQ Vol.17 1995 at 64-5; Packer, J “On the definition of minorities” 23-65 in Packer
international recognition of collective rights i.e. rights which are intrinsic to the
community rather than merely derivative.

This ethnocentric perspective fails to recognise the intricate link between group and
individual rights that makes individual rights without a collective dimension,
meaningless for many people from diverse cultural backgrounds. The primacy of the
individual over their community can be seen as an attractive approach where all people
are created equally and have equal access to education. However, for many people
born into unequal, disadvantaged situations, the primacy of individual rights does not
represent their experience and may seem largely meaningless. J Herman Burges
concurs with Donnelly that the purpose of human rights should be in securing the
indispensable conditions necessary for existence as a human being, yet regards the
realisation of collective rights as compatible with, and often essential to meet this
objective. A broad interpretation of equal dignity incorporating a recognition of
individual difference, as advocated by Taylor and Rockefeller, necessitates support for
the survival of cultural groups.

Univ., Finland argues that the basic error of post-War minority protection has been to depart from the
general premise of equality and emphasise difference.

41 Such criticisms have been levied at the individualistic interpretations of Western thinkers by writers
from some third world nations. See Zvobgo, Eddison Jonas Mudadirwa “A Third World View” in
Kommers and Loescher (eds) Human Rights and American Foreign Policy (1979) at 95; Panikaar, R
“Is the notion of human rights a Western concept?” 1982 Diogenes 120 p75-102. Donnelly
recognises that the values of Aboriginal communities are at odds with the individualist tradition. He
advocates individual human rights even though at odds with their traditions as providing a powerful
weapon against the destruction of their land and values: Donnelly, J supra n17 at 52-3. However, it is
apparent that in defending their land rights Aboriginal communities have had most success in
working as a group to secure reserves for their people.


43 Herman Burgers, J “The function of human rights As collective And individual rights” in Berting
supra n16 at 73.

44 Supra n27 Taylor at 39-42 and Rockefeller at 87.
Indeed, individual rights violations may often arise out of a denial of collective rights.\(^{45}\)

For example, when the cultural values of a minority group are not acknowledged by the State, individual members may find that their rights of expression and association are restricted.\(^{46}\) In such a case it would appear fallacious to draw a sharp distinction between individual and collective rights.

The distinction may also appear absurd when one considers the option of leaving the group, especially when the particular group is a visible cultural minority. In considering groups, membership of which has a high social profile, Margalit and Raz observe that there is no question of choice being involved in membership of a particular cultural group.\(^{47}\) Thus integration into an alternative culture would be a 'very slow process'.

With this in mind it is difficult to see how any theory of justice can treat the application of collective and individual rights as anything other than interdependent.

**The Cosmopolitan Alternative**

Advocated by Jeremy Waldron, who makes reference to the writings of Salman Rushdie, the 'cosmopolitan alternative' acknowledges the importance of culture to our individual identities, but also emphasises the variety of cultural sources to which we are exposed.

> From the fact that each option must have a cultural meaning, it does not follow that there must be one cultural framework in which each available option is assigned a meaning. Meaningful options may come to us as items or fragments from a variety of cultural sources.\(^{48}\)

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\(^{45}\) Baehr, P R and Vander Wal, K "Human rights as individual and collective rights" in Berting supra n16 at 37.

\(^{46}\) The cultural insensitivity of Part V of the Criminal Justice and Public Order Act 1994 which criminalises unauthorised camping - rights to non-interference with family life and freedom of association are seriously undermined as a result.

\(^{47}\) Margalit and Raz "National self-determination" in Kymlicka (1995a) supra n16 at 84.

\(^{48}\) Waldron supra n17 at 106.
Waldron argues thus: it would be unwise to promote certain ethnic cultures because they are so singularly fundamental to the individual well-being. Modern person is a ‘creature of modernity, conscious of living in a mixed-up world and having a mixed-up self’.\(^{49}\)

It is easy to see that Waldron has a particular type of ‘modern’ person in mind, presumably those people who do not feel bonds with numerous cultural sources are regarded as ‘primitive’ and undeveloped. Borrowing from a variety of cultural stimuli may be an increasing occurrence, even a desirable ideal, but one could argue that it is unrealistic when applied to disadvantaged and long-term marginalised communities. Waldron’s culture may allow him to enjoy these various sources, but it would seem profoundly unjust if those people immersed into a particular cultural group, spatially or culturally removed from surrounding influences, are to have their identity undermined because they have not ‘developed’ so as to partake in the borrowing process.

Furthermore, it is difficult to see the glory of borrowing from this variety of cultural alternatives when the cultures they depend on are themselves unprotected and undermined. For example, the telling of travelling stories to Romani children may lose its cultural relevance and eventually die out if the travelling lifestyle itself is prohibited and can not have been experienced by the storyteller.

It could be argued that Waldron’s desire for alternative stimuli would not be adversely affected by a greater recognition of the rights of groups. On the contrary, choices would be facilitated by such recognition. Using the example of the English Gypsies: a choice, made by new-age travellers in the last two decades to begin a travelling lifestyle, has been complicated by the United Kingdom’s legislative attitude to Gypsies which emphasises sedentarism at the expense of travelling.

\(^{49}\) Waldron *supra* n17 at 95.
Waldron fears the artificial maintenance of group boundaries, the dangers of which are exposed in the writings of Iris Marion Young. For Young the self is constituted in the community. However, concerned with the use and exclusion of the ‘other’ in the formation of identity, she argues:

*The ideology of group difference in this logic attempts to make clear borders between groups, and to identify the characteristics that mark the purity of one group off from the characteristics of the Others.*

As an alternative Young advocates a relational conception of difference in which groups must be seen as overlapping, as constituted in relation to each other. This is in keeping with Taylor’s need for recognition which is framed in a dialogical context: “my own identity crucially depends on my dialogical relations with others.”

The decision to leave should surely be based on informed choice. If a person chooses to remain within their particular ethnic community then the practice of undermining that community in order to promote greater awareness of ‘alternatives’ amounts to nothing more than imperialist rhetoric. For those who are fortunate enough to be exposed to and enjoy a variety of cultural influences throughout their lives, choice is essential. Such choice will not be facilitated by the false maintenance of ethnic boundaries, neither by the erosion of minority identities.

**The Communitarian critique**

Communitarianism was popularised by, but is by no means confined to, the American sociologist Amitai Etzioni in his work *The Spirit of Community*. According to

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51 Young *supra* n16 at 158-9

52 Taylor *supra* n27 at 34

Elizabeth Frazer and Nicola Lacey the basic message of a Communitarian philosophy is clear:

*...unless we can revive the idea of a substantial common life, unless we can design political (state and non-State) institutions which enable each of us to feel empowered and involved as citizens, our society may disintegrate, either literally or in the sense that it will be governable only by authoritarian means*\(^\text{54}\).

Plagued by his perception of teenage American apathy, Etzioni is concerned to stress the responsibilities and duties of the citizen to their community in an attempt to recreate the sense of belonging through reaffirming a set of shared moral values\(^\text{55}\):

> *We suggest that free individuals require a community which backs them up against encroachment by the state and sustains morality by drawing on the gentle prodding of kin, friends, neighbours and other community members.*\(^\text{56}\)

Etzioni is offering a critique of individualism coupled with a prescription to make society ‘better’. However, this should not be used to detract from some of the more interesting communitarian arguments as to the boundaries of group identity.

The Communitarian philosophy rejects the notion of the atomistic individual and with it the contractarian vision of the individual existing prior to society\(^\text{57}\). Thomas Moody explains the deficiency of liberal theory:

> *Communitarians attempt to reconstruct important liberal ideals such as respect for persons, liberty, and justice on a more acceptable metaphysical basis, i.e. based on a relational self and a non-foundationalist epistemology.*\(^\text{58}\)

The importance of the community to individual development can be seen at its strongest point in Sandel’s brand of ‘constitutive communitarianism’ in which the

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\(^{55}\) Etzioni *supra* n53 at 15 and 18.

\(^{56}\) Ibid. at 15.

\(^{57}\) For a readable overview of the Communitarian vs Liberal debate see Bell, Daniel *Communitarianism and its Critics* (1993) Oxford University press.

community constitutes the person. Thus the language of individualism which seeks to isolate the self from her surroundings is deficient. Furthermore, it is regarded as a myth that individualism, where the right is prior to the good, does not promote a particular vision of the good life.

In ‘On Liberty’, J.S Mill defends the liberal proximation of the priority of right:

*The only freedom which deserves the name, is that of pursuing our own goods in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it*.

Sandel’s communitarian critique supports Kymlicka’s deconstruction of the liberal state’s ‘benign neutrality’ by which the state is supposedly neutral and not linked to any aspiration of the good life. Dworkin contends that a liberal state will not promote a particular substantive view of the good life, promoting instead the universal notion of equal respect. However, this is itself a particularist, albeit broadly constructed, version of the good life which promotes autonomy as the greatest good and can thus be seen as little more than an example of liberal hegemonic cultural supremacy. Charles Taylor argues that the affirmation of certain rights ties us to the affirmation of particular capacities and thus defines certain standards by which a life may be judged full or truncated. Such a view receives support from Mill’s contention that only individuals in the maturity of their faculties are sovereign over their mind and body:

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61 See Kymlicka, W below at 102


63 Taylor “Atomism” in Avineri, S and De Shalit, A (eds.) *supra* n25 p 29-50 at 43; and *Supra* n27 at 43.
“For the same reason, we may leave out of consideration those backward states of society in which the race itself may be considered as in its nonage”64.

Taylor argues that the conception of ourselves as autonomous individuals could not have been sustained alone or in a different type of society65. Consider, for example, members of a geographically isolated community that has been marginalised and excluded from the larger society - they do not exhibit any desire to choose between different conceptions of the good life. A common criticism directed towards the Roma is their lack of active interest in formal education and unwillingness to engage in wage-labour. Both make possible the liberal view of the good life, which enables the individual to maximise potential for choice in life, by promoting personal autonomy and self-development. The conception of the good life is likely to be very different for members of a culture which values family relations and group networks over the individual. Taylor asks: how long could we continue understanding autonomous choices without public debate concerning moral and political questions?66. Thus in the absence of such a supporting culture, the concept of rights and autonomy find no place.

In order to maximise human potential, the political system must, Sandel argues, be based on collective interests:

_to imagine a person incapable of constitute attachments such as these is not to conceive an ideally free and rational agent, but to imagine a person wholly without character, without moral depth. For to have character is to know that I move in a history I neither summon nor command, which carries consequences none the less for my choices and conduct_67.

64 Mill _supra_ n25 at 16.
65 Taylor, C “The modern identity” in Daly, M (ed.) _supra_ n25 p55-71 at 59.
66 Ibid.
67 Sandel, M “The procedural republic and the unencumbered self” in Avineri and De Shalit (eds.) _supra_ n 25 p12-28 at 23.
A powerful critique of communitarianism has been offered by Feminist writers such as Elizabeth Kingdom and Marilyn Friedman who are concerned that the attractive discourse of community spirit and togetherness can mask and legitimise oppressive practices and attitudes towards women. Traditional liberal individualism has also been criticised for ignoring the experience of women and allowing the public/private dichotomy to operate through the undermining of women’s experiences. Feminists find an appealing aspect in a political theory which is keen to advocate the collective experience rather than simply the white, male, dominant experience. On closer inspection though, the gender issue appears undeveloped in much of communitarian thinking. Frazer and Lacey observe that: “it hardly begins to address the political problem of overcoming the domination and inequalities which deprive certain groups of a voice, or give their voices systematically lower status.”

It can be seen that this is a major difficulty with the Communitarian agenda; excluded groups and alternative moralities are unlikely to be tolerated in a community concerned solely with the public good. The issue of who has the power not just to speak but to be heard is undeveloped.

Communitarianism does, it is suggested, offer a powerful ontological critique as to the isolation of the Self from its surroundings. Nevertheless, it is argued that the development of a political theory which rests on collective interests is not a necessity.

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69 Friedman, M Capitalism and Freedom (1964) Chicago: Univ. of Chicago press.

70 See for example Frazer and Lacey supra n54 Chps. 2 and 3.

71 Phillips, A “Democracy and difference” in Kymlicka (1995a) supra n 16 p288-299 at 293 comments that ‘abstract individualism imposes a unitary conception of human needs and concerns, and this serves to marginalise those groups who differ from the dominant norm’.

72 Fraser and Lacy supra n54 at 145.
or the logical outcome of the ontological critique\textsuperscript{73}. Feminists have identified difficulties with solely community based politics which supports the argument that any theory of group-based rights should operate in complementarity with fundamental individual human rights.

**Situating Group Rights in the Political Space**

**Assimilation v Pluralism in practice**

The United Nations 'Study on Racial Discrimination in the Political, Economic Social and Cultural Spheres' considered the different approaches a State may adopt when dealing with minorities\textsuperscript{74}.

Assimilation is a strategy based on the 'superiority of the dominant cultural group'; minority groups will be accepted in society so long as they abandon their distinct culture\textsuperscript{75}. Such a policy has been used continuously with respect to Roma in most states. Some of the more obvious recent examples which will illustrate this point include the forcible name changing policy of the Bulgarian Government which ended in 1989\textsuperscript{76}, the sterilisation programme operating until 1990 in Czechoslovakia\textsuperscript{77}, and the prohibition of unauthorised camping in the U.K\textsuperscript{78}. Douglas Sanders has similarly noted that the strategy of assimilation, widely regarded as a Western liberal approach, was equally evidenced in the socialist tradition\textsuperscript{79}.

\textsuperscript{73} Taylor, C "Cross-purposes: the liberal-communitarian debate" in Rosenblum (ed.) supra n25.
\textsuperscript{74} UN Sales No 71.xiv.2.
\textsuperscript{75} Ibid. para.370
It is estimated that some 400,000 Gypsies were forced to change their names and by 1985 virtually all Bulgarian Gypsies had received Bulgarian names.
\textsuperscript{77} Human Rights Watch *Struggling for Ethnic Identity: Czechoslovakia’s Endangered Gypsies* (1992)
HRW: NY at 50-51.
\textsuperscript{78} see O’Nions “The marginalisation of Gypsies [1995] 3WebJCLI no pagination.
For those who choose to resist assimilation, the strategy may involve exclusion or containment. Liégeois notes that the unintegrated Gypsy or traveller is perceived as physically threatening and ideologically disruptive, particularly through their laziness and asocial behaviour. It is the nomadism of the traveller that is the particular problem promoting the most fear. The traveller is defined as an asocial marginal with no fixed abode - the traveller is not born Gypsy, but becomes so.

Integration is a less hostile objective, aiming to combine diverse cultural groups in unity whilst retaining their distinct cultures. Such a strategy would seek to: "(i) eliminate all purely ethnic lines of cleavage; (ii) to guarantee the same rights, opportunities and responsibilities to all citizens, whatever their group membership." Whilst this may appear to be a desirable objective, it gives rise to one serious question i.e. how is the transcultural unity to be achieved without damaging the cultures of the constituent units? Furthermore, it will be shown, serious human rights issues are raised when the dominant culture attempts to impose any sort of unity on minority cultures.

It is easy to envisage how the integration objective may mean that a State is hostile towards special minority rights which aim to improve the situation of particular groups as such measures may also promote heterogeneity.

A pluralist approach regards cultural diversity as being of inherent value to the whole of society. It "aims at uniting different ethnic groups in a relationship of mutual independence, respect and equality, while permitting them to maintain and cultivate their distinctive ways." A pluralist policy should promote diversity at the grass roots.
level within a framework of unity and co-operation. This approach is compatible with a recognition of special minority rights and tries to avoid creating a cultural hierarchy. In his recommendations to the Sub-commission on the Protection of Minorities, Special Rapporteur Eide stated:

_The state should be the common home for all parts of its resident population under conditions of equality, with separate group identities preserved for those who want it under conditions making it possible to develop those identities. Neither majorities nor minorities should be entitled to assert their identity [my emphasis]in ways that deny the possibility for others to do the same, or that lead to discrimination against others in the common domain...Priority in minority protection should be given to members of groups that are truly vulnerable and subject to discrimination and marginalization by the majority_.

Although Eide refers to 'members of groups', he evidently perceives minorities as having their own particular identity and the vision he advocates for minority rights protection is manifestly pluralist in nature.

It is also argued that accommodation of group differences should serve to promote confidence and allegiance to the larger polity, as members of minorities will see that their identity is nurtured and not threatened. It is submitted that a pluralist vision is the only approach which does not substantially threaten individual human rights as well as group rights.

**Implications of pluralism for the group/individual rights debate**

That there are few, if any, ethnically homogenous societies in existence today is undisputed. Pluralist societies are a matter of fact, but the question remains as to whether ethnic pluralism should be promoted or discouraged. Does ethnic diversity...
have anything positive to offer society, as suggested by Lord Scarman\textsuperscript{87}, or is it divisive and potentially detrimental to national unity?

Liberalism would aim to stay neutral on this question, viewing ethnic affiliation as essentially a matter of personal choice. Advocates of collective rights, however, challenge traditional liberal norms and seek to promote a vision of a pluralist society where the ethnic diversity of the populace is not simply a private matter but is reflected in public policy. Rolf Darendorf holds that heterogeneity in a climate of peace and security is preferable to homogeneity 'as a test of human tolerance but also as a source of human creativity'\textsuperscript{88}.

Walzer outlines the three functions of pluralism thus: the defence of ethnicity against cultural naturalisation; the celebration of an ethnic identity, involving both celebration of diversity itself and more specifically, of the historical and cultural development of the group; and finally, ethnic assertiveness may serve to promote institutions, provide educational and welfare services etc. which are specific to the needs of the group and its members\textsuperscript{89}.

Pluralism can be distinguished from the orthodox liberal approach, clearly exhibited in the international human rights instruments, which regards ethnic membership as a private matter and aims to promote integration whilst being compatible with assimilation. Young argues:

\textit{The tradition of liberal individualism promotes an assimilationist ideal. It condemns group based exclusions and discriminations, along with the essentialist ideologies of group superiority and objectification that legitimate these oppressions. Liberal individualism not only rightly calls these conceptions of group identity and difference into question, it also claims that social group categorisations are invidious fictions whose sole function is to justify privilege.....The liberal individualist position}


\textsuperscript{88} Darendorf, R "Minority rights and minority rules" in Whitaker supra n 87 p79-92 at 81.

\textsuperscript{89} Walzer supra n29 at 146-7.
associates group based oppression with assertions of group differences as such; eliminating group oppression such as racism, then, implies eliminating group differences\(^{90}\).

She argues there are several problems with this approach: namely that it does not correspond to the actual experience of many people; that it presumes a conception of the self which transcends social context - such a voluntarist conception of the self is unrealistic, undesirable and unnecessary; and that it will not be likely to succeed as a strategy where some groups are more privileged than others - the cultural assumptions of the dominant cultural group evolve to become the oppressive norm\(^{91}\).

The criticism of substantive liberal neutrality has been outlined above. Rights attributed on the basis of group membership are perceived as essential in order to prevent the imposition of the cultural hegemony on members of more economically and socially marginalised groups. It is immediately obvious that the state cannot be neutral to the interests of ethnic minorities if we consider the foundation of the individual self to be rooted in the culture to which they belong. Governments tend to represent the dominant cultural group in society and policies introduced by a dominant culture are unlikely to have the same blanket effect on all members of the populace\(^{92}\). Rodolfo Stavenhagen is one of several writers who dismiss the argument that the realisation of individual rights can adequately protect members of minorities who find their cultures undermined by social and economic environments outside their control\(^{93}\).

\(^{90}\) Young in Kymlicka (1995a) supra n16 at 162.

\(^{91}\) ibid.

\(^{92}\) Clear examples can be seen with respect to education policy. Walzer, supra n 29 at 149 gives the interesting example of public welfare provision which undermines the strength of cultural institutions.

Political participation for minority groups may be the only effective way for government policies to be adequately monitored so that their effects are not disproportionate. Such a proposition is discussed further in Chapter Seven.

Inherent in the pluralist approach is the belief that cultural minorities should be supported and are thus relatively stable units. This does not mean however, that the members of the particular group do not have a right to choose to question collective decisions or an alternative way of life, although in practice this choice could be made more difficult as boundaries may be more defined. For example, segregated schooling may be compatible with the pluralist vision. The potential for the strengthening of ethnic boundaries through the education system is obvious\textsuperscript{94}.

**The Possessor of Collective Rights**

The extent to which individual rights are bound up in the realisation of collective rights is essentially a subjective issue that depends on the nature of the group boundaries as well as the extent of ostracisation from the dominant culture. In explaining the needs of certain groups for collective rights recognition, Sanders contrasts the needs of cultural minorities with other discriminated groups where there is no cohesive group identity:

*In contrast, cultural minorities seek more than the right of their individual members to equality and participation within the larger society. They also seek distinct group survival. Because economic and social forces, as well as state policies, tend to promote assimilation, the leaders of cultural minorities often look to the state for support. They seek either protection or autonomy as the means to ensure that their collectivities can survive and develop.*\textsuperscript{95}

Galenkamp argues that in order to make a good case for the need to recognise collective rights, such rights must themselves be understood as non-reducible. Such an

\textsuperscript{94} Discussed further in Chp 5 p190
understanding would presuppose "the existence of de facto, pre-legally existing non-reducible collectivities, having collective interests". Therefore, he argues that collective rights should be restricted to relatively homogeneous communities where the identities of the individual members is clearly framed by their membership in that community. In communities where the individual well-being is not so bound up with the collective identity, the individual rights of non-discrimination and compensatory affirmative action measures may be sufficient to remedy any disadvantage suffered on account of group membership.

In arguing for greater recognition of group rights, Will Kymlicka distinguishes between immigrant groups which are "not 'nations' and do not occupy homelands" and "national minorities". It is the latter to which he extends his concept of group based rights, arguing that immigrant groups seek to maintain their ethnic differences within a general policy of integration as determined by the host State. He then distinguishes both of these groups from 'new movements' i.e. associations of marginalised people such as women and the disabled who often comprise sub-cultures within the various groups.

In order for collective rights to be realistically addressed there are other questions that need to be considered, particularly as to the way in which the interests of a group are

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95 Sanders (1991) supra n93 at 370.
96 Galenkamp, Marlies "Collective rights: much ado about nothing?" Neth HRQ 3 1991 at 297. See also Vander Wal supra n16
97 Ibid. at 299.
98 Kymlicka rejects the category of collective rights as misleading, preferring to refer to group-differentiated citizenship which encompasses a variety of group rights as well as rights vesting in the group itself such as rights to self-government.
99 A distinction is made between Old World countries of 'intact rooted communities' and New world countries of immigration and ethnic diversity in the works of Walzer, M The Politics of Ethnicity Harvard University Press 1982 at 6-11 and Glazer, N Ethnic Dilemmas 1983 Harvard Univ. press at 76-83.
100 Kymlicka, Will (1995 b) supra n 16 at 14-5.
to be ascertained. Similarly, who can represent the interests of a group and the way to adjudicate between conflicting claims of representation. A minority that wishes to claim group rights would need to provide guarantees as to the individual rights of its members. These are serious questions which if left unanswered pose serious problems for the realisation of group rights.

**How would the Roma fit into this theory of group based rights?**

The Roma present a problem for Kymlicka’s distinction between immigrant groups and national minorities\(^{102}\). For Kymlicka, the ‘national minority’ is interpreted as requiring a common homeland and historical language, in much the same way as the definition of a ‘people’ as discussed in Chapter Seven. Such an approach perpetuates the myth of the genuine Romani-Gypsy whose ancestors left India in the eleventh century to migrate across Europe and into the Americas\(^{103}\). Inevitably, one becomes tied up in the descent based arguments that Kymlicka himself seeks to avoid\(^{104}\).

In this respect his theory appears simplistic. While he recognises that certain groups, particularly emphasising the situation of the African-Americans, fall between the two categories, he tends to gloss over the consequential injustice such categorisations could promote\(^{105}\). The relevant question for Kymlicka is whether the group in question arrived voluntarily in the particular country or whether they were forced to come\(^{106}\). Although he does acknowledge that an immigrant group may evolve into a national

\(^{101}\) Ibid. at 19.


\(^{103}\) Discussed in Chapter One.

\(^{104}\) Kymlicka (1995b) *supra* n16 at 23.

\(^{105}\) Ibid. at 25.

\(^{106}\) Ibid. at 24-25
minority over time\textsuperscript{107}, the implication of this aspect to his theory is that minority rights are a gift or privilege granted by the State to compensate for previous mistreatment.

As far as the issue of representation is concerned, Gheorghe and Mirga see the Romani elite as engaged in a process of ethnic mobilisation:

_The Romani elite, consisting of numerous non-governmental organisations in post-communist countries and Western Europe, attempted a revaluation of its cultural heritage and past, a redefinition and construction of its own minority identity, and a rejection of its imposed and stigmatised name, as well as the emancipation of the Romani masses. Thus, the Roma, find themselves in transition toward becoming an ethnically mobilized group, having a common stance and interests\textsuperscript{108}._

Thus the Romani leaders are beginning to address the serious need for a more focused and unified approach. The lack of formal structures in the Romani community and the fact that many of these leaders come from countries that are inexperienced in the interpretation and language of human rights, present considerable, though not insurmountable, obstacles. Demands for a European Charter on Romani rights\textsuperscript{109} and for recognition as a transnational minority\textsuperscript{110} perhaps appear to the human rights cynic as idealistic and naive. They are certainly unprecedented. Whilst international institutions have shown increasing concern for the situation of the Roma, exhibited in specific resolutions\textsuperscript{111}, the individualist language at present prevents any active support for a notion of ‘Romani rights’.

**The Individualist Approach**

\textsuperscript{107} Ibid. at 25


\textsuperscript{110} Mirga and Gheorghe _supra_ n1

Non-discrimination and Affirmative Action

Non-discrimination and particularly affirmative action measures do provide limited support for minority cultures. The question remains as to whether these limited rights are sufficient to ensure that the interests of minority members are respected and protected. These limited rights are essentially ‘group rights’ as distinguished from ‘collective rights’ in that they are afforded to individuals as members of a group. The group is not viewed as capable of possessing any rights over and above those possessed by the individual members.

In some cases non-discrimination measures will suffice in protecting the interests of the group. However, in other cases individual well-being can only be promoted by affording special rights to the particular group in its own right. This is the situation of Galenkamp’s ‘homogeneous constitutive communities’\textsuperscript{112}, which is equally applicable to the situation of the Romani community. However, the term ‘homogeneous’ needs to be interpreted widely if it is to apply to such a geographically dispersed group. Whilst an observer may note that the Roma have survived thus far without any special group-protected status, it will become apparent in this thesis that this has only been possible at the expense of individual rights and a unique adaptability to survive in hostile environments.

The Non-discrimination Angle.

Non-discrimination and equality are key themes in international human rights documents. They are the themes which define the individual rights contained in the \textit{ICCPR} and the \textit{ECHR} and they are widely accepted as part of customary international

\footnote{Galenkamp, \textit{supra} n 40 at 299.}
Walzer argues that non-discrimination measures should be sufficient to protect minority rights and equality of treatment should mean that all people in society, irrespective of ethnic or cultural affiliation, are treated the same. This approach also tends to view minority rights as essentially disruptive and separatist.

Whilst not denying the value of cultural membership, Hartney stresses that such value is individualist in nature, in that the value of the group is based on its value to the lives of individual members. The group has no value over and above the interests of its constituent members. The consequence of this approach is that groups cannot be afforded rights per se against the State—the duties being owed to the members of the group, as individuals. Individual members could have a collective interest in the preservation of the group, however this will be realised through individual rights rather than the rights of the collectivity which could essentially undermine individual rights.

Such an approach also tends to support the view that membership of a minority arises through individual choice rather than as a result of competing pressures. John Packer suggests that “membership is established by free association in relation to a specific issue” rather than by birth or particular features. Waldron views cultural exchange and interchange as part of his ‘cosmopolitan alternative’ by which people can pick and choose cultural aspects from a variety of sources, without feeling an attachment to any one particular culture. Indeed, Waldron goes so far as to assert that there are no

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114 Kymlicka (1995 b) supra n16 at 10.
115 see Waldron supra n17 at 113.
117 Packer supra n40 at 43.
118 Waldron, J supra n17.
such things as distinct cultures. Such a claim receives support if one looks strictly at the overlaps between different groups, for example those occasioned by inter-marriage. However, there is clearly a level of separation between many cultures; a product of self-affirmation as well as enforced boundaries.

**Affirmative Action Strategies**

Some of the harshness of the individualist approach was recognised during the drafting of Article 26 of the *ICCPR* which prohibits discrimination on the basis of natural or social categories. It is now understood that 'discrimination' is used in a 'negative sense only, to mean a distinction of an unfavourable kind'. Affirmative action measures aimed at redressing the inequalities experienced by particularly disadvantaged groups of society appear to be acknowledged as necessary, although temporary, measures which do not constitute 'discrimination' under either the International Convention on the Elimination of All Forms of Racial Discrimination or Article 26. The scope of such provisions is discussed further in Chapter Three.

In practice, special measures have been used in a variety of situations to remedy a disadvantage suffered by a community, examples include special land rights for particular groups; quotas of seats in the legislature and specific language rights. Such rights are based on the individuals membership of the group and are thus 'group rights'. This is essentially the limit of the individualist perspective and is not accepted by all individualist thinkers.

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120 Ramcharan *supra* n113 The fact that de facto equality of treatment may require differential measures was noted by the representatives of Chile, Netherlands, and Uruguay
121 ibid. at 261; see also Roth, S “Toward a minority convention: its need and content” Israel YBHR Vol.20 p93-126 at 104.
123 Van Dyke (1975) *supra* n24 at 611.
In the United States the issue of affirmative action has been the subject of considerable debate. A quota system was gradually introduced to remedy a perceived deficiency in the Civil Rights Act of 1964 which prohibited all distinctions on the grounds of colour. Dworkin's examination of two US cases concerning individuals claiming to be the victims of discrimination reveals the difficulties of a blanket non-discrimination approach. In the Sweatt case, a black applicant was refused admission to law school because Texas state law provided that only whites could attend. The Supreme Court held that this violated his rights under the Fourteenth amendment to the Constitution, which provides that no state shall deny a man the protection of its laws. This can be contrasted with the DeFunis case of 1974 in which a Jewish applicant was refused admission on account of his grade scores which, despite being lower than the cut off admission rate, where higher than many of the successful black applicants. The policy of reverse discrimination introduced to remedy the disproportionately low number of black lawyers, clearly posed a difficulty for many Americans raised in the liberal tradition. If justice should be colour-blind, then the colour of applicants should be irrelevant, despite the evidence that blacks had been and were still regularly discriminated against on account of their colour and were thus at an extreme disadvantage. In the event, the University of Washington agreed to allow Mr Defunis to graduate regardless of the outcome and the Supreme court thus declined to give judgement on the constitutional aspects of the case.

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126 Sweatt v Painter, 399 US 629, 70 S. Ct. 848; discussed in Dworkin ibid.
127 DeFunis v Odegaard, 94 S.Ct. 1704 (1974); discussed in Dworkin ibid.
Dworkin presents his view that the cases should be regarded as distinct and that 'reverse discrimination' is not at odds with the individualist tradition. The Equal Protection Clause did not define the nature of equality and thus DeFunis was relying not on a fundamentally asserted right that justice be colour blind but rather on a particular assertion of the interpretation of equality. Thus in a simplified version of Dworkin's argument: because this was not a strong right but rather a derivative right, it could be trumped by other claims, particularly in the interests of the wider society. Nevertheless, the subtlety of Dworkin's distinction between a strong (or fundamental) right and a derivative right, seems to elude many writers and members of the legal profession as well as the American public. In 1978 the US Supreme Court ruled by a narrow margin, in favour of a white medical student who had been denied admission to the University of California Medical School. The University operated a quota system, whereby 16% of places were reserved, in order to improve the number of black doctors. The belief that justice should be colour-blind and thereby indifferent to the racial disadvantage suffered by members of some groups prevailed against any notion of group rights. Such a view appears to have support from all sections of American society, with a Gallup poll revealing that a substantial majority of blacks and whites are opposed to the practice.

The unpopularity of affirmative action strategies may be simply attributed to the prevalence of the approved language of individualism. In an ideal world, justice should be colour blind. However, in the real world such a policy could have inherently

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129 Dworkin supra n 125 at 225-228.
130 A discussion of the Bakke case and its implications can be found in Glazer, N “Why Bakke won’t end reverse discrimination” Commentary Sept 1978 p36-41
132 New York Times 1.5.77. Poll found that 83% of whites and 64% of non-Whites were opposed to affirmative action strategies.
discriminatory consequences. An alternative explanation, particularly concerned with
the unpopularity of reverse discrimination among members of minorities, could lie in
the stigmatisation of disadvantaged groups and their members which may result from
the operation of such a policy A black doctor for example, may feel that she is
regarded by non-black staff as being the token black person regardless of her
performance and ability.

Affirmative action strategies still have many obstacles to overcome if they are going to
be accepted by individualist writers and the public at large as just responses to an
unjust situation. Nevertheless, many states have found a need to introduce these
policies. In the Czech Republic, a special initiative was introduced to increase the
number of Romany police officers. Due to their lack of formal secondary education,
many Roma could not comply with the education criteria necessary to train as an
officer. These standards were relaxed so that more Roma would be able to train, the
justification being that the police needed to be made more aware of Romany issues and
that the Romany community itself may be more likely to put trust into the police force.
Thus, the interests of the wider society are promoted by relaxing the application
criteria.

Affirmative action may go some way to remedying the defects of past inequalities, but
significant doubts remain as to whether it can really succeed in securing remedying
these past entrenched inequalities that serve as a barrier to the effective realisation of
human rights. Most of the Czech Roma who took up the opportunity of police training
left within the first few years of the programme; they were clearly unimpressed by the
latent racism and insurmountable obstacles they faced in being treated as equals. The

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133 Radio Prague E.mail service “Romanies invited to join police force” 7th March 1998.
fact that they were recruited with preferential criteria may well have added to their non-Romany colleagues assumed superiority.

Problems with the Individualist Perspective

(i) Equal treatment: Unequal consequences

It is clear that an individualistic approach is fundamentally flawed. Treating people equally without regard to their cultural specificity can lead to gross injustices; there are numerous examples of people with particular cultural identities being penalised for failing to respect the cultural values of the majority. Examples include the national, State-approved recognition of Christian bank holidays and the imposition of the national curriculum on all state schools irrespective of religious and ethnic denomination. Individual autonomy may thus enable people to enjoy their cultural identity, but only up to a point and only so long as it does not interfere with the value of the majority.

(ii) The principle of liberal neutrality

Liberal writers often refer to the cardinal principle that the State must be neutral as to the variations of the good life which individuals seek for themselves. Ronald Dworkin explains the rationale of the doctrine:

Since the citizens of a society differ in their conceptions [of what is the good life], the government does not treat them as equal if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or powerful group.


It may seem an obvious point, that a liberal state in a modern, heterogeneous society should not impose one particular version of the good life onto its citizens. Nevertheless, the vision of neutrality is contradicted by practice. Furthermore, Waldron argues that the justification for neutrality should be in the aims it seeks to serve (i.e. that of promoting a more tolerant and liberal society)\textsuperscript{136}. He argues that liberal neutrality is not a self-justifying policy: ‘one is always neutral for a particular reason, and it is obvious that one cannot be neutral about the force of that reason’\textsuperscript{137}. Thus liberalism promotes a paradox of neutrality; it is neutral only regarding liberal conceptions of the good life.

In his liberal critique of the individualist approach to human rights, Will Kymlicka argues:

\textit{It is not enough to simply assert that a liberal state should respond to ethnic and national difference with benign neglect. That is an incoherent position that avoids addressing the inevitable connections between state and culture}\textsuperscript{138}.

Positing a more relational account of the self, Thomas Moody also argues against a belief in liberal neutrality - ‘any social order will favour some forms of life over others’\textsuperscript{139}.

(iii) Affirmative action in the absence of special measures protecting identity

Affirmative action measures, such as the American quota system\textsuperscript{140}, tend themselves to conflict with individual rights and are dependant on the individuals desire to redress the

\textsuperscript{136} Waldron, J “Legislation and moral neutrality” supra n33
\textsuperscript{137} Ibid. at 165
\textsuperscript{138} Kymlicka, (1995a) supra n16 at 127.
\textsuperscript{139} Moody supra n53 at 192. Van Dyke concurs, arguing: “Even if the members of the majority are committed to upholding the dignity and equality of all and justice for all, somehow it usually works out that what dignity and equality and justice require is also compatible with their own interests. They can champion democracy, knowing that democracy assures and sanctions their dominance” at 220 in Human Rights, Ethnicity and Discrimination (1985) Greenwood, Ct.
\textsuperscript{140} Discussed at length in Glazer (1984) supra n99
grievances of her group. They may also entrench ethnic hostility rather than respect for minority cultures as the dominant group in society may perceive the beneficiaries of such programmes as 'privileged' and thus, undeserving.\textsuperscript{141}

Many minority groups require specific measures, which are actively supported and funded by the State, in order that their culture can survive such constrictive pressures. The temporary nature of affirmative action measures and the control exercised over the provisions of such measures by the dominant group, mean that many groups will not benefit unless they have a strong political voice and internal unity. Unpopular, marginalised groups are unlikely to be in a position to request affirmative action unless their identity is first protected and allowed to flourish. The aggregate will of the individual members alone cannot in most cases compete with the power of the State reinforced dominant cultural values.

A further problem with non-discrimination provisions is their inherent dependence on individual action to correct injustices. A major weakness of the non discrimination provisions in the ICCPR is the denial of any group right to petition the Human Rights Committee. Article 1 of the Optional Protocol states:

\textit{A State Party to the covenant that becomes a party to the present Protocol recognises the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State party of any of the rights set forth in the Covenant.}\textsuperscript{142}

The absence of a group right to petition, discussed in Chapter Three, is bound to deter many victims from considering such a challenge. Whilst it may be desirable for a minority to challenge the advocacy of ethnic hatred under Article 20 (2) ICCPR as

\textsuperscript{141} Means, G. P "Human rights and the rights of ethnic groups - A commentary" (1974) International Studies Notes at 17. Describes affirmative action measures as 'special' and 'preferential privileges'. This definition tends to lead to a conclusion that such measures are undeserved, rather than emphasising the unequal position that the measures aim to redress.
suggested by Alfredsson and de Zayas, an individual is unlikely to have the strength to challenge an entire legal system and may not wish to adopt the role of ‘champion of the cause’ of a particular minority group. The International Convention on the Elimination of All Forms of Racial Discrimination does recognise a group right to petition the Committee on the Elimination of Racial Discrimination\textsuperscript{143}. However, only a small minority of States have recognised the competence of the Committee to hear individual complaints and as a result there have been no minority cases heard by the Committee to date\textsuperscript{144}.

Whilst for some minority groups the non-discrimination provisions have proved to be beneficial in redressing prejudices as well as empowering members of the minority group, for many other groups that are not so well organised and focused, a great deal of work still needs to be done. International awareness of the plight of particularly disadvantaged communities is unlikely to be sufficiently promoted via the present focus on individual action\textsuperscript{145}.

\textbf{The Special Minority Rights Approach}

When referring to special minority rights it is important to distinguish them from the types of affirmative action which may fall within the non-discrimination approach

\begin{itemize}
  \item \textsuperscript{142} (First) Optional Protocol to the International Covenant on Civil and Political Rights (1966)
  \item \textsuperscript{143} Article 14(1) refers to individuals and groups of individuals
  \item \textsuperscript{144} Alfredsson and de Zayas “Minority rights: protection by the United Nations” HRLJ 14 No 1-2 (1993) at 7-8.
  \item \textsuperscript{145} Henkin \textit{supra} n113 (1979) at 113 notes that whilst there has been much interest in racial discrimination perpetrated by white people against black people, there is less concern where Africans discriminate against Asians; and ‘virtual indifference’ where the victims are other groups such as tribes or ethnic and religious communities.
\end{itemize}
discussed above. Affirmative action is based on a recognition of the disadvantage suffered by individuals as a result of their involuntary membership in specific groups. It is thus a 'group right' in that it pertains to individuals as members of a particular group. Special minority rights in contradistinction may be termed 'collective rights' in that they are derivative of the groups per se rather than individuals.

Special rights are necessary to support the cultures of many minority groups in order to prevent enforced integration and assimilation. Such measures may be of a temporary nature in order that members of particular groups can be placed on an equal footing with those of the majority or may extend at the fullest point to self-determination and self-government. Either way it must be clear that non-discrimination provisions alone cannot prevent the erosion of minority cultures. Ramaga argues that culture and group consciousness are mutually supportive and collective rights are thus the only way that minority cultures can survive the implicit contrary pressure exerted by the dominant groups in society. To focus on the individual enjoyment of culture would be to ignore the group dimension by which that culture is nurtured\textsuperscript{146}.

One of the key aspects to this approach is the perception that many groups do not have fluid boundaries and that the members do not have a real opportunity to move between cultural groups to a great extent. For many liberal thinkers, this is a problematic angle: a particular consequence is always envisaged, i.e. that minority rights will entrench ethnic boundaries and therefore decrease individual autonomy\textsuperscript{147}.

Nevertheless, many States have rejected the simple individualist emphasis and have engaged in actively promoting the interests of specific minority groups. For example, in Canada the law grants a right to French and English speaking communities the right to

\textsuperscript{146} Ramaga, P.V "The group concept in minority protection" 1993 HRQ Vol. 15 at 583.

\textsuperscript{147} Glazer, N \textit{supra} n 128 at 98 and \textit{supra} n 99 at 268; Packer, J \textit{supra} n95.
education in their own language\textsuperscript{148}. In Quebec Province, the French speaking community form a majority of the population and thus are a powerful lobbying force. An alternative method is to adopt some form of minority government. The minority may be given power to manage its own distinctiveness. For example, the Hungarian minority government system enables increased representation of minority interests at a national level whilst aiming to provide local government that reflects the cultural values of the region. A similar model is adopted in the Spanish Constitution which allows autonomous regional parliaments for cultural and linguistic minorities within the country\textsuperscript{149}.

**Problems with the Group Rights Approach**

One of the problems with providing long-term measures aimed at protecting particular minority groups, is that this may erode individual rights to criticise the culture and to move between cultures. It may in effect codify minority differences and overwhelm individual rights. For example, it may be argued that the Indian reservations in Canada and North America have artificially maintained minority differences by preventing ‘natural’ assimilation. Whereas a focus confined to recognising individual rights of non-discrimination and equality would have facilitated assimilation. Such an approach views cultural rights as essentially a private matter of individual choice, ignoring the degree of cultural ascription exercised by the majority. Membership of a minority is rarely as a result of individual autonomy, rather it is a product of a whole combination of cultural and societal pressures over which the individual has very little actual control. If anything, an emphasis on individual rights,

\textsuperscript{148} Constitution Act 1982 Charter of Rights and Freedoms s23. 
\textsuperscript{149} Simons “Catalan is spoken here (Do You hear Madrid?)” NYT 19.4.91 A9.
non-discrimination and equality perpetuates this lack of individual control as there is no element of cultural security - already acknowledged as fundamental to the well-being of individuals. An individual will be reluctant to question the culture and traditions of their group if in so doing they will be threatening the existence of the group and security of other members.

Furthermore, it is clear that rather than enforced pluralism, the danger which threatens the existence of minorities is assimilation\textsuperscript{150}. In order to give minorities the tools necessary to survive such pressures there will inevitably be a certain amount of artificial boundary construction between groups and some groups may be artificially maintained as a result. However, the liberal critique of collective rights also identifies a more worrying threat to individual rights, namely the problem of the illiberal minority.

The problem of the illiberal minority that is concerned with the survival of the collectivity at the expense of the well-being of individual members needs to be addressed before the provision of collective rights can be endorsed. There are additionally a number of practical hurdles which must be overcome if minorities are to benefit from special rights.

(i) The Illiberal Minority

Special minority support and assistance may lead to an entrenchment of cultural values, some of which may be less than liberal. Theorists who place a high emphasis on autonomy and choice but who value group rights may be faced with the dilemma of the illiberal minority that restricts the choices of its members in the interests of group preservation. This is particularly the case when territorial separation is an issue. For

\textsuperscript{150} Sanders, D \textit{supra} n 93 at 373.
example, in the former Yugoslavia, individuals from mixed marriages are having to choose their ethnic allegiance in societies composed of many different ethnic groups. Kukathas contends that the problem of illiberal minorities can only be avoided if viewed from an individualist perspective, as a union of individuals, any one of whom can decide to leave the group if their interests are not respected. The extent of injustice within the minority, he argues, is tempered by two factors: the degree of integration with the wider society - communities more integrated will find it more difficult to infringe rights, and, the principle upholding freedom of association and dissociation. However, this view whilst attractive in principle, is obviously limited. Kukathas recognises that the freedom to exit requires a wider society which is happy to accept the cultural dissident, in many cases this is an idealistic vision. Immigrants who have chosen to enter a new country with different cultural values are rarely accepted by the new society - they tend to be perceived as Outsiders, particularly if they have distinguishing physical characteristics.

Furthermore, the individual right of freedom to leave the group which Kukathas contends will prevent a minority from undermining individual rights, ignores the depth of the cultural bonds which are so fundamental to the individuals well-being. Leslie Green is similarly sceptical: "The argument is sound only if members of minority

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151 Young, I M supra n16 at 168.
152 Kukathas, C in Kymlicka (1995a) supra n16 at 252.
153 ibid. at 251-2
154 Van Dyke supra n24 at 157 argues on the issue of school segregation in the U.S that whites always regarded blacks as a race apart. The group is kept subordinate by discriminating against individual members - "To lynch one black was to intimidate them all, and to educate one was to encourage them all". Consider for example the case of the Pike family who wished to move into a house in the Somerset village of Middlezoy were greeted by a petition of ninety objecting villagers. None of the villagers had ever met the family in question, their objections were based solely on the Gypsy origins of the family. The Independent 16.5.92.
groups do in fact have a fair chance to leave if mistreated. To see how rarely that is the case, one must assess the real prospects for exit\footnote{Green, L "Internal minorities and their rights" in Kymlicka (1995a) \textit{supra} n16 at 264.}. Nevertheless, the individual right of exit has often been seen as essential if groups are to be given collective rights. In \textit{Gerhardy v Brown}, a member of the Pitjantjatjaras tribe alleged that his freedom of association had been violated when he was prevented from bringing a non-tribe member onto the collective land. Brennan J held that providing the individuals of the tribe had elected to receive a collective benefit, there was no incompatibility with individual rights - the decision being based on individual autonomy and choice\footnote{\textit{Gerhardy v Brown} \textit{supra} n122 in Triggs, G "Peoples' rights and individual rights" in Crawford \textit{The Rights of Peoples} (1988) at 148-9.}. Essentially, the right of exit is a safety net which aims to keep collective rights within the framework of individual rights. Although in practice, because of the deep rooted ties linking many individuals to their community, it may be an unlikely resort, it would appear to be a necessary limit on the power of an undemocratic minority.

It is easy to conceive of a situation where in the face of pressures to assimilate from the majority, the minority in turn restricts the expression of its members- internal minorities may thus be silenced and disempowered\footnote{supra n 155 at 268.}. Mill called the tendency to compel social conformity "one of the most universal of all human propensities"\footnote{Mill \textit{supra} n 60.}. However, the extent of this threat to the individual rights of internal minority members is contingent upon the perceived need to keep the minority group 'pure' and unified in order to prevent assimilation\footnote{Hannum argues that the increase in nationalistic tendencies among groups is a response to a state which does not recognise their needs: Hannum, H "The limits of sovereignty and majority rule:}. This perceived need is dependant on the attitude of the
dominant group in society; if the majority wish to assimilate the minority they will be looking for evidence of disunity and division amongst the group. So it may well be the case that if special minority rights were recognised in a society, the rights of internal minorities would also be less vulnerable\(^\text{160}\).

Kymlicka also points out that most nations and dominant groups in society have illiberal pasts - a fact which is often forgotten when it comes to questions of minority autonomy. Liberalisation of minority cultures must be left to the minority itself and it should not be used as a reason for denying rights to all minorities.

Thus there is not inevitably going to be a conflict between individual and collective rights within a minority group. Although, the restriction of individual rights may be part of a transitional stage in the development of the minority collective identity, this should not be used as a reason to deny collective rights. However, individuals within collectivities may not be the only people at risk of having individual rights threatened in the name of the collective good. Special minority rights for certain groups will necessarily involve a denial of rights to individuals who do not fall within that collectivity. This is an inevitable consequence of group-based rights, whether they have their basis in the collective rights school or the individualist tradition.

(ii) The inevitable conflict with individual rights

Collective rights for particular groups are bound to lead to some conflicts with individual rights. In Quebec a measure aimed at promoting the Francophone community prohibited the use of any language other than French on commercial signs. The English speaking community of Quebec challenged the law, alleging an

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infringement of the right to free expression under the Constitution and the Canadian Supreme Court had to consider where the balance of collective vs. individual rights should lie\textsuperscript{161}. Although the Supreme Court ruled against a total ban on the use of other languages finding that such a ban was disproportionate to the collective needs of the Francophone community, they also held that other measures which potentially restricted individual expression could be justified in the interests of protecting the Francophone community in Quebec\textsuperscript{162}. Similarly, in \textit{Kitok v Sweden}, the Human Rights Committee were asked to consider whether reindeer husbandry, a traditional occupation of the Sami minority, should be confined to the Sami community\textsuperscript{163}. The Human Rights Committee found that such a right could be protected by Article 27 of the \textit{ICCPR} and thus, a non-Sami could be legitimately restricted from such an occupation.

However, this conflict is not unique to the collective versus individual rights debate. Furthermore, the disruption to individual rights attributed to collective rights denial may be a far more serious matter. There are few human rights that can be regarded as absolute and universal\textsuperscript{164}. The matter is essentially one of balance: between the interests of one or a community of individuals and the rights of another. Freedom of expression is necessarily limited by the potential harm caused by racist sentiments and by public order and national security considerations\textsuperscript{165}. Even the rights of freedom of

\textsuperscript{160} Sanders \textit{supra} n 93 at 375 makes the point that tolerance of minorities will facilitate adaptation and evolution within the minority. Interestingly, he goes on to point out that tolerance may thus be a 'sophisticated route to minority assimilation'.

\textsuperscript{161} \textit{Ford v Quebec}, 2 S.C.R 712 (Canada, 1988) cited in Sanders \textit{supra} n 93 at 378.

\textsuperscript{162} Ibid.

\textsuperscript{163} HRC no 197/1985 (1988) UN Doc A/43/40 Annex VII.G.

\textsuperscript{164} Only Article 7 of the ICCPR which concerns torture or inhuman and degrading treatment is absolute. Even the right to life may be taken away as a sentence for serious crimes where the death penalty has not been abolished (Article 6(2)).

\textsuperscript{165} see \textit{J.T v Canada} 4 HRLJ 193 (1983)
thought, conscience and religion can be limited in the interests of public safety, order, health, or morals or the fundamental rights and freedoms of others\textsuperscript{166}. The implementation of international human rights standards is thus dependant on balancing and limiting the human rights listed. Gillian Triggs argues for a wide interpretation of equality:

\textit{The salient point is, that if special rights are not granted to such groups to defend their cultures, the practice of their religion, and the use of their languages, they will be treated unequally and unjustly. Minority rights thus have the purpose of ensuring the effective implementation of fundamental individual human rights}\textsuperscript{167}.

The criminalisation of unauthorised camping contained in Part 5 of the Criminal Justice and Public Order Act 1994 applies equally to Gypsies and non-Gypsies. In practice however, it will have much greater effect on the Gypsy community as travelling is an essential element of the lives of many Gypsies\textsuperscript{168}. Furthermore, universally recognised individual rights, such as freedom of association and respect for family life, are undermined by the denial of elements of the collective identity.

The issue concerning those advocating a greater recognition of group or collective rights is that the present focus on the individual does not go far enough. Vernon Van Dyke describes the liberal focus as 'unduly limited':

\textit{It is not enough to think in terms of two-level relationships, with the individual at one level and the state at another; nor is it enough if the nation is added. Considering the heterogeneity of mankind and of the population of virtually every existing state, it is also necessary to think of ethnic communities and certain other kinds of groups.}\textsuperscript{169}

If we accept, contrary to Waldron, that some cultural groups are sufficiently distinct so as to form separate focus groups, Van Dyke's reference to 'ethnic communities and

\begin{flushright}
\textsuperscript{166} Article 18(3) ICCPR 1966
\textsuperscript{167} Triggs \textit{supra} n156 at 145.
\textsuperscript{168} O'Nions \textit{supra} n78
\textsuperscript{169} Van Dyke (1995) \textit{supra} n14 at 31.
\end{flushright}
other kinds of groups’ raises the next important issue in this debate. Which cultural
groups are to be protected by group-based or collective rights? It is helpful here to
examine the approach taken by international law where a limited recognition of the
significance of group identity can be observed.

(iv) Defining A Minority

Van Dyke’s ethnic community comprises a group of people primarily of common
descent ‘who think of themselves as possessing a separate identity based on race or on
shared cultural characteristics, usually language or religion’. This self-affirmation of
cultural membership is crucial. A group whose members do not wish to be defined as
such would not be regarded as deserving such protection; to enforce protection would
be a violation of the individual rights of its members to express themselves how they
choose and to associate freely.

The problem of defining a minority for the purposes of international law has troubled
international lawyers and academics since the League of Nations first became
concerned with minority protection. Fifty years later there is still no accepted definition
as to what constitutes a minority in international law; (the United Nations Declaration
on the Rights of Minorities of 1992 contains no definition). Furthermore, the types
of minority protected by international documents also varies from ‘ethnic, linguistic
and religious’ minorities (in the ICCPR) to ‘national’ minorities (in the CSCE
documents). This lack of definition is generally blamed on the complexity of the
subject. However, other commentators have also pointed to the traditional antipathy

\(^{170}\) ibid. at 32

\(^{171}\) UN Res 47/135 of 18.12.92
and ‘fear’ that talk of minority rights invokes in national governments. These
difficulties are discussed in more detail in Chapter Six.

It has been argued that the definitional difficulties should not be considered fatal to
affording special minority protection. It would appear that in most cases recognising a
group as a minority does not present a particular difficulty and it is clear that
international law will not treat as conclusive the status ascribed to groups by the
particular state in which they live. It is submitted that there is nevertheless a need for
some international codification in this area.

States at present can easily evade protection for unpopular or small minorities and if
necessary can invoke the lack of international clarification to support their domestic
policies. Peter Leuprecht, Deputy Secretary General of the Council of Europe, noted:
“Let us not hide behind legal hair-splitting as to whether this or that definition of
minorities applies to the Roma. Let us be honest. We all know that the Roma are a
minority and a particularly vulnerable one.”

Whilst this may be an accurate representation of the real situation, Francesco Capotorti
found that the Roma are rarely recognised by States as being a legal minority targeted
with special measures aimed at equality and non-discrimination:

*It is important to remember that in most cases the groups recognised as “minorities”
or as communities which are to benefit from special treatment are well-defined
groups. Certain groups, including those which are scattered throughout the territory
of a country, seldom appear among those forming the subject of recognition by the
State with legal effect. Such is the situation, for instance, of the groups described as
“Gypsies” in a large number of European countries.*

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172 Packer *supra* n117 at 25-6.
173 Chp 6 p227.
174 Capotorti *supra* n82 para 570.
176 Capotorti *supra* n82 at para 77.
Whilst domestic recognition of Roma as a minority group has increased since the collapse of Communist regimes in Eastern Europe, this thesis will show that widespread discrimination remains as does an urgent need for special collective programmes to make the individual rights of this minority realistically attainable.

(v) Which Minorities?

It is argued that collective rights are given to a community to protect its non-reducible collective interests. As such it is preferable that they should only be given to rather homogeneous constitutive communities where the identity of the individuals is largely determined by their community membership. Galenkamp proposes indigenous peoples and traditional ethnic minorities, although he omits to give detail of the precise traditional groups considered suitable. As the discussion above indicates, the Roma may have to overcome many obstacles before fitting into the theoretical paradigm of the possessor of group rights.

Calls for the Roma to be recognised as a transnational minority depend on stressing the homogeneity of geographically dispersed Roma/Gypsy groups. This may be a problematic endeavour, stressing outdated values for some, whilst reinforcing the values of more ‘traditional’ communities. Accommodation is one example of an area where there is wide divergence, education may be another where conflicting views tend to be expressed amongst the same family group, let alone between communities.

Whilst some authors romanticise the ideological desire to travel shared by all Roma, Gypsies and other travelling people, it is unlikely that the majority of Roma have entertained the idea of taking to the road for generations. The issue is not whether they

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177 Galenkamp supra n40 at 299.
178 Ibid. at 300
179 See Ch 7 passim
180 Liégeois (1986) comments that “Nomadism is still a state of mind” supra n102 at 57.
would have continued travelling if the pressures to assimilate had not been so severe, but rather whether as a collective they wish to travel now. Clearly, it becomes impossible to impose the concept of a collective will on to Roma and travellers throughout the world as one common group. Communities with a common origin and, undoubtedly, some common values and beliefs, must not be forced to meet standards of homogeneity in order to qualify for recognition as a minority group with specific and distinct needs. This would have the effect of imposing a new kind of assimilation.

**Conclusion: Collective Rights as Supplemental**

It has been argued that the emphasis on individual rights in international human rights treaties cannot by itself redress the rights grievances of many minority groups. Whilst the individual rights approach does allow for affirmative action measures to ensure de facto equality of opportunity, it is submitted that many smaller and unpopular groups will be unable to access such measures. The emphasis on individual action to redress wrongs makes the realisation of full human rights protection a distant dream for many minorities. In a critique levied at both the traditional liberal interpretation of rights and the radical collectivist stance, Jurgen Habermas argues:

* A correctly understood theory of rights requires a politics of recognition that protects the integrity of the individual in the life contexts in which his or her identity is formed... All that is required is the consistent actualization of the system of rights*181.

The community was and still is a vital unit of Gypsy/Romani organisation and collective rights recognition may be essential if the community interests are to be preserved and developed*182. It will be shown that the individual rights emphasis fails to

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*182 Any serious account listed in the bibliography to this thesis will demonstrate the significance of the community to Romani/Gypsy identity.
meet many of the challenges presented by this minority, and in some of the new Eastern European regimes this problem is already being addressed. In Hungary, the minority government system aims to increase the participation of specific minorities from a collective dimension. This can be contrasted with the situation of the Roma in the Czech Republic where the absence of internal autonomy and collective constitutional guarantees has left thousands of Roma without citizenship.

Collective rights should not be regarded as an alternative but as a supplement to individual rights where it is clear that the latter cannot be adequately protected without some collective protection. Gábor Kardos argues that the true meaning of self-determination and autonomy should lie alongside individual rights in the strengthening of the constitutional status of the communities themselves.

There are clear dangers in prioritising the collective interests over the individual. The difficulty of labelling the Roma as a transnational minority group are extensive, but they may not be insurmountable. Progress has been made, with an increasing number of international forums and debates on the difficulties facing the Roma of Europe. Nevertheless considerable unifying work needs to be done in order to avoid dominance of the debate by unrepresentative ‘representatives’. Involvement in public life and active citizenship will serve to promote greater understanding of the extent of deprivation that the Roma face; it will also serve to inform of their positive contributions to society which are often overlooked when there are no Roma voices to remind.

At present it is probably true to say that there is limited grass roots involvement or awareness of the theoretical debate surrounding recognition as a transnational minority. Economic and social poverty in many regions prevents the active citizenship envisaged by many liberal and communitarian writers. The present reality appears to be that a balance between individual and collective interests can only be achievable at a local level. Common issues such as the violence and intolerance faced by the Roma and other travellers could be internationally addressed, but local issues which depend on the values and circumstances of the people affected, require local, internal autonomy, specific to the needs of the communities it seeks to serve. Local autonomy aims to give identity and value back to the Romani community at a level where it can be realistically attained with dramatic effects. In turn, active citizenship is likely to be promoted and a stronger transnational bond may be encouraged.

The individual rights contained in human rights documents must be respected but in order for them to be fully realised, the communities themselves must have the opportunity of developing their collective interests and values. The decision of the European Court of Human Rights in *Buckley v UK* helps to illustrate the potential consequences of this dualistic approach. Ms Buckley's individual rights under Article 8 of the European Convention were held to be outweighed by the interests of the local community. If the collective interests of the Roma/travelling minority had been adequately protected the outcome may have been very different. Finding in favour of the applicant, the Commission had recognised that living in a caravan was an integral part of the lifestyle of Ms Buckley as a Gypsy. The dissenting judgement of Judge Lohmus in the Court noted that "living in a caravan and travelling are vital parts of

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gypsies’ cultural heritage and traditional lifestyle\textsuperscript{186}. A supplemental approach would thus weigh the interests of the local community with not only the applicants right to respect for home and family life but also the rights of travelling people to live in a caravan as an essential aspect of the travelling identity.

\textsuperscript{186} Ibid at 426.
CHAPTER THREE:

THE PROTECTION OF MINORITIES THROUGH INDIVIDUAL RIGHTS

Introduction

Following the collapse of the League of Nations regime\(^1\), the concept of a general, universal protection of human rights evolved\(^2\). The United Nations Charter was proclaimed by the General Assembly as “a common standard of achievement for all peoples and all nations” which “seeks to enlist every individual and every organ of society in a universal human rights movement”\(^3\).

A brief overview of the various human rights instruments reveals a clear focus on the rights of man as an individual, although there is a limited recognition that the individual personality can only fully develop within the context of community\(^4\). The individual is viewed within a variety of social relationships which are protected under the instruments, such as family and religious groupings. Yet the rights to petition the Human Rights Committee in the UN are available to the individual rights holder only.

There is no inherent concept of justiciable group-oriented rights.

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\(^{1}\) See Ch. 6 at 230


\(^{4}\) e.g. Article 29 (1) UDHR
This chapter will examine the position of the group within this individualist perspective and identify the limitations of this approach. The following two chapters will examine, in detail, areas where the individualist focus is clearly seen to be inadequate to protect the human rights of Roma - education and citizenship. The question is how far, if at all, can individual rights protect effectively the cultural identity of the Roma.

**The obstacle of entrenched discrimination**

Roma are frequently labelled as 'foreigners' and 'outsiders' in racist pronouncements throughout Europe, and ethnic violence is steadily increasing\(^5\). In Eastern Europe discrimination against the Roma is openly practised. The wave of migration to West Europe and Canada in 1997-8 suggests that in many cases the Roma are frightened for their safety and the safety of their families. An account in a Canadian newspaper on the Czech situation observed:

*Every Gypsy in Ostrava appears to have a first-hand account of discrimination. They're the victims of skinhead beatings, verbal abuse on public transport, threatening letters. They're refused service in bars and restaurants. They're even excluded from the local swimming pool, they say. And it's getting worse\(^6\).*

A recent Slovak opinion poll revealed that whereas 94.5% of Slovaks would not mind Czechs in their neighbourhood, the figure was 76.8% for Jews and a mere 15.7% for Roma\(^7\).

Such discrimination appears endemic, exacerbated by insensitive government policies and judicial decisions which tend to perceive the Roma as a social problem, ignoring the ethnic dimensions of this widespread discrimination. A recent decision by a Czech District court in a trial under Article 196 of the Czech Criminal Code, is illustrative of

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\(^5\) See Chapter One, pp 8-13.

these deeply embedded attitudes. The trial concerned two white youths who threw four Romani passengers from a train whilst uttering anti-Roma sentiments. The District Court found the defendants guilty but acquitted them of having a racial motivation under Article 196(2). The court reasoned that as Roma were not a separate race the provision was inapplicable.

The situation of the Roma in Romania has recently been documented by the European Roma Rights Centre (hereafter ERRC) in Budapest. Their follow-up report noted a major change in the nature of anti-Roma prejudice:

*The previous pattern of community violence has been replaced by a new pattern of police raids systematically conducted in Roma communities. Before, angry mobs of villagers attacked neighbouring houses of Roma...Today, the threat comes from an official institution - the police.*

Such police raids are supported by the law enforcement establishment. The police *Mob Violence Prevention Programme* designed to address the number of mob based attacks occurring throughout the country attributed local violence against Roma to their way of life and participation in illegal activities.

Police violence has been documented in Slovakia. Following one such incident, the victims reported that electric cattle prods had been used in an early morning raid by masked police using racial slurs. The *ERRC* and the *Nevipe Foundation* have

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8 As reported by James Goldston of the ERRC to the CSCE *Romani Human Rights in Europe* July 21st 1998 at p 51.
9 *ERRC Sudden Rage at Dawn*, Country Reports series no 2 (Sept. 1996)
10 ibid. at p1
11 ibid. “Official Violence” at Ch. 3 p2
photographic evidence of beatings and burns caused by the prods. Following the raid, the local Mayor commented:

To tell you the truth, they were beaten...We are very satisfied with the results of the action, but it is necessary to repeat such raids more often. One action every 2-3 years if we realise what this (Romani) settlement means for its surroundings. Our citizens reacted very positively towards this action.

Police violence has occurred throughout Eastern and Central Europe and the judicial reaction to incidents of racist and mob violence is all too often slow or non-existent. The men suspected of lynching the three Roma men in the Romania village of Hadareni in October 1993 were released by the Chief Prosecutor apparently as a result of local pressure and fear of retaliation.

Recently the Roma Press Centre in Budapest has made complaints concerning several remarks made by the Hungarian Prime Minister, Gyula Horn, in which the Roma were criticised for their inherent criminality and lack of work ethic. Such high profile attitudes are bound to have an effect of reinforcing public prejudice; indeed, a recent opinion poll revealed that 50% of Hungarians do not like Romanies.

The situation in Western Europe, whilst not so directly discriminatory, gives rise in many cases to great concern. Many of the Roma fleeing the Czech Republic and

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14 See for example ERRC "Open letter to the Austrian Ministry of the Interior Concerning an attack by the Vienna police and 'WEGA' Special Commando Units against members of the Austrian Romani community" May 15th 1996; ERRC Newsbrief "Romani woman raped by police officers in Ukraine"; ERRC press release "Police brutality in Hungary" March 21st 1997 and ERRC "Letter to the Czech General Prosecutor" June 13th 1997 concerning the police investigation into the violent attack on two Romani men in Klatovy.
15 ERRC "Past Abuses not yet rectified" in Supra n9
17 AFP, Budapest Jan 16th (also reported in the Budapest Sun, Jan 16th)
Romania originally arrived in Germany\textsuperscript{18}. Paul Hockenos notes that racist attacks have increased ten-fold since German re-unification\textsuperscript{19} and that this violence is particularly directed at Roma, Vietnamese, Turks, Poles and black Africans\textsuperscript{20}. The Roma in Germany do not have a status as national minority and the hostility towards support for such status can be seen in the official rejection of the UN Human Rights Commission’s resolution on the \textit{Protection of the Roma} in 1992\textsuperscript{21}.

In the U.K, fascist organisations were quick in their attempt to mobilise public opinion against the arrival of Roma seeking asylum in the port of Dover\textsuperscript{22}. It has become a feature of British National Party publicity tactics to become involved in local anti-gypsy protests\textsuperscript{23}. The arrival in Britain of some two-hundred and eighty three Romanies from the Czech Republic was reported with furore in the tabloid press\textsuperscript{24}. The immigration minister, Mike O’Brien, acted quickly to reduce the period for establishing asylum claims from 28 days to five in order to deter those described as ‘economic migrants’\textsuperscript{25}.

\textbf{The Two Tenets of International Law: Equality and Non-discrimination}

The principles of equality and non-discrimination are essential pre-requisites to the realisation of human rights. They support the understanding of human rights as

\textsuperscript{18} Edginton, B notes that 24,000 people were detained in the Czech Republic for attempting to illegally depart for Germany in 1993, a significant number were Roma “To kill a Romany” in Race and Class (1992-3) Vol. 35 p80-83.
\textsuperscript{20} ibid. at 39.
\textsuperscript{22} Held on 28th February 1998.
\textsuperscript{23} “BNP denies dirty tricks” in Leicester Herald and Post 15.4.91 p1.
\textsuperscript{24} It is interesting to note the reporting of the more respectable broadsheet papers also. The \textit{Independent} headline “Gypsies invade Dover, hoping for a handout” 20 Oct. 1997 p1 and the \textit{Telegraph} “Dover nightmare” 20 Oct. 1997 p2.
\textsuperscript{25} CTK news Summary, October 27th 1997.
universally applicable; no personal characteristic can entitle a person to greater human rights than another\textsuperscript{26}.

Equality and non-discrimination are often viewed as synonymous terms. More accurately, it can be said that non-discrimination is the negative formulation of the equality principle\textsuperscript{27}. It has been argued that the prevalence of non-discrimination provisions in international law is indicative of their status as part of customary international law\textsuperscript{28}. Together proclaimed as official policy in virtually every state\textsuperscript{29}, both equality and non-discrimination are essential to any recognition of minority based rights\textsuperscript{30}. Indeed, it is often argued that the full realisation of non-discrimination provisions would make the need for minority - based rights protection redundant\textsuperscript{31}.

The advantages of an individual-centred approach to rights protection

It has already been noted that those involved in establishing a new human rights order after the collapse of the League of Nations regime were concerned to prevent the re-growth of nationalist tendencies. Drawing attention away from group affiliations enables a policy of blanket equality for all citizens to be adopted, irrespective of any notion of group disadvantage. On the surface this is an attractive argument. Biological

\textsuperscript{26} Sieghart, P \textit{The International Law of Human Rights} (1983) Clarendon at 75


\textsuperscript{28} See Judge Tanaka’s dissenting Opinion in the \textit{South West Africa Case} ICJ Reports 1996, pp3, 293. Shaw substantiates this argument by reference to article 55 and 56 UN Charter, article 2 and 7 UDHR and the provisions in the international covenants; regional documents and state practice - \textit{International Law} 1997 Cambridge Univ. Press p213


\textsuperscript{30} ibid. at 149.
racial differences are no longer regarded by social scientists as legitimate reasons for
denyng or ascribing rights to particular groups.32 Most societies are multicultural and
there is no such thing today as a pure race.33 Furthermore, the very notion of giving
extra rights to members of a particular group will invariably diminish the rights of other
individuals and cause resentment. Such resentment may be incompatible with the
ultimate goal of preventing discrimination. Indeed if we accept that most people hold
prejudiced attitudes in at least one respect, it has been argued that there are only two
ways of preventing people actively discriminating. The first is to remove the
opportunity to discriminate; the second is to show that discriminatory behaviour is
socially unacceptable (usually through punishment)34. The recognition of the rights of
minorities is unlikely by itself to stop active discrimination in society.

Related to this point is the concern, adopted by writers such as Nathan Glazer, that
group rights may be seen to exaggerate and promote group difference.35 Artificial
boundaries are thus retained and become entrenched, with the possibility of deepening
ethnic conflict.

In addition, there is of course the massive practical problem of determining which
groups deserve additional rights and how these rights are to be distributed within the
group itself. An emphasis on the rights of the individual arguably avoids these
complications in favour of a simple, egalitarian approach.

31 For example: Packer, J “On the Definition of Minorities” in Packer and Mynti The Protection of
Ethnic, and Linguistic Minorities in Europe Abo Akademie, Finland at 44.
33 Mack, R W and Duster, T S Patterns of Minority Relations (1964) Anti-Defamation League of
B’Nai B’rith, US at 25.
34 Ibid p39-41
35 See Chp 2 passim Glazer, N “Individual rights against group rights” at 98 and Glazer, N Ethnic
The Approach of international law

McKean defines discrimination as "any act or conduct which denies to individuals equality of treatment with other individuals because they belong to particular groups in society". Not all forms of discrimination are prohibited in international law. Distinctions based on innate ability or merit are not prohibited. The crucial grounds are factors over which the individual has no control. The Charter of the UN mentions the four criteria for non-discrimination of sex, race, religion and language. This list has been considerably enlarged since the Universal Declaration of Human Rights which included 'political or other opinion, national or social origin, property, birth or other status'.

Discrimination is prohibited in the International Covenants, the Universal Declaration of Human Rights and the European Convention on Human Rights and Fundamental Freedoms. It is necessary however, to examine the scope of these provisions in order to understand the limitations of these instruments in the absence of further guarantees of group protection.

Non-discrimination in the UN Covenants

The International Covenant on Civil and Political Rights (hereafter ICCPR) attends to the principle of non-discrimination in three separate provisions. Article 2(1) is the comprehensive non-discrimination and equality clause, comparable to the European Convention on Human Rights and Fundamental Freedoms. Article 26 provides for

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38 Article 2(1) UDHR.
equal protection before the law and Article 3, of limited purpose in this context, provides for equality between the sexes.

The variety of terms used such as equality before the law, equal protection of the law, non-discrimination and non-distinction is illustrative of the inconsistency of the provisions but can also be seen to cover an extensive list of situations. In all three provisions, the positive obligation to promote equality rests alongside its negative corollary of non-discrimination. Ramcharan argues that the objective of genuine equality may, as discussed below, necessitate some differential treatment. The non-discrimination elements exist to limit the areas where differential treatment is acceptable.

Article 2 is comparable in scope to Article 14 of the ECHR in that it requires state parties to respect and ensure “the rights recognised in the present Covenant, without distinction of any kind...”. Therefore, it does not prohibit discrimination outside the boundaries of substantive Covenant rights. However, when read in conjunction with Article 26 it can be seen that the potential of Article 2 is far greater than that offered in the regional instrument. Article 26 provides equal treatment before the law and could cover a vast range of situations where discriminatory treatment has occurred as a result of unequal application of the law.

The Human Rights Committee and the Roma

The issue of minority protection is dealt with in Chapter Six. However, in those states where Roma are not officially recognised as falling within the definition of minority, the non-discrimination provisions become of paramount importance. In it's General

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Comment on Article 2, the Committee clearly establishes that distinctions and exclusions based on matters including national or social origin as well as 'birth or other status' will contravene the non-discrimination provisions\textsuperscript{41}. It is confirmed that identical treatment is not appropriate in every instance and that affirmative action may be necessary to diminish or eliminate conditions which perpetuate discrimination\textsuperscript{42}.

It may then come as some suprise that the Human Rights Committee itself has said suprisingly little on the subject of Roma and other travellers. The formal absence of non-governmental organisations in the reporting process necessarily means that much of the evidence of discriminatory practices is not available to the Committee. Often the Roma are listed as a subject of concern\textsuperscript{43}, but the state party generally evades much criticism by highlighting examples of economic iniatives designed to improve the situation of Roma communities.

The International Convention on the Elimination of All Forms of Racial Discrimination

Since 1969, The International Convention on the Elimination of all forms of Racial Discrimination (hereafter ICERD) has operated as the one universal human rights instrument dealing specifically with the right of non-discrimination. The large number of ratifications is indicative of a broad support for the principles it endorses across a wide range of political cultures\textsuperscript{44}. The Preamble emphasises the equality and dignity 'inherent in all human beings' and states that 'the existence of racial barriers is

\textsuperscript{40} ibid. at 252.  
\textsuperscript{41} CCPR Non-discrimination: 10/11/89 General Comment 18 para.7  
\textsuperscript{42} Ibid paras 8 and 10  
\textsuperscript{43} See for example Concluding observations of the Human Rights Committee: Hungary 3/08/93 CCPR/C/79/Add.22 para. 10  
\textsuperscript{44} As of 1.1.93 the Convention had 132 state parties: HRLJ 14 No 1-2 at 69.
repugnant to the ideals of any human society’. Certain distinctions are permitted under
the ICERD, such as those between citizen and non-citizens or nationals and aliens
‘provided they do not discriminate against any particular nationality”45. There is no
special reference to minorities, the main objective being to promote conditions of
equality both de jure and de facto46.

‘Race’ is defined by Article 1(1) to incorporate national or ethnic origin. Partsch
contends that the important question is whether a person is deemed to be socially,
physically or culturally distinct by others, whether this is in fact true or not47. This
construction would favour the inclusion of Roma/Gypsies without requiring an
examination of their distinct ethnic origins. It is completely at odds with a traditional,
biological approach to the race question, such as that adopted by the Czech District
Court above48.

s2(1) imposes a negative obligation on state parties to pursue without delay a policy to
eliminate racial discrimination; measures to be undertaken include effective provisions
to review Government policies and to nullify/rescind/amend laws of a discriminatory
nature and to encourage integrationist, multiracial movements and ways of eliminating
barriers between races.

ICERD and the Roma

The Committee on the Elimination of Racial Discrimination, charged with overseeing
the implementation of the provisions contained therein, has received evidence on the
treatment of the Roma on several occasions. Following the Hungarian Report of
March 1996, the Committee expressed approval at the new policy regarding the

45 ICERD Article 1(3); Lerner supra n27 at 49.
46 Pejic, J “Minority rights in international law” HRQ 1997 666-685 at 676.
47 Partsch supra n27 at 72.
48 above p83
treatment of minorities\textsuperscript{49}. However, the report is critical of the racial hatred experienced by several minorities including the Roma and, in recommending increased attention to their needs\textsuperscript{50}, goes on to state that:

_The persistent marginalisation of the large Gypsy population, in spite of continuing efforts by the Government, is a matter of serious concern. It is noted that the de facto discrimination Gypsies face in the enjoyment of their economic, social and cultural rights increases their vulnerability in a context of economic crisis. Concern is expressed that three quarters of the Gypsies are unemployed with no prospect of entering the labour market\textsuperscript{51}._

Both the reports of Spain\textsuperscript{52} and Czechoslovakia\textsuperscript{53} devote attention to the situation of Roma in these countries, it being obvious that such a consideration is within the ambit of the Convention.

The issue of repatriation agreements was raised in the Committee's concluding observations on the 1993 report of Germany. Considering the obligations under Article 2, clarification as to the agreements which sought to repatriate Roma and Sinti asylum seekers from Romania and Bulgaria was requested. In addition, the Committee sought information on the level of representation in national elected bodies and the cultural protection of those Roma and Sinti without legal German nationality\textsuperscript{54}.

\textit{Problems with the ICERD Approach}

The Convention can be criticised on several counts. The lack of adequate enforcement is dealt with below and this is in part attributable to the wording of the text which,

\textsuperscript{49} CERD Concluding observations: Hungary. 03/28/96 CERD/C/304/Add.4 at para.11
\textsuperscript{50} ibid. at para. 21.
\textsuperscript{51} ibid. at para. 14.
\textsuperscript{52} CERD Ninth periodic reports of States Parties due in 1986, Addendum, Spain 1 CERD/C/149/Add.14.
\textsuperscript{53} CERD Tenth periodic report of States parties due in 1988 Addendum, Czechoslovakia CERD/C/172/Add.5.
\textsuperscript{54} CERD Concluding Observations of the Committee on the Elimination of Racial Discrimination: Germany15/09/93 A/48/18 paras. 426-452
according to Meron, exacerbates the “difficulties through its lack of precision”\textsuperscript{55}. Furthermore, whilst it allows for special measures to be introduced to compensate disadvantaged groups, the introduction of such measures are ultimately at the discretion of the individual state. Given the economic difficulties of many of the Eastern European states and the comparative unpopularity of the Roma across Europe, there would seem little incentive in the Convention for any state to address the issue of special measures.

\textbf{UNESCO Declaration on Race and Racial Prejudice}

It is interesting to contrast the ICERD provisions with the non-binding UNESCO Declaration on Race and Racial Prejudice in which can be found a clear appreciation of the importance of minority identity. The Preamble to the latter notes the injustice of forced assimilation, included with apartheid and genocide as ‘offences against human dignity’. Article 1 explicitly recognises the right of all individuals and groups to be different and Article 1(3) asserts the corollary right to maintain cultural identity. The right to be different should be interpreted as enabling all individuals and groups to lead their lives ‘without needing to abandon their essential identity’\textsuperscript{56}. Article 5, concerning cultural identity, provides that every minority group has the right to decide the extent to which it desires to preserve and develop its own culture, or, if it prefers, to join the dominant culture\textsuperscript{57}. The rights bearer in this context is clearly the group,


\textsuperscript{56} UNESCO Explanatory report, Doc 20/C/18, annex.

\textsuperscript{57} ibid. at 4-5.
rather than the individual group member, prompting Thornberry to comment: "The individualist bias in contemporary international law is here completely dissipated"\(^{58}\).

In the UNESCO Declaration collective and individual rights are supplemental. The possible benefits of such an approach for the Roma were discussed in Chapter Two\(^ {59} \).

Instead, of depending on the political will to introduce special measures, the group has a right to maintain its cultural identity and as such is entitled to make a trumping demand that the state respect its interests in the face of contrary pressures. The sum total of the rights of the group members are clearly strengthened by the recognition of the group as rights-bearer and thus legal entity.

The extent to which the needs of groups may be addressed through the application of de facto equality

International law does recognise that equal treatment may result in very unequal consequences; as a result affirmative action strategies are given legitimacy by the non-discrimination provisions.

Affirmative action

Special measures for minority groups can be defined as the requirement to ensure suitable means, including differential treatment, for the preservation of minority characteristics and traditions which distinguish them from the majority of the population\(^ {60} \).

As Stavenhagen argues, minority groups need special measures to ensure real equality\(^ {61} \). The promotion of such measures does not violate the principle of equality unless a person is subjected to invidious treatment as a consequence of such measures;

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\(^{58}\) Thornberry, P *International Law and the Rights of Minorities* OUP (1991) at 296.

\(^{59}\) See Chp. 2 p73

\(^{60}\) According to Alfredsson and de Zayas "Minority rights: protection by the United Nations" 1993 HRLJ 14 no 1-2 at 2.
such treatment results from a classification or distinction; and, that classification in the
given context is unreasonable\(^62\).

Modern international law accepts in principle the notion of preferential treatment for
disadvantaged groups and their members\(^63\). In the Advisory Opinion of the Permanent
Court of International Justice in *Minority Schools in Albania* (1935) the court stated:

\textit{Equality in law precludes discrimination of any kind, whereas equality in fact may
involve the necessity of different treatment in order to attain a result which
establishes an equilibrium between different situations}\(^64\).

The modern principle of special measures for such groups has gradually developed
since the UN Charter and in 1970 it was possible to observe that “certain distinctions
are legitimate if they are special measures designed to achieve rather than to prevent
equality in the enjoyment of rights”\(^65\). Their purpose is clearly to compensate for past
injustices and such measures should not continue once that compensation is realised\(^66\).

In this way such measures are distinct from the measures included in the UN
Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and
Linguistic Minorities and the Council of Europe Framework Convention for the

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\(^{63}\) See for example Article 2 CERD (below); UNESCO Convention against Discrimination in Education (1960); (Article 6) ILO Convention No 111 Concerning Discrimination in Respect of Employment (1958).

\(^{64}\) (1935) PCU Ser. A/B No 64 at 20

\(^{65}\) McKean (1970) *supra* n2. The author goes on to provide an example in the field of education
where, international law would support the establishment of separate schooling, if required, in a
separate language for a particular population group (*Study of Discrimination in Education*, UN Doc

\(^{66}\) Lerner, N *supra* n27 at 168.
Protection of Minorities\textsuperscript{67} as the latter has the intention of promoting the maintenance of a separate identity and thereby enables a lasting manifestation of difference.

Article 1 of ICERD states that in given conditions, special measures do not constitute discrimination. Article 2(3) advocates special concrete measures with the object of ensuring full enjoyment by such individuals of human rights and freedoms. It is further stated that such measures shall not lead to the maintenance of unequal rights and therefore should be of a temporary nature only.

The preference of the term ‘racial group’ in the ICERD is much narrower than the formulation in Article 27 of the ICCPR but it is generally regarded that a group will be considered a ‘racial group’ under the Convention if it can be regarded as ethnically discrete\textsuperscript{68}. Meron argues that emphasis should be placed on the group’s economic and political position rather than anthropological factors\textsuperscript{69}.

The Convention goes further in actually requiring states to engage in affirmative action policies when the circumstances so warrant. Article 2(2) states that in certain, unspecified circumstances:

\textit{...special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purposes of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms}\textsuperscript{70}.

The World Conference to Combat Racism and Racial Discrimination, echoed this position:

\textsuperscript{67} Discussed in Chapter Six
\textsuperscript{68} Meron, T supra n 55 at 39.
\textsuperscript{69} ibid
\textsuperscript{70} Article 2(2) ibid
Such specific measures should include appropriate assistance to persons belonging to minority groups, to enable them to develop their own culture and to facilitate their full development, in particular in the fields of education, culture and employment\textsuperscript{71}.

Whilst there is little guidance on the types of measures that States could use and the circumstances that could warrant the implementation of such measures, there is a clear recognition of the rights of groups as well as individual members of groups\textsuperscript{72}. In this respect the Convention goes further than Article 27, discussed in Chapter Six, by providing specifically for affirmative action in the interests of protection of group identity\textsuperscript{73}. Group identity is further recognized in Article 14 which allows groups as well as individuals to petition the Committee where the particular state has recognized the competence of the Committee to receive such complaints\textsuperscript{74}. As Thornberry notes however, this clearly falls well short of a right to maintain a minority identity\textsuperscript{75}.

The philosophy of the ICERD can be described as ‘integrationist’\textsuperscript{76}. It is unfortunate that the distinction between integration and assimilation is not always easy to draw. In the Seventh Report of Czechoslovakia the Czech representative had described the fact that re-education programmes had led to the removal of Roma from the locality as a ‘favourable development’\textsuperscript{77}. Doubts were raised by one committee member and it became clear that the distinction between integration and assimilation blurred when essential cultural practices were ignored.

\textsuperscript{71} UN doc A/33/262 at 20-1 (1978)
\textsuperscript{72} 37 UN GAOR Supp (No 18) para 468, UN Doc A/37/18 (1982).
\textsuperscript{73} Meron, T \textit{supra} n55 at p37
\textsuperscript{74} ICERD Article 14.
\textsuperscript{75} Thornberry (1991) \textit{supra} n58 at 258.
\textsuperscript{76} Thornberry \textit{supra} n58 at 276.
\textsuperscript{77} CERD/C/91 Add 14, para 393.
ICERD’s philosophy is reflected in Article 26 of the ICCPR. The Third Committee, preferring the phrase discrimination to ‘distinction’ recognised “the word ‘discrimination’...was used...in a negative sense only, to mean a distinction of an unfavourable kind”\textsuperscript{78}. Clearly, it has become apparent that even within the individual rights emphasis, there may be a need for special measures of a temporary nature to remedy unfavourable distinctions. This must be contrasted with the UNESCO approach in which collective and individual rights are supplemental.

**Affirmative Action in Practice**

Affirmative action programmes have at their heart the disadvantaged situation of certain groups in society. The practice has been vigorously debated in the US where the limits of American individualism are tested. One critic argues:

\begin{quote}
the practice of reverse discrimination undermines the foundation of the very ideal in whose name it is advocated, it destroys justice, law, equality, citizenship and replaces them with power struggles and popularity contests\textsuperscript{79}.
\end{quote}

The infamous Bakke case revealed a tautology: how can individual rights to equality be protected if one group of individuals is automatically given certain benefits not available to other individuals? The case concerned a white applicant who had been denied a University place on two occasions due to the existence of such policies favouring less fortunate groups. Justice Powell’s literal view of equality, did not encompass such programmes:

\begin{quote}
the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another colour. If both are not accorded the same protection then it is not equal\textsuperscript{80}.
\end{quote}

\textsuperscript{78} UN Docs A/C3/L. 1028/Rev.1 and Rev.2; A/C3/S.R.1181-5, 1202-7

\textsuperscript{79} Newton, Lisa "Reverse discrimination as unjustified" Ethics 83 (July 1973) at 312

\textsuperscript{80} Regents of the University of California v Bakke 438, US 265 (1978) at 280.
Affirmative action is clearly not a universally popular strategy for remedying past injustice. A marginalised group may be further stigmatised by its designation as requiring such special treatment. It may encourage a feeling of resentment amongst other groups and the beneficiaries themselves may feel that they have been awarded a particular position as a token rather than through merit.

Individual Rights under the European Convention of Human Rights and Fundamental Freedoms (ECHR)

(i) non-discrimination

It is apparent from the wording of Article 14 of the ECHR that the Convention is only concerned with discrimination relating to the other substantive rights contained therein:

"...the enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground". For example in Buckley v UK, discussed below, the applicant alleged that her right to respect for family and home life (Article 8) had been interfered with and further that the cause of this violation resulted from legislation which discriminated against her on account of her Gypsy identity (Article 14).

However, case law indicates that in finding a violation of Article 14 it is not necessary for the Court to find a breach of the substantive article.

Article 14 is the only provision in the Convention recognising, albeit implicitly, the adverse implications that may result from membership of a minority group. Discrimination is prohibited on specified grounds including association with a national minority, social and national origin as well as the more traditional aspects of race, religion and language.
According to the European Commission, discrimination contrary to Article 14 will be established when: the facts disclose differential treatment; and the distinction does not have a legitimate aim (see below); or there is no reasonable proportionality between the means employed and the aim sought to be realised\textsuperscript{82}.

However, the provision falls well short of imposing a positive obligation on states or of endorsing affirmative action. These limitations can be seen in the case of \textit{Rassemblement Jurassien and Unite Jurassienne v Switzerland}-where the applicants planned a demonstration to protest against the removal of 'people of Jura' from the Bern Constitution. They alleged a breach of Article 11 in conjunction with Article 14, contending that the Bern authorities had taken discriminatory measures in response to anti-separatist pressure. The Commission found that the central issue of the case concerned the linguistic autonomy of the group and it was therefore outside the ambit of the Convention provisions\textsuperscript{83}.

Similarly, in \textit{Isop v Austria}, the applicant was unable to use the Slovene language in an Austrian court\textsuperscript{84}. The applicant alleged a violation of the right to a fair hearing (Article 6) as he was unable to use his mother tongue (Article 14). The claim was rejected as the language had no official status in Austria.

A further prohibition on discrimination is contained in Article 20(2) which requires states to legislate against the advocacy of "national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". Alfredsson and de Zayas

\textsuperscript{81} \textit{Belgian Linguistics Case} 1474/62 1 EHRR 252.

\textsuperscript{82} Ibid

\textsuperscript{83} Quoted in Thornberry (1991) \textit{supra} n58 at 307 see also \textit{X v Federal Republic of Germany} App 6780/74; 6950/75; 8007/77 concerning Sudeten German applicant who had been expelled from Czechoslovakia in 1945 and \textit{X v Netherlands} App 6742/74 DR 3, 98, applicant claiming that Surinam independence should have been granted only to the original Indian descendants. Both cases failed on admissibility as there is no right of self-determination included within the provisions of the convention.
suggest that minorities would benefit from making more use of this provision in arguing that the source of their discriminatory treatment can be attributable to the advocacy of such hatred.\textsuperscript{85}

(ii) The right to respect for a particular lifestyle

The right to respect for private life guaranteed by Article 8 has been interpreted to cover the freedom to develop relationships in order to fulfil one’s personality.\textsuperscript{86} Marquand has distinguished between the right to adopt a particular lifestyle (which may fall outside the Convention) and the right to respect for a particular lifestyle.\textsuperscript{87} But it seems clear that in some cases the European Court of Human Rights has been prepared to accept that ‘respect’ may entail a positive obligation on the part of the State.\textsuperscript{88}

Article 8 is really the only provision in the Convention that may entail the protection of a particular lifestyle or culture. In \textit{Beckers v Netherlands} (1991)\textsuperscript{89} an application was bought by the occupant of a mobile home after he was evicted when he did not comply with the trades listed in a decree under the Mobile Homes Act (Woonwagenwet) 1986. Although declared inadmissible, the commission noted that as the applicant could not show association with a particular minority, the rules were not disproportionate to the aim of limiting mobile home occupation in the interests of preventing over-crowding in

\textsuperscript{84} \textit{Isop v Austria} App 808/60 CD, 80.

\textsuperscript{85} Alfredsson et al supra n60 at 7.

\textsuperscript{86} \textit{X v Iceland} DR 5 at 86.

\textsuperscript{87} Marquand, C “Human Rights protection and minorities” PL 1993 at 365; \textit{G and E v Norway} DR 35 at 30, 3.10.83

\textsuperscript{88} \textit{Airey v Ireland} App 6289/73 2 EHRR 305 - the courts should be made available to any person who wishes to obtain a decree of judicial separation.

\textsuperscript{89} Application No 12344/86; Decision 25/2/91.
a small country. Such an approach suggests that members of minority groups, such as the Roma, will be given greater protection by Article 8.

However, the recent decision in Buckley v UK illustrates the limited protection of cultural identity offered under the provision and the need for a greater awareness of the importance of minority identity when balanced against the planning interest of the state. In Buckley, the applicant, a Gypsy, had occupied her own land in caravans with her family without planning permission since 1988. She made two unsuccessful retrospective planning applications in 1989 and 1994. The local authority attempted to evict her and fined her for breach of the planning regulations when she refused to move. It was argued that she had alternative places to reside, particularly a public caravan site nearby. She alleged a breach of Article 8 coupled with Article 14 of the Convention.

The European Commission found in favour of the applicant under Article 8 of the Convention on the basis that her right to home life had been violated and that she had been deprived of realistic alternatives making the violation not 'necessary in a democratic society' (Article 8(2)). Both Commission and Court declined to look into the detail of Article 14 as the applicant had not been directly affected by the legislation introduced to restrict the lawful residence of Gypsies.

Both Commission and Court disagreed with the Government argument in holding that a 'home' under Article 8 did not need to have been lawfully established, providing the applicant could show continuity of residence. The Commission particularly understood the importance of the applicants Gypsy identity and recognised that Gypsies following

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90 O'Nions, H "The right to respect for home and family life: the first in a series of 'Gypsy cases' to challenge UK legislation" (1996) 5 Web JCLI.
a traditional lifestyle required special consideration in planning matters. The Court held that there had been a breach of Article 8(1) concerning respect for home life but added that in cases involving planning concerns and local needs, the Government would enjoy a wide margin of appreciation. Furthermore, in finding that there was no violation of Article 8, the Court held that proper regard had been given to the applicant’s needs and that on balance the means employed to achieve the legitimate aims pursued could not be regarded as disproportionate.

The dissenting judgements of Judges Repik, Lohmus and Pettiti reveal a greater appreciation of the problems facing nomadic Gypsy people and greater weight is given to this aspect of identity when balanced against the State’s margin of appreciation. In referring to a Council of Europe resolution on the cultural identity of nomads, Judge Lohmus noted that “living in a caravan and travelling are vital parts of gypsies’ cultural heritage and traditional lifestyle”. In noting that the planning objections were substantial, he nevertheless went on to stress the importance of different treatment in order to achieve equality in fact. The opinion of Judge Pettiti is particularly interesting and well-informed. In taking a wider view of the legislation affecting Gypsies in the UK he contended that there had been a violation of both Article 8 and Article 14:

the discrimination results equally from the fact that if in similar circumstances a British citizen who was not a gypsy wished to live on his land, in a caravan, the authorities would not raise any difficulties, even if they considered his conduct to be unorthodox.

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92 ibid. at 423 para 75
93 ibid. at 424 para 84.
94 Committee of Ministers Resolution (75) 13.
95 Supra n91 at 426.
96 ibid.
97 ibid. at 427.
The judgement of the Court can be criticised on several grounds, particularly the failure to look at the cumulative effect of the legislation facing Gypsies in the UK which combines to make the establishment of family and home life near impossible.

There is also the spurious reasoning for the planning refusals. The Planning Inspector's initial concerns about highway safety and planning matters had all but disappeared from the final version placed before the Court. The clear rationale was to restrict the number of Gypsy families living in the area. Gypsies are often unpopular neighbours; however, unpopularity itself is not one of the permissible grounds for derogation under Article 8(2).

Overall the Buckley case verdict can be characterised as a missed opportunity. In the words of Judge Pettiti:

..the European Court had, in the Buckley case, an opportunity to produce, in the spirit of the European Convention, a critique of national law and practice with regard to gypsies and travellers in the United Kingdom that would have been transposable to the rest of Europe, and thereby partly compensate for the injustices they suffer.

(iii) The rights of assembly and association

The twin rights of freedom of association and assembly have a dual quality in that whilst they inhere in all individuals, they can only be exercised collectively. The realisation of these rights can be seen as pivotal to the full realisation of individual rights such as freedom of expression and religion as well as minority-based rights.

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98 O'Nions supra n90.

99 This is of course crucial as many minority practices and beliefs face hostility from the rest of society- see for example Dudgeon v UK (1981) Series A No 45, 4 EHRR 149 concerning the ban on certain homosexual practices in Northern Ireland.

100 supra n91 at 428.

The Universal Declaration\textsuperscript{102}, ICCPR\textsuperscript{103} and the ECHR contain proclamations of the right to 'peaceful' assembly and association.

Article 11 of the ECHR contains the basic right to freedom of association and assembly. Restrictions can only be imposed under Article 11(2) when they are prescribed by law; have a legitimate purpose and are necessary in a democratic society. The necessity test requires a balance of the individuals interests with those of the State in deciding whether such measures are proportionate to the legitimate aim pursued\textsuperscript{104}.

The application of this article in cases where Roma are prevented from associating with each other as the dissemination of their culture requires, appears limited. In the UK, the Criminal Justice and Public Order Act 1994 makes several inroads into this right by limiting the size of gatherings and by making trespassory assemblies illegal in the name of public order\textsuperscript{105}. Residence restrictions apply to Roma across Eastern and Western Europe effectively preventing the full realisation of this right\textsuperscript{106}.

The fact that a gathering may be peaceful will not hold much weight if there is a risk of public disorder. In \textit{ARM Chappell v UK}\textsuperscript{107} it was held that gatherings for spiritual events could be legitimately prevented if there was a real risk of disorder or violence, even when the disturbance was not created by the group in question. The interference with the right of Druids to conduct their solstice celebration was justified as necessary in a democratic society for the prevention of disorder and protection of rights and freedoms of others (Article 11(2)).

\textsuperscript{102} Article 20 UDHR.

\textsuperscript{103} Article 21 ICCPR.

\textsuperscript{104} \textit{Handyside v UK} Judgement of 7th December 1976. Series A No 24 at p23, para.49.

\textsuperscript{105} see Part V Criminal Justice and Public Order Act 1994.

\textsuperscript{106} See below n112

\textsuperscript{107} DR 53 at 241.
The extent of the Article has also been bought into question following the decision in *X v UK* where a prisoner was denied a right to receive visits from an acquaintance in order to discuss his medical condition. In citing *Mc Feeley et al v UK*, the court stated that “The provisions did not concern the right ...to ‘associate’ with other persons in the sense of enjoying the personal company of others.”

Although the decisions of the Court do not constitute binding precedent, it would appear that Article 11 is envisaged as being restricted to the right to form or be affiliated to a group pursuing particular aims, rather than merely a social collectivity.

(iv) Freedom of Movement

The Universal Declaration provides for the right to leave a country and to move freely within the borders of a given state. The ICCPR goes further in including the right to choose residence. Article 2 of Protocol 4, ECHR states:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence...
2. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with the law and are necessary in a democratic society for the maintenance of 'ordre public', for the prevention of crime, for the protection of the rights and freedoms of others.
3. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with the land and justified by the public interest in a democratic society

Liberty of movement is still essential to the culture of many western travellers. Throughout Europe there have been many attempts to control the movement of Roma and to set maximum limits on their number in particular areas. The freedom to

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109 DR 20 at 44.
110 ibid.
111 Article 13 UDHR.
112 For example the French ‘carnet de circulation’ which restricts the movement of French travellers to specific regions; the Czech Jirkov rules (discussed in Ch.4 below) and the designation provisions under the Caravan Sites Act 1968 in the UK.
choose residence was successfully invoked in the German courts by a Turkish national residing in Berlin when his residence permit was stamped ‘not authorised’ in three specified districts. However, the Commission has indicated, in a case involving mobile-home dwellers, that Article 2 of Protocol 4 does not guarantee the right to choose a specific residence without title to the land.

The relevance of this provision to travelling people depends on the region in question. Whilst it may be asserted that the Roma have the state of mind of a nomad irrespective of their nomadic lifestyle, it remains a fact that in much of Europe, Roma live sedentary lives in long-established housing. Nevertheless, the notion of freedom of movement is a contentious issue in two circumstances. Firstly, the situation of Roma in much of Western Europe does involve a nomadic element. In the UK, Department of Environment statistics suggest that 32% of Gypsy families do not have an authorised stopping place. It is inevitable that most of these families, as well as many families who do have an authorised abode, will be regularly moving. Such a move may occur for economic or social reasons or in response to police/local authority pressure.

The second situation where freedom of movement may be at issue concerns the right to reside and leave a country of residence. Such an issue is discussed in more detail in Chapter Four (concerning citizenship rights in the Czech Republic). Case law from Strasbourg provides a clear indication that the Convention does not guarantee the right to enter a country and, as has previously been noted, distinctions between citizens and aliens do not fall under Article 14 of the Convention. Expulsion of aliens is not covered by the Convention unless it is ‘collective’. The Human Rights Committee has taken a

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113 V wG Berlin, 26th August 1977, discussed in Sieghart supra n26 at 182.
similarly restrictive approach by refusing to examine the interpretation of domestic law on expulsions unless there is evidence of bad faith\textsuperscript{117}.

In either situation, the limitations of Protocol 4 are all too apparent. It only applies to persons lawfully on the territory of a state, enabling the German Government to agree to a bilateral treaty with Romania to repatriate those persons suspected of being of Romanian (particularly Romani) origin en masse\textsuperscript{118}. Furthermore, the right can be restricted in the interests of public order and also in the ‘public interest’ - the definition of which appears uncertain. Protocol Four has not yet been ratified by the UK.

(v) Peaceful enjoyment of property and possessions

Article 1 of Protocol 1 to the ECHR concerns the right to peaceful enjoyment of possessions and prohibits the arbitrary deprivation and confiscation of such possessions. Article 2 is concerned with the right to education and specifically provides for parental freedom from unreasonable state interference with this right. As far as Article 1 is concerned, it could be argued that ‘possession’ includes the trailer/caravan home and related belongings\textsuperscript{119}.

A right to enjoy the group culture?

Omitted from the wording of the ECHR, the right to enjoy and participate in cultural life is included in the Universal Declaration and elaborated upon in the International Covenant on Economic, Social and Cultural Rights\textsuperscript{120}. There is however no mention of minority cultures\textsuperscript{121} in the formulation adopted by the UN. Article 15 merely provides:

\textsuperscript{117} Maroufidou \textit{v} Sweden ( R 13/58) HRC 36, 160.
\textsuperscript{118} See Ch 1 p13.
\textsuperscript{120} Article 15, International Covenant on Economic, Social and Cultural Rights.
\textsuperscript{121} Although Article 27 does include the rights of members of minorities to enjoy their own culture.
(1) the States parties to the present covenant recognise the right of everyone:
  a) to take part in cultural life;
  b) to enjoy the benefits of scientific progress and its applications;
  c) to benefit from the protection of the moral and material interests resulting from
     any scientific, literary or artistic production of which he is the author

This provision has not been the subject of much interpretative elaboration. For
example, it is unclear whether ‘cultural life’ would include the right to engage in
traditional practices which are at odds with the values maintained by the rest of
society. The right to cultural identity as such is omitted from the international human
rights documents, although it has been argued that such a right is unnecessary given
the extensive non-discrimination provisions122.

International Enforcement and Monitoring

UN Special Rapporteurs

Perhaps the most effective means of monitoring the implementation of human rights
standards is through the reports of special rapporteurs by the Commission on Human
Rights and the Sub-committee on the Prevention of Discrimination and Protection of
Minorities. The results of the investigation carried out, for example, by Special
Rapporteur Asbjorn Eide123 were considered by the Sub-committee and became the
basis for the UN Declaration on the Rights of Persons Belonging to National or
Ethnic, Religious and Linguistic Minorities124.

International Covenant on Civil and Political rights

122 Donnelly, J “Human rights, individual rights and collective rights” in Berting Human Rights in a
123 See for example Eide, A “New approaches to minority protection” MRG Profile 93/4 MRG, London
124 UN GA Resolution 47/135.
The Human Rights Committee has the responsibility of overseeing the implementation of covenant provisions. A reporting system exists which has led to a series of General Comments on the interpretation of Covenant articles. The reporting procedure is rather weak with a lack of minority participation. To the extent that such participation exists it tends to be on an ad hoc basis and does not extend to involvement in the debates of the Committee\(^\text{125}\).

There is also a complaints procedure under which the parties may complain of non-compliance, provided both states have recognise the competence of the Human Rights Committee (under article 41). Additionally, the Optional Protocol allows individuals to make complaints where the State has recognised Committee competence and where all available domestic remedies have been exhausted\(^\text{126}\).

The Optional Protocol machinery is weak, particularly as it excludes a role for non-governmental organisations (NGOs). Its potential strength lies in the ability to invoke Covenant rights before a committee of experts. A summary of committee activities is included in the annual report under Article 45\(^\text{127}\). In drawing attention to the weakness of the individual complaints procedure, Pejic contends that it is:

unimaginable that the Committee could be used to solve minority problems similar to those in the former Soviet Union or the former Yugoslavia. The above reservations apply to the Committee on the Elimination of Racial Discrimination established under the CERD, as well\(^\text{128}\).

Without the involvement of NGOs the role of the individual complaints mechanism is very limited. Organisations such as the European Roma Rights Centre in Budapest, the Tolerance Foundation in Prague and Human Rights Watch in New York have been

\(^{125}\) Alfredsson and De Zayas supra n60 at 4.

\(^{126}\) Article 1 and 2 Optional Protocol

\(^{127}\) Article 6 Optional Protocol

\(^{128}\) supra n 46 at 682.
crucial in bringing the situation of Europe's Roma to the attention of the international community. Many Roma are illiterate or poorly educated and do not have access to free legal advice outside of such voluntary organisations. It would therefore be extremely unlikely for such a challenge to be mounted.

Committee on the Elimination of All Forms of Racial Discrimination

The Committee of eighteen experts charged with overseeing the Convention on the Elimination of All Forms of Racial Discrimination has a tripartite function. It is empowered to consider state reports and make recommendations to the General Assembly; consider complaints bought by states against each other, and to consider the communications from individuals or groups.

The most effective measure to date has been the reporting system, with few states recognising the competence of the Committee to hear individual complaints under Article 14. The Committee reports annually to the Secretary General of the General Assembly and can include recommendations and suggestions based on the consideration of the reports.

In its consideration of State reports, the Committee can request information from the state parties but, unfortunately, is unable to request information from other sources such as NGOs. It is poignant to note at this stage that most of the information pertaining to the effects of the Czech Citizenship Law contained in the following chapter has been documented by such organisations. In the absence of such documentation there would be a very different picture.

129 Lerner, supra n27 at 69.
130 Lerner supra n27 at 59.
131 CERD Article 9.
The Human Rights Committee and the CERD have been prepared to criticise states for failing to recognise the right to petition the Committee. In one example, a group of German Gypsies had complained to the European Court of Human Rights concerning discriminatory treatment in housing allocation. The CERD understood that Article 14 of the ECHR did not provide for a general right of non-discrimination and consequently the case would be inadmissible before the European adjudicators. If the state party had recognised the right of petition under Article 14 of the ICERD however, the Human Rights Committee could have undertaken a full, judicial investigation.

**The European Court of Human Rights**

Until recently, the right to petition the European adjudicatory machinery was provided by Article 25 of the ECHR. Under Article 25, the right of individual petition was available only at the option of governments. In November 1998, the adjudicatory procedure was simplified and the Commission was replaced with a permanent court with automatic jurisdiction over individual complaints. The Court can receive complaints from individuals, NGO's or groups of people who claim to be the victim of a violation and have exhausted all domestic remedies under the new Article 35. In this sense the Convention is more liberal than both the preceding documents. However it must be remembered that irrespective of the identity of the complainant there must be

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132 Summary Report of the 1196th Meeting: Germany 14/03/97 CERD/C/SR/1196 para. 35

133 An express declaration by each State is required, most are limited in time to allow for a change of policy.

134 Protocol X1, Article 34 For a brief commentary and the full text of the new protocol see Wallace, R Companion to the European Convention on Human Rights 1999 Trenton: London p74

135 Jacobs, F.G The European Convention on Human Rights (1975) Oxford Univ. Press at 227 points out that applications have been brought by groups including companies, trade unions, churches and political parties.
locus standi, i.e. the individual, group or NGO must be a victim. The effectiveness of
the European system can be seen in the recent decision in Assenov v Bulgaria
(discussed below) in which the European Court found in favour of a Roma applicant
whose rights had been violated\textsuperscript{136}. The Court also held unanimously that the right of
individual petition under Article 25 had been violated when members of the police
attempted to dissuade the applicant from pursuing his case.

**Obstacles to the Realisation of Individual Human Rights**

**Inadequate enforcement mechanisms**

It can be seen from the above discussion that there are substantial weaknesses in the
enforcement processes. These can be summarised as falling into two camps: inadequate
consultation with minority groups and non-governmental organisations in the reporting
process; the right of petition to international enforcement bodies being dependant on
State recognition of the body’s competence and the fact that such a rights is often
unavailable to group petitioners. Consequently, an individual who alleges a violation of
a particular human right is unable to rely on support from his or her group.

**Lack of support from the group**

An individual who alleges that their rights have been violated is presented with the
unenviable task of challenging the political might of the state, first in the national
courts and then before one of the international enforcement bodies. A member of an
unpopular minority, such as the Roma, may find this task complicated by the dominant
perception that he or she is an undeserving case. It may be difficult obtaining a good

\textsuperscript{136}Assensov and Others v Bulgaria 90/1997/874/1086 Judgement of 28th Oct 1998 C/E Strasbourg
http://www.dhcour.coe.fr/eng/ASSENOV%20ENG.html
lawyer or obtaining the appropriate evidence, the victim may be hauled before the national media, or there may be deliberate attempts by law enforcement officials to dissuade the victim from pursuing their case. Some of these factors were raised before the European Court of Human Rights in *Assenov and Others v Bulgaria*\(^{137}\). The case concerned a family of Roma with Bulgarian nationality that alleged police mistreatment and a breach of Article 3 (concerning torture or inhuman or degrading treatment), Article 5 (unlawful detention), Article 6 (access to a court), Article 13 (denial of an effective remedy) and Article 25 (state hindrance of the right of individual petition). Following the Strasbourg application law enforcement officials had attempted to intimidate the family into abandoning their case and two Bulgarian newspapers reported that a Roma gambler had “put Bulgaria on trial in Strasbourg”\(^{138}\). It is difficult to see how in the present climate, a move to take legal action for a violation of a right will promote a wider climate of tolerance and equality. Indeed, as this case demonstrates, it may lead to further ostracisation.

**Insufficient weighting given to the situation of the group as a whole in society**

The inevitable consequence of an individualist approach to non-discrimination, is the absence of any enquiry into the situation of the group in society as a whole. As a result of the specific and abstract legalistic approach, a state can escape wider criticism for failing to address the root causes of discrimination in society. This can be seen clearly in the Buckley Case discussed above, in which the European Court of Human Rights was unwilling to examine the situation of the Gypsy minority in the United Kingdom outside the strict boundaries of the case. It is submitted that such narrow legal

137 Ibid.

138 Ibid at para. 50.
reasoning can lead to great injustice and it is for this reason that accountability through detailed state reports is so important. Unfortunately however, the monitoring procedure of the regional instruments does not provide for such effective scrutiny. As a result of the individualist approach, special measures depend on the political will of the state and hence the popularity of the group in question will be a relevant factor. It is easy to understand a state's unwillingness to consider an affirmative action policy when there are few votes to be won and many votes to be lost. The state is not under a duty to implement such measures to achieve de facto equality, as a result the unpopular minority is unlikely to benefit greatly from these provisions.

The significance of cultural identity is given little weight. Thus in balancing the interests of the individual's culture with the state's need to protect public order or security, the individual stands alone against the state/society.

**Conclusion**

The realisation of human rights for members of minority groups is fraught with difficulties. The present emphasis treats members of minorities as individuals, existing in a vacuum, removed from their culture, history and traditions. Special measures to counter discriminatory practices of the past are envisaged in the various international documents, particularly the ICERD. In practice however, they will depend on the willingness of the State to support the culture of the particular group. In the absence of international provisions protecting the identity of the group, it would seem at best naive to expect states to show such concern, particularly in cases where the minority is

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The OSCE is the only international organisation with a human rights agenda that examines a wide range of non-governmental evidence. The recent report *Romani Rights in Europe* (1998) *supra* n8 contains the detailed information required to enable effective scrutiny. It is testament to the fact that a reporting process without recourse to non-governmental organisations, such as with the Convention on the Elimination of All Forms of Racial Discrimination, is unlikely to ensure accountability.
relatively small, unpopular with the electorate and politically disorganised. The Roma minority in most states, with the exception of Romania and Bulgaria, tends to be smaller than other minority groups. Their geographical dispersion and lack of political organisation has made them particularly vulnerable to assimilation pressures.

The human rights standards of non-discrimination and equality are important foundations on which a wider human rights culture has been developed. Nevertheless individual human rights are often balanced against the collective rights of the state. The interests of the ‘outsider’ culture is presented as at odds with the dominant culture and the emphasis on the individual cannot by itself redress this disparity. The margin of appreciation under the European Convention allows the interests of minority groups to be weighed against factors of more prevalent public importance such as public order and the rights and freedoms of others. The decision of the European Court of Human Rights in the Buckley case clearly illustrates the adverse consequences of the simple balancing act approach.

The lack of effective enforcement machinery under both the ICCPR and the CERD enables State parties to provide minimal constitutional protection to members of ethnically distinct groups while in practice efforts are made to promote assimilation in the name of integration.

There is no recognition in any of the instruments, including Article 27 of the ICCPR, of the possibility of ethnocide i.e. the cultural destruction of the group. Ethnocide consists of two elements, firstly the economic dimension and secondly, the cultural aspect. It occurs when Government policies lead to the undermining of cultural identity of groups through measures such as language prohibition, erosion of land and

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141 Stavenhagen supra n 61 at 65
resources and lack of support for cultural values and institutions. In reality, minority groups are often in such a marginalised position that they require active support from the State to maintain such attributes. A failure to provide funding and other positive measures could thus constitute ethnocide.

At present there is no obligation on states to recognise the existence of minority groups, surely a prerequisite to the realisation of non-discrimination. When the non-discrimination provisions are considered in the light of the limited recognition of minority rights in Chapter Six, the limitations of the present emphasis are obvious. There is no obligation on states to support the interests of minority groups and there is little to actively promote the maintenance of minority identity. Eide observes:

Whether subjected to assimilationist ethno-nationlist domination or to a process of fusion, some groups seek to defend their own cultural identity, to maintain their own language and traditions. This can be done without any attempt to dominate others and without objecting to equal treatment in the common domain.

Eide goes on to argue that any approach to minority protection must comprise three elements: to search for approaches which can safeguard equality between all human beings in society; to promote group diversity when required to ensure the dignity and identity of all; and to advance stability and peace, both domestically and internationally. The emphasis on the rights of the individual contributes to the first of Eide’s criteria but neglects the others. If one considers Claire Palley’s observation that “the aim of such approaches is to eliminate differences of treatment between group and group, and individual and individual” the conclusion is reached that, somewhat paradoxically, assimilationism may be encouraged by individualism.

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142 ibid. at 86
143 Eide (1993) supra n62
144 ibid. at 12
The examples of official prejudice at the beginning of this chapter remind us that even if the law does not wish to enter into questions of ethnicity, society regularly categorises people in this way. Many people are not treated and do not regard themselves merely as individuals - this can be clearly seen with the attitude of the Mob Violence Prevention Team\textsuperscript{146} that all Roma are involved in criminal activity. The question of why so many Roma are involved in criminal activity is often overlooked - the status of the group in society itself is regarded as irrelevant. However, it is clearly not irrelevant to its members or to the rest of society. A Council of Europe report in 1995 asked Gypsy/Roma women about ways of combating the discrimination they had experienced both as Roma and as women:

_The Roma/Gypsy women participating in the Hearing felt that their personal fulfilment could only be achieved by maintaining their most positive traditional and cultural values and their view of the world and life. They also felt that it would be wrong to impose other cultural models on Gypsy communities in an arbitrary fashion. They wished to be able to love and be respected in their own right and to receive social and economic support from the majority population whilst still preserving their culture and language\textsuperscript{147}. _

The European Committee on Migration accepted that the hostility shown towards the Roma in Europe is attributable to "prejudices, deeply rooted in the collective memory, compounded by economic hardship and also the playing down of the cultural contribution Gypsies have made to Europe\textsuperscript{148}. It is difficult if not impossible, to conceive how the cumulative undervaluation of this culture can be redressed by an emphasis on individual rights.

\textsuperscript{146} See above p79
\textsuperscript{147} C/E Hearing of Roma/Gypsy Women of West Central and East Europe 30th Sept 1995 EG/TSI (95) 2 at para.10
\textsuperscript{148} European Committee on Migration The Situation of Gypsies (Roma and Sinti) in Europe 1995 C/E CDMG (95) 11 at para.48
The following two chapters look at particular contrasting examples of situations where the individualist emphasis of human rights instruments can be clearly seen to fail the Roma of Europe - the areas of citizenship and education.
CHAPTER FOUR

CITIZENSHIP IN THE CZECH REPUBLIC.

Introduction

The issue of citizenship is fundamental to the application of political as well as social and economic rights. Any examination of the situation of Roma in Eastern Europe today could not avoid the issue. The Czech government’s response to the perceived ‘Gypsy problem’ is illuminating. Not only does it illustrate the extent of support for anti-Roma measures at all levels of a civilised society, it also reveals a significant deficiency in international law. Despite international criticism, the Czech government has consistently argued that its citizenship law is in keeping with international standards.

International law makes the application of some human rights contingent upon ‘citizen’ status, particularly in relation to political activity. Furthermore, the status of those declared ‘non-citizens’ is tenuous, with the ever present possibility of expulsion. The dependant right of political representation is particularly important if the Roma are to get any recognition of their distinct cultural needs. If the failed policies of the past are to be avoided, involvement in the political process must be regarded as essential.

The political title of ‘citizen’ whilst conferring many advantages, is only one element of the wider debate of citizenship. Violence against Roma all over Europe suggests that despite often being afforded the legislative right to residence and political participation, they are often regarded as ‘outsiders’. This appears to be more the case than with any
other ethnic minority group, perhaps because of their unwillingness to adapt and assimilate into the dominant lifestyle.

The prevalence of the 'outsider' view has allowed ethnic violence and discrimination directed at the Roma to pervade the newly established democratic states of Eastern and Central Europe. In a written question to the Council of the European Communities in 1994, it was suggested that:

_Violent attacks on gypsies in Eastern Europe have already caused the death of a considerable number of this minority group during the last three years. More than 400 houses have been set on fire in two years alone._

In the Czech Republic 181 attacks on Romanies were reported in 1995 alone. Being 'at the bottom of the social ladder, Roma face daily discrimination in housing, education and employment. They are often segregated in 'special schools', denied residency permits and refused jobs solely because of their ethnicity. Those who do not participate or condone the ethnic violence often register their disapproval of the Romani residents in opinion polls. The response of the new regimes to the situation of Europe's largest minority group provides an illuminating indicator of their commitment to human rights and the democratic principles of equality and non-discrimination.

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1 For discussion of reasons see “Anti-Gypsyism” Chp. 15 in Hancock _The Pariah Syndrome_ (1987) Karoma Ann Arbor.


3 Human Rights Watch Press release 8th June 1996 accompanying the report _Roma in the Czech Republic Foreigners in their Own land_ (1996) NY.


5 See Times-Mirror group survey of 13,000 respondents in Barany, Z “Democratic changes bring mixed blessings for Gypsies” in Radio Free Europe 15.5.92, at 45.
This chapter focuses on the Czech Republic which provides an illuminating case-study. In many ways the constantly changing, broadly negative attitude towards the Czech Romani community reflects the policies of many other states and it is interesting to compare the treatment of the Romani population under the former Communist regime and the present policy under the fledgling democracy. Within this analysis, the issue of citizenship has recently become contentious and the influence of Western approaches to the question of Romani rights is all too apparent.

An analysis of the legislative attitude towards the Romani community in the former Czechoslovakia is used to set the context for the present developments but also to illustrate the comparable attitudes towards the Roma exhibited by Communists and Libertarians alike. It can be seen that the nature of the regime, whilst providing justification through ideology of particular treatment, is irrelevant to the general negativity of policies.

Individual rights guarantees alone, even if fully implemented, appear incapable of remedying many of the problems faced by the Roma in the Czech Republic. The Council of Europe's 'Framework Convention For the Protection of National and Ethnic Minorities' may go some distance towards recognising the distinct cultural identity of ethnic groups but does not go far enough. There is no right of effective political organisation (let alone citizenship) vested in members of ethnic minorities. Whilst the Czech citizenship law has attracted international criticism, it may be seen that there is little in the normative human rights standards on which to base such criticism. The only possible way forward is to recognise a legal right enabling groups to organise and develop their distinct culture in order to challenge the entrenched nation-state ideology, which regards the Roma as outsiders and aliens.
Historical Context of ‘Gypsy Policy’ in Czechoslovakia

The Communist Attitude: The ‘non-Gypsy’ Gypsy

After the second World War⁷ there were only six hundred out of an estimated fifteen thousand Roma left in the Czech Republic⁸. Many had been exterminated, others had fled to Slovakia where the harsh conditions of compulsory labour at least provided some chance of survival⁹. There is no evidence of a specific Roma policy at this time but by implication the post-war industrial drives resulted in many Roma moving to urban areas¹⁰. Individual human rights had little place in the Marxist ideology espoused by Stalin. The focus was on the duties of the individual, any rights were viewed as synonymous with the objectives of the state¹¹.

A limited degree of autonomy was allocated to nationalities who could satisfy the basic Marxist criteria as explained by Milena Hubschmannova:

."five markers of a nation were fixed: (common territory-history-language-culture-economic life). If an ethnic collectivity missed one of these markers, it was labelled as ‘nationality or national group’. If it lacked more markers, it descended into the hierarchy of a mere ‘ethnic group’, which was liable to get assimilated"¹².

When the Czech Socialist Republic (CSR) did turn its attention towards the Roma it was quickly decided that they could not be a nationality as they had no common land

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⁶ For a full discussion see Chp Six below
⁷ For pre-war history of the Gypsies in the Czech lands see Guy, W “Ways of looking at Roms” Chp 8 in Rehfsch Gypsies, Tinkers and other Travellers (1975) Academic Press, london
or distinct language; the Romani language was demoted to being a ‘hantyrka’ - a concocted jargon. Furthermore, they were regarded as having an absence of common culture. An authoritative Czech language dictionary of the time defines a ‘Gypsy’ as “a member of a nomadic nation, symbol for mendacity, trickery and vagabondage”.

The Roma (then popularly referred to as ‘Gypsies’) were thus regarded as a socially backward group who should be encouraged to assimilate.

**Origins of the Settlement Policy.**

As a result of the policy decision that ‘Gypsies’ were not a nationality, the government introduced legislation on “the permanent settlement of nomadic persons” in 1958; penal sanctions were introduced the following year.

An estimated 6-7,000 ‘Gypsies’ were nomadic in Czechoslovakia at this time and though the law was not confined to those labelled ‘Gypsies’, it was generally regarded as indicative of an increasing animosity towards the Romani population. The law, which was intended to offer improved accommodation and employment prospects for ‘Gypsies’, failed for a number of reasons. Firstly, there was a lack of suitable, available accommodation; when municipal authorities succeeded in finding such

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12 Hubschmannova, M ‘3 years of democracy in Czecho-Slovakia and the Roma’ in Roma No 38/9 1993, p45.

13 It is estimated that over 80% of Hungarian Gypsies speak no Romany dialect according to Barany (1992) supra n5 at 41.


15 Ibid.

16 Bill No 74/1958 zb


18 In the UK, a similar problem had developed with the provision of adequate accommodation in the form of caravan sites for ‘gipsies’ (Caravan Sites Act 1968). Many local authorities simply had no available land and others were not prepared to accommodate these ‘outsiders’ - see O’Nions, H “The marginalisation of Gypsies” 3 Web JCLI (1995).
accommodation there were often many problems between the Romani and non-Romani residents, many of whom had waited years for such housing. Consequently, new ghettos developed where old ones had been demolished, often without running water or sanitation. Czech employers added to the problem, ignoring the regulations which prohibited nomads from gaining employment until they had settled, often giving jobs to registered nomads without seeking approval beforehand. These factors were compounded by the fact that local government officials failed to keep track of the movement of nomadic families and census statistics were allegedly altered in order to conceal the extent of the failure of the Act.

By 1970, when full assimilation should have taken place according to the plans, over seventy thousand Romanies were still living in extremely poor conditions in shanty-towns in Eastern Slovakia. During his field-work, Will Guy found that “Each adequate well and toilet had to serve over two-hundred Gypsies”.

**A new strategy under the same policy**

In 1965 the CSR created the ‘National Council for Questions of the Gypsy Population’ and a resolution “on organized dispersion of the Romanies” was introduced. It marked a renewed attempt at forcing assimilation by attempting to gain full employment of able-bodied men and liquidating the settlements whilst dispersing and relocating the inhabitants, often to the more prosperous Czech lands. The previous restriction on free migration which previously applied to all registered nomads was now extended to all. The only Gypsies permitted to move were those in the planned resettlement and it

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19 Guy 1975, *supra* n17


21 Guy *supra* n17.
was recommended that there should be a quota of 5% in any town, the largest quota
being in the industrial heartland of Northern Bohemia. Gypsies were classified
arbitrarily according to the likelihood of their assimilation; there was no right of
appeal.

Once again the program was fraught with operational difficulties as many local
authorities contended they had no accommodation. As a result under five-hundred
Gypsies were transferred in the first three years of the programme. Hubschmannova
comments that the Communist party were convinced that only by means of dispersion
would they be assimilated; this implies a recognition that there is a common culture
which prevented assimilation in the absence of division and dispersal.

The policy of dispersal continued until 1989 when it was halted by the Velvet
Revolution, but the task was still far from over. Some 4,850 families were relocated
from Slovakian shanties between 1972 and 1981, but in 1983 there were still over
3,000 shanties remaining (10.5% of the Romani population in the Republic).

If we describe improvement in terms of our Western values we find better housing,
access to education and employment and that the conditions for many of the Roma in
Czechoslovakia had improved significantly. However as far as the intended
beneficiaries were concerned these policies did little to improve their situation. Whilst
they had access to running water, they were often in substandard housing, their
extended families had been divided and they were the subject of abuse and animosity.

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22 Kalvoda supra n20 at 100.
23 Utc, O “Gypsies in Czechoslovakia. A case of unfinished integration” in East European Politics and
24 Guy supra n17
25 Kalvoda supra n20 at 100.
26 Kostelanick supra n17 at 313.
27 Imrich Farkas “Transformation of our fellow Gypsy citizens” Pravda, Bratislava 23.9.82 p5.
from the non-Gypsy residents. Many Roma involved in relocation were evidently reluctant to abandon their old way of life. Zoltan Koren, a Public Prosecutor, wrote of this problem: "It is a generally known fact that the main obstacle in accomplishing the charted goal of elevating the Gypsy population are the Gypsies themselves" 29.

**The Prague Spring 1968**

The liberalisation of attitudes following the Prague Spring led to the establishment of the Union of Gypsy Romanies, the first organization of its kind in Czechoslovakia, which promoted a variety of cultural activities and tried to address the hostility towards the Gypsies from the non-Gypsy population30. Even the media became involved in the project with Gypsies increasingly being referred to as ‘Rom’ and an issue of Demografie being devoted to Gypsies in 196931.

It is clear that obtaining nationality status was regarded as essential to the realization of basic human rights at that time. The President of the Union of Gypsy Romanies, Miroslav Holomek, became involved in the political struggle to advance the concept of a separate Gypsy nationality. There were more than five thousand members of the Union before the first conference in 1969, suggesting elements of a common culture that had a wide base of support. Hubschmannova has argued that a clear nationality consciousness was evidenced by the success of the Union32.

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28 Kostelanick supra n17 at 314.
29 Quote in Ulc (1988) supra n23 at 318
30 See generally Kalvoda supra n20 at 277.
31 Reported in Demografie, vol. 11 no 4.
32 Kalvoda supra n20 at 278
Following the Soviet invasion in 1973 and the subsequent period of 'normalization', the Union were disbanded having “failed to fulfil their integrative function”\textsuperscript{33}. The resettlement policy was renewed and demands for recognition as a nationality fell silent again.

**Charter 77: demands for human rights.**

Charter 77, a temporary human rights organization, was established to bring human rights concerns in Czechoslovakia to the attention of the international community following the ratification of the Helsinki accord in January 1977. Many of the people involved in the project went on to gain political power in the new democracy in 1989. Document 23 of the report was titled “the situation of the Gypsies in Czechoslovakia”. The Gypsies were described as one of the largest minorities in Czechoslovakia but legally the Gypsy identity was denied and they did not exist. The high illiteracy rate and poor housing conditions which Gypsies experienced were highlighted, as was the practice of sterilization carried out on Gypsy mothers with consent often being obtained in 'suspicious circumstances'\textsuperscript{34}. With the support of some illuminating evidence they described the Gypsies as “the least protected of all citizens- a 3rd World culture in the midst of a European culture”\textsuperscript{35}.

Unsurprisingly the Government took little notice of the Charter 77 report and resisted any suggestion that Gypsies/Roma should be given nationality status. Similarly, when the World Congress of Gypsy-Romani in Geneva made appeals to recognise the

\textsuperscript{33} Guy *supra* n17

\textsuperscript{34} Ulc (1988), *supra* n23 at 315.

\textsuperscript{35} Powell, C “Time for another immoral panic? The case of the Czechoslovak Gypsies” *Int'l J Soc L* 1994 vol. 22, at 106
nationality of the Gypsies, as had occurred in Poland and Hungary, the media was used to show success stories of assimilated Gypsies.\(^{36}\)

**Policies of Benevolence or Racism?**

McCagg concludes in his article that despite allegations of genocide by Charter 77 the evidence reveals that the Communist Government in Czechoslovakia were driven by welfare objectives rather than a more sinister racist ideology.\(^{37}\) However, the evidence suggests rather the opposite. In the assimilation strategy the Roma were always dealt with as a group rather than individuals, they were regarded as a socially backward group and only when completely assimilated could they be regarded as full Czechoslovak citizens. It was apparent that the failure of the Roma community to successfully assimilate was unique and could only be attributed to the Government's failure to recognise their cultural interests as a minority group.

The 1958 Settlement Bill was clearly understood by the Municipal Authorities to refer to Gypsies. The Gypsies were targeted as a group based on the classification of local officers who used methods such as skin colour, large families and language difficulties (all indicators that they were regarded as a separate nationality who could be easily identified). They were identified as a separate nationality (albeit arbitrarily) and discriminated against as a separate nationality, yet in the eyes of the law they did not exist as a nationality, which enabled the policies of dispersal and assimilation to be pursued with a belligerent rigour that ignored the interests of the people concerned.

Statistics suggest that health-care and education have been adversely affected by the Communist policies. The average life-span of a Rom born in 1980 is expected to be

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\(^{36}\) Reported in Rudé Pravo 21.6.86.

\(^{37}\) McCagg *supra* n10 at 329.
thirteen years less than that of a gadjo\(^{38}\), 20% of Roma children are born retarded as a result of poor pre-natal care\(^{39}\) and a massive proportion will attend special schools designed for children with mental health difficulties\(^{40}\). These facts do not suggest that the authorities have been motivated by concern for the welfare of Romany families over the past 30 years. The disapproval of the Romani culture is captured in this statement printed in Demografie in 1962:

*Under socialism it is totally unthinkable to build some 'socialist and nationalist' Gypsy culture from the fundamentals of something which is very primitive, backward, essentially often even negative and lacking in advanced tradition...The Question is not whether the Gypsies are a nation but how to assimilate them*\(^{41}\).

Perhaps the best example of an attitude which is primarily routed in racism is the process of sterilization, carried out without informed consent. Human Rights Watch reported:

*...the government reportedly took specific steps to encourage the sterilization of Romany women in order to reduce the “high unhealthy” Romany population and, as a result, a disproportionately high number of Romany women were sterilized, often in violation of the existing safeguards and of their rights to non-discrimination on the basis of ethnicity or sex*\(^{42}\).

Romany women were given a financial incentive to undergo sterilisation of between 5 and 10 times that offered to other women\(^{43}\). Human Rights Watch were compelled to conclude as a result of numerous cases examined that the Government policy though it did not specifically refer to the Roma, sought to lower their birth-rate\(^{44}\).

\(^{38}\) Kalibova (1992) cited in Powell *supra* n35.

\(^{39}\) Kalvoda *supra* n20 at 288

\(^{40}\) Up to 50% in some areas, see Kalvoda *supra* n20 at 288 and Kostelanick *supra* n17 at 316.

\(^{41}\) Demografie (1962) p 80-1.


\(^{43}\) Ibid at 29; Ulic (1991) *supra* n14 at 116; Ofner, P “Sterilisation practice in Czechoslovakia” in O Drom April 1990 at 268/9.

\(^{44}\) HRW *supra* n42 at 20.
Sterilization and Cultural Genocide.

Charter 77 referred to the process of institutional discrimination as ‘cultural genocide’ i.e. the intent to destroy the culture, language or religion of an ethnic, racial or religious group. It was further asserted that sterilization practices were in danger of breaking Article 259 of the Penal code on genocide. Whilst cultural genocide is not included in the Convention on the Prevention and Punishment of the Crime of Genocide (1948), Article II of the convention states that “d) imposing measures designed to restrict births within the [national, ethnical, racial or religious] group” with intent to destroy that group, amounts to Genocide which is an international crime.

Similarly Article 259 (1)(b) of the Czech Penal Code states:

*Whoever seeks to destroy fully or partially any national, ethnic, racial or religious group; ...takes measures in order to prevent reproduction among the group...will be subject to punishment of between twelve and fifteen years in prison or the death sentence.*

Whilst there is some supportive evidence to amount to a policy of genocide it is unlikely that the requisite intention to destroy could be proved; improved housing and employment conditions could be cited to show that the Government was trying to improve rather than destroy the Romani identity.

If nothing else this debate serves to indicate the thin line dividing the welfarist concern for the situation of the Roma and the desire to ‘ethnically cleanse’ the society of ‘unsavoury elements’.

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46 Human Rights Watch supra n42 at 31.

It has already been noted that human rights protection has been directly associated with the recognition of the Roma as a nationality within Czechoslovakia. Following the Velvet Revolution of 1989 Roma were given the status of minority which had been sought for so long but the instant improvement in their circumstances did not follow as expected. The Government issued ‘Principles of the governmental policy of the Czech and Slovak Federal Government Toward the Romany Minority’. The first principle states:

Alongside the basic hypothesis of eliminating societal inequality of Romanies in the CSFR is the all-sided respect of the rights and free declaration of the Romany nationality. The Romany national minority is equivalent to other national minorities in the CSFR....

On the other hand however, increased freedom of expression throughout Czechoslovakia resulted in increased abuse and violence towards unpopular groups, most prominently Roma. This coupled with the decrease in socio-economic benefits following the revolution has led many to conclude that they were better off under the Communist regime. Tomias Haisman, head of the Federal Department of Human Rights and Humanitarian Issues 1990-2, explains the incompatibility of the post-Communist state and Romany rights. He argues that the key concepts which symbolise the new Czechoslovakia are freedom, democracy and the market economy: “You extend these concepts to the Roma people and you have a real horror story”.

Haisman states that freedom enables the Roma to express themselves which is not necessarily conducive to good relations with non-gypsy neighbours; in turn their freedom means freedom to take action against the Roma. In this analysis democracy is

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47 For discussion see Chp 6 p236
49 Hockenos, P Free to Hate (1993) Routledge, NY at 221.
perceived as the codification of the present status quo and the assertion of the will of
the majority over the minority, and the free market as entrenching the position of the
Roma at the bottom of the economic ladder.\(^{50}\)

On 24th November 1991 a large group of fascists marched on the centre of Prague
shouting slogans such as “Gypsies to the gas chambers!” and “Czechs for Czechs”,
local Gadje residents reportedly clapped in approval.\(^{51}\) In 1992 there were twenty-six
deaths of Roma in racially motivated attacks prior to the break up of the federal
state.\(^{52}\)

The new constitution came into force on the 1st of January 1993, the date of the
transitional split of the federal Republic. The Preamble states that the Government
are:

\[...\textit{determined to build, protect and develop the Czech Republic in the spirit of the}
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\[...\textit{inviolable values of human dignity and freedom, as a homeland to equal, free citizens}
\]
\[...\textit{who are conscious of their obligations towards others and of their responsibility}
\]
\[...\textit{toward the whole, as a free and democratic state based on a respect for human rights}
\]
\[...\textit{and on the principles of a civil society}...\] \(^{53}\)

In an effort to show the commitment of the new Government to human rights
protection, Article 10 of the Constitution gives direct binding effect to the \textit{European
Convention on Human Rights} and the Constitution is accompanied by the Charter of
Fundamental Rights and Freedoms which is based on the Convention. Article 3 of the
Charter states that the rights shall be guaranteed to all without distinction as to race,
colour, national or ethnic origin, membership of a minority etc. and goes on to state
that everyone shall have the freedom to choose their nationality, any form of

\(^{50}\) Ibid.

\(^{51}\) Human Rights Watch \textit{supra} n42 at 3.

64. Traynor, I gives a figure of 32 Czech Roma deaths since 1989 “Czech Gypsies fear ghetto wall”
The Guardian 20th June 1998 p16
influencing that choice being prohibited. The Charter also goes further than the Convention by guaranteeing freedom of movement and settlement.\(^{54}\)

In relation to citizenship, the Constitution and adjoining Charter also make positive claims: Article 12 of the Constitution establishes that no citizen may be deprived of citizenship against their will and Article 14(4) of the Charter states that no citizen can be forced to leave the country. It is clear that unless otherwise stated the Charter of rights extends to all people on Czech soil whether or not they are citizens of the Czech Republic (Article 42(2)). The theoretical commitment to human rights of the Czech Government cannot be doubted; the acid-test is how far these words show a real, practical commitment. The treatment of the Roma as the country's most unpopular minority provides an indication of the strength of this commitment.\(^{55}\)

**The Jirkov Rules.**

Soon after the division of Czechoslovakia, municipal authorities in the Czech Republic began to introduce rules designed to limit the stay of Romani visitors in their area. The moves were a result of fear that Romanies would begin to come over the border to gain work.\(^{56}\) It is difficult to comprehend why this movement should suddenly occur after a policy aimed at forcing dispersal to Czech lands had taken three times as long as intended because the Roma in the settlements were unwilling to be relocated. It can only be assumed that the authorities seized the opportunity of reducing the indigenous Romani population by intimidation and discrimination.

The Jirkov rules, so called after the town where they were first introduced, restricted the residence of people staying with non-family members (using the Czech sense of the...
word rather than the extended family of the Romani communities) to five days in any six month period following registration with the municipal authority. Permission was required for any period longer than three days. Under the ordinance local police were empowered to check the identity of any person in an apartment between 6am and 12pm. Although the rules did not make specific mention of a target group, the explanatory text says that the objective was to 'regulate' the migration of Roma. It has been suggested that in practice the regulations were used to send all Roma residents who were not registered as Czech citizens back to Slovakia, regardless of whether they had ever lived there.

Many other localities were quick to follow in the footsteps of Jirkov and although the ordinance and following decrees were interdicted by the Government in February 1993, the pace with which they developed is indicative of a deep hostility towards the Roma which had survived the transition to democracy. Indeed, public opinion polls listed this hostility along with international criminality and the fear of Communism as matters of particular concern in the new democracy. The influence of the Jirkov regulations on the new Czech Citizenship Law suggests that such attitudes are not unique to the general public.

The rights of the Citizen

There is little theoretical legal material on the concept of citizenship. Most of the analysis is connected to nationality laws in the United Kingdom. The work of the

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56 Powell, C supra n35 at 115
57 Ibid.
58 Hubshcmannova supra n12 at 32.
59 Ibid.
60 Powell supra n35 at 116.
sociologist T.H Marshall provides a good starting point for any conceptual analysis. Marshall provides three basic dimensions to the concept of citizenship. Firstly, the political dimension which includes the right to participate in political affairs, as a voter and representative. Secondly, the social dimension which consists of the right to enjoy basic minimum protection from the social welfare system provided by the State, and finally, the civil dimension which provides the rights necessary for individual freedom.

These may be the three basic components of 'citizenship' but there is an obvious danger in making comparisons between states about the specific rights which citizens are afforded. Many states have the same concept but value it in different ways stressing, for example, the political dimension whilst denying the social dimension.

Marshall's analysis is clearly rooted in Western conceptions of 'citizenship' and whilst it is necessarily limited by this fact it is apparent that the new democracies are adopting Western approaches to citizenship by linking it with a variety of rights, particularly the political and social rights mentioned.

There are two prevalent ways in which people can be regarded as non-citizens. Both lead to institutionalized discrimination and the second has the force of law behind it. The legislative denial of citizenship is most commonly discussed in the various international human rights documents. However, a person may also be deprived of an effective citizenship if they are regarded as 'outsiders' and 'aliens' by other members of the society, irrespective of their legal status. In his book on European citizenship, Paul Close examines the meaning of 'real citizenship':

Citizens are those people who have acquired full citizenship rights - the full range of legal rights necessary for full membership of (or full inclusion within) society. But such rights in themselves are insufficient for real citizenship. Citizens are divided

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between those who are able to realise citizenship rights and those who are unable; between those who really enjoy and experience full inclusion, participation and membership and those who do not. Between those who have sufficient enabling resources to allow them to be included as full members of society and those who have insufficient, between those who enjoy the power to be real citizens and those who do not.

1) Personal, non-legislative denial of citizenship.

This occurs when other members of the State regard a class of people as not being true-citizens. In some ways this is an inevitable consequence of the development of nation-State ideology, with the only true members of the State being perceived as ethnically homogenous. Whilst intolerance towards ethnic minorities may appear to be growing in Eastern and Central European States, the Roma tend to be the victims of ethnic intolerance from all sections of society - not simply the dominant ethnic group. The fact that they appear unwilling to assimilate, unlike many other minorities, makes them ripe for such criticism.

Roma are often lumped with foreigners in racist dicta throughout Eastern Europe. In Romania it has even been alleged that the former Communist president Ceacescu was in fact Romani because his behaviour was so alien and abhorrent. This attitude can even be extended to the UK with reference to nomadic or semi-nomadic travelling people. Settled residents may be threatened by what is regarded as an alien lifestyle which opposes the values that they hold dear: owner occupation, deference to authority and the work-ethic. As a result discrimination is able to flourish unhindered by any debate as to the human rights implications. It is apparent that

66 For examples reported in the media see O’Nions supra n18
Czech Roma are regarded as aliens on both counts: because of the large-scale migration from Slovakia and because their lifestyle is so incomprehensibly different to that of Gadje and as a result, is perceived as being inferior. This has enabled discriminatory attitudes and practices to proceed without criticism in the past. It is only with the intense efforts of certain Czech non-governmental organisations, such as the Tolerance Foundation, the Czech Helsinki Association and HOST, that such behaviour is being critically challenged. 

2 Legislative discrimination

Van Gunsteren, in his analysis of conceptions of citizenship, has noted that there has been a new tendency in modern times for states to assist individuals in attaining the criteria to apply for citizenship ‘by helping them to obtain the qualities required for admission, but also by removing the obstacles and lowering the demands’. His label of the present model as ‘Neo-Republican citizenship’ requires that states recognise that the community of the ‘citizen’ as but one of many communities that the individual may belong to and that these communities should be enabled to develop their identity without sacrificing their citizen status. One may therefore expect that a modern democracy should assist disadvantaged individuals and groups to reach the criteria set for citizenship in order that they can access the rights and duties which the status provides. Furthermore, community interests and objectives should not be eroded when an individual strives to join the community of citizens. The Commissioner on National

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67 See App. 2
69 Ibid. at 45.
Minorities in the Organisation on Security and Cooperation in Europe (OSCE) has issued a number of principles which should apply in states considering new citizenship laws:

*Citizenship forms the basic bond between a person and state. For the individual, citizenship means he or she is wholly welcome in the state, a full member of the political community. For the state, citizenship underscores the loyalty of the person and confers certain duties and responsibilities on him or her. In granting citizenship, the state should take into account a person’s long term (and often life-long) residence on its territory and should furthermore use citizenship to promote bonds of loyalty to the new political community.*

People become citizens of the state in which they live either as a result of birth or by naturalisation. Domestic legal systems tend to be based on the principle of *jus soli* or *jus sanguinis*. The former grants citizenship on the basis of birth, whereas the *jus sanguinis* principle affords citizen status on the basis of descent, i.e. through a long-established link with the State in question. Whichever method is applied may be crucial and a person is unlikely to form any bond or loyalty towards the State unless they are afforded the title of citizen. The sense of bonding conferred by citizenship status is emphasised by many writers. Marcia Rooker explains the significance of acquiring legal citizenship as follows:

*Citizenship is the consolidation of the tie between an individual and a state. A citizen can always return to his country, can influence the governing of the country and participate in economic and social life. Citizenship makes the tie between state and individual even stronger. To deny an inhabitant citizenship or deprive him of it will alienate that person from the State.*

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70 CSCE Human Dimension Seminar on Roma in the CSCE Region (1994) CSCE at 10.

71 The *jus soli* method is applied in French naturalisation criteria. This can be contrasted by the German approach where less people are eligible to become full citizens.

72 Barbalet, J.M suggests citizenship defines or distinguishes between those who are and those who are not members of a common community or society in Citizenship Rights, Struggle and Class Equality (1988) Open University press at 18.

International human rights provisions are generally not contingent on the issue of citizenship but there are certain rights which may be denied to non-citizens; particularly significant is the right to vote and thus participate in the political life of the State.

Robert Blackburn notes:

*The right of every citizen to vote and take part in the political process of a state is the foundation of its democracy. It is a citizen’s right which is of immense symbolic as well as practical importance, for it enshrines the principle of political and civil equality...*74

The right to vote is crucial if the geographically dispersed Czech Roma are to have their voice heard in any effective way. This can be seen clearly following the results of the parliamentary elections of 1996 where the Republican party captured eighteen seats with an extreme-right agenda. Among his manifesto promises and populist rhetoric, leader of the party, Miroslav Sladek, called for the deportation of Czech Roma75.

The issue of nationality is generally left to the domestic jurisdiction of the State, outside the sphere of international law76. Brownlie observes that international law does not support a contention that the deprivation of nationality is illegal77. The usual test will be a genuine and effective link with the State concerned. In the leading case of Nottebohn a German national working in Guatemala had attempted to acquire the nationality of Liechtenstein in order to avoid the possible confiscation of his property should a war break out between Germany and Guatemala. Following Guatemala's declaration of war, Nottebohn's property was confiscated and Liechtenstein brought a

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76 Donner, R *The Regulation of Nationality in International Law* (1994) Helsinki Finnish Society of Sciences and Letters
77 Brownlie, I *Principles of Public International Law* (1990) Clarendon, Oxford at 405
claim on his behalf before the International Court of Justice\(^{78}\). According to the International Court of Justice, a State must act 'in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State'\(^{79}\). In this case, no genuine connection had been shown and the claim was unsuccessful.

Therefore, with limited restrictions, such as obligations made to other states via treaties and the unenforceable *Convention on the Elimination and Reduction of Statelessness*, there is no legal barrier to a state-sanctioned deprivation of nationality. The residence of a non-citizen can only be regarded as permanent once they have acquired citizenship. In the meantime they could risk deportation and may be ineligible for state support through Marshall's second dimension, the welfare system.

**Political developments in the Czech Republic**

**The New Republic and Constitution**

On the 1st January 1993 the Republic of Czechoslovakia ceased to exist and was formally split into the Czech Republic and the Republic of Slovakia. The Czech Republic has its own constitution of December 1992 and has ratified the European Convention on Human Rights and Fundamental Freedoms. In June 1994, the Republic became a member of the Council of Europe and is currently an associate member of the European Union.

The Czech Charter on Fundamental Rights and Freedoms is comparable in scope to the ECHR. Human rights appear to be very important in the new regime and some of the constitutional provisions clearly go further than the international standards established

\(^{78}\) ICJ *Nottebohm Case* (1956), 6th April General List no 18

\(^{79}\) Ibid.
in the Convention. For example, Article 3 of the Charter provides that there should be
‘no distinction as to race, national or social origin...membership of a minority’. This
provision exceeds the standard in Article 14 of the European Convention as it is not
limited by a link to the realisation of the other substantive Charter rights. Article 12
also exceeds the standards established at the European level, stating that ‘no-one shall
be deprived of citizenship against their will’. Chapter three of the constitution contains
‘the rights of minorities’ containing a list of rights vesting in citizens who constitute
minorities.

The Chapter on minorities and the Charter itself are encouraging in that they go
beyond the standards currently enforceable at the international level. In respect of one
particular minority however, the constitution appears to be providing very little
protection.

The Czech Citizenship law

The new citizenship Law came into effect with the new constitution on 1st January
1993. Law 40/1992 is not particularly unusual in the requirements it lays down for
acquiring citizenship. It has however, become controversial for the effects it has had on
many Slovak state citizens who, despite residing in the Republic for many years, were
immediately declared as migrants. The Tolerance Foundation’s Report on the Czech
Citizenship Law suggests the immediate effect of the Act:

_The new law means that there are people who were born in the Czech territory and/or
have lived there for decades-including those who were forcibly moved there from
Slovakia by the communist regime- who before January 1993 had all the rights of
citizenship, today are deemed foreigners in their own land._

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80 Blaustein and Flanz _supra_ n53
81 Law 40/1992 on ‘the acquisition and loss of citizenship’
Reflecting Marshall’s analysis of ‘citizenship’, social benefits from education to health care ceased to be available from June 1994 to those who could not prove citizen status. One month later the preferential procedure for Slovaks applying for citizenship in the Czech Republic ended so that they were treated the same as any other foreign national in the application process.

The new law builds on the old Citizenship Law 165/1968 which established dual citizenship: everyone became a member of the federation of Czechoslovakia and could additionally opt for citizenship of one of the two federal states. Only the federal citizenship was considered legally significant at the time and the state citizenship was not even used on identity documentation. The new law abolishes the category of federal citizenship; State citizenship becoming the relevant factor. It is hardly surprising then that many Roma found themselves no longer citizens of the state in which they lived. It is estimated that as many as one-hundred and fifty thousand Roma had to re-apply for citizenship in their own country.

The criteria which they needed to establish created a wealth of problems for the applicants and deserve closer examination.

1 Permanent residence in the Czech Republic for at least 5 years.

This provision was reduced to two years as a concession for Slovak citizens until July 1994. This may seem a relatively straightforward requirement, but there are some

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83 Article 18 of Law 40/1993
84 Ibid at 6.
85 Powell supra n35, at 117.
86 Article 18
87 Chan below n145 at 9. Denmark, Italy, Netherlands, Norway and Sweden all require five years residency for naturalisation. The figure is ten years in Spain and Germany. The new citizenship legislation in Latvia, following the vote for independence, set the residency requirement at sixteen
obvious difficulties with respect to Romani residents. Primarily it is often difficult for a family to prove they have been in permanent residence, especially as many of the dwellings allocated to them as part of the resettlement program were overcrowded and sub-standard and thus were not registered as permanent dwellings with the Local Authority. Another factor which affects the recent Roma arrivals in the Czech Republic is the increase in violence towards Romani residents which has meant that many have been forced to flee or have been harassed into leaving their residence.

2 The clean criminal record requirement (Article 7(1c))

The so called ‘Gypsy-clause’ must also be satisfied in any application for permanent residence. It states that in order to obtain Czech citizenship persons should not have been sentenced for an intentional criminal offence in the previous five years. Romanies have been convicted of a disproportionate number of criminal offences, many of them petty in nature. However, the law fails to draw any distinction between minor crimes and more serious offences; most crimes are intentional under the Czech penal code. Ina Zoon, a Czech human rights lawyer, observes:

*It is somewhat of a paradox that in ignoring the severity of the offense and focusing exclusively on when the sentence is pronounced, the citizenship law would allow a person convicted of crimes against humanity after the Second World War to obtain citizenship while at the time barring a person convicted of a minor offense from obtaining citizenship.*

This provision only applies to those people living in Czechoslovakia with Slovak state citizenship, it does not apply to Czechs who were abroad in 1968 and thus did not have to apply for state citizenship under the law 165/1968. It clearly disproportionately

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88 The Czech housing regulations specified at least 8m2 for each occupant.
89 Tolerance Foundation *supra* n 82 at 18.
affects the Romani population, many of whom have been involved in minor offences.

Zoon and Siroka argue that the link between crime and poverty is ".. not merely a matter of legal theory. There is a clear connection between the tragic social condition of the Roma community and the predominant type of criminal offences". A report undertaken by the Ministry of Interior in 1993 found that "Roma are most likely to commit property crime...the major subject of their interest is money, electronics, bikes, motorbikes and any parts of them".

One writer estimates that approximately half the Roma without Czech citizenship may fail to satisfy the criteria of the so-called 'Gypsy clause'. The evidence collated by Zoon and Siroka suggests that Romanies are more likely to have their papers checked, to be arrested and prosecuted than non-Gypsies because of racial bias in the criminal justice system. The Tolerance Foundation found that 45% of their sample of 208 Gypsies who failed to obtain citizenship had no criminal record and 23% of the survey were indicted for theft under Article 247 of the penal Code and 12% for other petty crimes. The report finds that many applicants are rejected by the local officials when they take their application to be approved. There is no right of appeal at this stage as the administrative procedure has not yet been embarked upon. It is clear that many applicants who are turned away do not return.

A similar problem has resulted from the wording of the section. Human rights organisations contend that a person will be excluded if they have been sentenced for a

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90 Tolerance Foundation supra n 82 at 16.
91 Tolerance Foundation The Non-Czech Czechs 1995 at 15.
92 Analysis of the situation of Romany Children and Youth, Czech Interior Ministry, Prague Sept 1993 referred to in HRW Roma in the Czech Republic - Foreigners in their own land (1996) at 22
93 U1c (1995) supra n 61 at 29.
95 Ibid at 18.
criminal offence in the preceding five years, however in practice any criminal record may result in exclusion. In one case, which is not untypical, the applicant is serving 11 years in prison after receiving a sentence in 1986. He was denied permission to apply for Czech citizenship whilst serving his sentence and as a result lost his citizenship status despite being sentenced over five years ago. Criticism has been directed at the law on the basis of the prohibition of retroactive penalties in Article 7 of the European Convention, discussed below, from the Council of Europe, United Nations and the Chairman of the Office of Security and Co-operation in Europe. The Council of Europe experts have criticised the law for depriving people of their right to vote on the basis of legislation that was not in force on the date that the crime was committed. The clean criminal record requirement thus appears arbitrary and unjustly discriminates between people holding former Czechoslovakian citizenship and also specifically against the Romani community.

3 The requirement to master the Czech language (s7(1)(d)).

The imprecise wording of this requirement gives rise to several difficulties. For example, it is not clear how mastery is to be interpreted or whether illiterate applicants are to be automatically excluded. It would appear that much depends on the discretion of the particular administrative officer. The harshness of the provision is mitigated by s10(2) which states that s7(1)(d) does not apply to former Slovak citizens. However the Tolerance Foundation have evidence

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96 The Tolerance Foundation Analysis of 99 Cases 21.11.94 at 27.
98 Chairman Smith, OSCE Letter to the Interior Minister 13.5.96
which suggests that in practice the language ability of the applicant is relevant to the success of the application. One representative from the Ministry of Interior stated in obvious contradiction “It is true that the Slovaks don’t have to be “examined” but they still have to “prove” that they have mastered the Czech language by speaking Czech when they apply for citizenship”\textsuperscript{100}.

Such difficulties must be viewed in the light of numerous practical problems which the Roma have in making applications, for example the high level of illiteracy and lack of awareness as to their rights means that many would not even consider making an application for citizenship, particularly if they have been long-term permanent residents. In response to the legislation the Roma Democratic Congress have asserted:

\textit{The Czech law on acquiring and losing citizenship will take away from tens of thousands of people their right to a homeland, will deny them their basic rights and threaten their existence}\textsuperscript{101}.

Despite many apparent problems with the legislation, the Czech Constitutional Court rejected attempts to abolish the law on the grounds that it violated the constitution\textsuperscript{102}. International institutions\textsuperscript{103} have however, been vociferous in their criticisms of the legislation and in 1996 an amendment was introduced by MP Jiri Payne to mitigate the harshness of the clean criminal record requirement.

\footnotesize
\begin{itemize}
\item \textsuperscript{99} Council of Europe \textit{Report of the Experts of the Council of Europe on the Citizenship laws of the Czech Republic and Slovakia and their Implementation} 2nd April 1996 DIR/JUR (96) 4 at 26 para.80.
\item \textsuperscript{100} Tolerance Foundation (1994a) \textit{supra} n 82 Interview with Mrs Goluskinova Feb 94 at 22.
\item \textsuperscript{102} Sept 13th 1994 Dec P1.US 9/1994 of Czech Constitutional Court. Article 87 of the Czech constitution allows the court to annul a law or part of a law if it contravenes the constitution or an international agreement - Matscher, F and Liddy, J “Report on the Legislation in the Czech Republic” HRLJ (1993) Vol.14 No 11-12at 442-6 at 443.
\item \textsuperscript{103} An overview of these criticisms can be found in Schlager, Erika “UNHCR Report says Czech Citizenship Law violates international law; Council of Europe experts say Czechs Violate Rule of Law” \textit{CSCE Digest} June 1996 p5-6
\end{itemize}
International criticism

In 1996, the Council of Europe experts reported that whilst the clean criminal record requirement was usual in naturalisation criteria for foreigners generally, in the case of state succession it would be discriminatory if a person could show established ties with that country\textsuperscript{104}. Statistics issued by the Tolerance Foundation indicate that over half of those Roma denied citizenship were born and have remained on Czech soil; over 80% had lived in the Czech Republic for more than twenty years\textsuperscript{105}.

The Council of Europe experts formed the view that the international administrative criteria of proportionality and foreseeability were not met by the legislation. The well established family ties of those denied citizenship and the importance attached to relatively minor criminal offences as well as more serious ones, clearly led to injustice\textsuperscript{106}. It was emphasised that the criteria for determining!citizenship should be a genuine and effective link with the State concerned\textsuperscript{107}.

It was further urged that the Czech Government review the expulsions and consider the implications of Article 8 of the European Convention concerning the right to respect for private, family and home life\textsuperscript{108}. Whilst the Convention does not guarantee the right to enter or remain in a country, there is limited protection for those whose families remain in a state and have established links over time with that state. For example, in \textit{Lamquindaz v UK}, the European Commission upheld a complaint by a

\textsuperscript{104} C/E \textit{supra} n99 at p10 para.21 (e) and p24-25 paras. 73-87

\textsuperscript{105} Tolerance Foundation (1994a) \textit{supra} n 82 at 4

\textsuperscript{106} C/E \textit{supra} n99 passim

\textsuperscript{107} C/E \textit{supra} n99 p27 para.84.

\textsuperscript{108} C/E ibid at 32 para.107.
Moroccan national threatened with deportation for criminal behaviour on account of the immense hardship he would suffer\textsuperscript{109}.

Following a three day fact-finding mission in 1994, the United Nations High Commission On Refugees has also issued a report criticising the law for failing to prevent statelessness resulting from the dissolution of Czechoslovakia\textsuperscript{110}. Although its ambit differs, the report echoes the conclusions of the Council of Europe by recommending that the relationship between territory and population should be the governing factor in determining citizenship rather than the internal Communist era law of 1969. In order to comply with the draft Convention on Nationality\textsuperscript{111}, the report found that in cases where an application was deemed necessary for the granting of citizenship in successor States, no conditions should be attached to that application\textsuperscript{112}. The apparent intransigence of the Czech government was also criticised.

The New Amendment

As a consequence of the continued international criticism, the Czech Government passed Jiri Payne's Citizenship Law amendment on April 26th 1996. The effect of the amendment is to give the Ministry of Interior the discretion to wave the clean criminal record requirement in less serious cases. Whilst this goes some way in remedying the deficiencies of the legislation it does not appear to go far enough\textsuperscript{113}. The permanent residence requirement remains unaltered and the discriminatory nature of the clean

\textsuperscript{109} Lamguindaz v UK 17 EHRR at 213 (for full discussion see below) case was not heard by the court as a friendly settlement was reached between the parties.

\textsuperscript{110} UNHCR supra n97

\textsuperscript{111} See below n162

\textsuperscript{112} UNHCR supra n97 at 7. This is the case, under Article 6 of the law, for Czech citizens living abroad at the time of the dissolution.

\textsuperscript{113} Chairman Smith of the OSCE has written to the Interior minister criticising the amendment for failing to redress the ex post facto increase of criminal penalties (dated 13th May 1996).
criminal record requirement is now discretionary rather than mandatory. The high crime rate of the Romani community in general may well act as the kind of justification the Minister needs in continuing to impose the requirement. Chairman Smith of the OSCE compared the amendment to telling Charter 77 dissidents that of course they had a right to free speech -providing they got a waiver of the Minister before exercising it.\textsuperscript{114}

Evidence suggests that the Minister is using his discretionary powers in an encouraging manner. Since the passing of the amendment 950 out of 962 requests for a waiver have been granted\textsuperscript{115}. However, the number of those who have not applied for a waiver is a continuous source of concern and the Government have been criticised for failing to publicise details of the amendment\textsuperscript{116}. In a recent decision the Czech Supreme Court ruled on the legality of citizenship denial for minor criminal offences\textsuperscript{117}. The victim had been sentenced to expulsion following the theft of $4 worth of sugar beet. He had lived in the Czech Republic since he was three months old and had been raised in Czech orphanages. His lawyers successfully argued that his private and family life had been violated contrary to Article 8 of the European Convention on Human Rights and that such measures were 'not necessary in a democratic society'. It was held that the offence did not meet the threshold for what constitutes a criminal offence for the purpose of the Citizenship law and the applicant is currently appealing to have his residence rights reinstated.

\textsuperscript{114} ibid.

\textsuperscript{115} Statistics according to Mark Theiroff of the Equal Rights Programme, Prague as of June 1997.

\textsuperscript{116} For examples of some of the rejected applications see O’Nions (1997) supra n75.
Possible Breaches of International Law

As a consequence of the Czech citizenship law an estimated 77,000 resident Roma Czechs face an uncertain future. They have been denied Czech citizenship personally, for leading lifestyles which are viewed as threatening to modernity\footnote{Powell \textit{supra} n35 at 120.}; and legislatively, as a direct result of the legislation or as a result of over zealous public. As a consequence their ability to enjoy the new rights and freedoms enshrined in the charter and the European Convention is seriously impeded.

European Convention on Human Rights and Fundamental Freedoms

Whilst there is no right to an effective nationality contained in either the European Convention or the ICCPR, the denial of a nationality may lead to consequences which violate other specific rights.

Article 6 of the Convention provides that there should be a fair and public hearing in the determination of a person’s civil rights and obligations. Any conclusion however, that this would demand full reasons for the refusal to grant citizenship and a right of appeal against the decision, would appear ill-founded. Although the case law of the Convention is only persuasive on this point an examination of cases under Article 6 clearly indicates a restrictive approach which does not suggest its application to administrative decisions\footnote{\textit{X and Y v Switzerland} (1977) Dr 9 p57 at 64 and \textit{76 and Church of X v UK} (1968) YB 12 at 306.}.

The requirement of a clean criminal record may contravene international law by denying rights on the basis of an act for which the applicant has already been sentenced. Article 7(1) of the ECHR states:

\footnote{May 1997. Again I am indebted to Mark Thieroff of the Equal rights Programme, Prague for this information.}
"...nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed"\textsuperscript{120}.

The Council of Europe\textsuperscript{121} and the Organisation on Security and Co-operation in Europe\textsuperscript{122} have been particularly critical of the citizenship law on the basis of this well established international provision. Whilst the Council of Europe report noted that 'penalty' is to be interpreted as an autonomous concept\textsuperscript{123}, an examination of the limited case-law under Article 7 suggests that administrative acts such as the denial of citizenship may be interpreted so as not to constitute a 'penalty' in the strict sense of the word\textsuperscript{124}.

In \textit{Jamil v France}\textsuperscript{125}, the court found that Article 7 had been breached when the French Government imposed an increased sentence on imprisonment in default for drug smuggling pursuant to a law that was not in force when the offence was actually perpetrated. On the question of the word 'penalty' and its scope, the court offered some insight into likely interpretation. The word penalty is to be given an autonomous meaning and it would normally be expected to follow from the commission of a criminal offence. Furthermore, the courts will look at the facts of the case in assessing whether the decision amounts to a penalty; relevant factors in Jamil included the fact that the increase was made by a criminal court, was intended to act as a deterrent and could have led to the deprivation of liberty. In relation to the citizenship law these first two factors are not present although clearly a deprivation, or at least restriction, of

\textsuperscript{120} See also Article 15(1) ICCPR which prohibits the imposition of retroactive penalties.
\textsuperscript{121} \textit{C/E supra} n99 at 26 para.80.
\textsuperscript{122} OSCE \textit{Ex post facto problems of the Czech Citizenship Law} Sept 1996 OSCE, NY
\textsuperscript{123} \textit{C/E supra} n99 at 47 para. 178.
\textsuperscript{124} For examples of this interpretation see \textit{Jamil v France} (1995) 21 EHRR 65; \textit{M v Italy} (1991) 70 DR 59 and \textit{X v Federal Republic of Germany} (1968) 27 CD 136.
\textsuperscript{125} (1995) 21 EHRR 65.
liberty could result. Further cases suggest that one of the crucial issues is whether the penalty is imposed as an additional punishment\textsuperscript{126}. Particularly interesting is the decision in \textit{X v FRG} where it was established that the penalty must be a punishment in its own right rather than a consequence of the original punishment of the offence\textsuperscript{127}. The case concerned an alteration of probation conditions which were regarded by the Commission as touching on the effects of the original punishment, there was no additional denial of liberty.

The notion of penalty appears linked to that of criminal charge under Article 6 of the European Convention. However, it is clear that the measure does not need to be 'criminal' as such. In adopting an autonomous interpretation, the European Court has held the criminal sphere would include "deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of enforcement cannot be appreciably detrimental"\textsuperscript{128}.

As far as the citizenship law is concerned, the Commission has consistently held that administrative acts are not additional punishments and, as such, do not fall within the interpretation of penalty under Article 7\textsuperscript{129}. In their reports on the citizenship law however, the Council of Europe experts and the Organisation on Security and Co-operation in Europe have publicly accused the Czech Government of failing to respect this provision. Indeed, a strict application of the European Commission's approach would lead to retroactive administrative measures which result in the deprivation of a person's liberty being unactionable. The distinction between administrative and judicial

\textsuperscript{126} \textit{M v Italy} (1991) DR 70 p59 and \textit{Welch v UK} (1993) CR 15.10.93 A/307-A. In the former case there was found to be no 'penalty' as the measure was preventative in nature and did not involve a finding of guilt subsequent to the criminal charge. Conversely, in Welsh the Commission held that the confiscation order amounted to a penalty as it was punitive in nature.

\textsuperscript{127} 11.7.68 CD 27 at 136 app.3347/67

\textsuperscript{128} \textit{Engel v Netherlands} (1976) 1 EHRR 647 at 649
decisions is notoriously difficult to draw and its implementation could seriously impede the scope of the Article. The court in *Welch* stressed the importance of “looking beyond appearances at the reality of the situation”. The 1986 Drug Trafficking Act had incorporated an additional penalty aimed at depriving the perpetrator of property accumulated through profits made in the commission of the original offence. It was held that Welch had faced more far-reaching detriment as a result of the order than that to which he was exposed when the offences were committed\(^\text{130}\).

The Report of the Organisation on Security and Co-operation in Europe attempts to bridge this gap by expressly stating that the denial of citizenship based on criminal record does amount to a penal sanction:

Forfeiture of citizenship, banishment and exile are historically tools used as punishment...the loss of citizenship serves the traditional functions of a punitive sanction: retribution and deterrence\(^\text{131}\).

Academic opinion on Article 7, a non-derogable right, generally sheds little light on the likely interpretation\(^\text{132}\), although Paul Sieghart contends that consequences such as deprivation of the right to vote and property restrictions would come within the ambit of penalty under the provision\(^\text{133}\). This is also the approach echoed by Chairman Smith of the Organisation on Security and Co-operation in Europe in a letter to the Czech interior minister criticising the inadequacy of the 1996 amendment\(^\text{134}\). It would appear that much turns on the reason for the particular provision, if it is regarded as a

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129 Lamguindaz v UK *supra* n109 per Mr Schermers at 219
130 *Welch v UK* (1997) *supra* n126
131 *supra* n122 at para. 4.3
133 Sieghart, P *The Lawful Rights of Mankind* (1986) Oxford Univ Press at 290
134 *supra* n113
punishment additional to the original penalty, then Article 7(1) of the Convention may have been breached.

Article 8 concerning the right to respect for family, home and private life, is clearly relevant. In Lamguindaz v UK, the state had made a deportation order concerning a Moroccan national on the basis that it was conducive to the public good. The parties reached a friendly settlement after the Commission found that Article 8 had been violated\textsuperscript{135}. In satisfying Article 8, it will be necessary to show that the applicant has an established family or home life in the particular state\textsuperscript{136}. This may be difficult for many Czech Roma as, for reasons discussed above, there may be no accurate record of their residence\textsuperscript{137}.

Providing the applicant can show established ties with the state, the particular State will need to satisfy the European Court of Human Rights that a deportation order or citizenship denial is ‘necessary in a democratic society’ for one of the reasons indicated in Article 8(2)\textsuperscript{138}.

\textit{There shall be no interference by a public authority with the exercise of these rights except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, of for the protection of the rights and freedoms of others.}

The issue of whether such a measure is ‘necessary in a democratic society’ will involve an assessment of proportionality i.e. consideration of whether the particular measure is proportionate to the aim sought. In Bouchelkia v France (1997)\textsuperscript{139} the Court held that in the case of an Algerian national who had been deported following the commission of

\textsuperscript{135} 17 EHRR at 213. The Commission expressly noted that there was no right to enter or remain in a country under the Convention at 215 para.36; see also S v Sweden App. 172/56 YB 1 at 211.

\textsuperscript{136} X and Y v Switzerland App.7289/75 DR 9, p74

\textsuperscript{137} X v FRG App 9478/81 DR 27 at 243. The Commission considering that there was evidence of family ties in the country of destination, held that the deportation of a foreigner was not an interference under Article 8.

\textsuperscript{138} K and W v Netherlands app. 11278/84 1.7.85 and X v FRG ibid at 243.
a criminal offence, there had been a breach of Article 8 as his family and private life had been well established in France. Nevertheless, under Article 8(2) it was held that the need to prevent disorder and crime made the deportation order proportionate in the circumstances (this assessment was made based on the evidence that the applicant did have some family links in Algeria as well as France)\textsuperscript{140}.

It is apparent from the evidence of rejected citizenship applications gathered by Czech human rights organisations that in many cases these limitation provisions do not apply and private life may have been unjustly interfered with\textsuperscript{141}.

The issue of legal citizenship may also be crucial for the legal recognition of the rights of members of minorities contained in the Framework Convention for the Protection of National Minorities. In continuing to push for an additional protocol to the ECHR on the rights of national minorities\textsuperscript{142}, the Council of Europe’s Parliamentary Assembly have proposed a definition of ‘national minority’, an integral element of which is citizenship and residence in the state concerned\textsuperscript{143}. According to the Assembly’s recommendation, discussed in Chapter Six, the designated members of such minorities have the right to learn and receive education in their mother tongue; set up and manage schools and the right of free and unimpeded access to citizens of other countries who are also members of that minority\textsuperscript{144}.

\textsuperscript{139} (1997) 25 EHRR 686

\textsuperscript{140} A similar decision was reached in \textit{Boughanemi v France} (1996) 22 EHRR 228 concerning a Tunisian national who had been deported in 1988 and had then returned illegally.

\textsuperscript{141} see particularly Tolerance Foundation \textit{supra} n96


International Standards on the Elimination of Statelessness

The United Nations High Commissioner on Refugees was particularly critical of the Czech Government’s unwillingness to address the issue of statelessness which has resulted from the implementation of the citizenship laws. Article 15 of the Universal Declaration of Human rights gives everyone the right to a nationality but does not impose a corresponding obligation on a particular State to uphold that right.\(^{144}\) This provision has been considerably watered down by the drafting of the ICCPR which merely provides that every child has the right to acquire a nationality.\(^{145}\) Most writers on the subject of nationality echo the view that there is no rule of international law imposing a positive duty on States to grant nationality,\(^{146}\) although some argue that there may be a negative duty not to create statelessness under international law.\(^{147}\) As far as territorial transfers are concerned, there is however, evidence of a strongly supported principle that nationality is linked with territorial occupation. Brownlie contends that “the evidence is overwhelmingly in support of the view that the population follows the change in sovereignty in matters of nationality.”\(^{148}\) More specifically, Chan asserts that the issue of nationality in such cases will depend on a ‘genuine and effective link’, in most cases established by residency.\(^{149}\) Thus there is evidence of a principle but not a rule that on the dissolution of Czechoslovakia, those residing in the Czech Republic would acquire Czech nationality.

\(^{144}\) Reiterated in Recommendation 1255 (1995), Articles 8 and 11.


\(^{146}\) Article 24(3) ICCPR


\(^{148}\) Chan, supra n145 at 11.

\(^{149}\) Brownlie, I “The relations of nationality in public international law” (1963) BYIL 284 at 320.

\(^{150}\) Chan supra n 145 at 12
There is clearly a gap in international protection where an individual has lost their nationality and as a result has no means of effective representation and none of the usual access to nationality based rights. The difference between de facto and de jure statelessness has given rise to such a gap. In his 'Report on Nationality including Statelessness' in 1952, Manley Hudson noted:

*Purely formal solutions...might reduce the number of statelessness persons but not the number of protected persons. They might lead to a shifting of statelessness 'de jure' to statelessness 'de facto'.*

The 1954 Convention Relating to the Status of Stateless Persons, the first international document dealing specifically with the increasing rise in the number of refugees and stateless persons, did not concern itself with the problem of de facto statelessness. The 1961 Convention on the Reduction of Statelessness paid little attention to the issue, despite the advice of the High Commissioner for Refugees who considered the inclusion of de facto statelessness to be essential if the convention was to have any meaningful effect. Nevertheless, the legislative competence of a state is limited by some of the provisions contained therein. Article 1 of the Convention provides that a state shall grant its nationality to a person born on its territory if that person would otherwise be stateless. This provision is extended by Article 4 by which a state should grant its nationality if one of the parents of a stateless person was born on its territory. Particularly relevant to the Czech situation is the principle providing

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153 28.9.54 UN Treaty series Vol. 360 at 131. This convention has not been signed by the Czech Republic or Slovakia UN Treaty Series Vol 360 p117.

154 Dr P Weis in Conference on Elimination or Reduction of Future Statelessness (1959) UN Doc A/CONF 9/3 (13.2.59) 3. The final vote on the text was reached at UN Doc. A/CONF.9/Sr.23 (11.10.61).
that a State shall not deprive a person of their nationality if they would otherwise be stateless\textsuperscript{155}. However, this right is subject to the qualification that the person has not acted in a manner which is prejudicial to the interests of the State\textsuperscript{156}.

Despite the weakness in the wording of such principles and the lack of State support for the Convention generally\textsuperscript{157}, the Special Rapporteur on Nationality and State Succession of the International Law Commission contends that limits are placed on the discretion of States in the context of state succession and, specifically, naturalisation\textsuperscript{158}. In particular he refers to the general principles against discrimination on the grounds such as sex, race and religion, he also refers to Article 9 of the Convention:

\textit{In the event of State succession, this provision must be understood as a prohibition of any arbitrary policy on the side of the predecessor state when withdrawing its nationality from the inhabitants of the territory affected by state succession}\textsuperscript{159}.

His report also finds that the criteria of habitual residence and domicile are the most frequently used in practice\textsuperscript{160}. In response to the Council of Europe's criticism however, the Czech Government argued that any assumed obligation to comply with these principles is tenuous. Their response rejected the role of international law in such cases:

\textit{Public rights cannot be guaranteed on succession, because they represent the innermost “hard core” of sovereignty of a new State and may be regulated only by the successor State}\textsuperscript{161}.

\textsuperscript{155} Article 8  
\textsuperscript{156} Article 8(3) (a)(ii)  
\textsuperscript{157} As of 1999 the Convention has twenty-one State parties and only five signatories see UN Traety Series Vol 989 p175  
\textsuperscript{158} Special Rapporteur of the International Law Commission, Mr Mikulka, in Doc A/CN.4/467 on 17th April 1995 at para. 85.  
\textsuperscript{159} ibid. at 154 para. 85  
\textsuperscript{160} ibid. at 154  
\textsuperscript{161} “Comments of the Czech Republic to the report by the Council of Europe experts on the citizenship laws of the Czech Republic and Slovakia” in \textit{supra} n99 at 103 para. 32
In November 1997 the *European Convention on Nationality* was opened for signature. Article 3 confirms the approach advocated by the academic writers: each state has the responsibility of determining who are its nationals as far as is consistent with the principles of international law, custom and conventions. Everyone is given the right to an effective nationality, but again there is no firm obligation placed on a particular state to honour this commitment. Although there is a duty to facilitate the acquisition of nationality by people born on a territory, stateless persons and people lawfully and habitually resident, the state has the ultimate decision of determining the period of residence for naturalisation. The relevant factors in state succession cases are spelt out under the Convention: a genuine and effective link, habitual residence at the time of the succession, the will of the parties and the territorial origin of the parties. Here again though, the internal laws of the state are paramount. The only area which may give rise to a problem for the Czech legislature concerns the duty to give reasons in writing when there is an adverse decision concerning nationality.

The lack of clear international guidance on the subject of State succession and nationality transfer is clearly problematic. However, from the confused picture there are several clear strands that emerge as established principles, the breach of which will attract international condemnation and will demand satisfactory justification. An obligation to reduce or eliminate statelessness is one such principle. It further seems apparent that the elimination of statelessness will only be successful if the "nationality of the individual is the nationality of that State with which he is, in fact, most closely

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162 *European Convention on Nationality* 6th November 1997 European Treaty Series/ 166
163 Article 4
164 Article 6(2), 6(3) and 6(4).
165 Article 18
166 Article 11. Article 12 gives a right to review in these cases.
i.e. if the Czech Republic actually gave citizenship to those Roma resident at the time of dissolution.

Consequences of the Czech Citizenship provisions for the Roma population.

The Czech Government initially claimed that only two-hundred Roma had been denied citizenship. Whilst the exact figures remain elusive, this figure is clearly a blatant underestimate. The Equal Rights Programme established by the Tolerance Foundation found over four hundred people whose applications had been refused and that from a sample of ninety-nine cases, 92% of those denied citizenship had not got a Slovak passport either. The Roma Democratic Congress initially estimated that at least 77,000 Czech Romanies will be without citizenship as a direct result of the legislation\(^\text{168}\), (the figure is now thought to be somewhere between 10,000 and 25,000\(^\text{169}\)).

Article 16 of the Czech Criminal Code allows a foreigner to be expelled by the police for a misdemeanour or crime. Expulsions by judicial decision can also occur for serious crimes if the person is a non-citizen irrespective of citizenship elsewhere\(^\text{170}\).

It would appear that scant regard has been paid to Article 12 of the Czech Constitution which states that 'no-one can be deprived of their citizenship against their will'. The Czech authorities argue that such an Act was essential to maintain sovereignty and contend that reasonable and preferential measures have been adopted in order to enable all former Slovak citizens to claim Czech citizenship. In making this assessment though the authorities have, perhaps conveniently, failed to consider the special needs of the Romani population and the entrenched prejudice of many of those who are

\(^{167}\) Hudson *supra* n152

\(^{168}\) Press Conference June 30th 1994 *supra* n 101.

\(^{169}\) Human Rights Watch (1996) *supra* n 4 at 26

\(^{170}\) Article 57 Czech Criminal Code
employed to deal with the citizenship applications. The ‘Equal Rights Program’ has
discovered many examples of Roma applicants being refused citizenship on dubious
grounds before there is any right of appeal171. In some cases applicants were refused
because they had not obtained the correct identification documents or for criminal
offences committed over five years previously and, in at least one case, as a result of a
"regrettable misunderstanding" when officials failed to consider all the relevant
circumstances172. A survey by the Roma National Congress in Hamburg revealed that
90% of Czech Roma see no reason for remaining in the Republic173.

Choices for Those Without Citizenship

Czech residents from Slovakia who have not obtained the new citizenship status have
two possible alternatives to remaining in the Czech Republic as a foreigner. Many non-
Czech citizens may still possess Slovakian identity documents and may chose to return
to Slovakia. However, one of the conditions of applications is that any Slovak
citizenship must have been surrendered prior to the application for Czech citizenship.
As a result there are many non-Czech citizens who are now de facto stateless and are
unable to return. The second route for many non-citizens undoubtedly is to leave the
country for Western Europe, often Germany and, more recently the United Kingdom
and Canada, in search of a more secure future.

Remaining in the Czech Republic as a ‘foreigner’

In the Czech Republic a person who is not a Czech citizen is necessarily a ‘foreigner’
and must comply with the Act on Foreigners Stay and Residence174 or risk expulsion.

171 Tolerance Foundation (1994b) supra n 96.
172 Ibid. at 24-6
174 Law 123/1992
Under the Act there are three forms of legal stay for a non-citizen: 1) short-term stay (intended for tourists) up to 180 days, 2) Long-term residence (work, studies, medical treatment) for up to 1 year and 3) permanent residence which is generally only available to family members who reside permanently in the Czech Republic. The latter is still dependant on satisfaction of the clean criminal record requirement. Permanent residence is necessary in order to obtain health and unemployment benefits; if a father does not have permanent residence then the whole family may be deprived of these benefits. The law does not take into consideration residence in the Republic before January 1993 or the ownership of property before that date.

Return to Slovakia

Roma who decide to return to Slovakia are likely to face conditions of extreme poverty and hardship. One observer from the International Helsinki Federation for Human Rights was alarmed by the high level of deprivation in one camp of over six-hundred people living in wooden units of twelve to fourteen people. The report revealed that there was no public transport to the camp and that the rubbish had not been emptied for over a year. The one positive aspect was that the site had a school, financed by local money from Roma entrepreneurs. This camp was regarded by the Roma guide as being one of the better ones with “The Roma of a neighbouring village living in dug out holes in the ground, covered by plastic sheets.” Rising poverty in the ghettos has led to an increase in crime, alcoholism and deteriorating relationships with the non-Gypsy community.

175 Human Rights Watch (1996) supra n 4 at 26
177 Ibid. at 3.
178 Mann, A The Romanies in Slovakia Local History and Minorities training course, Slovakia C/E 1994 at 5.
Furthermore, for many non-Czech citizens the option of returning is unrealistic as well as undesirable. Many left Slovakia during the industrial drives and no longer have family or territorial links with Slovakia\textsuperscript{179}. For those who surrendered their Slovakian citizenship or who cannot obtain necessary identity documentation the situation is even more disconcerting. In their analysis of ninety-nine cases, the Equal Rights Program, found that 92% of those interviewed had failed to acquire citizenship and did not possess a Slovakian passport whilst 8% had been released of their Slovakian citizenship to make them de jure stateless\textsuperscript{180}. None of those surveyed has a permanent residency permit under the Foreigners Act which would allow them to claim state benefits or employment without a work permit. There is no guarantee that those who remain in the Czech Republic without a residence permit will not be expelled; their existence is precarious in a hostile country.

**Emigration to Western Europe.**

The other alternative for many of the Czech non-citizens is to leave the country and seek prosperity abroad in Western Europe, often Germany\textsuperscript{181} and more recently, the United Kingdom and Canada\textsuperscript{182}. In 1993 the Czech government detained 24,000 people attempting to depart illegally for Germany, a significant number of whom were Roma\textsuperscript{183}. Evidence tends to suggest that those who succeed in illegally entering Germany may soon discover that their problems are only just beginning.

Following the reunification of Germany racist attacks increased ten-fold in 1991 and the terror increased through 1992 to over two thousand incidents of right-wing

\textsuperscript{179} Tolerance Foundation (1995) supra n 91 at 21.
\textsuperscript{180} Tolerance Foundation (1994b) supra n 96 at 17
\textsuperscript{181} Roma National Congress supra\textsuperscript{173} at 21
\textsuperscript{182} O’Nions “Bonafide or Bogus” [1999] 3 Web JCLI
\textsuperscript{183} Edginton, B “To kill a Romany” in Race and Class Vol. 35, 1994.
The prejudice is particularly intense towards Roma, Turks, Vietnamese, Poles and black Africans. On the political platform, Roma have not yet been acknowledged as a 'national minority' and there are numerous examples of official prejudice. A member of the Bremen state Parliament referred to the Nazi Holocaust and stated 'it's a pity that not more of them were murdered' and one Green Party Council supervisor likened the Romani Holocaust to the disappearance of the dinosaurs, saying "We cannot help everybody we've hurt through history...The Romani culture is not worth protecting". Furthermore Germany was the only nation to vote against a United Nations Resolution on the 'Protection of Roma' in 1992 on the basis that the Roma are not considered a minority and they should not be afforded special positive treatment. Germany is thus unlikely to provide the security that the Romani refugees from Eastern Europe are seeking.

A recent wave of migration has also occurred to Canada following a television documentary shown on 5th August 1997 depicting a country of tolerance with a special program to assist Romanies. Figures as to the number of Rom moving to Canada in the late-summer and autumn of 1997 remain elusive: the European Roma Rights Centre in Budapest stated that thousands were preparing to move and the Helsinki Commission noted 1100 arrivals in September 1997. By the end of August 1997 the homeless shelters of Toronto were full to capacity of Czech asylum

184 Hockenos, P (1993) supra n49 at 28/9
185 Ibid. at 39
186 Quoted in RNC supra n173 at 16.
188 "Gypsies go to heaven" August 5th 1997 TV NOVA; "Gypsy accuses 'Arrogant' Canada" Toronto Star 24th August 1997 pA2
seekers. A significant number of these arrivals returned to the Czech Republic in the following months after finding that their relatives were not given permission to join them.

In one three-day period in October, some 200 Roma arrived in Dover from the Czech Republic and Slovakia. Soon after, the Sun newspaper reported that ‘3,000 gipsies’ were heading for Britain from Slovakia to utilise the ‘cushy benefit system’. Many did not arrive after news spread quickly that the welcome would not be as warm as the Romani arrivals had been led to believe following another favourable Czech television documentary. The extreme-right organisation, the British National Party, were quick to try and mobilise local anger by demonstrating at the port of arrival, although they received little support from the Dover residents.

The visa requirement for Czech citizens coming to Canada was quickly reinstated and the period of application for asylum seekers in the UK was similarly reduced by immigration minister Mike O’Brien, from 28 days to 5 in response to the wave of these allegedly ‘economic migrants’.

It now appears that most of the migrating Rom were from the Czech Republic rather than Slovakia and the majority were quickly sent back to France. After the initial scare-

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191 CFRB Radio, 22 August 1997 6.30pm; RFE/RL Newsline vol. 1 no 101, Part II August 22nd 1997 estimates that 20% of the hostel residents are Rom.
192 Radio Prague E.news “Romanies come home” 15th June 1998, reported that 600 of the 1,500 Romani asylum seekers have now returned to the Czech Republic.
194 Lee “Man whose tale prompted scores of Gypsies to follow him to Dover has no regrets” Times 23 October 1997, Fisher “Now Czech TV sending Gypsies to UK” Toronto Sun Oct 26/7th 1997
195 Appleby “Visiting Czechs need visas” Globe and Mail, Canada October 8th 1997; Schneider “In bid to restrict Gypsies, Canada Limits Czech visitors; visa controls reinstated to curb refugees” Washington Post 10th October 1997 A31.
196 CTK (Czech news agency), Prague October 27th 1997
mongering had subsided\textsuperscript{197}, several newspapers were forced to recognise, albeit reluctantly, something of the discrimination faced in the Czech Republic. Following the murder of a Romany woman in a racially motivated attack\textsuperscript{198}, the Immigration Appeals Tribunal has been prepared to grant asylum to Roma applicants\textsuperscript{199}.

\textbf{Conclusion}

Whereas the Romani minority in the Czech Republic existed without legal recognition prior to 1990, it is now the Romani individual whose identity is threatened. The Czech Charter on Fundamental Rights and Freedoms follows the language of the regional human rights instruments, paying little more than lip service to the effective recognition of minority identity. Without the effective recognition of this identity, the individual Rom is powerless in realising adequate protection of these human rights standards. The strength of Kymlicka’s argument that the protection of group-based rights is a necessary prerequisite to the adequate protection of individual rights can be seen clearly here\textsuperscript{200}. Whilst the Czech authorities can point to an impressive charter of individual freedoms, such freedoms cannot be realised in the climate of discrimination and intolerance in which all Czech Roma find themselves. The Roma minority has been officially recognised for the first time and has become increasingly visible as a result. In this situation an emphasis on the rights of the individual is ineffective and may be counter-productive if one considers the Czech Citizenship criteria. Seemingly equal

\textsuperscript{197} Note the headline in the Independent "Gypsies invade Dover, hoping for a handout" 20 Oct 1997 p1; the Telegraph talks of the ‘Dover Nightmare’ on 20th Oct 1997 p2.

\textsuperscript{198} CAROLINA No 277 “Young woman dies after racially motivated attack” February 20th 1998

\textsuperscript{199} reported in CAROLINA No 279 “Romany family granted asylum in Great Britain” March 6th 1998; more recent Immigration Appeal Tribunal decisions granting asylum to Roma from the Czech and Slovak Republics are SSHD v Peter Balaz 17.8.99 CC/41172/98 (19294) and SSHD v Jaroslav Gujda 4.6.99 CC/59626/97 (18231)

\textsuperscript{200} See above Chapter two.
non-discriminatory criteria can be seen to have very unequal discriminatory consequences. The Tolerance Foundation explain the way in which the citizenship law indirectly discriminates against the Roma:

_The law was aimed at limiting the Roma population's possibility of acquiring citizenship because it imposed a set of requirements that are particularly difficult for this ethnic group to comply with._²⁰¹

There is very little sympathy for the largely unassimilated minority who, it is perceived, choose to be different and must therefore accept the consequences of that choice. Indeed, there is some evidence to suggest that the exodus of a large number of Roma (such as has recently occurred to the UK, Canada and other Western European countries) was not an unforeseen consequence of state succession²⁰².

If this is the case then it is even more disheartening to conclude that with the present focus on the individual in the human rights instruments, one cannot confidently demonstrate that the Czech authorities are failing to respect human rights. The criticism levied at the Czech Citizenship Law struggles with the reconciliation of values such as respect for other identities and alternative lifestyles with the language of these human rights instruments. In short, the Czech law and its intentions appears to smell of injustice, but a reading of international human rights law as presently constituted suggests that this injustice may fall short of a legal violation of human rights. Human rights are not dependent solely on questions of citizenship, but it may be argued that their realisation becomes a fiction without such a basic guarantee of personal security. Until the voices of the individual Roma who comprise the Romani minority in the Czech Republic are heard and the group are considered as requiring

²⁰² As reported in the Open Media Research Institute Daily Digest 17.9.92.
special treatment to redress the entrenched prejudice of the legislature and the general public, there can be no human rights protection for them. The Czech Citizenship law does not take into account the Roma minority status by developing a procedure which is both simple and fair, with a right to appeal as guaranteed both nationally and internationally.\textsuperscript{203}

The recent wave of migration has brought the Czech human rights record to the forefront of international media. The European Community have continually expressed concern about the treatment of Czech Roma. The Agenda 2000 report noted that the Roma:

\textit{are the target of numerous forms of discrimination in their daily lives and suffer particular violence from skinheads, without adequate protection from the authorities or police. Their social situation is often difficult (though sociological factors to some extent account for this), alongside with any discrimination they may suffer from the rest of the population, notably over access to jobs or housing}.\textsuperscript{204}

Their treatment is being critically monitored before the Czech Republic is invited to become a full EU member. In March 1998 the European Parliament threatened to block the approval of EU associate members' entry criteria, stating that Romany integration must be moved from a medium to a short-term objective.\textsuperscript{205} The recent report of the UN Committee on The Elimination of All Forms of Racial Discrimination was equally critical. Concern was expressed at the level of segregation, discrimination in housing, employment and civic life and the six-fold rise in racially motivated attacks between 1994 and 1996.\textsuperscript{206}

\textsuperscript{203} Rights to an effective remedy - Article 13 of the ECHR; Article 6 CERD; Article 26 ICCPR.

\textsuperscript{204} CTK July 17th 1997 “EC points to Romany human rights in Czech Republic”.

\textsuperscript{205} CTK (Czech news agency) Brussels 3rd March 1998.

\textsuperscript{206} UN 52nd session CERD, reported in ERRC Press Statement on the Concluding Observations Concerning the Czech Republic of the UN CERD March 1998.
Aware of these criticisms\(^{207}\), the Czech government have begun to address the problem by establishing an inter-ministerial ‘Commission for Romany Issues’ including six Romany representatives\(^{208}\). Representatives visited Ostrava to discuss the problems of Romani unemployment and poor housing conditions and finally, in 1998, the 1958 bill outlawing the nomadic life was repealed\(^{209}\). There are signs that the causes of discrimination are beginning to be addressed and the profile of the Roma is being gradually raised. Initiatives to recruit Romany police officers have been explored\(^{210}\) and recently a deputy Mayor has been found guilty of encouraging racial hatred and fined when he issued a ban on Romanies using the public swimming pool\(^{211}\). The parliamentary elections of June 1998 indicate a loss of support for the extreme right-wing agenda of the Republican Party. The centre-left Social Democrats received the greatest proportion of the popular vote, with the Republicans losing their parliamentary seats\(^{212}\). Later in 1998, allegations of apartheid were directed at the Usti Nad Labem municipal authority, who began constructing a wall to segregate Roma and non-Roma inhabitants\(^{213}\).

Nevertheless, as far as the citizenship law is concerned, despite calls by human rights organisations to remedy the defects of the legislation\(^{214}\), the Czech Government have

\(^{207}\) Pehe, J “Attitude to foreigners, emigres must change” Prague Post 24th June 1998. The writer, parliamentary adviser to the president, writes that in order for the Czech Republic to be fully accepted as a European state there must be vast improvements in the attitude to foreigners. He highlights as as ‘outrageous example’ the Czech Citizenship Law.

\(^{208}\) CTK (Czech news agency) “Czech cabinet drafting legislation to solve Romanies problems” 16th January 1998.

\(^{209}\) RFE/RL “Czech senate revokes anti-Romany law” March 5th 1998.

\(^{210}\) Radio Prague E.mail service “Romanies invited to join police force” 7th March 1998.

\(^{211}\) CTK 20th February 1998.

\(^{212}\) BBC 20th June 1998.

\(^{213}\) Traynor \textit{supra} n52.

\(^{214}\) See address by the OSCE High Commissioner on National Minorities p9-10 and Speech by the Deputy Secretary General of Council of Europe at 7/8 of \textit{Human Dimension Seminar on Roma in the}
refused to bow to pressure showing that they are unwilling to accept unequivocally the principles of human rights and democracy pertaining to a 'civil society'.

Any measure to improve the situation of the Czech Romani population must consider the daily denial of human rights which they endure. Individual rights amount to little more than rhetoric in a climate of entrenched prejudice and discrimination. Positive protection for minority identity and special measures are urgently needed alongside individual rights to give real meaning to constitutional guarantees.
CHAPTER FIVE

The Education of Roma and Traveller Children in
Europe: The Development of a New Pedagogy

Education is empowerment. It is the key to establishing and reinforcing democracy, to
development which is both sustainable and humane and to peace founded upon
mutual respect and social justice. Indeed, in a world in which creativity and
knowledge play an every greater role, the right to education is nothing less than the
right to participate in the life of the modern world.

Introduction

A strictly individualist emphasis also gives rise to problems with respect to the right to
education. Regarded as a social right, rather than a civil/political right, education is
housed between the related rights of health and culture in Articles 13 and 14 of the
United Nations International Covenant on Economic, Social and Cultural Rights
(hereafter ICESCR). It will be recalled that the second of the two international
covenants is not regarded as imposing immediate obligations on the signatory states.
This is an uncomfortable position for many writers who argue that education is a
prerequisite to the realisation of other human rights, such as freedom of expression and
religion. Any further extension to the notion of group rights would itself depend on

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2 Many writers from the Third World and developing countries in particular have argued that economic and social rights should have priority. Only when the basic living conditions are achieved through the provision of economic and social rights, it is argued, can there be the necessary equality for civil and political rights to flourish - see Cassese, A Human Rights In a Changing World (1990) Polity at 59-60.
access to education as does the effective elimination of racial discrimination and intolerance.

Improvements have been made in the provision of education for Roma and other travellers, particularly since the European Community Resolution On School Provision for Gypsy and Traveller Children in 1989. It can be seen that much of this improvement derives from a greater recognition of the different needs of minority groups in the education process. There are still many obstacles to be overcome and the Roma are still categorised as one of the most poorly educated groups in Europe. It is believed that only 30-40% of these children attend school with any regularity and up to 90% of adults in some regions are illiterate.

Analysis of factors affecting educational achievement indicate that the Roma are disadvantaged in the education system for a variety of reasons. A crucial factor is the attitude of educators as exemplified in the national education policy; in too many cases the education system has been used to promote assimilation. However, this is not the only problem to be overcome as Romani parents have tended to disapprove of formal education and considered it to be unnecessary for the traditional lifestyle. The reasons for this negative attitude will be explored in this chapter.

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4 Ibid.
6 Research by the OECD in 1983 lists several categories of disadvantaged students. The Roma fall into several categories - including membership of ethnic minorities; economically disadvantaged and geographically disadvantaged. OECD The Education of Minority Groups (1983) Gower, Hampshire at 11.
Why is Formal Education for Roma and other travellers so important?

The importance of education is taken for granted in Gadje society; it is essential for economic and social progression. However, for a Romani child the benefits may not so self-evident.

Roma pupils rarely learn anything of their culture, language or values in a classroom. They are presented with a stark choice of denying their cultural identity and perhaps consequently suffering rejection at home, or rejecting the educational system. One observer in the former Federal Republic of Germany noted “only those Sinti who disguise their origin and who avoid contact with the group, have succeeded in learning a trade requiring prolonged apprenticeship or studies”. Daily discrimination within many schools from pupils and teachers alike mean that most children will choose the latter option.

When one considers these factors the reluctance to attend regular school exhibited by many Roma is understandable. Paradoxically however, these difficulties can only be addressed and surmounted when Roma children attend mainstream schools. Once those involved in the provision of schooling begin to understand more of the traditions and history which frame the Romani culture, in all its forms, they can begin to overcome the prejudices and discrimination which has subverted attempts at understanding in the past.

The value of education as a key to realising other rights such as accommodation and employment cannot be overstated. Unemployment is a major problem for Roma

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throughout Europe. The installation of market economies in the former Communist
countries of Eastern Europe has worsened this situation; the new emphasis on a
competitive workforce has enabled employers to reduce costs by dismissing workers
for flimsy reasons. Poor qualifications and an irregular work history provide excuses
for employers who do not wish to hire or retain dark-skinned employees.

The Roma community has, in the past, tended to shy away from holding positions of
authority and as a result has suffered the consequences of restrictive and disabling
legislation which has seen them deprived of citizenship, suitable accommodation and
access to education throughout Europe. Their increased visibility as a stigmatised and
often impoverished group necessitates the need to become more actively involved in
the dominant culture of the state, in a demanding, not subordinate, role.


At the root of the problem of provision of education services lies a fundamental goal-
based decision. If one considers the purpose of education it would have to involve the
maximising of the child’s potential so that in later life they have access to more choices
and opportunities in the society in which they live. Liégeois states: “The ultimate goal
of any school is to give each child the means and tools he requires in order to achieve

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9 International Helsinki Federation for Human rights Annual Report (1997) IHF Vienna, indicates the frequency of Roma unemployment across Europe. The report highlights particular unemployment problems in Greece, the Czech Republic and Hungary.
10 The International Committee on the Elimination of Racial Discrimination noted that unemployment of Czech Roma was between 70 and 80% and this was largely attributable to their poor education and labour skills. UN CERD Summary record of the 1254th meeting: Czech Republic 11th March 1998 para.55CERD/C/SR.1254.
11 Liégeois and Gheorghe Supra n5 passim.
autonomy"\textsuperscript{12}. However, integral to this approach when educating minority children should be the respect for their culture and the need for flexibility so that the education process as a whole does not promote assimilation. Many older Roma see little need for education and may perceive it as a threat to their culture, especially if they speak a minority language and the child will be instructed in the majority language\textsuperscript{13}. It is for this reason that the majority education system must be sensitive to the needs of minority cultures, instructing pupils about the foundations of their identity rather than alienating them.

Assimilationist and pluralist education strategies contrasted.

It is clear that policies which on the surface appear non-discriminatory may result in serious inequality in fact. Hawes and Perez note that the British ‘open door’ policy of the 1970’s did nothing to encourage the enrolment of travelling people\textsuperscript{14}. Specific funding was required in order to focus on the particular needs of travellers, many of whom did not have a legal place of abode and whose interests were consequently outside the net\textsuperscript{15}.

The assimilationist ideology, which regards ethnic affiliation as potentially dysfunctional, was dominant in many education systems until recently\textsuperscript{16}. Such a perspective emphasises a belief in the common culture to the detriment of minority

\textsuperscript{12} Liégeois \textit{supra} n7 at 208.

\textsuperscript{13} Office for Standards in Education, \textit{The Education of Travelling Children}, OFSTED. 1996 at 20, and Advisory Council for The Education of Romany and Other Travellers \textit{Supra} n7 above passim.

\textsuperscript{14} Hawes and Perez \textit{The Gypsy and the State. The Ethnic Cleansing of British Society} (1996) at 67.

\textsuperscript{15} Ibid. at 71.

\textsuperscript{16} Liégeois \textit{supra} n8
characteristics and values. In his study of US educational policy, James A Banks is critical of the assimilationist approach to education:

When assimilationists talk about the 'common culture', most often they mean the Anglo-American culture and are ignoring the reality that the US is made up of many different ethnic groups, each of which has some unique cultural characteristics that are a part of America.

Nathan Glazer sees a policy of 'benign neutrality' in respect of ethnic issues as the best way of promoting universalism in education. Will Kymlicka's critique of the 'benign neglect' strategy has already been discussed in Chapter two. The question remains as to how far a state or education authority can remain neutral to the needs and interests of all minority groups, particularly when such a policy involves supporting a dominant language.

Liégeois argues that educators have paid little attention to the education provided in the family unit, concentrating solely on the formal state education system. The education provided at home, he contends, has the same objectives as formal education, namely autonomy, responsibility and a sense of community. However, Liégeois observes an increasing recognition that school may have negative effects on minorities:

it can easily and effectively participate in assimilating the minority groups subjected to it, all the more so as attendance is often compulsory. Yes, school can “form” a child - but its role may be conforming, reforming or deforming.

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19 See Ch. 2 p 39.
20 Liégeois (1998) supra n16 at 64
21 Ibid. at 175
Thus the blanket policy of benign neutrality is exposed as a myth. Many writers have thus begun to explore pluralist education policies. The pluralist ideology recognises cultural differences as significant in the development of education policy 22. A dramatic re-organisation of the curriculum is advocated so that minority values form an intrinsic part of the mainstream educational policy. Furthermore, it is recognised that different ethnic groups have different cognitive styles and that these styles must be part of any educational assessment process 23.

As far as minority cultures are concerned, equality of opportunity can only be truly equal if there are measures to enable plurality rather than assimilation. Holly Cullen has pointed out that pluralism and equality of opportunity are both important objectives of a good education system 24. To a large extent it is a question of resources as to how far the pluralist approach can be applied, particularly in states where there are many ethnic minority groups making competing claims for resources. Equally important though is the political will of the dominant state system. The provision of special education measures to Roma and travelling people is unlikely to be popular with non-Roma 25 and if there is no effective lobbying to produce better quality education which centres around the minority culture this need can easily be forgotten 26. There are of course many other areas, not just education, which require

22 See for example Novak, M “Cultural pluralism for individuals: a social vision” in Tumin and Plotch (eds) supra n18 at 25-57.
23 Banks (1981) supra n17 at 63 highlights research by Ramirez and Castaneda concerning the learning styles of Mexican-American youths, and a study by Stodolsky and Lesser which supports the notion that the cognitive approaches of ethnic groups differ.
24 Cullen, “Education rights or minority rights?” (1993) 2 IJLF 143-177, passim.
25 Turgeon, L claims that the 1956 Kadar Gov. in Hungary had to play down affirmative action measures to assist the social situation of Gypsies in order to retain majority support. See “Discrimination against Gypsies” in Wyzan, M (ed.) The Political Economy of Ethnic Discrimination and Affirmative Action, Praeger. NY 1990 at 158.
26 This may explain why many of the advancements in traveller education are attributable to the action of voluntary organisations rather than part of a focused national strategy.
special measures and education may often be ignored. A common complaint is that education is discussed without reference to accommodation, the absence of which is often a major factor in poor attendance by Roma children. Acton and Kenrick also observe that sedentarism is regarded as being an essential prerequisite to the provisions of education. Their research suggests that this is an inaccurate perception:

...historical experience...would seem to indicate that it is not nomadism in itself, but only frequent forced evictions, or discrimination against nomads, that is an obstacle to education.

Nonetheless, the significance of education for any minority group cannot be overstated. If sensitively delivered, it would provide the tools which these children need to maintain their own culture, reducing discrimination and the potential of assimilation. The pluralist approach however, can be criticised for promoting and exaggerating difference at the expense of unity. If there is no universal conception of rationality, replaced by a belief in relativism, then the logical outcome of pluralist education policy, it is argued, would be ethnic segregation. There is also concern that pluralism in education would prevent critical commentary on illiberal practices. This has led to the middle-ground 'multi-ethnic' approach:

...multi-ethnic education is intended to reduce discrimination against ethnic groups and to provide all students with equal educational opportunities...Ethnic groups anywhere are the intended beneficiaries by modifying the school environment to reflect the diversity of multi-ethnic populations.

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27 Liégeois supra n7 at 7. Tom Lee, Secretary to the Romany Guild in the UK, asserts: “To discuss education before stopping-places is like putting the cart before the horse”.

28 Acton and Kenrick in Liégeois supra n16 at 100. This conclusion receives support from Italian and French sources in the same report.

29 Assimilationists argue that it could lead to the ‘Balkanization of society’ by increasing separatism and segregation.


32 OECD supra n6 at 297
Multi-ethnic education recognises that pluralism may exaggerate cultural differences but also that the role of these groups is greatly underestimated in the assimilationist approach. Freedom of choice is essential. Banks envisages an open society in which individuals are free to maintain their ethnic identity:

multi-ethnic theorists feel strongly that during the process of education the school should not alienate students from their ethnic attachments but help them to clarify their ethnic identities and make them aware of other ethnic and cultural alternatives.

Modification of the curriculum is still a crucial issue. The multi-ethnic ideology requires that the curriculum respects the diversity of each child and that teachers are skilled and sensitive to the needs of ethnic cultures. Such an approach is grounded in a group rights perspective but also entails a recognition of the complementarity with and, in cases of conflict, supremacy, of individual rights.

A review of some of the policies operating in the Council of Europe states reveals a conflicting message. On the one hand there are serious problems in accessing quality education, on the other hand there have been some positive steps taken, usually by individual schools and teachers which provide a glimmer of hope that the provision of education for travellers is an increasing concern. Coupled with initiatives in the European Community and the Council of Europe the overall picture is brighter than it has ever been but there is still much work to be done before the sun finally comes out.

The multi-ethnic approach with its inherent recognition of group rights is given support in the international documents on education, but it has yet to receive widespread recognition in the school policies for Romani and traveller education.

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33 Banks supra n17 at 71
34 Ibid. at 70
An Overview of the Situation in Europe

Spain

Article 3.3 of the Spanish Constitution states that the diverse range of cultures, languages and traditional institutions which make up Spanish heritage will be the objects of special respect and protection.\(^{35}\)

It has recently been estimated that the number of Spanish Roma or ‘Gitanos’ is somewhere in the region of 650,000 to 800,000.\(^{36}\) They are the largest minority group in Spain. Half live in Andalucia, usually in out of town districts without basic amenities such as electricity, water and sewerage. Accommodation is often in caves dug out of hillsides or in shanty towns. Throughout Spain Roma live in the poorest strata of society with high unemployment and extremely deprived housing conditions.\(^{37}\)

Schooling for the Spanish Roma has improved greatly over the past two decades but, as is the case throughout Europe, there are still numerous obstacles to be overcome.\(^{39}\) In a country in which half of the Gitano population are under eighteen,\(^{40}\) it is estimated that some 75% are illiterate. Secondary attendance levels are very poor and only

\(^{35}\) “Spanish Constitution” in Flanz and Blaustein, *Constitutions of the Countries of the World* (1971-)

\(^{36}\) Liegeois and Gheorghe *supra* n5 at 7.


\(^{40}\) The Gypsy Council for Education, Culture, Welfare and Civil Rights *supra* n38.
around 40% of Gitano children attend primary school with limited regularity. The drop-out rate is very high, particularly from the age of eleven, as is school failure.

Whilst free, compulsory education is open to all in Spain, Spanish educators have persistently failed to recognise the need to provide true de facto equality of opportunity based on the special needs of the most disadvantaged groups in Spanish society. Compensatory education schemes which attempt to redress entrenched inequalities appear to make little real difference; concentrating on socialisation skills and looking at future employment prospects. Gozalo Yagües refers to the lack of preschool provision which could attempt to redress immediate disadvantage that children from economically unstable backgrounds will face when they begin primary school.

Furthermore, he argues:

_There is also inequality of opportunity in the educational process, because from the pedagogical point of view teaching and instruction methods are scandalously inadequate and there is a lack of differentiation and adaptation of programmes of study and methods suited to the interests, lives, values and particular features of the Gypsy community._

A simple non-discrimination policy is shown to be insufficient in achieving de facto equality. Such problems are not unique to the poorer countries of Europe as an analysis, below, of the situation in Germany will illustrate, and a similar point has been made with respect to education in the former socialist countries: Csapo found that the

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42 Advisory Council for The Education of Romany and Other Travellers (eds) supra n7 at 111.
43 Ibid. at 116.
44 Ibid at 111.
45 Ibid.
education difficulties in the former socialist Hungary were comparable to those of the
well-developed capitalist countries of Finland and Austria\(^\text{46}\).

**Germany**

There are between 110,000 and 130,000 ‘Gypsies’ in Germany\(^\text{47}\); divided into the Sinti,
who have been resident in Germany for centuries, and the Roma, who have emigrated
to Germany since the nineteenth century\(^\text{48}\). As in other European countries, education
has in the past been used as a method of assimilation and oppression\(^\text{49}\).

At a national level it appears that there is no-one employed to co-ordinate the
 provision of education for these communities and there is no evidence of any national
policy\(^\text{50}\). Indeed Ms Lenner, who reported to the Carcassonne conference on the
situation of the Gypsies in Germany, stated that although she was responsible for the
education of Rom and Sinti in Munich: “I am not an expert in the education of Sinti
and Rom children nor am I in any way responsible for this education”\(^\text{51}\).

Isolated measures, discussed below, have been developed in particular Länder. The
support schools programme provides opportunities for education near some of the

\(^{46}\) Csapo, M “Concerns relating to the education of Romany students in Hungary, Austria and
Finland” (1982) 18 Comparative Education 2 p205-219, passim.

\(^{47}\) Liégeois and Gheorghe *supra n5* at 7.

\(^{48}\) Jansen “Sinti and Roma: An ethnic minority in Germany” in J Packer and K Myntti (eds), *The
167.

\(^{49}\) Lindemann, Florian (1991) quoted in Sinner, H “Information file: Germany” Interface Vol.15
August 1994 p11.

\(^{50}\) Lenner, “Federal Republic of Germany” in ACERT (eds), *The Education of Gypsy and Traveller
Children*, University of Hertfordshire Press. (1993) at 57.

\(^{51}\) Ibid.
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There are between 110,000 and 130,000 'Gypsies' in Germany\textsuperscript{47}; divided into the Sinti, who have been resident in Germany for centuries, and the Roma, who have emigrated to Germany since the nineteenth century\textsuperscript{48}. As in other European countries, education has in the past been used as a method of assimilation and oppression\textsuperscript{49}.

At a national level it appears that there is no-one employed to co-ordinate the provision of education for these communities and there is no evidence of any national policy\textsuperscript{50}. Indeed Ms Lenner, who reported to the Carcassonne conference on the situation of the Gypsies in Germany, stated that although she was responsible for the education of Rom and Sinti in Munich: "I am not an expert in the education of Sinti and Rom children nor am I in any way responsible for this education"\textsuperscript{51}.

Isolated measures, discussed below, have been developed in particular Länder. The support schools programme provides opportunities for education near some of the

\textsuperscript{46} Csapo, M "Concerns relating to the education of Romany students in Hungary, Austria and Finland" (1982) 18 Comparative Education 2 p205-219, passim.

\textsuperscript{47} Liégeois and Gheorghe supra n5 at 7.


\textsuperscript{50} Lenner, "Federal Republic of Germany" in ACERT (eds), The Education of Gypsy and Traveller Children, University of Hertfordshire Press. (1993) at 57.

\textsuperscript{51} Ibid.
permanent sites and teacher training initiatives have been developed to familiarise teachers with different cultural issues\textsuperscript{52}.

A major problem which the state has yet to address seriously is the number of refugees (many of whom are Roma) from Yugoslavia and Eastern Europe; they live in very poor conditions, speak limited German and are often quickly moved on so the chances of schooling are minimal\textsuperscript{53}. Any move to provide education for minority groups must be viewed against a largely xenophobic and intolerant backdrop\textsuperscript{54}. Whilst the German authorities have been attempting to repatriate refugees to countries of origin\textsuperscript{55} there is no evidence of any initiatives to provide education to the children of these families.

**Slovakia**

Slovakia now has the highest concentration of Roma in the world (estimated at half a million\textsuperscript{56}, this amounts to approximately 12\% of the total population). A recent report in the Helsinki Monitor describes ‘Gypsies’ and ‘Hungarians’ as the ‘natural enemies’ of the Slovak state “The result is growing social isolation of the Gypsies in their ghettos...such isolation excludes these minorities from social and political life and from defining national priorities and long-term national goals”\textsuperscript{57}. It will thus come as no

\textsuperscript{52} Sinner \textit{supra} n49 at 10-15
\textsuperscript{54} Hockenos, P \textit{Free to Hate} (1993) Routledge at 28 states that racist attacks increased ten-fold in United Germany's first year. Roma National Congress Ibid at 15-19.
\textsuperscript{55} Open Media Research Institute, \textit{Repatriation of Romanian Gypsies from Germany}, (1992) Daily Digest 11.3.92.
\textsuperscript{56} Liégeois and Gheorghe \textit{supra} n5 at 7.
surprise that the state of Roma education lags far behind the rest of the Slovak population.

Whilst the break up of Czechoslovakia led to a new constitution and legislation guaranteeing the equal rights of ethnic minorities in 1991, there has also been a large increase in unemployment and poverty\textsuperscript{58}. Additionally, a major problem in the development of schooling is the self-denial of the Roma minority status in the census, a consequence of centuries of prejudice including the Romani porajmos of World War Two\textsuperscript{59} and recent increases in right-wing violence and anti-Roma hostility\textsuperscript{60}.

Around 20\% of Roma children do not complete their primary education, although there have been recent initiatives to improve this situation including a course for teachers at the Faculty of Education in Nitra and a secondary school in Kosice which focuses on Roma music\textsuperscript{61}. Despite these positive steps there also remain some deeply entrenched problems. One such problem relates to the use of special schools for children designated as ‘mentally retarded’. In one such school in Rudnany some 98\% of the pupils are of Romani origin\textsuperscript{62}. Furthermore, there is no provision for teaching in

\textsuperscript{58} Mann, A.B Training Course for Teachers As Part of Pilot Project No 2: “The Analysis of the Questions of Minorities Issue and of the Possible Response of History Teaching and History Textbooks Design”, Council of Europe. 14-17th September 1994 at 14.(DECS/SE/BS/Sem (94) misc 6).

\textsuperscript{59} Advisory Council for The Education of Romany and Other Travellers Education for All: Working for Equal Rights, Advisory Council for The Education of Romany and Other Travellers. 1995 at 23, a mere 80,000 Gypsies in Slovakia classified themselves as such in a recent census.

\textsuperscript{60} The Economist, “His struggle/ Slovak Prime Minister under Fire over Gypsy Comments”, 18.9.83. Ex Slovak prime minister Vladimir Meciar was allegedly referring to Gypsies when he expressed concern at the number of “socially unadaptable and mentally backward populations”.

\textsuperscript{61} Ibid.

the mother tongue despite the fact that an estimated 70% of Slovak Roma speak
Romanes.

The United Kingdom

The education of travelling people in the United Kingdom has been a story of
progressive success, which received a significant set-back in 1994 with the
introduction of the Criminal Justice and Public Order Act which criminalises Gypsies
and travellers who do not have a legal place of abode. The success of traveller
schooling can be clearly attributed to the dedicated work of a small number of
volunteers and teaching professionals. Traveller education has never been seriously
addressed by legislation.

The Plowden Report of 1967 described Britain’s travelling community as ‘probably the
most deprived children’ requiring ‘special attention and planned action’ to remedy their
educational disadvantage. The first Gypsy caravan school was founded by Thomas
Acton in 1967, but, despite particular initiatives and extensive lobbying by the
National Gypsy Education Council and the Advisory Council for the Education of
Romany and other Travellers (ACERT), most of the changes over the next twenty
years were of an ad hoc nature.

Following extensive research by the West Midlands Traveller Education team between
1970 and 1972, Christopher Reiss concluded that: “The educational plight of the

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63 ERRC Time of the Skinhead. Denial and Exclusion of Roma in Slovakia January 1997 (ERRC
Budapest) p54.
education policy see Acton and Kenrick The Education of Gypsy/Traveller children in Great Britain
Gypsies has changed little since the 1870's. Acton recalls that the Department of Education and Science began to introduce short courses for teachers who might meet travellers in school but, paradoxically, there was little effort from the department to ensure that such children attended school.

Government reports and academic commentary on the education of minorities continued to highlight the travelling community as experiencing severe educational disadvantage. The Department of Education and Science's *Education of Travellers' Children* report of 1983 suggested that as many as 10,000 Gypsy children were still not getting any educational provision, especially at secondary level. Two years later, the 'Swann report was particularly critical of traveller education provision:

> In many ways the situation of Travellers' children in Britain today throws into stark relief many of the factors which influence the education of children from other ethnic minority groups - racism and discrimination, myths, stereotyping and misinformation, the inappropriateness and inflexibility of the education system and the need for better links between homes and schools and teachers and parents.

In response to the criticisms of the report, many local authorities began appointing advisors on developing a multi-cultural education policy. Nevertheless, the concerns exhibited in the Swann report can be seen clearly in the preference among travellers for on-site education. Bridging schools such as that offered in Avon were rarely...

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67 Acton, T *Romani Studies at the University of Greenwich* Course Information, Univ. of Greenwich
68 see for example HMI *The Education of Travellers Children* (1983) DES and the Swann report - Education for All: the report of the Committee of Inquiry into the Education of Children from Ethnic Minority Groups 1985, DES; Jeffcoate *supra* n31 at 72
69 Swann report *supra* n68.
70 Hawes and Perez *supra* n14 at 69. One encouraging example which demonstrates that a simple idea can be very effective occurred in Cornwall when a Craft, Design and Technology class was asked to design a bender tent and thus consider the sociological and technological issues of nomadism. See Taylor, W H "*Ethnic Relations in all-white Schools*" p106 in Tomlinson and Craft *Ethnic Relations and Schooling: Policy and Practice in the 1990's* (1995) Athlone Press, London.
successful\textsuperscript{71}; segregation was an easier option for all concerned. Robert Jeffcoate observed that due to their nomadic existence and traditional hostility towards formal education, Gypsies were the only ethnic minority presenting a ‘prime facie case for segregation in education’\textsuperscript{72}.

By the late 1980s the emphasis had shifted firmly from voluntary provision to provision within the state education system and the number of teachers grew greatly. In 1990 s210 of the Education Reform Act came into force allocating specific funding for traveller education projects\textsuperscript{73}. Such funding replaced the ad hoc grants made under the ‘no area pool’ provisions and suggested that the Government was aware that the different needs of travelling children needed to be addressed through specifically targeted resources. However, the sheer number of projects competing for resources has meant that many projects are under funded. Research by Hawes and Perez reveals that seven local education authorities lost more that 20% of their grants in April 1993 which inevitably led to job losses and reorganisation\textsuperscript{74}. By the mid 1990s Acton contends there were around 500 specialist teachers besides many more who had Gypsy children in their ordinary classes. Nevertheless, further cuts in the specific funding of education projects have followed compounding the effects of the Criminal Justice and Public Order Act 1994\textsuperscript{75}

\textbf{A European Problem}

\textsuperscript{71} Hawes and Perez (1996) \textit{supra} n14 at 70 and Ch.4.

\textsuperscript{72} Jeffcoate \textit{supra} n31 at 115. Such reasoning can be criticised for its failure to understand the causes of this ‘traditional hostility’ as they manifested themselves in discrimination and racism in the classroom.

\textsuperscript{73} s210 Education Reform Act 1988

\textsuperscript{74} Hawes and Perez, \textit{supra} n14 at 80-1.
The experiences of Roma school children across Europe reveal the same problems. Along with general difficulties caused by poverty and unemployment, there often exists a lack of awareness on the part of education authorities; inappropriate, culturally-insensitive education policies; and an inability to cope with the particular demands of this student body. Successful initiatives tend to be attributable to the work of a few committed individuals rather than a targeted, co-ordinated policy.

**Obstacles to educational access**

For those parents who do wish their child to attend school there are numerous obstacles to their educational success. Some of these result inevitably from cultural differences, others from the inefficiencies of the school system and others still, from the discrimination shown in the classroom by teachers and fellow pupils.

**Cultural Difficulties**

1. *Parents' illiteracy means lack of family support for formal schooling plus the need for the child to be economically productive at a comparatively young age.*

The importance of education is not so obvious when considered in the context of the Roma community in which most children will live and work and where education is only essential so far as it improves the ability to earn or parent. Such education is not provided by schools but through the close family networks whereby the children work alongside their parents, learning their skills, from an early age. Mainstream education provides few additional skills which are regarded as valuable and which mitigate the absence of a young wage-earner from the family unit. As a consequence, young Roma

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75 Ibid. at 83-5.
attending school are often discriminated against by their families in addition to the school system\textsuperscript{77}. A Spanish Gitano representative writes of this internal prejudice:

\begin{quote}
In his peer group they will consider him as 'apayado (Gorgified). They will be contemptuous of him in the belief that he no longer has 'picardia' (a commonly used term in certain Spanish Gypsy contexts to express irony and sharpness of word and deed) and he will perhaps be the target of the typical bitter, and even pitiless humour that we usually reserve for the Gorgios. That is to say that, little by little, they will begin treating him as if he had stopped being a Gypsy\textsuperscript{78}.
\end{quote}

The lack of parental literacy is also a major problem in increasing education. The Amman Affirmation on Education for All notes that improvement in adult education is crucial:

\begin{quote}
In all societies, the best predictor of the learning achievement of children is the education and literacy level of their parents\textsuperscript{79}.
\end{quote}

2. Nomadic Travellers.

It is a practical impossibility for many nomadic travellers to obtain consistent education for their children. Whilst nomadism is primarily confined to West European Gypsies in countries where the provision of education to travellers generally is hailed as something of a success, e.g. in the UK, the provision of education to nomadic families is still regarded as problematic\textsuperscript{80}. It has previously been noted that it is not the nomadic lifestyle itself that present problems, but rather the threat of constant eviction\textsuperscript{81}. The

\textsuperscript{76} Okely, J \textit{The Traveller-Gypsies} (1983) Cambridge Univ. press at 160-164.

\textsuperscript{77} Liégeois \textit{supra} n20 at 177 looks at the loss of Gypsy identity through regular school attendance.

\textsuperscript{78} European Community Conference \textit{supra} n41 at 20/1.

\textsuperscript{79} The Amman Affirmation, adopted at the mid-decade meeting of the International Consultative Forum on Education for All, Amman from 16th to 19th June 1996, reprinted in \textit{supra} n1 Annex.


\textsuperscript{81} \textit{supra} n27.
child’s education is often cited as a motivating reason why nomadic families gives up the road and becomes sedentary or semi-sedentary.\footnote{Davies, E \textit{Housing Gypsies} (1987) D/E}

3. \textit{Economic instability leads to poor social skills.}

The inferior standard of living of many Roma families, particularly in Spain and Eastern Europe, creates its own difficulties for the child faced with entirely new surroundings. Nicolas Jimenez Gonzalez, a Spanish Gitano speaking of the situation facing Roma boys starting school:

\begin{quote}
\textit{The lexicon of Spanish words used by his family is undoubtedly smaller and, what is more, if he lives in a shanty he will not know how to use certain instruments that he will find in a school, such as a light switch, washbasin, toilet etc.}\footnote{OFSTED supra n80 at 19.}
\end{quote}

Poverty inevitably means that parents may not be able to provide the school uniform and books which will further alienate the child at school.

4. \textit{Difficulties of adapting to schooling in the dominant language.}

Rajko Djuric of the International Romani Union cites difficulties with the dominant language as an ‘immediate disadvantage’ for many Romani children particularly in Eastern Europe.\footnote{Ibid. Opening address. Hartmann, “Information File” (1994) 16 \textit{Interface} 16 - A Romani teacher of Roma children in Cologne mentioned the following specific problems exhibited by the students: irregular attendance, insufficient grasp of the German language and significant gaps in general knowledge.} A French school teacher interviewed by Cottenc recognised three separate linguistic spheres: the traveller version, standard oral French and written
French: “In theory the teacher has a command of the last two, but not of the first: the children are in the opposite situation” \(^{85}\).

The Czech government have acknowledged that the language difficulty represents a serious factor in access to education. However, there is still evidence of misunderstanding and insensitivity in this respect. The attitude of Ladislav Goral, a Czech official, is far from atypical; he observed that language was a major problem, but then went on to defend the lack of pre-school provision by suggesting that the fault lay with the Roma culture: “because for the Romani person time doesn’t exist and they don’t know the value of education” \(^{86}\).

An increased focus on pluralism and group based difficulties in accessing schooling has led to a general recognition, emphasised by various international conventions and statements, that preliminary education requires some instruction to be taken in the mother tongue. Dr Tove Skutnabb-Kangas concludes:

*High levels of bilingualism and biculturalism benefit every child, but for minority children, bilingualism is a necessity. High level bilingualism can be achieved but it requires the adoption of the principle of institutional support for minority languages, which, without such support, are less likely to develop to a high level than are majority languages* \(^{87}\).

The significance of minority language teaching in schools is gradually being realised in national education policies. The Czech constitution recognises the right of citizens constituting minorities to education in their own language \(^{88}\) and there have been suggestions that some teachers should learn the Romani language. However, at present

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\(^{86}\) Central Europe On-line “Czech official says government is doing its part to help the Roma” Oct. 10th 1997.

the pre-school education initiative still devotes resources to enabling Romani children to catch up with the linguistic abilities of the majority Czechs. In some areas with a high proportion of Roma, an advisor who is Rom may assist with translation and understanding.

The Slovak Minister for Education, attending a conference on the Roma in Eastern and Central Europe in 1992, advocated mother tongue teaching for the Roma as it was found to facilitate the learning experience. Nevertheless, in a 1996 resolution the Roma were the targets of a programme for citizens in need of special care, and measures under the policy included alternative teaching programmes with ‘an emphasis on better Slovak language instruction’. Thus there is some awareness of the problems that can arise from insufficient grasp of the dominant language, but there is an obvious difficulty in assessing the best means of solving these problems. The absence of Romani teachers also presents an added complication.

Inability of the school system to cater for minority groups

In the 1995 Hearing of Roma/Gypsy Women of West, Central and East Europe the delegates asked the European countries to consider the cultural specificity of the

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88 Czech Constitution, Charter Article 25(2) in Blaustein and Flanz Supra n 35
89 Central Europe On-line “Czech official says government is doing its part to help Roma” Oct. 10th 1997.
91 The Resolution of the Government of the Slovak Republic to the Proposal of the Activities and Measures in order to solve the Problems of Citizens in need of Special Care April 30th 1996, Ministry of Labour, Social affairs and Family.
children when making educational provision. It was felt that this must include a recognition of the Romany language and culture in the school curriculum.\(^{92}\)

In the UK, a LEA survey of travelling children on school rolls in 1967-70 revealed some worrying attitudes amongst teachers, many of which continue to be expressed today:

*Most teachers saw traveller children as socially and culturally deprived and disadvantaged. There seemed a widespread belief that the travellers had no culture or even sub-culture as such but merely a way of life-and one which met with general teacher disapproval...several thought that education could play a role in preventing the children from having to follow in their parents footsteps.*\(^{93}\)

This inflexible and ignorant approach from school authorities is deeply entrenched and many families are still reluctant to send their children to school as a result. One mother in Leicester stated in 1993:

*I never had no education, and I don't want my children being educated. They don't teach them Gypsy ways, they teach them travelling's bad. And they teach them bad ways. All my children's trusty but them gaujo children's not. They got no respect.*\(^{94}\)

It is apparent that most of the problems that teachers raise about the behaviour of the Romani students occur because of the collision between two very different cultures. Romani culture and language are transmitted orally, reading and writing are unfamiliar concepts and yet they will be expected to progress at the same level as children who are familiar with books and show confidence in basic writing skills.\(^{96}\)

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\(^{92}\) Gimenez Adelantado, *A Hearing of Roma/Gypsy women of West, Central and East Europe*, Council of Europe. 29-30th September 1995 at 3, para 13. (EG/TSI (95) 2)

\(^{93}\) Reiss [*supra* n66]

\(^{94}\) Rhys Morris [*supra* n53 at 25].

\(^{95}\) Although in some countries, such as Finland, the Romany has been written - dictionaries and grammar books have been developed to assist in teaching: As observed by Myniti, Kristian "National Minorities and Minority legislation in Finland" in Packer and Myniti [*supra* n48 at 93].

Similarly, Romani children have been brought up with distrust for Gadje society and separation is maintained between the two cultures. Entering an alien environment inhabited by a majority of total strangers is difficult for every child, but the difficulty is compounded when there is an imbued distrust of the stranger\(^7\).

Generally it would appear that teachers are insufficiently trained in educating minorities and that the school curriculum fails to incorporate anything of the Romani culture\(^8\). The pupils are alienated and are thus bound to be disruptive and unenthusiastic; the teachers are confused and unsympathetic\(^9\). There is often a stalemate and it is the traveller's schooling that will suffer. Jimenez Gonzalez, a Spanish Gitano representative, reports that there is no account taken of the different values of the Gypsy students and few teachers have any familiarity with their culture, interests and language:

*All this prepares for and conditions methodological, pedagogical and didactic assumptions which place Gypsy students in an inferior position, denigrate them and show contempt for them*\(^10\).

A report on education and literacy by Doctor Tove Skutnabb-Kangas highlights the importance of minority language teaching in schools alongside the dominant language\(^11\). He notes that immersion into a foreign language regularly results in poor academic achievement\(^12\). It is inevitable that it will also encourage disinterest and

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\(^7\) Ibid. at 316 and Zatta "Oral tradition and social context: language and cognitive structure among the Rom" in Salo, M T *One Hundred Years of Gypsy Studies* (1990) Gypsy Lore Society. Cheverly, Maryland at 74.

\(^8\) Liégeois *supra* n7 Ch. 15.

\(^9\) The question of whether students need to see themselves reflected in the curriculum in order to learn effectively is critically addressed by Glazer, Nathan *We are all Multi-culturalists Now* (1997) Harvard University press at 49.

\(^10\) The Gypsy Council for Education, Culture, Welfare and Civil Rights *supra* n 38

\(^11\) Skutnabb-Kangas *supra* n87

\(^12\) Ibid. at p19
result in irregular attendance. His report is critical of assimilationist educational strategies, noting their effects on the minority culture:

*ethnicism and linguiscism are more sophisticated but equally sufficient weapons as biological racism in committing ethnocide, the destruction of the socio-cultural (often including linguistic) identity of a group*\(^{103}\)

There is also the problem of resources which potentially threatens any positive initiatives to improve the service to travelling communities. In the example of the United Kingdom funding of traveller schooling was modernised in the 1988 Education Reform Act s210. Local Education Authorities had to bid for the amount of funding from the new specific grant but the funding level was well below that allocated to traveller education in the previous year\(^{104}\). Many projects were thus threatened and in 1995, despite assurance to the contrary, the grant was again cut by a further 10% (notwithstanding the news from The Advisory Service for the Education of Romany and other Travellers that 80% of teenagers were not registered at school\(^{105}\)). The ad hoc, localised nature of many of the measures to improve traveller schooling often means that funding can be subject to the vagaries of the market and that there is little opportunity for long-term secure planning for projects.

**Daily discrimination at school by pupils and teachers**

A recent report *On the Status of Romani Education in the Czech Republic*\(^{106}\) has revealed an extremely worrying factor in discrimination against Romany children at

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\(^{103}\) Skutnabb-Kangas *supra* n87 at 13.

\(^{104}\) Binns, D “History and growth of traveller education” (1990) 38 Brit J Ed St p251-258 at 256.


school; that of teacher acquiescence\textsuperscript{107}. Over a five month period, the researcher witnessed school practices in seven key areas and interviewed teachers, teaching assistants, school directors and others involved in providing education for Roma children. Conway found that with regard to classroom racism: “It is fair to say that the basic school teacher does not want to, or does not know how to deal with the Romani child”. One special-school teacher stated: “I get embarrassed when the other teachers won’t take things from Romani children’s hands, because they’re afraid of getting lice or fleas”\textsuperscript{108}. The results of Conway’s research echo the findings of a Council of Europe investigation which culminated in the 1989 Resolution on School provision for Gypsy and Traveller Children\textsuperscript{109}.

The effects of the teachers’ acquiescence in racist stereotyping and bullying are considered in the Czech report with reference to the work of Trevor Holme, an educational psychologist. Holme looks at the effects of labelling a child rather than their behaviour, for example ‘You’re stupid’ or ‘You’re a thief’. He contends that the effects of such behaviour by teachers is: “damaging and hurtful...reduces self-esteem...makes the young person think he/she has to change their whole personality not just their behaviour”\textsuperscript{110}.

Rhys Morris looks to a study by the Spanish anthropologist Tomas Buezas on the “Attitudes and Prejudices of Teachers and Pupils Regarding Other Peoples and Cultures”. Buezas found that teachers often reinforce the prejudice of their pupils and

\textsuperscript{107} Literature on the education policy in the United Kingdom in the 1970’s reveals similar racist stereotyping and acquiescence from teachers - see Jeffcoat, R \textit{Supra} n 31 at 102. The Czech Republic is a fledgling democracy and it is probably fair to say that teachers have no adequate training on how to counter prejudice which has existed for generations.

\textsuperscript{108} \textit{supra} n 106 at 33.

\textsuperscript{109} \textit{supra} n3; Liégeois \textit{supra} n16 passim.
that Gitanos are the minority which inspire the most prejudice from teachers and pupils alike. He found that 5% of teachers and 11.4% of pupils claim that given the choice they would banish the Gypsies from Spain\textsuperscript{111}. It is likely that many more would prefer not to share their classroom.

A Common Consequence: Special schools and segregation

As a result of the perceived difficulties in educating Roma in the mainstream school, many Roma children throughout Europe have been referred to a special school\textsuperscript{112}. Some of these schools are established primarily to cater for children who have learning difficulties and often they have a disproportionately high number of Romani pupils on their records\textsuperscript{113}.

The case against segregated schooling is however, by no means closed. It remains a paradox, that whilst segregated schooling violates notions of prime facie equality, it nevertheless can provide the only opportunity for education and employment in which Roma children have a chance of success. The agendas of special schools vary considerably and it is unwise to generalise about their educational standards. The question is largely one of choice; if parents would prefer to send their children to mainstream schools they should be able to do so. In many cases however, evidence indicates that this choice does not apply.

\textsuperscript{110} Ibid. at 34 and Holme, "The importance of self-esteem" and "Enhancing self-concept" (1994) 363 TMH (Teacher training manuals).
\textsuperscript{111} Rhys Morris \textit{supra} n53 at App. 3.
\textsuperscript{112} The report by Liégeois \textit{supra} n16 at 83-86 has examples of segregated schooling in the Federal Republic of Germany as well as the United Kingdom.
\textsuperscript{113} Conway \textit{supra} n106 at Ch. 1.
The use and abuse of the special school for Romani children has been noted in the report on education in the Czech Republic by Conway\textsuperscript{114}. In an interview with Central Europe On-line, Milan Pospisil, Secretary of the Czech Council of Nationalities, recognised the problem of poor educational achievement in the special schools\textsuperscript{115}. Pupils will rarely complete their elementary (primary) level of schooling and the gap between elementary and secondary is so great that very few students are able to bridge it\textsuperscript{116}.

In Slovakia, the “Osobitna Skola” or special schools, are used in a similar way to segregate Roma children from other pupils. The Roma Participation Program found that many of these children come from out-of-town ghettos and that such segregation serves to reinforce prejudice and disadvantage experienced by the Roma pupil\textsuperscript{117}.

Special schools have also been used in Hungary to segregate difficult Roma children who are linguistically or otherwise disadvantaged in mainstream education. In 1985, 36% of children in schools for the mentally impaired were Rom and 15.2% of all Rom school children were in such schools\textsuperscript{118}. In certain crisis areas the percentage is much higher - in the area of Ercsi 90% of special school pupils are Wlach Roma who speak Romani as their mother tongue\textsuperscript{119}.

\begin{flushright}
\textsuperscript{114} Ibid.
\textsuperscript{115} Central Europe On-line Nov. 6th 1997. Interview by editor Bruce Konviser.
\textsuperscript{116} Information received by the International Committee on the Elimination of Racial Discrimination suggests that 20% of Roma children attend special schools compared to 3% of children from the majority. supra n10 at para.57
\textsuperscript{117} Zubak, L and Lagryn, A “Roma are tired of being studied” Roma Participation Program Reporter See App 2. Glazer supra n99 at 136 argues that educational segregation reinforces separate ethnic perspectives on life in general.
\textsuperscript{119} Reported in Népszabadság February 2nd 1996.
\end{flushright}
All-Roma classes are also used in mainstream schools to segregate the children, often against the wishes of parents\textsuperscript{120}. It has been noted that these children tend to be ridiculed and despised by the other students and that integration rarely succeeds\textsuperscript{121}. An investigation by Human Rights Watch in 1995, found that some children were not examined prior to being placed in the remedial class and the reintegration of these children was rare\textsuperscript{122}. Two years later, a legal action\textsuperscript{123} was mounted by fourteen Romani pupils against their primary school in North-eastern Hungary which had operated a policy of separate dining and a separate graduation ceremony for Romany pupils\textsuperscript{124}. A reporter for the Hungarian newspaper \textit{Magyar Narancs} found that the exclusion was requested by non-Romani parents\textsuperscript{125}. In December 1998, Hungarian courts held that the local mayor and school authorities had violated the pupils rights and awarded nominal damages\textsuperscript{126}.

According to the Roma Press Centre, the Minister of Education has now publicly admitted that there are discriminatory elements in the process of directing children in mass numbers to special schools\textsuperscript{127}. It has been suggested that the general tests used would be more appropriate if linked to different skills\textsuperscript{128}. Acton argues that the nature

\textsuperscript{120} Reuters "Report shows Romany segregation in Hungarian schools" Feb. 5th 1998. A conference held by the National and Ethnic Minorities office found that up to 10% of Romany children are educated separately without the consent of their parents.

\textsuperscript{121} According to the head of the Experts' and Rehabilitation Committee for Learning skills Examination of Fejér County quoted in \textit{Népszabadság}, February 2nd 1996.


\textsuperscript{123} On the basis of Article 84(1)(a) Civil code, Art 70K of the Constitution

\textsuperscript{124} ERRC "The submission against the principal of the Ferenc Pethe Primary School, Tiszavavari, Hungary" \textit{Newsletter} Spring 1998.

\textsuperscript{125} “Graduation in separate ways” \textit{Magyar Narancs} June 19th 1997


\textsuperscript{127} Roma Press Centre “The Roma are not stupider than others” February 1996.

\textsuperscript{128} Reported in \textit{Népszabadság}, February 2nd 1996.
of assessment tests, used throughout Europe, reveals less about the ability of the
candidates than the ethnocentric perspectives of the testers.\(^{129}\)

In Bulgaria, the legal segregation of schooling for Romani children was abolished in
1992. Nevertheless, as Marushiakova and Popov observed, ‘Gypsy-schools’ continued
to exist against the wishes of the vast majority of Bulgarian Roma.\(^ {130}\) Linguistic and
socio-economic disadvantage combines to prevent the Rom from attending ‘normal’
schools, with the result that many are thereafter unemployable.

Whilst educational segregation in itself does not necessarily contravene the non-
discrimination criteria of international human rights instruments, providing it is both in
accord with the accepted standards of mainstream education and if it is voluntarily
undertaken,\(^ {131}\) it may present several obvious disadvantages. It is often unpopular with
Roma parents, there is very little real choice involved for the child who may have been
ostracised and alienated in the mainstream school, issues of intolerance between Roma
and Gadjes cannot be addressed at an early age and thereby reduce the chance of
future animosity and xenophobia, and finally, it prevents school systems from having to
address the very important demands of cultural minorities.

It is possible however, for special schools to present excellent standards of education
for their Rom pupils. One such example is the Gandhi Gimnazium in Pecs, Hungary
which was established at the initiative of local Roma organisations. The school’s
director, János Derdák, himself of Romany origin, defined the aim of the school as to

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\(^{129}\) Acton, T (1984) quoted in Liégeois \textit{supra} n16 at 85

\(^{130}\) Maurushiakova, E and Popov, V “‘Gypsy schools’ in Bulgaria” \textit{Promoting Human Rights and
Civil Society Newsletter} No 4 1994 p5.

\(^{131}\) Cullen \textit{supra} n24 above at 155.
create an elite among Romanies who will work in the interest of their country. The syllabus incorporates Romani culture alongside Hungarian culture through the traditional curriculum. The Alternative Foundation Trade school in Szolnok is another initiative supported by the National Minority Self-Government of the Gypsy population, aimed at enabling disadvantaged school pupils to gain the necessary skills for specific trades. The trade school was established in 1996 and is open to both Roma and Gadjes; the success of the project has led to its adoption in other Hungarian regions. The headmaster of a Gypsy secondary school in Budapest argues that separate schools are needed not just because of the level of discrimination in mainstream education:

_We learn in a different way and require teachers to teach in a different style, but we also need to develop a real knowledge of our own culture, our own language and our own history. These things are not taught in normal Hungarian schools._

At present there remains an insufficient number of well-educated Roma in most countries. This means that the special school system is open to abuse by educators who know little of the Romany culture. Segregated schooling must be approached with caution. Where it is run by and for the Roma, it is an example of collective rights in practice. However, it plainly contradicts notions of equality and it is to be hoped that whilst such measures are being provided, lobbying for better quality mainstream education:

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135 Three trades were selected for the 1996 programme: computer operator, park caretaker and road maintenance skilled worker.

136 Csillei supra n134 at p11

137 Jozsef Choledroczi interviewed by Simon Evans “Separate but superior?” Hungary Report Archive 2.05 July 22nd 1996
education will also continue. The Roma Education Program, financed by the Soros Foundation places the emphasis on integration rather than separation:

They are not separated in society and need to know how to communicate with non-Gypsies, to learn about their own cultures as well as their own.\footnote{Ferenc Arato interview by Evans. Ibid.}

There is a catch-22 situation. Discrimination prevents many Roma from completing school. Yet at the same time, how is this discrimination to be addressed if not from an early age through the education system?

**The International Human Right to Education**

The basic right of every child to an education is laid down in a variety of international instruments. Article 13 of the Covenant on Economic, Social and Cultural Rights is the starting point for any discussion of the international obligations. Whilst the purpose of such education includes the promotion of “understanding and tolerance among all nations and all racial, ethnic or religious groups”\footnote{Article 13 (1) International Covenant on Economic, Social and Cultural Rights (1966).}, there is no recognition of, and thus no recommendations for alleviating, the specific educational problems faced by certain minority groups. Thus free primary education must be compulsory, but there is no requirement as to the quality of such provision.\footnote{Ibid. Article 13(2)(a) and Article 13.}

The United Nations’ Convention on the Rights of the Child 1989 elaborates on the basic right to education laid down in the Covenant. The Convention has received
almost unanimous support from states. Article 28 guarantees the basic right to education as laid down in the ESCC\textsuperscript{141}.

The real elaboration on the Covenant provisions can be found in Article 29 which expressly recognises the significance of culture and family life. Article 29(1)(c) provides that the education of the child shall be directed towards:

*the development of respect for the child’s parents, his or her own culture, identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own.*

However, the provision is clearly lacking in that there is no demand on states to guarantee multi-cultural education or even education in the mother tongue. Article 30, which provides for the interests of members of minorities, does so only in a negative formulation comparable to Article 27 of the ICCPR. Article 2 reiterates the basic principle of non-discrimination in relation to any of the substantive rights laid down in the Convention, but it is somewhat surprising to note that there is no express provision dealing with the quality of education.

The implementation of the Convention is examined by a series of reports on its implementation by state parties every three years\textsuperscript{142}. There is no opportunity for an individual to take a case against a signatory state for breach of obligations under the Convention. However, the Committee overseeing the implementation of the Convention has issued critical reports which do recognise the educational disadvantage

\textsuperscript{141} Article 28 provides: a) make primary education compulsory and available free to all; b) encourage the development of different forms of secondary education, inc. general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in the case of need; c) make higher education accessible to all on the basis of capacity by every appropriate means; d) make educational and vocational information and guidance available and accessible to all children; e) take measures to encourage regular attendance at schools and the reduction of drop-out rates.

suffered by members of some minority groups\textsuperscript{143}. Following the report of the Czech Republic, the Committee found:

\ldots no adequate measures have been taken to prevent and combat all forms of discriminatory practices against children belonging to minorities, including Roma children, and to ensure their full access to health, education and other social services. The committee is concerned that the principles and provisions of the Convention are not fully respected as regards to Roma children, in particular those who are in detention or otherwise institutionalised\textsuperscript{144}.

The ECHR as originally drafted did not deal with any right to education per se. This deficiency was remedied by Protocol 1, Article 2 in 1952:

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

A member state that has ratified the First Protocol can be challenged in the European Court of Human rights if they fail to respect the right to education\textsuperscript{145}. Article 2 is not as extensive as the provision in the Convention on the Rights of the Child and as such appears to serve a very limited purpose in isolation. Giving the limited wording of Article 2 it may perhaps be more prudent to mount a challenge in conjunction with Article 14 of the \textit{ECHR} which prohibits discrimination in the implementation of the Convention on grounds which include national or ethnic origin. The \textit{Belgian Linguistics Case}\textsuperscript{146} centred on the interplay of these two provisions in addition to a separate application under Article 8 for interference with family life. The case

\textsuperscript{143} On the composition of the Committee see Article 43 of the Convention on the Rights of the Child (1989)

\textsuperscript{144} United Nations Concluding observations of the Committee on the Rights of the Child: Czech Republic 27/10/97 CRC/C/15/Add.81 para.15

\textsuperscript{145} Article 34 of the ECHR allows the Court to hear individual or group applications alleging a violation of a protocol right.
concerned an application from French speaking parents challenging the Belgian school system which had divided the country into various regions and denied access in some regions to French language instruction. The court found that denial of the right of access to instruction in the minority language was a breach of the two provisions. As far as Article 8 was concerned there was held to be no right to be educated in the language of one's parents by the public authorities or with their aid.

Cullen criticises the restrictive interpretation of the Court and distinguishes the Commission decision which found a violation where the subsidies to minority language schools in unilingual areas had been withdrawn and studies completed in minority language were not recognised by the education system. The cultural protection of minorities in the education system does not appear to have been particularly advanced by the Court's interpretation.

Non-discrimination and the importance of pluralism in education can be implied into other international rights documents. The ICERD accepts special measures of temporary duration in the interests of remedying the disadvantageous positions of some minorities:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

146 The Belgian Linguistics Case, (1962) 1 EHRR at 252.
147 Cullen supra n24 above, at 171.
148 Article 1(4):
Thus, temporary initiatives which seek to establish special educational programmes or develop the curriculum in order to recognise the contribution of the Roma in society would not constitute a form of discriminatory treatment contrary to international law.

The Committee on the Elimination of Racial Discrimination has been critical of the Czech Government’s measures in education and employment with respect to the Roma minority\(^{149}\). Their 1998 report noted that the level of education and vocational skills was comparatively low, whilst unemployment was correspondingly much higher than the average. However, in keeping with their obligations under the Convention, the Czech Ministry of the Interior had instructed every local authority to create a post of ‘Roma assistant and advisor’. Roma assistants are being trained to “bridge the gap between teachers and pupils and also to encourage Roma parents to overcome their mistrust of the school system”\(^{150}\). Nevertheless, the Committee expressed concern that only the basics of Roma culture and language were taught at a small number of teacher-training colleges. It was added that “To promote the social integration of members of the Roma population, greater importance should be given to education in their mother tongue”\(^{151}\).

Thus the Committee implicitly recognised that the goal of integration is dependant to some extent on the maintenance of minority identity through instruction in the minority language.

\(^{149}\) The Czech Government's initiatives in the field of education and other areas in respect of the Roma can be found in the Resolution of Government of the Czech Republic of 29.10.97 No 686 “On the report on the situation of the Romani community in the Czech Republic and on the present situation in the Romani community” (1997)

\(^{150}\) United Nations CERD “Summary Record of the 1254th Meeting: Czech Republic 11th March 1998” CERD/C/SR.1254. Paras 12 and 13

\(^{151}\) Ibid. Mr Diaconu (Country Rapporteur) para.27.
Specifically on the subject of schooling, the UNESCO Convention on the Elimination of Discrimination in Education (adopted as early as 1960) advocates minority education rights as an essential element of the integrated approach to education provision. Article 5(1) recognises the right of national minorities to carry on their own educational activities, including school maintenance, providing that the state is not obliged to provide financial assistance, that attendance is optional and that it is not exercised in a way that would make the minority unable to understand the dominant language. Professor Thornberry terms these criteria a 'negative freedom'.

Regional Human Rights Provisions

Multi-ethnic education is implicitly endorsed in the Council of Europe’s Framework Convention on the Protection of National Minorities, discussed in Chapter 6 below. Article 12 requires states to “where appropriate, take measures in the field of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority”. To this end, opportunities for teacher training and access to textbooks shall be developed to enable a policy of equal opportunities for all. The right to learn and communicate in the mother tongue is also expressly recognised. Article 14 provides that adequate opportunities for teaching in the mother tongue shall be made available, where numbers and resources demand.

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152 Cullen *supra* n24 at 148, discusses the problems of enforcement of the Convention and notes that there have been no inter-State complaints to date.
155 Ibid. Article 12(2) and (3).
156 *Supra* n144 Article 14(1) states: “The parties undertake to recognise that every person belonging to a national minority has the right to learn his or her minority language”.
These provisions whilst encouraging for the future of multi-ethnic education, do not impose positive obligations on states and depend on resources, numbers and demand. It is thus submitted that in practice, the absence of positive rights for minority groups to be educated bilingually, deprives these provisions of much of their meaning. The Czech Government have already noted that bilingual education provision for the Roma has not been regarded as particularly important as there has been no ‘demand’ for it from Roma parents\textsuperscript{157}.

The non-binding European Charter for Regional and Minority Languages contains a provision for the appropriate forms and means for teaching regional and minority languages at all appropriate stages\textsuperscript{158}. This provision applies to non-territorial languages such as Romani. However, Article 7(5) enables them to be interpreted in “a flexible manner, bearing in mind the needs and wishes, and respecting the traditions and characteristics of the groups which use the languages concerned”\textsuperscript{159}. The Charter also includes extensive provision for education in the mother tongue\textsuperscript{160}. The Standing Conference of Local and Regional Authorities of Europe, Resolution \textit{On Gypsies in Europe: the role and responsibility of local and regional authorities} requests that the Committee of Ministers encourage ratification of the charter and application of its principles in respect of non-territorial languages\textsuperscript{161}. Given the resources and the determination that the charter demands for the provision of minority languages in education it is perhaps unsurprising that there have been very few ratifications.

\textsuperscript{157} This comment from the Czech Government's report to the ICERD was criticised by the Committee: \textit{ICERD Summary Record of the 1255th Meeting: Czech Republic 30.3.98} CERD/C/SR.1255
\textsuperscript{158} Article 7(1)(f)
\textsuperscript{159} Article 7(5) European charter for Regional and Minority Languages.
\textsuperscript{160} Ibid. Article 8
\textsuperscript{161} SCLRAE \textit{Res} 249 (1993) \textit{on Gypsies in Europe: the Role and Responsibility of Local and Regional Authorities} para.10.
The Organisation on Security and Co-operation in Europe and its offices in the Czech Republic, Poland and the U.S has been concerned with the situation affecting Roma and other travellers throughout Europe for some time. For the Eastern European countries which have only recently joined the Council of Europe it was a welcome opportunity to be included in discussion on the future of Europe, political co-operation and the protection of human rights. The Document of the Copenhagen Meeting (1990) provided a comprehensive provision on the rights of national minorities, something which had, until recently, largely been over-looked by the Council of Europe. The importance of ‘special measures’ are stressed in Article 31 of the Copenhagen document ‘for the purposes of ensuring to persons belonging to national minorities full equality with the other citizens in the exercise and enjoyment of human rights and fundamental freedoms’. Groups of experts have examined and reported on the human rights of Roma in Bulgaria, Czechoslovakia, Hungary and Romania and Article 40 of the Copenhagen Document refers to the particular problems of the Roma (Gypsies) in the context of racism and xenophobia. In the following conferences in Geneva, Moscow and Helsinki the treatment of Roma and travellers was raised regularly.

The Human Dimension Seminar on Roma in the CSCE region took place in September 1994. It represented a natural progression but also serves as a very welcome review of the situation of Roma throughout Europe, its topics for discussion included ethnic violence, administration of justice, mobility and citizenship. The forty-seven page consolidated summary illustrates the strength of concern for this minority group

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162 CSCE supra n133
163 Liçgois supra n7 at 285-6.
internationally. In an introductory address the Deputy Secretary General of the Council of Europe observed the importance of a policy based multiculturalism:

*We all proclaim our commitment to human rights. The acid test of their effectiveness lies where the most exposed and vulnerable members of society are concerned. After all their past suffering, the Roma are entitled to be recognised at last as full members of a democratic, pluralistic and multicultural European society which we want to build together*.

On the subject of education the summary identifies the need for better teacher training and pre-school schooling where available and a number of projects have been funded to find the best ways forward.

**The European Community and Minority Education.**

The jurisdiction of the EC regarding education was spelt out in the Treaty of the European Union Article 116 and there have been many projects throughout the community which have been aided by both European Community and/or Council of Europe funding.

While many of the problems with access to education are to be found in the former Communist states of Eastern Europe, not yet members of the Community, there remains serious work to do in the ‘advanced’ states of the West. The resolution of the Council of Ministers of Education of 22nd May 1989 *On School Provision for Gypsy*

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164 CSCE *supra* n133 at 10
165 Ibid. at 9 para 9.
166 Ibid. at 25.
167 The Council of Europe particularly have raised the profile of the Gypsy minority by holding seminars and documenting reports on subjects including: Education, teacher-training and Roma women. They have also funded the Interface collection of journals on Gypsy and Traveller Education.
and Traveller Children\textsuperscript{168} instructed states to make every effort to give support for educational establishments in providing schooling for these children. Teaching methods suggested included support for distance learning programmes, use of new technological aids, improved teaching materials and ‘consideration for the history, culture and language of the Roma and travellers. Improvements for teacher training were advocated, including using teachers of a traveller origin when possible. In many areas highlighted as needing dramatic improvement, the Community resolution will be welcome.

\textit{On School Provision for Gypsy and Traveller Children}\textsuperscript{169}

The member states reported on implementation of the resolution at the end of 1993 and eventually, in 1996, the Commission’s findings were published. It will come as little surprise, given the history of exclusion and assimilation, that the respondent States had very little information on the number of travellers/Gypsies who fell outside the education system. Nevertheless, illiteracy levels were considered to be as much as 90\% in Greece and 80\% in French speaking Belgium\textsuperscript{170}. Poor school attendance was a common problem, particularly in relation to secondary schooling. The UK report bore out the earlier conclusions of Liégeois\textsuperscript{171}, revealing that 47\% of Gypsy children were not enrolled at secondary school\textsuperscript{172}. The report recognised that the low literacy level

\textsuperscript{168} \textit{Supra} n3; the report by Liégeois \textit{supra} n16 provided the impetus for the Council of Ministers Resolution.

\textsuperscript{169} European Commission \textit{On School Provision for Gypsy and Traveller Children} (1996) COM (96) 495 Brussels

\textsuperscript{170} Ibid at 24 Para. 61 and 23 para.56

\textsuperscript{171} Liégeois \textit{supra} n16 at 255

\textsuperscript{172} Ibid at 25 para.66
was a major problem and yet most States had failed to construct a national policy on Roma/Gypsy education\(^{173}\).

**Examples of Positive Educational Initiatives**

There are some encouraging examples of education policies targeting the Roma. These policies tend to adopt a flexible, culturally sensitive approach to education which respects the specific needs of the community and seeks to provide education within a cultural framework. A blanket policy of educational neutrality in respect to minorities is felt to be inadequate and potentially disruptive.

(i) **Germany**

Roma and Sinti teachers and social assistants are employed in schools with a relatively high concentration of Roma/Sinti to disseminate culture and to provide language teaching alongside traditional schooling\(^{174}\). The Roma National Congress, based in Hamburg, have also established Romani classes and are working on a literacy programme in the Romani language\(^{175}\).

The project in Bremen has seen the greatest success in getting more Sinti and Roma children to attend mainstream schools with regularity. Four teachers began working on support programmes for Sinti and Roma pupils in 1990 as part of the EC backed 'Pilot support project for Sinti children.' Since 1990, when the project commenced, there has been a 'considerable reduction' in scholastic

\(^{173}\) Ibid at 27

problems, notably failure and retardation amongst the Sinti children, and as a consequence a Roma facilitator has now been appointed to help improve access for Roma children. Again the existence of a professional who happens to be a Rom is crucial to the success of the project; parents' confidence in the school system is a relatively new phenomenon and they are now encouraged to play an active role in their child's educational development. The emphasis is on the provision of education within the mainstream system, avoiding segregation wherever possible.

(ii) France - National Centre for Distance Learning (CNED)

Preparatory and elementary courses are offered by the CNED. A personal tutor follows the development of the pupil with a flexible learning approach based on the individual's own progress. The curriculum is specifically targeted towards the cultural needs of the travelling community and the skills of pupils are developed rather than rejected from the school environment. The Director of the Centre is clear about the importance of the travellers' culture in the programme: "To accept the traveller's way of life is to concede that the school should go with him, and allow him to reconcile the various constraints of a shifting base, travel and unconventional living conditions." A wide range of teaching materials and resources are used in order to maintain the pupils' interest, including audio tapes and videos. Rhys Morris summarises the advantages of this approach thus:

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175 Roma National Congress Supra n53 at 4.
176 Wilker, "Information file" (1994) 15 Interface at 16.
177 Supra n169 at 31 para. 94.
178 Plcssis, J C, School Provision of Gypsy and Traveller Children - Distance Learning and Pedagogical Follow-up, Council of Europe. 1992 at 30 (C/E DESC/EGT (90) 47).
They make education available right across the geographical, linguistic and age spectrums of the client group, with passage into adulthood not being a barrier to acquiring a vocational training for those requiring a second chance\textsuperscript{179}.

Whilst the provision may be criticised for isolating the pupil, it should be recognised that the alternatives for the pupil are likely to be far from satisfactory and may well result in the child receiving no formal education\textsuperscript{180}. Distance learning initiatives have also been reported in the United Kingdom and Italy\textsuperscript{181}.

3) UK - The West Midlands Traveller Education Service

The West Midlands Traveller Education Service's \textit{Educational Support for Travellers in the West Midlands} is operated by a consortium of ten LEA's. The support consists of a pupil record transfer system - to allow a record of the traveller's previous education to be monitored when s/he enters a new school; a resource centre for both teachers and pupils; three field welfare officers; advisory and support teachers and help with transport if needed. The Information Pack illustrates a refreshing awareness of the central problems of traveller education:

\textit{Travellers are not a homogeneous group and we need to be aware of different experiences, traditions, language, histories and work patterns. Children in school bring a cultural experience/background and a personal history we need to be responsive to, assessing and meeting their needs appropriately...in this way schools can, given awareness and understanding of the travelling communities, ensure

\textsuperscript{179} Rhys Morris \textit{supra} n53 at 52.

\textsuperscript{180} Alcaloide, M and Gramond, B "France The General Situation" Advisory Council for The Education of Romany and Other Travellers (eds.) \textit{The Education of Gypsy and Traveller Children} (1993) University of Hertfordshire Press at 42. It was estimated that in 1979 some 65% of children of school age were not in attendance.

\textsuperscript{181} \textit{Supra} n169 at 31 paras 95-6
formal education skills add to and enhance family education skills and do not seek to replace them.\textsuperscript{182}

The service attempts to establish pre-school places as well as higher education for the post-16 pupils. Class teachers and support teachers work as a partnership. The information stresses that often the class teacher will work with a small group or 1:1 of the traveller pupils if necessary whilst the support teachers instructs the rest of the class. This practice is intended to help create a bond between the teacher and the Gypsy pupils which will give them confidence in the school system.

Education within the cultural framework

Increasingly, teaching materials are being developed which incorporate aspects of the Gypsy/traveller identity.\textsuperscript{183} The previous emphasis on individualism and neutrality is being questioned. it is no longer presumed that absenteeism is attributable to social backwardness. The report of French-speaking Belgium noted:

\textit{Once we perceive the correlation between persistent illiteracy, daily school attendance, and failure to progress beyond primary level, we cannot but admit how inappropriate basic teaching has been to the needs of Gypsy and traveller children, sedentary or not.}\textsuperscript{184}

In 1995, the European Parliament’s \textit{Consultative committee on Racism and Xenophobia}, issued a series of proposals aimed at tackling discrimination against young people. A policy of multi-cultural and anti-racist teaching was endorsed in the report. It was expressly recommended that such teaching should incorporate ‘understanding of Gypsy culture and history’ with the aim of improving access to

\textsuperscript{182} West Midlands Consortium. \textit{Education Service for Traveller Children}, Information Pack.
\textsuperscript{183} Supra n169 at 33.
\textsuperscript{184} Ibid at 44 para. 179
schooling and reducing the prejudice and discrimination to which Roma school children are exposed\textsuperscript{185}.

It is essential that the initiatives respecting the cultural identity of Roma/travellers in the education field, are viewed as international guidelines. With the forthcoming enlargement of the European Union, the issue of minority education must be extended to the East European states. Three years after the European Parliament's recommendations, a report from the Romanian Ministry of Education revealed that as many as 59\% of women and 44\% of male Roma suffer from illiteracy\textsuperscript{186}. The composition of Romanian orphanages reflects a Romani community plagued by poverty, deprivation and discrimination\textsuperscript{187}.

Recent International progress

Many states are now employing Gypsy mediators, one of their roles being to provide scholastic support and thereby reduce absenteeism\textsuperscript{188}. Since 1990, the National Gypsy Education and Schooling Association in France has been training Gypsy mediators and has recently began work in the classroom aiming to reduce the mutual prejudice of Gypsy pupils, educators and other children. In 1993, six Romani women passed their

\textsuperscript{185} European Parliament (1995), Committee on Civil Liberties and Internal Affairs, Consultative Commission on Racism and Xenophobia - Final report Doc. EN\textbackslash CM\textbackslash 274\textbackslash 274586.

\textsuperscript{186} Xinhua "Gypsies' Situation in Romania" Oct. 5th 1998, Bucharest.

\textsuperscript{187} Roma are estimated to comprise around 10\% of Romanian society (see Appendix 1), yet in Romanian orphanages they amount to between 40 and 80\% of children - Brearley \textit{supra} n62 p29.

\textsuperscript{188} Scjdinov, K "Theme" \textit{Interface} Vol. 17 Feb. 1995 p5-10.
Certificate of General Education along with the teaching and administration course enabling them to work as mediators\textsuperscript{189}.

In 1994 the European Union established the SOCRATES education programme to run from Jan 1995 to December 1999. The Comenius chapter encompasses three action fields, one of which is on the education of migrant workers, occupational travellers, Travellers and ‘Gypsies’\textsuperscript{190}. The programme allows for financial assistance to be given to projects which aim to increase participation of Gypsies and travellers; to improve their schooling; to meet their specific needs and capacities and to promote inter-cultural education for all children. Inter-cultural teaching is an essential part of the Socrates programme, with support given to projects which incorporate multiculturalism into the curricula and into teaching practice. The guidelines also note that in connection with Gypsy and traveller children, priority should be afforded to primary and secondary education, the transition from school to work, the training of Gypsy intermediaries and the use of open and distance learning\textsuperscript{191}.

\textbf{Concluding Observations}

Romani children are at a clear disadvantage in the educational process. Pre-school places which enable Romani pupils to catch up with their future classmates are still


\textsuperscript{190} SOCRATES, Action 2 14th March 1995 Official Journal of the European Communities 20th April 1995

\textsuperscript{191} The SOCRATES project and its implications for the education of travellers and Gypsies is discussed in “Programme” Interface Vol. 19 August 1995 p3-5.
illusory. Many governments are beginning to recognise their need but a shortage of teachers and a perceived lack of demand from Romani parents provide excuses for inadequate provision.  

Education in the mother tongue is now regarded by leading educationalists, such as Dr Tove Skutnabb Kangas, as essential. The focus on individual human rights and the assimilation of minority cultures has been prevalent in the education policies of many states. In the past, there was little in the international human rights standards to provide strong argument in favour of multi-cultural teaching. This position is now changing; international organisations such as ICERD and the European Community now understand that education cannot be offered in a neutral, value-free manner without undermining the human rights of members of non-dominant groups. Mother tongue teaching for minorities and multi-ethnic teaching, which enables a comparative and tolerant approach to alternative ethnic cultures and values, is now demanded. ‘Colour-blind’ strategies for educating all students equally have been rejected as unsuitable in a world where people are far from being colour-blind.  

However, problems have also been raised by the pluralist education policy. A pluralist approach that demands segregation and isolation cannot, it is argued, achieve the promotion of tolerance and respect for diversity that the Roma and other disadvantaged minority groups need in order to live and develop in the wider society. Racism needs to be challenged in the classroom in a climate of inter-cultural respect;  

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192 The Czech Government have increased pre-school provision to 66 classes in 1997-8. However 45 of these classes were still in special schools for special need children. The Committee on the Elimination of Racial Discrimination noted that only 10% of Roma children attended such pre-school classes. *supra* n10 at para.57  

193 Gillborn, D *Race* Ethnicity and Education (1990) London Unwin Hyman at 199. This study concerning Afro-Caribbean students in the education system bears out the findings of researchers on Romani education in that teachers who believed they were ‘treating everyone the same’ were actually applying stereotypes which discriminated heavily against minority students.
in keeping with the United Nations' recently elaborated policies on human rights education\textsuperscript{194}.

In developing the multi-ethnic strategy, consultation and co-operation are essential pre-requisites. As far as possible Roma should be involved in the development of policy and the delivery of education programmes. This not only serves to demonstrate legitimacy but also provides role-models and understanding of particular problems which cannot be learnt from a teacher training programme. At present the high level of illiteracy means that there is a shortage of Roma in a position to offer teaching. Therefore, it is desirable to develop the role of teaching assistants and mediators\textsuperscript{195}. Banks argues that excluded groups must be included in shaping educational policy in order that the necessary reforms become institutionalised in the education system\textsuperscript{196}. Furthermore, the dangers of testing without regard to the cultural backgrounds of pupils have been documented in the report on the Czech Republic by Laura Conway\textsuperscript{197}. Testing must be done in a way that is sensitive to cultural, social and economic disadvantage\textsuperscript{198}. A blanket approach to school testing which fails to recognise the educational inequality of some groups may be reconcilable with liberal principles of equal treatment but it does not meet the demands of equal opportunity in a multi-ethnic framework. Labelling Roma children as handicapped on account of their lifestyle has been a popular approach in education policy. It is keeping with the goal of assimilation in that the group are regarded as socially disadvantaged and hence

\textsuperscript{194} The United Nations Decade for Human Rights Education, proclaimed by the General Assembly in Res. 49/184 of 23rd December 1994, is to end in 2004.

\textsuperscript{195} \textit{Supra} n169 at 37

\textsuperscript{196} Banks \textit{supra} n17 at 83.

\textsuperscript{197} Conway \textit{supra} n106 at Chp.2

little national focus. Inevitably many of these projects are under-funded and poorly resourced.\footnote{A letter to Romnet from an American Journalist, John Smock, who worked in a Romani school in Spain echoes these concerns. Although Smock describes the school as culturally sensitive and educationally progressive, he is compelled to conclude that the "school seems designed to keep the Romani children out of the mainstream schools as much as to address their special needs by giving them a special school" Letter to Romnet dated 13th Oct. 1998.}
CHAPTER SIX:

MINORITY RIGHTS PROVISIONS IN INTERNATIONAL LAW

Introduction

The importance of international human rights law in the protection of the rights of minorities has not been universally accepted. As a result, such protection has, in the past, been patchy and inadequate. Events, such as that which have occurred in the Balkans and the former Soviet Union, have shown the world that minority rights cannot be ignored and that rather than increasing irredentist tendencies they may be a prerequisite for the peaceful stable societies which are in the interests of all.

In a detailed study on methods of protection of the rights of minorities, Special Rapporteur Eide identified three crucial components in the protection of minorities. The equality of all human beings in society should be respected; group diversity when required to ensure the dignity and identity of all should be promoted; and such an approach should aim to advance stability and peace, both domestically and internationally. The first of these complimentary issues has been dealt with in Chapter

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1 Sohn, Louis.B "The rights of minorities" in Henkin, L The International Bill of Rights (1981) Columbia Univ. Press, NY at 271. Vierdag for example doubts the need for a minority rights regime, arguing that the full realization of non-discrimination provisions would negate the need for such special measures. Vierdag, E.W The Concept of Discrimination in International Law (1973) Nijhoff, The Hague at 158; Further arguments on this point are illustrated in Chp 3

Three which raised serious questions over the ability of international law to protect minorities when grounded on a purely individualist foundation.

This chapter will focus on the promotion of group diversity under international law. It will aim to clarify the types of groups protected and the extent of that protection whilst critically evaluating the effectiveness of minority protection, bearing in mind Eide's third point.

Minority rights and non-discrimination can be viewed as two sides of the same coin. The Sub-Commission on the Prevention of Discrimination and the Protection of Minorities distinguished them as follows:

1 Prevention of discrimination is the prevention of any action which denies to individuals or groups of people equality of treatment which they may wish.

2 Protection of minorities is the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population.

The Legal Status of the Group

International legal provisions concerned with the interests of groups are varied and numerous. However, the intrinsic rights of groups per se as distinct from the derivative rights held by members of the group is seldom recognized let alone protected. It would appear that great efforts have been expended, particularly since

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4 UN Doc E/CN.4/52 Section V (Sub-commission, 1st session 1947)

5 Baron describes this difference in terms of ‘rights of minoritics’ which are concerned with equality and opportunity for individual members of the group, and ‘minority rights’ referred to as the rights of groups to a degree of autonomy, for example in the provision of education and cultural establishments; Baron, S Ethnic Minority Rights Some Older and Newer Trends (1985) Oxford Centre for Postgraduate Hebrew Studies at 3.
the establishment of the United Nations, to avoid the creation of a group entity. The Western tradition with its central focus on the rights of individuals is clearly reflected in the international norms of equality and non-discrimination. But even the provisions concerning the protection and preservation of minority cultures and characteristics contained in Article 27 of the ICCPR refers to ‘persons belonging’ to minorities rather than the rights of the group per se.

The protection of the existence of certain types of minority groups is covered by the Convention of the Prevention and Punishment of the Crime of Genocide of 1948. Until the recent events in the former Yugoslavia, the convention had been regarded as largely symbolic; governing extreme forms of minority-focused violence. The use of the treaty to protect the identity of ethnic groups and to promote their characteristics in the face of assimilation will be clearly shown to be limited. Additionally, Article 1 of the ICCPR refers to the inherent and inalienable right of all peoples to self-determination. Peoples it can be seen are not purely a group of unassociated individuals, and the rights to self-determination can only be claimed by a people and not by an individual or dissociated group. Its use as a vehicle for the promotion of minority rights in a non-colonial setting, discussed in Chapter seven, has been limited and is likely to remain so.

The definition of minority

A major difficulty with affording special rights for particular minority groups, namely the problem of defining a minority, has hounded international lawyers and academics
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A major difficulty with affording special rights for particular minority groups, namely the problem of defining a minority, has hounded international lawyers and academics
since the League of Nations first became concerned with minority protection⁶. Fifty years later there is still no accepted definition as to what constitutes a minority in international law. The Declaration on the Rights of Minorities in 1992 contains no definition⁷. Furthermore, the types of minority protected by international documents varies from ‘ethnic, linguistic and religious’ minorities (in the ICCPR) to ‘national’ minorities (in the Council of Europe Framework Convention and the OSCE documents). This lack of definition is generally blamed on the complexity of the subject. However, other commentators have also pointed to the traditional antipathy and ‘fear’ that talk of minority rights invokes in national governments⁸.

In trying to reach a consensus in this complex area, it is possible to delineate some common criteria:

1. A Distinct non-dominant Group

The Sub-Commission on the Prevention of Discrimination and Protection of Minorities suggested the following definition in 1954:

_The term minority shall include only those non-dominant groups in a population which possess and wish to preserve ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population_⁹.

Thus there must be an element of unity within the community to the extent that a non-minority member could not easily acquire the minority identity. The nature of distinction is not specified and the group does not need to be distinguished in the

⁷ UN Res. 47/135 of 18.12.92
⁸ Packer _supra_ n6 at 25-6
physical sense, i.e. the members do not need to live together in a geographically separate location.  

On the same point, a minority must be distinguished from a loosely defined collection of disadvantaged individuals. In a memorandum on the definition of minorities, the UN Secretary-General noted: “Communities” are based on unifying and spontaneous (as opposed to artificial or planned) factors essentially beyond the control of the members.  

The most commonly cited definition was developed by Francesco Capotorti, Special Rapporteur for the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, in a special study on minorities in 1977:

* A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.  

The Capotorti definition was revised in 1985 by Judge Jules Deschenes of the Human Rights Committee, although it remains substantially the same. Both definitions incorporate the same elements of objective and subjective classification. The former refers to ‘nationals’ of the State, the latter to ‘citizens’- illustrating a clear intent to exclude certain groups from the minority status. The Deschenes definition has further

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11 Definition and Classification of Minorities (Memorandum) UN Doc. E/CN.4/2/85 at para 18.
been criticized\textsuperscript{14} for additionally including a limitation to the aim of achieving equality in fact and law\textsuperscript{15}.

2) A specific homeland

Commentators often regard minorities as associated with a specific homeland and this can be damaging for groups such as the Roma who cannot claim to have a specific territory. Indeed, the Roma community were excluded from negotiations on the future of Yugoslavia as they had no territorial boundaries over which to negotiate\textsuperscript{16}. Alcock notes that “Almost all minorities have a homeland in which they are concentrated”\textsuperscript{17}, he then focuses exclusively on the ‘almost all’ without regard to non-territorial groups. The diversity of the Roma people across a large variety of borders is discussed in Chapter One and the absence of a ‘protector-state’ to look out for their interests may indeed be the principal reason for their comparatively poor economic and social status. The Roma are unlikely to benefit from the new trend in bilateral treaties and their political vulnerability may necessitate some sort of transnational approach to Roma culture and identity\textsuperscript{18}. Territorial connection is not featured as an essential component of a minority in these definitions and the issue of territory, although a relevant factor, should not act as a prerequisite for minority status\textsuperscript{19}.

3) Numerical Inferiority

\textsuperscript{14} see for example Packer \textit{supra} n6 at 56
\textsuperscript{15} Doschencs \textit{supra} n88
\textsuperscript{17} Alcock, A “A new look at the protection of minorities and the principle of human rights” in Community Development Journal vol. 12 No 2 (1977)
\textsuperscript{18} See for example the bilateral treaty of Sept 1992 between Germany and Romania on the repatriation of Romanian Rom for a negotiated price. Reported in Open Media Research Institute Daily Digest, 3rd Nov 1992. European Parliament Motion for a Resolution Doc B3-1503/92 \textit{On the Agreement between Germany and Romania on the forced repatriation of Romanian Gypsies}
This requirement appears to be uncontroverted when defining minorities\textsuperscript{20}. The maximum number that can constitute a minority is clearly established at less than 50% of the total population of the State\textsuperscript{21}. The only area of disagreement appears to relate to the minimum number of people who could constitute a minority group\textsuperscript{22}. Capotorti manages to evade this question by indicating a test of reasonable proportionality where the effort involved in implementing special measures should not be disproportionate to the benefit to be derived from it\textsuperscript{23}.

4) Excluded Categories

There has been a general expectation among commentators and States that the rights conferred by Article 27 are only available to ‘citizens’ or ‘nationals’ of the particular state\textsuperscript{24}. The Central European Initiative’s Instrument for the Protection of Minority Rights adopted in 1996 adopts this approach “reaffirming that the protection of national minorities concerns only citizens of the respective state”\textsuperscript{25}. As a result certain groups will be unable to claim protection. The excluded groups include refugees, aliens and migrant workers, all of which are provided for in customary law and other

\textsuperscript{19} Ramaga \textit{supra} n10 notes that the absence of a physical collectivity (i.e. in geographically dispersed communities) should not negate the existence of a minority.

\textsuperscript{20} Although the issue of apartheid in South Africa clearly illustrates that this approach is not absolutely satisfactory.

\textsuperscript{21} Sohn (1981) \textit{supra} n1

\textsuperscript{22} Shaw, M “The definition of minorities in international law” Israel YBHR (1991)Vol. 20 at 13-42 at 37.

\textsuperscript{23} Capotorti (1991) \textit{supra} n12 at 12, 96

\textsuperscript{24} Report of the Third Committee, GAOR 16th session, agenda item 35, at 14. UN Doc A/5000/Annexes (1961-2)

\textsuperscript{25} CEI \textit{Instrument for the Protection of Minority Rights} (1996) at 4, Centre for Information and Documentation, Trieste Italy. Though, ironically, Article 7 of the instrument recognises the specific problems faced by the Roma and emphasises a commitment to their rights.
international law treaties\textsuperscript{26}. The exclusion of non-nationals can be criticised for leaving a loop-hole where protection is needed most\textsuperscript{27} and in its General Comment the Human Rights Committee expressed disapproval at this interpretation:

\textit{In this regard, the obligations deriving from article 2.1 are also relevant, since a State party is required under that article to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under Article 25. A State party may not, therefore, restrict the rights under article 27 to its citizens alone}\textsuperscript{28}.

In respect of the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the definition advocated by Mr Chernichenko emphasised that minorities should include non-citizens who permanently resided in a given State\textsuperscript{29}.

5) The problem of loyalty

The issue of the loyalty of minorities to the State has been raised by several commentators and can be seen in the Sub-commission's fifth session definition\textsuperscript{30}. However, the criterion of loyalty can no longer be regarded as part of the definition of a minority. As Thornberry argues it would mean that there was no such thing as a disloyal minority and it would enable an intolerant State to argue that Article 27 does not apply as the particular group had not exhibited sufficient loyalty\textsuperscript{31}. Bruegel

\begin{footnotes}

\textsuperscript{26} Thornberry, P \textit{Minorities and Human Rights Law} (1987) MRG, London at 7.

\textsuperscript{27} Ramaga \textit{Supra} n10 at 580

\textsuperscript{28} HR1/GEN/1/Rev.1/ at 38 (1994) at para.5.1


\textsuperscript{30} Capotorti (1991) \textit{Supra} n12 at p6 para 23.

\end{footnotes}
supports this argument by contending that such a clause would make the provision of
minority rights into a charitable event\textsuperscript{32}.

6) Community unity

There is an obvious requirement that the members of the group itself do not wish to be
assimilated. Whilst the Roma may not be a universally homogeneous group with
uniform value systems, their refusal to accept the majority goal of assimilation can be
seen in virtually every State in which they live. Capotorti notes:

\textit{With respect to the indigenous populations and to the Gypsies, for example, the
available information suggests that their imperviousness to the encroachment of the
dominant culture is due to the strong attachment to their own traditions. Any attempt
to impose assimilation would lead to conscious and deliberate resistance.\textsuperscript{33}}

This refusal to assimilate in such adverse circumstances should present ample evidence
of a desire to exist as a group. Shaw comments further that: "It is also axiomatic that a
group that has survived historically as a community with a distinct identity could hardly
have done so unless it had positively so wished.\textsuperscript{34}

\textbf{The Two poles of Minority Identity}

The coupling of the objective and subjective elements of the definition give effect to
what Alfredsson describes as the 'two poles' of minority identity\textsuperscript{35}. In the Lovelace
case, the Human Rights Committee considered whether minority status could be lost
on marriage to a non-member and affirmed the subjective element:

\begin{footnotesize}
\begin{enumerate}
\item Bruegel, A "A neglected field: the protection of minorities" Revue des Droits de L'homme, 4
(1971) 413, at 440.
\item Capotorti (1991) supra n12 at para.255
\item Shaw supra n22 at 40
\item Alfredsson, G "Emerging or newly restored democracies - strengthening of democratic institutions
and development" paper presented at Workshop 1: Human Rights, Fundamental Freedoms and the
\end{enumerate}
\end{footnotesize}
persons who are born and brought up on an [Indian] reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant36.

It has been argued that the definitional difficulties should not be considered a bar to special minority protection. It would appear that in most cases recognizing a group as a minority does not present a particular difficulty and it is clear that international law will not treat as conclusive the status ascribed to groups by the particular state in which they live37.

It is submitted that there is nevertheless a need for some international codification in this area. States at present can easily evade protection for unpopular or small minorities and if necessary can invoke the lack of international clarification to support their domestic policies.

Capotorti found that the Roma are rarely recognized by States as being a legal minority targeted with special measures aimed at equality and non-discrimination:

It is important to remember that in most cases the groups recognized as “minorities” or as communities which are to benefit from special treatment are well-defined groups. Certain groups, including those which are scattered throughout the territory of a country, seldom appear among those forming the subject of recognition by the State with legal effect. Such is the situation, for instance, of the groups described as “Gypsies” in a large number of European countries38.

It is evident that there is a vast amount of material and debate within the United Nations on exactly what constitutes a ‘minority’ group and it would seem unlikely for any precise definition to be enumerated in the near future. The minority status of Roma is problematic when looked at in relation to some of these definitional proposals,

37 Capotorti (1991) supra n12 para 570
38 ibid at para77
particularly in relation to the absence of a specific territory. It is submitted however, that the development of a precise definition, whilst encouraging debate, is unnecessary to show that Roma/Gypsies are and should continue to be regarded in the international legal system as a ‘minority’ International documents regularly refer to the Roma or Gypsy minority. When considering the Romanian state report, the Committee on Economic, Social and Cultural Rights stated:

_The Committee is concerned about the realization of the right to education and of the right to take part in cultural life by one of the largest minorities in Romania, namely the Gypsy minority..._

Introducing a Conference on the Roma in Europe, Peter Leuprecht, Deputy Secretary General of the Council of Europe, noted:

_Let us not hide behind legal hair-splitting as to whether this or that definition of minorities applies to the Roma. Let us be honest. We all know that the Roma are a minority and a particularly vulnerable one._

Whilst the criteria adopted by Capotorti and Deschenes suggest similar strategies for ascertaining the existence of a minority group, it can be seen that the definition of the Roma minority fits uncomfortably within these definitional parameters and it should perhaps be emphasized that the most important aspect is “the exposition of a distinct culture and way of life as compared with the majority culture and living conditions should be seen as a decisive criterion for determining the nature of a minority”.

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39 For example see CSCE Roma (Gypsies) in the CSCE Region Report of the High Commissioner on National Minorities (1993)
41 CSCE Human Dimension Seminar on Roma in the CSCE Region, Consolidated Summary. 20-23rd September 1994 at p7 para 7. CSCE, Warsaw
42 Heinz, W Indigenous Populations, Ethnic Minorities and Human Rights (1988) Quorum Verlag, Berlin at 1. This is also the main approach of the definition advocated by Fawcett in 1979. He defined
This is the main reason why those people who have experienced the diverse lifestyle of the Roma of Europe recognize this minority status.\textsuperscript{43}

\textbf{The Background to Minority Recognition}

Most early minority treaties were concerned with the treatment of religious minorities.\textsuperscript{44} However, Capotorti notes a change of attitude in the nineteenth century which saw an increased range of minority provisions contained in various multilateral instruments.\textsuperscript{45} Despite this increased concern, attributed primarily to the number of wars in this period, there was little attention paid to the situation of ethnic and linguistic minority groups until the League of Nations was created following the First World War.\textsuperscript{46}

\textbf{League of Nations}

Prior to the adoption of the United Nations Charter which contained no provision for the rights of minorities or their members, minority rights had been frequently on the agenda of bilateral treaties between the Allied nations and the Eastern and Central European states. The treaties were not of a universal application, applying only

\footnotesize{a minority group as having “a common will- however conditioned-to preserve certain habits and patterns of life and behaviour which may be ethnic, cultural, linguistic or religious, or a combination of them, and which characterise it as a group. Further, such a minority may be politically dominant or non-dominant” in Fawcett, J.E.S The International Protection of Minorities (1979) MRG, London at 4

\textsuperscript{43} It can also be argued that well-established travelling groups such as Irish travellers satisfy this definition and more recent groups such as ‘new age travellers’ may, over time, be able to claim a similar status.

\textsuperscript{44} Heinz supra n42 at 22-3

\textsuperscript{45} Capotorti (1991) supra n12

\textsuperscript{46} Heinz supra n42 at 24-5}
between the Allied nations and the particular signatory State. Indeed it has been noted that none of the Allied powers were willing to accept the treaty obligations for themselves.

In the Advisory Opinion on Minority Schools in Albania, the Permanent Court of International Justice referred to two distinct requirements under those treaties: 1) To ensure true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being a minority.

Despite the refusal to support President Wilson’s suggestions for a positive obligation to promote minority rights in the Covenant of the League, one commentator observed that:

...international law hesitated to enter the age of human rights. Instead it entered the age of minority rights, in that, although there was no general system, the League’s minority regime was the most extensive developed by the international community.

The rationale for such concern over minority rights appears not to have been a humanitarian desire to increase access to justice for disadvantaged groups, but rather resulted from concern over European security. Nevertheless, numerous bilateral treaties were in evidence, aiming to provide much more than equality of treatment,
extending to special teaching in the mother tongue where there was a sufficient number
of a linguistic minority group.

Despite the fact that the minorities referred to in the treaties were not generally
regarded as collective entities52, there was a clear understanding that a simple non-
discrimination approach was insufficient53 and groups as well as individuals were given
the right to petition the League (a right unfortunately absent in the United Nations
Covenants that followed).

The minority provisions established by the League have been criticized for their
cumbersome procedures and lack of real enforcement powers54 and it is clear that the
treaties were only concerned with the protection of certain minority groups55. Most of
the newly created and enlarged States were reluctant to implement the treaty
provisions regarding them as a serious incursion into their sovereignty56. Furthermore,
policing of the treaty provisions apparently created problems for some Allied powers
most of whom were also involved with their own minority problems57.

52 Capotorti supra n12 at para. 101
53 Article 9 of the Polish Treaty states that minorities are to be afforded an equitable share of the funds
for education, religious or charitable purposes, See Green, L.C “Protection of Minorities” in Gotlieb
(ed) Institute of Canadian Affairs at 190.
54 During the first ten years, 773 petitions were received of which 292 were found inadmissible, action
was taken by the League in two cases. Three case decisions were given by the Permanent court of
Justice and two further advisory opinions were issued (Fawcett 1979 Supra n39 at 29) See also
at 33-6
55 Wolfram argues that many of the existing minority groups such as Gypsies and Jews were actually
excluded from the protective measures as they were not ‘racial groups’; see also Ramaga, P.V “The
bases of minority identity” HRQ 14 (1992) 409-428 at 416 he argues that Jews were regarded as racial
groups, he goes on to look at the deliberate omission of ‘race’ from the minority criteria in Article 27.
56 Baron supra n5 18-9; Thornberry (1991) supra n31 at 47; Sacerdoti, G “New developments in group
consciousness and international protection of the rights of minorities” Israel YBHR 13, 1993 116-146
at 120; Claude Supra n54 at 35-6; Poulter, S “The rights of ethnic, religious and linguistic minorities”
57 Grocn supra n53 at 195.
Nevertheless there is considerable symbolic if not practical significance in the recognition of the importance of minorities as a fundamental aspect of international law. Each particular state undertook that the treaty provisions “shall be regarded as fundamental laws, and that no law, regulation or official action shall conflict or interfere with these stipulations, nor shall any law, regulation or official action prevail over them”\textsuperscript{58}.

The controversial application of special measures for minority members highlighted the importance of the distinction between equality in law and equality in fact, the recognition of which remains fundamental to the realization of non-discrimination and equality. The treaties stated that:

\textit{Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of differential treatment in order to obtain a result which establishes an equilibrium between different situations... The prohibition against discrimination, in order to be effective, must ensure the absence of discrimination in fact as well as in law}\textsuperscript{59}.

Successful initiatives of the period included the establishment of minority schools in several countries; the rehabilitation of some neglected groups and minority involvement in the political affairs of countries such as Czechoslovakia and Latvia\textsuperscript{60}. It is also interesting to note that although the main emphasis was on citizens of the particular state who were members of minorities, limited protection was also available to those people who were not citizens\textsuperscript{61}.


\textsuperscript{59} Treatment of Polish Nationals in Danzig (1932) Scrics AB/44, 39-40 (2 W.C.R 814-5) at 19 and 20.


\textsuperscript{61} Distinction is discussed inTreatment of Polish Nationals in Danzig supra n59
It will become apparent that much of the post-War reluctance to improve minority rights has been based on the fear of secessionist demands and irredentism. These fears were not realized before the demise of the League system, rather its' demise appears to have been the result of its' selective application\(^\text{62}\) coupled with the appropriation of minority rights ideology in the second world war\(^\text{63}\). Goronwy Jones contends that Hitler's use of minority rights as a vehicle for the expression of Nazi ideology marked the nail in the coffin for the group rights vocabulary of pre-war Europe\(^\text{64}\).

**The New Age of Human Rights for All**

Most commentators appear to concur with the view of Lemer that with the advent of the United Nations: "The emphasis in the protection of human rights now shifted from group protection to the protection of individual rights and freedoms almost exclusively"\(^\text{65}\). There was no mention of minorities in the Charter to the UN or the Universal Declaration\(^\text{66}\) and despite the General Assembly's recognition that 'the United Nations cannot remain indifferent to the fate of minorities'\(^\text{67}\), there is evidence

\(^{62}\) Green *supra* n53 at 197.

\(^{63}\) Lerner notes that all the treaties lost their force following the war with the exception of the Aaland Islands agreement *supra* n60 at 14.

\(^{64}\) Jones, G "The UN and the domestic jurisdiction of states: interpretations and applications of the non-intervention principle" (1979) at 4; Geroe and Gump also note the post-war rejection of minority rights concepts which refused to soften until the mid 1960's and Bilder, R "Can minorities treaties work?" in Dinstein and Tabory *The Protection of Minorities and Human Rights* (1992) Martinus Nijhoff, Dordrecht at 67.

\(^{65}\) *Supra* n60 at 14

\(^{66}\) Nowak (1993) notes that there were a number of draft proposals to include such a provision in the Declaration and that the USSR's abstention in voting on the UDHR was attributable to the absence of such a provision. *UN Covenant on Civil and Political Rights CCPR Commentary* (1993) Engel, Kchh at 481.

\(^{67}\) UN GA res. 217 C [III] 10 December 1948.
of a clear intention to subsume issues of collective identity into the individual rights of non-discrimination and equality.68

A draft minority provision prepared by the Sub-commission had not been endorsed by the Human Rights Commission69, but the issue was not laid to rest. In the Third Committee of the General Assembly, representatives of the USSR, Denmark and Yugoslavia submitted draft recommendations for the inclusion of a minorities article70. The Yugoslav delegate stressed the importance of the collective dimension:

In order to secure the protection of individuals who formed a community, that community must first of all be recognized and protected. Thus the principle of the recognition and protection of national minorities as communities must appear in the Declaration of Human Rights. The cultural and ethical rights of all persons belonging to a national minority...depended upon the recognition of the minority itself as an ethnical group71.

Such approaches were ultimately unsuccessful. Thornberry notes that minority rights tended to be viewed as alternatives to individual rights. Mrs. Roosevelt, the US delegate, gave her opinion that 'the best solution of the problem of minorities was to encourage respect for human rights’72. Consequently, as Inis Claude observes:

...the United Nations Charter was formulated without consideration of the questions of principle which are presented by the existence of national minorities in a world dominated by the concept of the nation state73.

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68 The explanation given for the lack of minority provision is that they are inherently incompatible with the universalist nature of the Declaration. According to Szabo this masks the real motive for its omission, namely the uncertainty of the relationship between individual and collective rights; Szabo, I Cultural Rights (1974) A.W Sitjhoff, Leiden at 109 (He goes on to argue that in ignoring the difference between groups in an attempt to forge unity in a divided world, the United Nations policy risks increasing division and tension between groups, at 113).
69 UN Doc E/CN.4/SR.74, 5 (by 10 votes to 6)
70 GAOR 3rd session, part 1, 3rd Committee Annexes, UN Doc A/C.3/307/Rev.2, 45-6
71 UN Doc A/C.3/SR.161, 720
73 Claude supra n54 at 113
Optimists, such as Mrs. Roosevelt, apparently believed that problems concerning the treatment of minority groups could be successfully addressed through the individualistic perspective74. The principle of self-determination featured in the Charter but its aim, as discussed below, was strictly limited and may be of little use to minorities who do not comprise peoples.

Nevertheless, a look behind the Charter revealed that concern with minorities had not disappeared altogether. The Sub-Commission on the Prevention of Discrimination and Protection of Minorities was established in 1947 to look into ways of addressing specific minority problems. In 1953, the Economic and Social Council recommended that in the preparation of international treaties and decisions, ‘special protection should be paid to the attention of any minority which may be created thereby’75.

The issue of the rights of minorities resurfaced in the 1948 Genocide Convention.

The Genocide Convention

The measures contained in the Convention on the Prevention and Punishment of the Crime of Genocide have been described as ‘supra-positive’76 in that their force does not depend on their recognition in domestic legal systems. The International Court of Justice has stated that the principles contained therein are part of customary law: “recognized by civilized nations as binding on States, even without any conventional obligation”77.

74 Baron supra n5 at 22
75 ESC res. 502 F [XVI]
77 ICJ Advisory Opinion On Reservations ICJ Reports, 1951 pp15
Until recently considered a largely symbolic document, the Convention is a major step in the 'enforceable' international human rights code. Disapprobation for the crime of genocide is universally acknowledged and despite occasional examples of genocide in the latter half of this century, no nation would ever admit to endorsing such a policy.\(^{78}\)

Recent activities by the International Court of Justice and International Tribunals on War Crimes in the former Yugoslavia and Rwanda have shown that the Convention has much more than a symbolic role to play. In the case bought by Bosnia and Herzegovina against Yugoslavia relying on Article IX of the Convention, the ICJ ruled that the Convention was binding on both state parties despite the latter's submissions that the matter was a civil war and thus of domestic jurisdiction only.\(^{79}\) The International Criminal Tribunal for the Former Yugoslavia was established in 1993 to investigate complaints of offences against humanity including allegations of genocide.\(^{80}\) Ninety individuals have so far been publicly indicted in twenty-seven indictments.\(^{81}\) The International Criminal Tribunal on Rwanda recently ordered a former mayor to serve three life sentences for torture and rape of women from the Tutsi minority. It was held that sexual offences were capable of amounting to genocide under the International Convention.\(^{82}\) The need for an effective tribunal to investigate crimes against humanity has led to the replacement of the ad hoc tribunals with an International Criminal Court.


\(^{80}\) UN Security Council Res. 827, 25th May 1993


\(^{82}\) The Prosecutor versus Jean-Paul Akayesu Case No. ICTR-96-4-T. 2nd Sept 1998. Statute of the Tribunal, Article 2 specifically addresses genocide.
(hereafter ICC). The ICC was established by the 1998 Rome Treaty and requires sixty ratifications to bring it into force\textsuperscript{83}. The definition of genocide contained in Article 5 of the draft statute has been taken directly from the Convention.

The crime of genocide consists of a strictly prescribed mens rea requiring the intention ‘to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’. There are five acts which constitute genocide when coupled with the necessary mens rea: killing members of the group; causing serious bodily harm to group members; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children from the group to another group\textsuperscript{84}.

The convention is clearly concerned with the collective right of the specified groups to exist. Genocide cannot be committed against one or even a small number of individuals. The proposed inclusion of cultural genocide\textsuperscript{85} would have increased the scope of collective rights to a limited protection against the erosion of group identity. Cultural genocide was considered in the drafting of the Convention\textsuperscript{86}. It was defined to encompass prohibition of the use of the group's language in schools or in publications; and destroying or preventing the use of libraries, museums, schools, historical monuments and places of worship or other cultural institutions and objects of the group\textsuperscript{87}. When applied to travelling people, ‘cultural institutions and objects’ could have been interpreted to include the elimination of the travelling way of life through

\textsuperscript{83} Information and full text of the treaty are available on the web: www.lchr.org/lchr/icc/papr2nl.htm
\textsuperscript{85} Mentioned in General Assembly resolution 96, (1) of 11th December 1946
\textsuperscript{86} Support for the proposal was given by the USSR, Czechoslovakia and Poland; Heinz Supra n39 at 36
\textsuperscript{87} Article III of the Draft Convention on the Prevention and Punishment of the Crime of Genocide (E/794) in Capotorti supra n12 at p37, para 220.
the closure of authorized stopping places; or the compulsory dispersal of densely populated minority regions. It is thus unfortunate that the provision did not survive the drafting process.

Thornberry notes the views of the United States and France that the subject of cultural genocide should be dealt with under minorities protection, in the latter case this was apparently related to concern over excessive interference in the political affairs of states. Other arguments against the inclusion of cultural genocide related to the imprecision of the definition which it was feared could diminish the value of the convention as a whole.

Article 1 of the International Covenant on Civil and Political Rights: Self-determination.

The opening provision of the ICCPR states:

All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Thus Article 1 is conferring a collective right on 'peoples'. An individual cannot claim a violation of their right to self-determination and from this we can deduce that the allegation that international law should and does only protect the interests of individuals is plainly misleading. A focus on individual rights here would clearly be at odds with the emphasis in Article 1, as Drost observes:

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88 Thornberry (1991) supra n31 at 72.
89 ibid at 73
room to States who want to avoid the consequences of a people asserting their right of self-determination\textsuperscript{96}.

The Human Rights Committee have distinguished the collective right of self-determination from the minority provision under Article 27\textsuperscript{97} and in so doing have underlined the fact that a minority may not necessarily be a people and vice versa.

There has been much international caution in developing this sphere which is clearly attributable to its association with political secession\textsuperscript{98}. However, the issue of territorial integrity versus secession arises less in the case of internal self-determination, discussed further in Chapter Seven, and defined by Rapporteur Eide as:

\ldots the right of a people to control significant aspects of its internal matters (culture, education, property relations, social matters and welfare) while external matters (defence against armed attack from third states, international trade relations, diplomatic intercourse) are left in the hands of a larger political entity, e.g. a federal State\textsuperscript{99}.

**Article 27 of the International Covenant on Civil and Political Rights**

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

At the Fifth session of the Commission on Human Rights in 1949, the limitations of a focus on non-discrimination were recognized and the importance of 'differential...

\textsuperscript{96} Kiss, A "The right to self-determination" in HRLJ Vol.7 No2-4 p165-17 at 173

\textsuperscript{97} Human Rights Committee General Comment No 18 (Article 27) 1994, para 3.1. HR1/GEN/1/Rev.1 at 38 (1994)

\textsuperscript{98} Ibid at 106; Kiss supra n96 at 168

\textsuperscript{99} Eide, A "National sovereignty and international efforts to realise human rights" in Eide (cd.) Human Rights in Perspective (1992) Blackwell p3-30 at 16
treatment...in order to ensure [minorities] real equality of status with the other elements of the population' was acknowledged\(^{100}\).

Article 27 is symbolically the most important minority provision in international legal instruments and the drafting process helps to reveal illuminating insights into the scope of the provision and expression of many of the fears surrounding a recognition of collective rights. During the debate of the draft provision in 1961, views were expressed by some members supporting assimilation policies. One representative contended that there were no minorities in the entire American continent\(^{101}\), and the Australian delegate suggested that aborigines were too primitive to constitute a minority\(^{102}\). Given the frequency of the expression of such views it is not surprising that the final version is deficient in many respects. It is in fact somewhat surprising that such a provision survived the drafting process at all.

The first draft of Article 27 stated that:

*Ethnic, religious and linguistic minorities shall not be denied the right to enjoy their own culture, to profess and practice their own religion or use their own language.*

Despite the negative formulation of the draft, there was a clear recognition of collective rights vesting in the minority rather than in the members as individuals\(^{103}\).

Following debates questioning the juridical personality of minorities, the Sub-Commission adopted a different construction, protecting the rights of ‘persons

\(^{100}\) Commission on Human Rights Fifth Session 1949, A/2929, Chapter 6, s183 quoted in Bossuyt Guide to the 'Travaux Preparatoire' of the International Covenant on Civil and Political Rights Martinus Nijhoff at 493

\(^{101}\) 3rd Committee of the GA A/C.3/SR.1103, SR.1104; A/5000, para 116-126

\(^{102}\) Ibid para 26

\(^{103}\) Sohn *supra n*1 at 273.
belonging to minorities. Some disappointment has been expressed regarding this change of emphasis. Bruegel comments:

*Here all the objections against any positive steps in this field have been collected in a resolution supposed to define the positive steps which are desirable. Small wonder that the representative of a Jewish organization taking part in the proceedings felt obliged to say that under the conditions of this resolution no minority of any kind could ever achieve any rights.*

The Covenant refers to 'ethnic, religious or linguistic' minorities rather than 'national' or racial minorities. The terms 'religious' and 'linguistic' minorities are self-explanatory; 'ethnic' is used instead of 'racial' to refer to all biological, cultural and historical characteristics, rather than inherited physical characteristics. Capotorti notes that the choice of wording reflects a desire to incorporate both national and racial groups within the obligation under Article 27.

**The Individual Emphasis**

The final version of article 27, following an amendment by a British delegate, refers to 'members of minorities' rather than the minority itself as the rights bearer. Capotorti provides three reasons for this individual emphasis; the historical background of World War Two and the abuse of the pre-existing minorities regime; the need for a coherent formulation which has been couched in terms of the individual against the State with no space for other collective entities; and for political reasons to prevent friction between the minority and the state. He subsequently warns against dismissing or under-estimating these sound reasons. Manfred Nowak goes further by attributing

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104 UN Docs E/CN.4/Sub.2/112 (1950); E/CN.4/Sub.2/SR.55 at 5-7 (1950); E/CN.4/sub.2/SR.57 at 2-3 (1950); E/CN.4/358 at 19-23 (1950).
105 Bruegel *supra* n32 at 425.
107 Capotorti *Supra* n12 para 201.
108 ibid paras 207-9.
the final wording to “the fear marking the entire historical background of Article 27 that effective, collective protection of minorities might threaten national unity in some States”\(^{110}\).

A collective dimension is added however, by the phrase ‘in community with the other members of their group’. Although the intention of this addition appears to have been to avoid a concern that any individual could claim the benefits of the rights for minorities\(^{111}\), the effect is to recognize that the rights of members of minorities are not independent and can only be fully realized within the security of the group\(^{112}\). Thus, Article 27 can be described as having a ‘double effect’\(^{113}\), which establishes collective goods realization through individual rights\(^{114}\).

The double-effect approach however is limited by the failure to recognize a collective right of petition under the Optional Protocol of 1976. The problems with the petition rule can be seen in *Mikmaq Tribal Society v Canada*\(^{115}\), where the Human Rights Commission declared the petition inadmissible as the petitioner could not show that he was authorized to bring the case on behalf of the group.

This raises a further problem, in that there is no obligation on member States to recognize minorities legally\(^{116}\), despite the argument that the allocation of resources

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\(^{110}\) Nowak *supra* n66 at 495

\(^{111}\) Bossuyt *supra* n100 at 495 s186

\(^{112}\) Hailbronner, K “The legal status of population groups in a multinational state under public international law” in Dinstein and Tabory *supra* n64 at 133.

\(^{113}\) Capotorti “Are minorities entitled to collective international rights?” in Dinstein and Tabory *supra* n64 at 508.


may depend on such recognition by the State. In elaborating his desirable criteria for a minority Convention, Roth regards the recognition of minorities as the fundamental ‘linchpin’ to rights recognition\textsuperscript{117}.

France has made a somewhat dubious reservation under Article 27 stating that ‘France is a country in which there are no minorities’\textsuperscript{118}. This is on the basis that the application of the principles of equality and non-discrimination under Article 2 of the 1958 French Constitution, providing that all people must be treated equally, without distinction as to race, colour, national origin etc, requires that all people are protected adequately as individuals, without need for minority recognition\textsuperscript{119}.

\textit{Special measures}

A refusal to see minority problems in any way other than from an individual perspective has meant that it is possible to regard Article 27 purely in a narrow, negative formulation which affords no rights to special positive measures such as government funding or specific education initiatives. Stavenhagen is particularly scathing in his verdict:

\textit{When Article 27 of the ICCPR states that persons belonging to minorities shall not be denied certain rights, it does not go far enough...In a world of polyethnic nation-States, these rights can only be guaranteed by the active involvement of Governments in their implementation}\textsuperscript{120}.

\footnotesize{\textsuperscript{117} Roth, S “Toward a minority convention: its need and content” Israel YBHR (1991) 20 93-126 at 102
\textsuperscript{118} Alfodsson and de Zayas \textit{supra} n114 at 7.
\textsuperscript{119} The Greek Government have also denied the existence of minorities in Greece with the exception of the Muslims of Western Thrace- Weber, R “Minority rights: too often wronged” Human Rights and Civil Society 2 No 1 (1995) at 1.
\textsuperscript{120} Stavenhagen \textit{supra} n116 at 65}
Indeed, a majority of the Human Rights Commission rejected a proposal which purported to ensure to national minorities the right to use their native language, to possess their own schools, libraries, museums and other cultural and educational institutions.\footnote{Proposal E/CN.4/L.222 (SU) was rejected by 8 votes to 4, with 4 abstentions in the 9th Session of the Commission (E/CN.4/SR.371, p.6)}

However, in a detailed investigation into the scope of Article 27, Special Rapporteur Capotorti rejected such a narrow focus arguing that a refusal to recognize some special rights would render the application of Article 27 ‘meaningless’\footnote{Capotorti \textit{supra} n12 at 16.}. It is widely accepted that rights under the ICCPR should be immediately implemented\footnote{Thomberry \textit{supra} n31 at Chp 18.}, and an interpretation which does not favour special rights would be at odds with the goal of immediate, rather than progressive, implementation.

The need for positive measures was also supported by the Committee on Human Rights in 1994 with the adoption of a General Comment on Article 27 which aims to clarify the interpretation of its scope.

Paragraph 6.1 states that each State party is:

\textit{under an obligation to ensure that the exercise and existence of [the rights declared by article 27] are protected against their denial or violation. Positive measures of protection are, therefore, required...also against the acts of other parties within the state party.}

Paragraph 6.2 goes further in establishing that positive measures to correct past discriminatory treatment and inequality may ‘constitute a legitimate differentiation...if based on reasonable and objective criteria’\footnote{CCPR/C/21/Rev.1/Add.5 26th April 1994}. This policy is clearly compatible with
Article 1(4) of the Convention on the Elimination of All forms of Racial Discrimination (discussed below).

There is no attempt by the committee to elaborate on the type of positive measures that a State should undertake125. The committee presumably felt that it was impossible to make up a prescription containing the most effective ways of eliminating past discrimination and achieving de facto equality in a vast variety of different types of minority needs. This failing might also be regarded as a consequence of the individualistic approach which in attempting to avoid any claims of rights inherent in a particular collectivity, has the effect of viewing minority issues as subjective and therefore requiring individual remedial measures rather than national programs for alleviating poverty and discrimination. It would be difficult to manipulate the individualistic language of Article 27 to stretch to any program of special group-oriented measures without undermining the rights of each individual member to choose their own ends.

*Universality of the Minority question*

The final version of Article 27 clearly does not regard minority questions as a universal problem. The opening 'In those states in which minorities exist' seems at odds with the general purposes of the International Covenants which aim to secure universal respect for human rights. There is clearly opportunity here for any member state to refuse to acknowledge the existence of minority groups within the state and whilst it has been

125 Although commentators such as Hailbronner supra n 112 at 134 suggest measures such as the right to use their own language and establish schools and newspapers he does not suggest where the responsibility for funding such initiatives would rest.
reiterated that the protection of Article 27 does not depend on national classifications\textsuperscript{126} there must be some conflict with notions of territorial integrity\textsuperscript{127}. Despite the fact that Article 27 refers to 'persons' rather than nations or citizens, immigrant groups would appear to be excluded from the Article 27 provisions\textsuperscript{128}. The rationale for this omission may be the expectation that immigrant groups should adopt the values of their new society and become fully integrated. This approach seems at odds with the needs of minority groups who may be fleeing cultural persecution in their home country and who do not satisfy the stringent requirements for political refugees\textsuperscript{129}. The approach is also clearly at odds with a general comment under Article 40 of the Covenant on the position of aliens\textsuperscript{130}.

\textit{In conjunction with other covenant provisions}

After examining the rights contained in Article 27 and the Declaration, Nigel Rodley argues persuasively that Article 27 adds nothing new to the range of other rights contained in the Covenants which could be used to protect the cultural identity of individuals. He cites Articles 2(1) and Article 26 on non-discrimination, which when read in conjunction with Article 18, would guarantee the rights to practice a particular religion to a member of a minority group\textsuperscript{131}. Similarly, in relation to language, Article 26 can be read to provide the same protection as Article 4(3) of the Declaration. The

\begin{itemize}
  \item \textsuperscript{126} General Comment No 18 (1994) \textit{supra} n 104 para.4.
  \item \textsuperscript{127} Ibid para. 3.2 states that the enjoyment of rights under article 27 'does not prejudice the sovereignty or territorial integrity of a State party'.
  \item \textsuperscript{128} Report of the 3rd Committee, GAOR 16th Session, Agenda item 35, at 14. UN doc A/5000/Annexes (1961-2). Such an approach is strongly criticized by Nowak \textit{Supra} n 66 at 488-9.
  \item \textsuperscript{129} Ramaga, P "The group concept in minority protection" HRQ 15 (1993) at 575-588
  \item \textsuperscript{130} General Comment 15/27 of 22 July 1986 (Position of Aliens). Para.7 states that "in those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with the other members of their group, to enjoy their own culture, practice their own religion and to use their own language".
\end{itemize}
response of the European Court of Human Rights in the Belgian Linguistics Case adds weight to this approach; the absence of education provided in the French minority language in a Dutch unilingual region, constituted discrimination on the grounds of language.\footnote{Belgian Linguistics Case 1474/62 EHRR p252}

The cultural rights of members of minorities present more of a problem for Rodley's theory. Article 15 of the Economic Social and Cultural Covenant contains a progressive guarantee of the right to one's culture but this would seem to fall short of the standard in Article 27 which is of immediate effect. Article 19 of the ICCPR guarantees freedom of expression which could cover most of the artistic element of culture and language,\footnote{Prof. de Varennes gave evidence to the Sub-commission Working group on Minorities that contravention of freedom of expression, including language, constituted some of the most direct threats to minorities. Examples were given of the prohibition of the Chinese language in Indonesia; the restrictions on the language of the Kurds in Turkey and in Algeria where the Berber language was restricted in certain sections of the private sphere: Sub-Commission on the Prevention of Discrimination and Protection of Minorities 48th session Protection of Minorities (1996) para 29 (E/CN.4/sub.2/1996/28).} but this is only one element of any culture.\footnote{Rodley supra n131 at 59}

John Packer looks at minority rights protection as essentially an issue of freedom of association.\footnote{Packer supra n6 p23-65} Clearly, the approach taken by the Human Rights Commission in Lovelace v Canada\footnote{Lovelace v Canada No 24/1997 2 HRLJ 158 (1981)} would support his contention. The committee had to consider whether Ms Lovelace, a Maliseet Indian, was a member of that tribe after marrying and subsequently divorcing a non-Indian. Applying Article 27 the Committee found that her rights were interfered with as she had been denied access to the other members of

\footnote{Rodley, N "Conceptual problems in the protection of minorities: international legal developments" (1995) HRQ 17 at 57.}
her community with which to enjoy her culture (essentially a matter of freedom of association)\textsuperscript{137}.

Nevertheless, the inclusion of an article dealing specifically with minorities has important implications. On one hand it could be seen as oppositional to the general emphasis dealing purely with individuals\textsuperscript{138} and may therefore appear to be suggesting that minority rights are in conflict with individual human rights and that there is no compatibility. On the other hand, Article 27 essentially delineates the importance of the rights of members of minorities and indicates that an individualistic approach alone will be deficient in providing de facto equality. This fundamental importance is seen in the absence of a limitation provision where ‘necessary to protect public safety, health, or morals or the fundamental rights and freedoms of others’\textsuperscript{139}.

\textit{Consideration of State reports by the Human Rights Committee}

It is interesting to note the Human Rights Committee makes frequent criticisms of state inaction under Article 27 in respect of the Roma minority. A random selection of examples is presented here.

Following the report of Romania in 1993, the Committee were concerned about the problem of discrimination and ethnic violence towards people from minority groups. It noted:

\textsuperscript{137} Lovelace actually lost the case as there was a reasonable and objective justification for the legislation which was consistent with the rest of the Covenant i.e. to protect the identity of the Malisct tribe.

\textsuperscript{138} with the obvious exception of Article 1 which appears as something of an anomaly.

\textsuperscript{139} The original draft intended for the Declaration and proposed by the Sub-commission in 1947 included such a limitation in the interests of public order and security (E/CN.4/52 at 9 (1947). However, Ramaga notes that an interference with Article 27 may be justified if there is a reasonable and objective justification and consistency with other convention provisions: Ramaga, Phillip.V "Relativity of the minority concept" in \textit{HRQ} 14 (1992) 104-119 at 112.
This situation is especially threatening to vulnerable groups, such as the Roma (gypsies). The Committee is concerned that the Government has not been sufficiently active in combating such discrimination or effectively countering incidents of violence committed against members of minority groups.\(^{140}\)

Here the two-pronged effect of Article 27 is clearly visible. The Committee are concerned with the condition of the Roma as a collectivity but they then adopt individualistic wording when criticizing the absence of measures to prevent discrimination. The Committee went on to advocate the need for positive measures to counter discrimination in the media, particularly regarding the Roma.\(^{141}\)

Following the Bulgarian report, the Human Rights Committee expressed concern over the disadvantages faced by the Roma community in Bulgaria;\(^{142}\) and in their comments to the Hungarian Government the Roma minority were again singled out as the particularly vulnerable victims of prejudice and discrimination.\(^{143}\) Such concern was not purely related to the central and Eastern European states however, with Ireland being similarly criticized in respect of the lack of electoral and public affairs participation amongst travelling people.\(^{144}\)

Further Elaboration of Article 27: The Declaration on the Rights of persons Belonging to National or Ethnic, Religious and Linguistic minorities.

Following a recommendation by Professor Capotorti,\(^{145}\) the Sub-Commission has been involved in developing a draft Declaration on the Rights of Persons Belonging to

\(^{140}\) Comments of the HRC on the Report of Romania, Part D para.9 5.11.93 (CCPR/C/79/Add.30)

\(^{141}\) Ibid para 14

\(^{142}\) Comments of the HRC on the Report of Bulgaria, Part D, para.8 3.8.93 (CCPR/C/79/Add.24)

\(^{143}\) Comments of the HRC on the Report of Hungary, Part D, para 10 3.8.93 (CCPR/C/79/Add.24)

\(^{144}\) Comments of the HRC on the Report of Ireland, para 23 3.8.93 (CCPR/C/79/Add.21)

\(^{145}\) Capotorti \textit{supra} n12 at Add 5, para 59.
Minorities. Following a three year study by special Rapporteur Asbjorn Eide\textsuperscript{146}, a Declaration was finally adopted in 1993\textsuperscript{147}.

In carrying out his study into constructive and peaceful ways of resolving minority problems, Eide was asked to "...accord special attention to and to provide information on the specific conditions in which the Roma (gypsies) live"\textsuperscript{148}.

The Declaration should be viewed as a reinforcement of the weak provisions in Article 27. It contains no definition of minorities but it does list a number of basic principles which, if implemented, would serve to greatly improve the situation of most minority groups. The Working Group on the Protection of Minorities are presently collecting information on State constitutions and domestic legislation in order to assess the extent of minority protection\textsuperscript{149}. In addition, short studies concerning the interpretation of the Declaration's core principles are being undertaken.

The preamble considers that:

\textit{the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live}\textsuperscript{150}.

The individual emphasis is still dominant, but Article 1 goes into new territory by requiring States to protect the identity of minorities as well as their existence (which is effectively guaranteed by the Genocide Convention)\textsuperscript{151}. A vast range of subjects dear to the hearts of minorities are covered in the nine articles including education which

\begin{itemize}
\item \textsuperscript{146} Eide "Protection of Minorities: Recommendations to the UN Sub-Commission" in \textit{supra} n2.
\item \textsuperscript{147} \textit{UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities} UN General Assembly Res. 47/135
\item \textsuperscript{149} Eide \textit{supra} n2 at 6.
\item \textsuperscript{150} For full text see HRLJ vol. 14 No 1-2 at 55-6
\item \textsuperscript{151} Article 1 (1): "States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories, and shall encourage conditions for the promotion of that identity".
\end{itemize}
should promote awareness of the minorities' traditions and culture\textsuperscript{152}, participation in cultural, religious, social, economic and public life as well as the right to participate in decisions concerning the minority at a national and, where appropriate, regional level\textsuperscript{153}; and the right to associate and maintain contact with other members of the minority group\textsuperscript{154}. There is a clear obligation on states to take:

\begin{quote}
       necessary measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards\textsuperscript{155}.
\end{quote}

It is interesting to note that the State can only evade this obligation if the practices of the group are contrary to international standards as well as domestic legislation. Thus it would appear to be outside the spirit of the declaration for a state to fail to support the travelling lifestyle of many Gypsies on the basis that national legislation prohibits unauthorized stopping and camping.

The Declaration does contain a number of significant weaknesses and can be criticized for doing too little too late - a seemingly inevitable consequence of international compromise. Minorities were not consulted during the drafting process\textsuperscript{156} and by looking at the measures omitted from the Declaration the deficiencies are all too apparent. There is no definition of minorities, enabling a subjective interpretation by states anxious to avoid a guarantee of basic minority rights for non-nations and new

\begin{footnotes}
\textsuperscript{152} Article 4 (4)
\textsuperscript{153} Article 2(2) and 2(3) respectively
\textsuperscript{154} Article 2(5)
\textsuperscript{155} Article 4(2)
\textsuperscript{156} Alfredsson and de Zayas supra n114 at 3.
\end{footnotes}
The emphasis of the wording is on ‘should’ rather than ‘shall’ or ‘will’ and the provisions are qualified with the words ‘where possible’, enabling a more gradual and possibly partial implementation of these essential measures. There is also, perhaps unsurprisingly, no right of minority autonomy included in the Declaration, thus the protection of minority identity is again at the hands of the particular State rather than an inalienable right of the group. Furthermore, Rodley argues that the goal of the Declaration as a whole is unclear and the same results could be obtained through the application of Article 26 of the ICCPR to a particular minority issue. Sigler’s observations concerning Article 27 are equally applicable to the new Declaration. He noted:

*The Covenant represents a minimalist version of minority rights. Minority rights are not promoted by such a provision. Minorities are not given special economic, social or political advantages, nor is their position made secure against majority culture, language or religion. Certainly no kind of autonomy is envisaged by the 1966 covenant, nor are minorities entitled to any institutional safeguards.*

Thus, there are clearly a number of serious deficiencies in the Declaration. Yet there is some cause for optimism as there have already been some positive consequences. For example, in Hungary, it formed the basis for the new law on National and Ethnic Minorities and was extended to provide for minority self-government in minority dominant regions. The Romanian Law on Education adopted in 1995 provides for the right of national minorities to receive education in their mother tongue at primary level.

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157 Thornberry, P “International and European standards on minority rights” in Miall Minority Rights In Europe: The Scope for a Transnational Regime (1994) Pinter pubs, London at 17 notes that Germany have insisted that the Declaration is limited to nationals and citizens of Germany, thus denying such rights to the large number of immigrant and refugee minority groups.

158 Rodley *supra* n131 at 57.

and it further provides for the teaching of history and traditions of the national minority. Furthermore, Professor Yacoub has contended that the Declaration could be a useful negotiating tool for minorities, reducing the desire to undermine political integrity. Neither Article 27 nor the Declaration distinguish between citizens and non-citizens and, according to Professor Thornberry, it could therefore be used to prevent denial of citizenship.

Other International provisions concerned with minority rights

Activities of UNESCO

The Declaration of International Cultural Co-operation affirmed that every people has the right and duty to develop their own culture. Most importantly, UNESCO have recognised the importance of education in the development of minority culture and identity. The UNESCO Convention against Elimination of Discrimination in Education states that:

*It is essential to recognize the rights of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or teaching of their own language.*

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161 ibid at para.35.
162 ibid at para.16.
163 ibid at para.143 see also Prof. Eide at para.145.
166 Article 5(c)
Drafted in 1960 when the importance of specific minority rights was hotly contested, this is clearly a weak provision. The rights of members of minorities are described as ‘essential’ at the outset, but it also appears that they may be watered down ‘depending on the educational policy of each State’167.

The 1989 Convention on the Rights of the Child

This document is unusual in that it has received widespread international support, being ratified by 187 states as of July 1996168. Article 30 provides for the protection of a child belonging to an ethnic, religious or linguistic minority. The Committee has so far failed to make use of Article 30 and has dealt with minority issues under the other Convention articles dealing with specific matters such as education; non-discrimination and development169.

Minority Rights and Discrimination

The issue of minority protection frequently emerges in the field of racial discrimination and intolerance. On the whole the policy has been individualist and is discussed in Chapter Three. However, there are certain provisions which specifically note the needs of members of minority groups for special measures and action to achieve de facto equality for the group. The approach taken by the Convention on the Elimination of All Forms of Racial Discrimination recognises the need for ‘affirmative action’, which

167 See Chp. 5 passim for more detail on education rights
168 Sub-commission supra n160 at para 79.
169 ibid at paras 80-1.
is deemed not to constitute discrimination under Article 1(4), providing that it does not:

*as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved*\(^{170}\).

Distinctions between citizens and non-citizens are permitted under the Convention\(^{171}\).

Such a deliberate omission can be criticized as it opens up a loop-hole in that States can argue that discriminatory treatment is not based on ethnic characteristics but rather on lack of citizenship. Meron recommends that the state should have the burden of proving that such discriminatory treatment was based exclusively on alienage: "The use of the citizenship exception as a pretext for discrimination could thus have been avoided"\(^{172}\). The situation of the Roma in the Czech Republic (discussed below) illustrates the way in which citizenship criteria can be manipulated to exclude unpopular minority groups.


Covering discrimination in employment, an ILO Commission of Inquiry has been concerned with the situation of specific minority groups on several occasions, including one inquiry which recommended greater respect for the minority languages of the Magyar and Roma minorities in Romania\(^{173}\).


\(^{171}\) Article 1(2) CERD. In Demba Talibe Diop v France No 2/1989 (12 HRLJ 300 (1991) the Committee could find no violation where a Senegalese lawyer living in France was denied a license to practice at the Bar.


\(^{173}\) Sub-Commission supra n160 at para 94.
Regional Minority Protection

The Conference on Security and Co-operation in Europe.

The Conference, now 'Organisation', on Security and Cooperation in Europe (hereafter, OSCE) has made considerable developments in international cooperation in the fields of human rights as well as in security and military issues. In 1994, fifty-three states had made political commitments to implement the CSCE initiatives contained in the Helsinki Final Act of 1975 and the numerous follow-up meetings.

The Conference Process

The CSCE focus on cultural rights is essentially individualistic. The Helsinki Final Act contains detailed provisions on individual rights to culture but the provision dealing with collective rights to culture and identity is by comparison, short and 'unsophisticated'. Over the past twenty years a clear development has taken place regarding the attitude of CSCE states to the problem of minorities. Helgesen notes that the Vienna Concluding Document was something of a landmark in the changing attitudes of member States: "For the first time in the CSCE Process, all (but one) of the participating States really wanted to comply with these fundamental values."
The Vienna document\textsuperscript{179} goes further than previous documents in explicitly requiring that 'legislative, administrative, judicial and other' measures be adopted. This development continued during the run up to the Copenhagen meeting. The Copenhagen meeting took place in a post-Communist Europe, which bought a new range of ideas and approaches to the subject of minority rights.

The Copenhagen document on the Human Dimension\textsuperscript{180} has been 'hailed as a veritable European charter on democracy'\textsuperscript{181}, Part IV focuses entirely on the protection of minorities. It recognises that the protection of the rights of persons belonging to minorities 'is an essential factor for peace, justice, stability and democracy in the participating State'. The main areas of concern are minority languages, education and political participation in a climate of pluralism. The right of education is linked to the rights of minorities to "develop their culture in all its aspects free of any attempts at assimilation against their will"\textsuperscript{182} and in furtherance of this objective, members of national minorities are given the right to establish their own educational institutions and to seek voluntary financial contributions and public assistance\textsuperscript{183}.

As far as political participation is concerned there is an implicit recognition that majoritarian democracy may not be sufficient to protect the interests of minorities\textsuperscript{184}, 'appropriate local or autonomous administrations' are envisaged\textsuperscript{185}.

\textsuperscript{179} \textit{Supra} n175

\textsuperscript{180} Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 29th 1990 reprinted in HRLJ 232 (1990)

\textsuperscript{181} Glovcr, A "The Human Dimension of the OSCE: from standard setting to implementation" Helsinki Monitor 3 (1995) at 2.

\textsuperscript{182} \textit{Supra} n180 at para 32.

\textsuperscript{183} ibid at para 32.2.


\textsuperscript{185} para 35
The situation of the Roma in Europe was specifically highlighted as a cause for concern. The document declares:

*The participating states clearly and unequivocally condemn totalitarianism, racial and ethnic hatred, anti-semitism, xenophobia, and discrimination against everyone as well as persecution on religious and ideological grounds. In this context, they also recognize the particular problems of Roma (gypsies)*.\(^{186}\)

The States pledged to take the measures to provide necessary laws to protect against discrimination and ethnic violence, and to promote tolerance and understanding particularly through education.

In 1991, The Geneva Meeting of Experts on National Minorities were similarly concerned about the rise in discrimination and xenophobia and reiterated paragraph 40:

*In this context they reaffirm their recognition of the particular problems of Roma (gypsies). They are ready to undertake effective measures in order to achieve full equality of opportunity between persons belonging to Roma ordinarily resident in their State and the rest of the resident population. They will also encourage research and studies regarding Roma and the particular problems they face*\(^{187}\).

In the Document of the Helsinki Follow-up Meeting (1992), the participating States agree to consider taking appropriate steps to address the escalating issues of intolerance and discrimination\(^{188}\). The need to promote human rights education and cross-cultural training and research were stressed. Furthermore the participating States:

*Reaffirm, in this context, the need to develop appropriate programmes addressing problems of their respective nations belonging to Roma and other groups traditionally identified as Gypsies and to create conditions for them to have equal*

\(^{186}\) *Supra* n180 Chapter IV, para.40  
\(^{187}\) CSCE Report of the Geneva Meeting of Experts on National Minorities (1990), Chapter VI  
\(^{188}\) CSCE Document of the Helsinki follow-up Meeting (1992) Chp IV, para 35
opportunities to participate fully in the life of society, and will consider how to cooperate to this end. By 1991 the Yugoslav crisis revealed the extent of the CSCE’s inability to respond to international security threats. Rady argues that previous unwillingness to elaborate on collective rights contributed to this failure. The negotiators involved in reaching a settlement in Yugoslavia were forced to adapt the framework of collective rights in both political and territorial spheres as well as the more traditional cultural sphere.

In 1994, The Budapest Declaration established the Contact Point for Roma and Sinti issues within the Office for Democratic Institutions and Human Rights (hereafter ODIHR). The contact point facilitates contacts between States on issues facing Roma and Sinti and provides information on the initiatives and programmes concerning them, a newsletter has recently been established to communicate these developments.

It is evident that the OSCE process has raised the profile of minority rights issues generally, in particular the plight of the Roma. Nevertheless, recent Conferences have recognized the urgent need to focus on methods of implementation. The Budapest document of 1994 decided to concentrate efforts on improving the cooperation framework in order to improve the effectiveness of the Conference documents.

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189 ibid.
191 Ibid 722-724
193 Thornberry, P in Miall (cd.) supra n157.
194 See for example CSCE supra n41
195 CSCE Document supra n192 decisions viii, 4.
The following year, a Conference dealing specifically with Implementation was held in Warsaw\(^{196}\). No negotiated document resulted from the meeting, the purpose being to record the problems faced by participating States in meeting their political obligations, and make suggestions for their solution\(^{197}\). Representatives from Non-Governmental organizations are invited to take part in working groups and plenary sessions and may raise problems of concern in specific States\(^{198}\).

**The work of the High Commissioner on National Minorities**

The office of the High Commissioner was established in 1992 following the Helsinki Summit\(^{199}\). The current High Commissioner, former Dutch foreign minister Max Van der Stoel, has a primary role in acting as an early warning mechanism for situations of minority conflict and also in examining the situation of minorities and issuing specific reports and recommendations\(^{200}\). The role of the High Commissioner is confined to situations involving minorities and there is no jurisdiction over individual rights\(^{201}\). The reports and recommendations are non-binding but they do have strong political influence and may prove more useful than the Framework Convention. In relation to political participation, the Commissioner has gone further than Article 15 of the Convention in advocating the development of specialized organs to deal with legislation concerning minorities\(^{202}\).

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\(^{196}\) OSCE Implementation Meeting on Human Dimension Issues 1995, Warsaw 2 to 19th October.  
\(^{198}\) Glover *supra* n181 at 3.  
\(^{199}\) Helsinki Decisions of 10th July 1992 in 13 HRLJ 289 (1992)  
\(^{200}\) 6 *ILM* 1385 (1992); Packer, J paper given to *Minority Rights in the ’New’ Europe* Conference, Univ. of Central Lancashire. Nov 1996.  
\(^{201}\) CSCE Helsinki Document 1992 *The Challenges of Change: Helsinki Summit Declaration, II, 5 (c)*  
\(^{202}\) Letter of the OSCE High Commissioner on National Minorities to Slovak Republic, CSCE Communication No 36, Vienna, 14 November 1994.
In 1993 the High Commissioner undertook an investigation of the situation of the Roma throughout Europe. He was asked by the Committee of senior officials "to study the social, economic and humanitarian problems relating to the Roma population in some participating States and the relevance of these problems to the mandate of the High Commissioner." The report advocated greater respect for individual rights coupled with measures recognising the identity and specific needs of the Roma. Such measures "...may also include special government policies for addressing Roma-related issues in such areas as employment, education, health care, and general welfare." 

The Council of Europe

Notwithstanding the absence of a specific minority provision in the European Convention on Human Rights, the Council of Europe have played a vital role in many recent initiatives concerning the treatment of the Roma. Studies and conferences have been established with funding from the Council along with the OSCE which have dramatically increased awareness of the issues facing the Roma community. Many of these reports and seminars as well as the Interface Collection, which also receives Council of Europe funding, are referred to throughout this thesis. The aim of this chapter however is to focus specifically on international human rights provisions and their weaknesses rather than provide a detailed assessment of the Council of Europe’s activity in their non-judicial/legislative capacity.

203 The only example to date of a non-territorial minority to be investigated by the Commissioner
204 CSCE Roma (Gypsies) in the CSCE Region Report of the High Commissioner on National Minorities (1993) CSCE
205 Ibid at 5.1 para 2
206 For further details see Council of Europe Council of Europe Activities on Travellers and Gypsies CDMG (92) 10 rev.2 (1993).
The European Convention on Human Rights and Fundamental Freedoms (1950) contains no substantive provision dealing with the rights of minorities comparable to Article 27. The only mention of minorities is found in Article 14 which prohibits discrimination on the grounds of association, *inter alia*, with a national minority. Members of minorities may seek to protect their identity under one of the substantive Articles, such as Article 11 concerning freedom of association and assembly or Article 9 on freedom of religion, coupled with Article 14 but this is clearly an individual procedure and cannot be pursued by collectivities. The solution of minority problems through individual rights enforcement has already been addressed from a critical perspective in Chapter Three.

The Framework Convention on the Rights of persons Belonging to National Minorities

The possibility of a document with a specific focus on the rights of minorities is not a recent development. In 1973 a draft protocol to the European Convention on ‘persons belonging to national minorities’ was considered by the Committee of Government experts.

In recent years however, the debate has gathered momentum with the increase of minority-based conflicts, particularly in the former Yugoslavia. A steering committee

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207 In *G and E v Norway* (1983) 9278/81 and 9415/81, DR 35/30, the Commission stated: “the convention does not guarantee specific rights to minorities...[though] under article 8(1), a minority group is, in principle, entitled to claim the right to respect for the particular life style it may lead as being 'private life', 'family life' or 'home'”. Marquand notes that the ‘convention organs have been careful not to find that there are minority rights when to do so may upset the political balances of the states in which the minority is present’ in “Human rights protection and minorities” Public law 359-366 at 365.

208 see for example *Buckley v UK* (1992) 20348/92
was established in 1991 to consider the best way for the Council of Europe to address this deficiency. The following year, the Parliamentary Assembly noted:

7. There have been more and more colloquies and conferences of every kind. The extreme diversity of situations has now been properly recorded, described and analysed, as have the very great variety of problems raised and the difficulties, both legal and political, involved in solving them.

8. All of this is no longer enough. These analyses and these conclusions that nothing can be done are no longer acceptable. There is an urgent need for international decisions and commitments which can rapidly be implemented in the area concerned. Peace, democracy, freedoms and respect for human rights in Europe are at stake.

In 1993, the Parliamentary Assembly recommended an additional protocol on the rights of minorities to the Convention. This document included a definition of the term 'national minority' and went as far as providing for local or autonomous authorities for national minorities. The Vienna summit of October 1993 saw the Heads of State advocating legal commitments for minority protection, and a draft protocol to complement the ECHR in the cultural field was commenced by the ad hoc

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209 Report of the Committee of Experts on Human Rights to the Committee of Ministers, adopted on 9th November 1973 (C/E, DH/Exo (73) 47), discussed in Capotorti, Supra n12 at 11

210 Following Parliamentary Assembly Recommendation 1134 (1990); see also Committee of Ministers Recommendation No R (92) 10 on the implementation of rights of persons belonging to national minorities.


212 Parliamentary Assembly of the Council of Europe: Recommendation 1201 (1993) on an additional protocol on the rights of minorities to the ECHR, reproduced in Klebes, H "Draft protocol on minority rights to the ECHR" (1993) JIRLJ 14 p140-144 at 144

213 The definition rencited in Recommendation 1255 (1995) (Parliamentary Assembly 3rd sitting) refers to "a group of persons in a state who: a) reside on the territory of that state and are citizens (my emphasis), b) maintain long-standing identity, and form lasting ties with that State, c) display distinctive ethnic, cultural, religious or linguistic characteristics, d) are sufficiently representative, although smaller in number than the rest of the population of the State in which they live, e) are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language".

214 Article 11. Special Rapporteur Bindig noted that this provision in particular was controversial and resulted in a cautious approach by the Vienna Commission at the summit (Report on the protection of the rights of Minorities Doc.7572 1996)
Committee for the Protection of National Minorities. In February 1995 the Framework Convention for the Protection of National Minorities was opened for signature requiring twelve ratifications to bring it into force. The Convention entered into force on 1st February 1998. It has now been signed by thirty-six member states (and one non-member, Armenia) and has been ratified by twenty-three states.

It will be immediately recognised that the Council of Europe have rejected the formulation of ‘religious, linguistic and ethnic minority’ in favour of the term ‘national minority’ which is also preferred by the OSCE. The development of minority rights in the OSCE in recent documents, particularly part IV of the Copenhagen document, has greatly influenced the Convention, although the final, legal commitments have clearly watered down the political obligations.

There is no definition of ‘national minority’ in the Framework Convention. The Explanatory Report notes that ‘it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member states’ and advocates a ‘pragmatic approach’. By contrast, a proposal to the Human Rights Commission by the Soviet delegate to replace ‘ethnic, linguistic or religious minority’ with ‘national minority’ in Article 27 of the ICCPR had not been accepted. He defined national minority as “an historically formed community of people characterized by a common language, a common territory, a common economic life and a common psychological

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217 The current status of the convention is available on the C/E internet site: http://www.dhdirhr.coe/fr/Minorities/Eng/m
219 Supra n216 at 12, para.12.
structure manifesting itself in a common culture. The rigid application of these criteria is certainly not a prerequisite for minority status in the Council of Europe documents if we compare the approach taken in the influential OSCE process. The OSCE has also shied away from elaboration in this respect, although Helgesen notes that there is agreement on the only distinct implication being that the individual must be a national of the given state in order to enjoy the particular protection.

The link between citizenship and minority status is of fundamental importance and Helgesen's conclusions are evidenced in Part IV of the CSCE Geneva report which states that 'the participating states affirm that every person belonging to a national minority will enjoy the same rights and have the same duties of citizenship as the rest of the population'. If the same approach is adopted by the Council of Europe, non-citizens will be outside the ambit of the Convention, a consequence that could deprive the rights under the Convention of much of their significance. Gilbert observes that this could be particularly problematic for the Roma who are generally regarded as a minority but who may be excluded from nationality legislation. He argues that whether Roma constitute a 'national minority' in this sense could prove to be...
debatable. This approach was taken in the drafting of the Hungarian minorities law, discussed in Chapter Seven, where citizenship is considered one of the criteria for membership of a national or ethnic minority. It should be noted here also that the use of bilateral treaties which may serve to promote the status of minority groups in their host countries will be unlikely to improve this situation - the Roma's absence of a homeland State removes a powerful bargaining tool in minority negotiations between States. The Treaty of Good Neighbourliness and Friendly Co-operation between the Slovak Republic and the Republic of Hungary incorporates the obligations under the Framework Convention into the mutual responsibilities of the treaty. The treaty however, does not go further than the Framework Convention in defining the term national minority, and though it clearly refers to the Hungarian and Slovak minorities on their respective soil, it is not clear how it is to be applied to other minorities.

It would therefore appear likely that many of the minority versus state disputes under the Convention will turn on the interpretation given to the term 'national minority'. Given this likelihood it is inevitable that some sort of definition will need to be formulated to avoid much duplication of the same academic arguments. The Parliamentary Assembly have indicated that non-territorial groups such as the Roma must also be included within the ambit of the Convention.

226 Gilbert supra n 218 at 176-7; see also Klebes supra n 224 at 143 who notes that an alternative approach of linking the minority with a territory rather than a State may similarly exclude 'gypsics'.

227 Chp 1, SI Act LXXVII of 1993 On the Rights of National and Ethnic Minorities


229 Although, it is recognised that the rights of persons belonging to national minorities is a matter of legitimate concern of the international community Article 15(1) Supra n228.


231 see below at page 275 supra n260 at para.11 (xiii)
Content of the Framework Convention

Article 1 clearly establishes that the protection of minorities and their members constitutes a fundamental element in international human rights protection. It is apparent from the Explanatory Report that this does not constitute a recognition of collective rights, with the general emphasis on ‘persons belonging to minorities’ as in the ICCPR. Nevertheless the Convention does contain rights which, although couched in individual terms, clearly apply to collectivities per se and could only be enforced by such collectivities.

Article 5 asserts:

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

2. Without prejudice to measures taken in pursuance of their general integration policy, the parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation.

Gilbert argues that if justiciable an individual could only seek enforcement on behalf of the group, to talk of purely individual rights to maintain and develop culture is meaningless.

On the whole, the Convention can be criticized as suffering from the same flaws as the UN Declaration on the rights of persons belonging to minorities, discussed above. The

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232 Supra n216 at 12, para.13

233 Gilbert, G, Supra n218 at 183.
language focus is typically progressive rather than immediate and there is little positive action required from states.

The opening lines of articles 8-11 state that ‘The parties undertake to recognize...’ rights ranging from freedom of religion to expression, language and name respectively. Thus there is no duty placed on states to ensure the conditions necessary for the promotion of these rights. Education is seen as a matter for the minority and incurs no State financing obligation\textsuperscript{234}, although the State shall take measures, where appropriate, to increase awareness among minority and majority about minority cultures\textsuperscript{235}. The application of these rights remains essentially a private matter between the individuals and their community and will thus depend on the resources and status of the community\textsuperscript{236}.

Several of the articles include the clause ‘within the framework of their legal systems’ which undermines the importance of the right to which it is attached. Heinrich Klebes notes that such a restriction implies, contrary to the European Convention on Human Rights, that national law prevails in cases of conflict and that there is no obligation on parties to adapt the national law to comply with the Convention rights\textsuperscript{237}.

The anti-discrimination provisions go further in requiring the state to take:

\begin{quote}
appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity\textsuperscript{238}.
\end{quote}

\textsuperscript{234} Supra n216 Article 13(1) and (2) respectively  
\textsuperscript{235} Supra n216 Article 12  
\textsuperscript{236} Similarly Article 14 concerns the right of members of minorities to use their own language. The explanatory report states categorically “there can be no exceptions to this” but then goes on to say “...this paragraph does not imply positive action, notably of a financial nature, on the part of the State” supra n216 at 21 para.74.  
\textsuperscript{237} Klebes, H Supra n224 at 94.
The Framework Convention and the Draft Protocol: A Comparative critique\textsuperscript{239}.

It is illuminating to compare the text of the Convention with the Parliamentary Assembly's draft protocol\textsuperscript{240}. Article 10 concerning the right to use the minority language is clearly weaker than the Draft protocol which provides for the right to use minority languages 'in publications and the audiovisual sector'. Furthermore, the latter provides that:

\textit{in the regions in which substantial numbers of the national minority are settled, the persons belonging to that minority shall have the right to display in their language local names, signs, inscriptions and other similar information visible to the public}\textsuperscript{241}.

The minority language provisions in the Protocol are developed from the Charter on Regional and Minority Languages and as a result they aim to impose clear, immediate obligations on the State. Article 8 of the Draft protocol provides a right to receive education in the mother tongue at an appropriate number of schools and state educational and training establishments. The language of the corresponding provision in the Framework Convention is more tentative and hinged with provisos giving the State a very wide margin of appreciation\textsuperscript{242}.

\begin{thebibliography}{9}
\bibitem{238} Supra n216 article 6(2)
\bibitem{241} ibid. Article 7.
\bibitem{242} Article 14 of the Framework Convention states "(2) In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, \textit{if there is sufficient demand, the parties shall endeavour to ensure, as far as possible, within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language}" (my emphasis).
\end{thebibliography}
Article 6 of the draft gives persons belonging to a national minority the right to set up their own organizations, including political parties, whereas the rights under the framework Convention to assembly and association are more vague and consequently weaker\textsuperscript{243}.

Perhaps the most far-reaching term of the Parliamentary Assembly’s draft related to the right to local autonomy or special status. Article 11 states:

\begin{quote}
In the regions where they are in a majority the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation of the State.
\end{quote}

This may explain the reluctance of the Vienna Commission to endorse the draft protocol; it has been frequently observed that:

\begin{quote}
The sensitivity with regard to autonomy in whatever form is still very strong in quite a number of Member States of the Council of Europe. There is widespread fear of the spiral “cultural autonomy, administrative autonomy, secession”\textsuperscript{244}.
\end{quote}

A right to an effective remedy ‘before the State authority’ is provided by Article 9 of the Draft Protocol, but there is no such right contained in the Framework Convention.

The method of monitoring implementation through ‘national legislation and appropriate government policies’ is through the supervision of State reports by the Committee of Ministers; there is no supranational enforcement mechanism\textsuperscript{245}. An Advisory Committee will be established to assist the Committee of Ministers once the convention receives the necessary ratifications\textsuperscript{246}. Article 26 provides that:

\begin{flushright}
\textsuperscript{243} Supra n216 Article 7.
\textsuperscript{244} Klcbcs supra n224 at 96.
\textsuperscript{245} Supra n216 Article 24-6
\textsuperscript{246} Parliamentary Assembly Recommendation 1285 (1996) on the rights of national minorities, para 5 (see Doc 7442 Report of the Committee on Legal Affairs and Human Rights, Rapporteur Bindig; and
1. In evaluating the adequacy of the measures taken by the Parties to give effect to the principles set out in this framework convention the Committee of Ministers shall be assisted by an advisory committee, the members of which shall have recognised expertise in the field of the protection of national minorities247.

Members of the Committee will be selected after entry into force and should be as 'independent, effective and transparent as possible'248.

It is clear that a minority cannot directly petition the Commission or the European Court of Human Rights and that implementation will depend on the particular State's commitment to minority rights, hardly a suitable guarantor in such matters249. Furthermore, as with the UN 'Declaration on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities', there is no duty on States to officially recognise their minority groups250. Capotorti notes that 'international protection of minorities does depend on official recognition of their existence'251. Despite the fact that the presence of sufficient elements indicating a minority will attract the international rules252, several commentators have indicated that such recognition is essential for the full realization of rights under the Convention253.

The Parliamentary Assembly have expressed the opinion that the Convention is weakly worded and are continuing to press for the inclusion of a draft Protocol on cultural rights pursuant to recommendation 1201 of 1993, which would enable individuals to

Doc 7471, Opinion of the Committee on Migration, Refugees and Demography, Rapporteur: Mr. Cuco)
247 Supra n216 Article 26.
249 Wheatley supra n223 at 8 describes the monitoring system in more detail and concludes that it is 'clearly inadequate'.
250 It has been noted in Chp1 p19 that Germany (despite ratifying the Framework Convention) has failed to recognise the Roma and Sinti as national minorities as they are not territorially defined
251 Capotorti supra n12 p12 at para. 61
252 ibid.
253 Roth supra n117; Wheatley supra n223 at 4; Capotorti supra n12, para 62.
petition judicial bodies and ultimately the court\textsuperscript{254}. In the meantime Recommendation 1201 is not completely redundant. The Assembly has never abrogated Order 484 which instructs the Legal Affairs committee to “make scrupulously sure when examining requests for accession to the Council of Europe that rights included in this Protocol are respected by the applicant countries”\textsuperscript{255}.

Thus arises an interesting comparison with the pre-War League of Nations regime, where it will be recalled, minority rights were legally protected in the new and enlarged States of Eastern and Central Europe, but were left unregulated in the West.

\begin{center}
\textit{Council of Europe: ad hoc recommendations specifically concerning the Roma.}
\end{center}

The Council of Europe has long been concerned with the situation of Roma and other travellers in Europe, in recent years this concern has been voiced in several recommendations which plainly regard the ‘Gypsies’ or Roma as a minority group\textsuperscript{256}.

Over twenty years have passed since the Committee of Ministers resolution ‘on the social situation of nomads in Europe’\textsuperscript{257}. The recommendations contained in that document were concerned with discrimination against travelling people generally, many of them being Roma. Suggested measures included legislation to safeguard the cultural heritage and identity of nomads; provision of camping and housing; education,

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\textsuperscript{254} Parliamentary Assembly Recommendation 1255 (1995) \textit{On the protection of national minorities} \url{http://stars.coc.fr/gcn/aintro7.htm}. The recommendation contains a list of suggested material to include in the protocol. Many of the Articles refer to minority language requirements initially substantiated in the Charter for Regional and Minority Languages.
\textsuperscript{255} As noted by Klebes \textit{supra} n224 at 97.
\textsuperscript{256} The Council of Europe have in the past tended to favour the label ‘Gypsy’ over Roma (see for example the report from the European Committee on migration \textit{The Situation of Gypsies (Roma and Sinti) in Europe} 1995 CDMG (95) 11) this may be attributable to the west European origins of the Council and increasingly the label Roma is appearing in documents, reflecting an increased awareness of the unpopularity of the term Gypsy amongst many Rom.
\textsuperscript{257} Council of Ministers Resolution (75) 13 22nd May 1975
\end{flushright}
health and social security. A further resolution was adopted in 1983 on the position of stateless nomads which again emphasizes an individualistic angle by focusing on non-discrimination and allowing freedom of movement so long as there is no incompatibility with territorial integrity.

The Parliamentary Assembly has also been active in recommending increased protection for the Roma and other travellers in Europe. A recommendation of 1969 ‘on the situation of gypsies [sic] and other travellers in Europe’, had pinpointed the main areas of concern: discrimination, the construction of caravan sites, health, education and social security. By 1993 it was apparent that the situation of the Roma and other travellers in Europe was not improving significantly and the Parliamentary Assembly noted that their numbers had increased dramatically, particularly with the addition of former Communist States, and “as Gypsies are one of the very few non-territorial minorities in Europe, they need special protection”. In their general observations, the Assembly noted:

Intolerance of Gypsies by others has existed throughout the ages. Outbursts of racial or social hatred however occur more and more regularly and the strained relations between communities have contributed to the deplorable situation in which the majority of Gypsies live today.

The measures recommended were divided into education; culture, including music and language; information, including a proposal to establish a European information centre.

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258 Committee of Ministers Recommendation No R (83) 1 on stateless nomads and nomads of undetermined nationality.


261 ibid at para.5
on the situation and culture of Gypsies, equal rights, where it was stated that the
provision of minority protocols or conventions should apply equally to non-territorial
minorities, everyday life; and general measures aimed at improving information
through research on the situation of the Gypsies including the appointment of a
mediator for Gypsies.

The same year, the Standing Conference of Local and Regional Authorities of Europe
made a resolution specifically on the situation of Gypsies in Europe. It was noted that
the afore-mentioned texts had been 'followed up with little concrete action'.

The Inadequacy of Minority Rights Protection for the Roma

Despite the clear prevalence of the individualist human rights approach in international
minority rights documents, there is some evidence to suggest that collective rights are
necessary and have indeed been recognised as such by some international institutions.

The right of 'peoples' to self-determination is clearly a collective right in that it can
only be claimed by a people and not by an individual. Its position in Article 1 of the
two United Nations Covenants suggests that it is a fundamental prerequisite to the
realization of individual human rights.

The emphasis on 'persons belonging to minorities' rather than the groups per se and
the absence of a collective right of petition to the Human Rights Commission fail to
protect adequately the human rights of those members. The adoption of the UN

262 ibid at para.11 (x)
263 ibid at para.11 (xiii)
264 ibid at para 11(xcii)
265 Standing Conference of Local and Regional Authorities of Europe 28th session Resolution 249
(1993) on Gypsies in Europe: The Role and Responsibility of Local and Regional Authorities.
Declaration on the Rights of Minorities in 1992 and the Council of Europe’s Framework Convention do not substantially alter this deficiency.

The attitudes of States can be witnessed through the restrictive interpretations exhibited in the Committee of Ministers in the Council of Europe. The Parliamentary Assembly has however, recognised the inadequacy of the Framework Convention and is continuing to push for an additional protocol to the European Convention on Human Rights which would provide an opportunity for national minorities to challenge State policy.

The recent decision of the European Court of Human Rights in the Buckley case, discussed in Chapter Three, exhibits the need for such a minority protocol. The majority of the Court felt that Mrs Buckley’s private and home life had been adversely affected contrary to Article 8 of the European Convention, when she was not allowed to reside in her caravan on the land which she owned. However, the interference was deemed to be necessary in the interests of a democratic society. The rights of one individual were simply balanced against the interests of the majority with insufficient weight being given to her Gypsy identity. If the Framework Convention provisions had been incorporated into the European Convention, the Court would have felt obliged to devote greater attention to her needs as a member of a minority group.

The watering down process from the political commitments in the OSCE to the Framework Convention further suggests that any translation into an optional Protocol will result in an even weaker, more nebulous approach. The failure of many of the Council of Europe states to ratify either the Framework Convention or the Convention on Regional and Minority Languages leaves little room for enthusiasm about the
potential of these documents to provide effective protection for the minority rights of the Roma.
of self-determination and more specifically, the scope of ‘internal’ self-determination will be examined in the light of this approach, along with alternative methods which could be used to extend the autonomy of groups.

This analysis will focus on the recently adopted Hungarian Law on National and Ethnic Minorities, described as ‘an effort to implement a new theory of human rights based upon collective rights’. This pioneering statute aims to guarantee a level of political participation and funding for specific minority groups including the Roma. The potential for the extension of this collective rights policy in a Europe aiming for increased globalisation will be discussed.

Self-determination
Group rights as a prerequisite to the realisation of human rights.

The definition and application of the right of self-determination is fraught with difficulties, raising more questions than it answers. Brownlie notes however that the right has a ‘core of reasonable certainty’:

This core consists in the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives.

As a legal principle it has gradually evolved into a legal right - the exercise of which may lead to consequences ranging from limited self-government to revolution and ultimately, in extreme cases, secession. In his study on the Right to Self-determination, Aureliu Cristescu noted:

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3 “Hungary and a new paradigm for the protection of ethnic minorities in Central and Eastern Europe” Note in Columbia Journal of Transnational law (1995) vol. 3, 3 p673-705 at 675
Today it is generally recognised that the concept of self-determination entails international legal rights and obligations and that a right of self-determination definitely exists.

The imprecision of the scope and application of the right is discussed below, but has not hampered its use in international practice, particularly in the decolonisation process and mostly recently in the former Yugoslavia.

It is clearly a collective right. Its place in the opening Article of the two UN covenants recognises that there is no point in recognising rights and freedoms if the community in which those individuals live is not free. The Human Rights Committee have stressed the link between self-determination and the realisation of individual human rights:

The right of self-determination is of particular importance because its realisation is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for this reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all the other rights in the two Covenants.

During the debates in the General Assembly’s tenth session on the draft Article 1 of the covenants, it was argued by some that as a ‘principle’ rather than a ‘right’, self-determination was inappropriate for inclusion in the covenants. Moreover, the collective nature of the principle was at odds with the emphasis on individual rights. To

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6 White, R notes “The right of self-determination goes one step further than individual human rights in that it grants to a group those rights necessary for the preservation of a group identity. These rights involve positive obligations on states such as the duty to respect the cultural heritage of peoples, which may involve, for example, ensuring the availability of education in a particular language, or respecting the observance of particular religious customs” in “Self-determination: time for a re-assessment?” in Neth Int’l L Rev Vol.28 No 2 (1981) p147-170 at 168.
the contrary it was persuasively argued that as a pre-requisite to the realisation of individual rights, self-determination must be situated at the opening of the international human rights covenants. Article 1(1) reads:

*All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

In 1992, the United Nations General Assembly adopted a resolution reaffirming the right of all peoples to self-determination. The opening paragraph states that the realisation of universal self-determination is a fundamental condition for the effective guarantee and observation of human rights.

**The scope and content of the legal right**

**I) A Collective right**

Self-determination is a right vesting in ‘peoples’ rather than individuals. Thus the scope is wider than simple minority rights; embracing the protection and advancement of political organisation and development outside the State. The right can only be claimed by the group; an individual member would have to show that they represented the people in question in order to lobby for self-determination. It represents a departure with traditional individualist language of the covenants and is excluded altogether from the staunchly individualist European Convention on Human Rights.

**ii) Territorial claims**

Theoretically and in practice the principle of self-determination appears to be strongly equated with territory. Rosalyn Higgins talks more generally of ‘an acceptable political

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unit but such a unit would need to be territorially based in order to be administratively efficient. Ofuatey-Kodjoe observes that the main two factors which attach to communities that wish to invoke the right of self-determination are political coherence and subject status. The subject status qualification is of little problem for the Roma who can be commonly interpreted as oppressed or 'subject nationalities'. However, political coherence, along with the requirement that the group generally desire the goal of self-determination, is generally associated with a specific territory.

Anthropologists have taken a different perspective on the importance of the territory to nation consciousness. Barth argues that such identity is bounded by social barriers rather than territorial ones. Similarly, Armstrong claims that the "primary characteristic of ethnic boundaries is attitudinal. In their origins and in their most fundamental effects, ethnic boundary mechanisms exist in the minds of their subjects rather than as lines on a map or norms in a rule book". This theory holds that the members, as well as the culture, of the ethnic group can change and the sense of belonging to the group is defined by sociological factors such as myth, symbol, and communication, as well as attitudinal factors. The ethnic group, therefore, need not be defined by the territory it inhabits. Cara Feys argues that a new definition of a nation is required to reflect this reality:

*A more useful definition of a nation for the purposes of the contemporary international system is a politicized ethnic group acting with or without attachment to*

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10 G.A Res 47/83 Universal Realisation of the Right of Peoples to Self-determination
11 Drost, P.N Human Rights as Legal Rights (1965) A.W Sijthoff, Leyden at 199.
14 *supra* n12 158
16 *Ibid* at 79
a territory. This definition more adequately captures the goals of a nation without undermining the territorial integrity of existing structures.\textsuperscript{17}

Nevertheless, in the present language of international law the concept of territory is still an important aspect.\textsuperscript{18} Not only does this specific group claiming self-determination benefit by showing a territorial basis, but in order to achieve international recognition, the claim of the group must not be incompatible with the territorial basis of the state concerned. The importance of territorial integrity is seen in the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), which proclaims: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."\textsuperscript{19} The Declaration on Friendly Relations is also explicit in its condemnation of action which would impair the principle of the territorial integrity of states.\textsuperscript{20}

Thus the application of notions of self-determination today depends on the willingness of particular states. The principle of territorial integrity effectively eradicates international solutions in all but the most extreme cases such as the former Yugoslavia where excessive human rights interferences eventually resulted in reluctant international involvement in the crisis.

\textsuperscript{17} Feys, C "Towards a new paradigm of the nation: the case of the Roma" (1998) \textit{PATRIN} no pagination.


\textsuperscript{20} Ibid. states: "Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political
iii) 'internal' vs. 'external' dimensions

Since the drafting of the UN charter in 1945 and its clarification in the covenants of 1966, the right of self-determination has evolved to include an internal aspect as well as the more traditionally conceived external aspect (which allows for the claims of secession and independence). The difference between the internal and external elements is explained by Asbjorn Eide:

[internal self-determination] can be understood as the right of a people to control significant aspects of its internal matters (culture, education, property relations, social matters and welfare) while external matters (defence against armed attack from third States, international trade relations, diplomatic intercourse) are left in the hands of a larger political entity, e.g. a federal state.

Internal self-determination may be applied to peoples living under the territorial jurisdiction of a state and essentially concerns the rights of such peoples to have meaningful participation in the processes of government. Antonio Cassese asserts:

...internal self-determination [i]s a truly democratic decision-making process, offering the population of sovereign States a real and genuine choice between various economic and political options.

Whilst the gradual recognition of the internal dimension of self-determination supports a pluralist approach as the 'hallmark' of a democratic society, it can be seen that international practice has developed to recognise the right to internal self-

unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples..."

21 The principle (as it was in 1945) of self-determination was not included in the Declaration of 1948, presumably because it was not considered a human right until some years later. The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples declared that 'all peoples have the right to self-determination' GA. Res. 1514, 15 UN GAOR, Supp. No 16, UN Doc. A/4684 (1960) preamble, para 2.


23 Eide supra n18 at 16.


26 As suggested by Cassese ibid. at 65.
determination only when defined as independence of a whole state population from foreign interference\textsuperscript{27}. The word ‘people’ has become closely equated with the notion of the nation-state. The status of smaller, non-dominant peoples and minorities is largely left in the hands of the particular host state.

The right of self-determination was not part of the Declaration, being included in the Covenant following debates in the General Assembly\textsuperscript{28}. During the evolution from political principle to legal right there was concern expressed over the scope of the right\textsuperscript{29}. During the Third Committee sessions it was argued that ‘the authors of article 1 were attempting to write a whole chapter of highly complicated international law into a single article’\textsuperscript{30}. The problem of minorities who may wish to secede was also raised: “much suffering had, in the past, been caused by the incitement of discontented minorities in the name of self-determination”\textsuperscript{31}.

The proponents of the legal rights approach argued that it was a fundamental ‘collective’ right on which the whole of the Covenant rested\textsuperscript{32}. Clear definitions of ‘peoples’, ‘nations’ and indeed ‘self-determination’ were considered less necessary due to the difficulty in finding a consensus; a view that was ultimately supported by the Human Rights Commission\textsuperscript{33}.

\textsuperscript{27} Hannum (1990) \textit{supra} n22 at 49.
\textsuperscript{28} GAOR, 6th session, Supp.No 20, UN Doc A/2119, 36
\textsuperscript{29} ibid at 20. Some delegates had argued that the controversy surrounding the concept of self-determination should not diminish its importance and advocated a separate international document or declaration E/CN.4/SR.255, p5 (AUS), p7 (F)
\textsuperscript{31} ibid
\textsuperscript{32} Bossuyt ibid refers to: E/CN.4/SR.254, p8 (RL); E/CN.4/SR.255, p6 (PL); E/CN.4/SR.256, p7 (YU)
\textsuperscript{33} E/CN.4/SR.254, p8 (RL); Commission on Human rights, 8th session (1952) A/2929 Chapter iv s8.9 in Bossuyt, \textit{supra} n30 at p32; Van Dyke, V “The cultural rights of peoples” in \textit{Universal Human Rights} Vol. 2, 2 April-June 1980 p1-21 at 2 notes that the difficulties in defining terms such as nation and people makes it difficult to assess the implications of Article 1, but he argues it should not be dismissed out of hand as it is already a politically significant issue.
In looking at the meaning of Article 1 of the Covenants, Cassese considers the position of minorities. It will be recalled that Article 27 of the ICCPR provides that members of minority groups have the right to maintain their identity through the development of religious, linguistic and cultural freedoms. Article 27 does not extend to political, economic or social autonomy. Cassese asks whether the freedoms in Article 27 should be read cumulatively in conjunction with Article 1. After examining the approach taken in the drafting process, he is compelled to conclude that the cumulative approach is at odds with the restrictive view of self-determination exhibited by the UN delegates. His analysis finds that 'these minority groups are not entitled to self-determination'.

The UN Declaration on Friendly Relations (1970) elaborates on the Covenant contents and concerns both elements. However, it is accused of being weak when it comes to the internal dimension, leaving it to states to decide if the particular applicants are genuinely representative of their peoples in all but the most obvious cases (such as South Africa which the international community could not legitimately ignore). Furthermore whilst the right elaborated talks of political exclusion, there is no mention of exclusion by economic and social other means. Self-determination is further limited by its association with efforts to promote friendly relations between states. It has been noted that in some cases self-determination may lead to claims for independence or secession and in many cases there will be ethnic conflict and tension between peoples and the host state and kin states (where applicable) and the host state.

34 For a full discussion of Article 27 see above at Ch 6 p241.
35 Cassese, supra n25 at 61-2.
36 ibid. at 62.
38 Cassese (1977) supra n7 at 89, for details of UN action see White, R supra n6 at 155; Cassese (1995) supra n25 notes that the socialist States were eager to restrict the right of internal self-
states. This is clearly at odds with the effort to promote friendly relations and this link therefore deprives the right of much of its meaning. Such restrictions on the exercise of the rights led Cassese to conclude in 1977:

*The principles governing internal self-determination are decidedly moderate and cautious and reflect a definite tendency to defend established governments even when this is detrimental to the effective implementation of the rights of peoples.*

Examining the UN action or, 'inaction', on behalf of ethnic groups such as the Kurds and Armenians, leads Cassese to observe an emerging tendency towards a broadening concept of internal self-determination. The vocabulary used by the UN tends to avoid a recognition or endorsement of self-determination, preferring instead to describe the rights in terms such as 'full autonomy'. The debates and General Assembly resolutions on the matter support the view that some groups are entitled to internal self-determination, and that this should be implemented by the granting of 'complete autonomy' to those groups.

However, apart from in the most extreme racial cases of South Rhodesia and South Africa, the UN's willingness to extend internal self-determination to the protection of minorities in independent States has been both cautious and largely ineffective. Whilst...
vaguer notions of full autonomy emerge from the discourse of 1960-1, there is a clear reluctance to embrace the vocabulary of self-determination in relation to minorities. The non-legally binding Helsinki Declaration appears favourable by comparison. The right of peoples to internal self-determination includes the permanent right to choose a new representative social or political regime. This provides a framework by which excluded groups, such as the Roma, may be able to argue for increased autonomy and local self-government. Nevertheless, the restrictions on the extension of this right to minority groups are clearly established and commentators suggest that the OSCE follow-up conferences have down-played the more embracing wording used in the Helsinki principle. Cassese speculates on the reasoning for this implicit retraction: "...it may well open a Pandora's box for many States and because it may complicate rather than solve the issues facing contemporary Europe, it is very likely that the CSCE will focus more attention on minority rights and less on self-determination".

iv) Principle is confined to 'peoples' or 'nations'

In keeping with the theme of importance of territory, the right contained in the United Nations Charter and elaborated in the Covenants is vested in 'peoples' rather than minorities or ethnic communities. In the European system the principle is similarly restricted, The Helsinki Declaration notes that minorities should be excluded from the purview of self-determination.

'Peoples' are not defined in the international instruments and it is submitted that a broad interpretation should be given with self-identification an important factor. The

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46 Cassese (1977) supra n7 at 103.
49 See McCorquodale supra n7 at 867.
International Commission of Jurists has suggested the following criteria could be used:
1) common history, 2) racial and ethnic ties, 3) cultural and linguistic ties, 4) religious and ideological ties, 5) a common geographical location, 6) common economic base, 7) a sufficient number of people\textsuperscript{51}.

In his study, Special Rapporteur Cristescu suggested three elements that should be considered in any definition. Firstly, the term ‘people’ connotes a social entity possessing a clear identity and its own characteristics; it also implies a relationship with territory; and thirdly, a people should not be confused with an ethnic, linguistic or religious minority\textsuperscript{52}.

The vesting of this right in ‘peoples’ is at odds with the complaints procedure which vests in individual applicants under the Optional Protocol\textsuperscript{53}. This leads to a somewhat bizarre scenario. It raises serious issues as to the effectiveness of an essential group rights provision which can only be enforced by an individual complainant. Furthermore, the Human Rights Committee have observed that since Article 1 vests in peoples an individual cannot allege a violation under the protocol procedure\textsuperscript{54}.

The future of self-determination

Events in the former Yugoslavia are an indicator of current and potential interpretations of the concept of self-determination. The approach of the Yugoslav Arbitration Committee recognised the rights of peoples living in a specific territory to self-determination, but only so far as there were in existence established spheres of

\textsuperscript{50} As reflected in the wording of the ILO Convention concerning Indigenous and Tribal People in Independent Countries 1989 Art 1(2), (1989) 28 ILM 1382

\textsuperscript{51} Secretariat of the International Commission of Jurists The Events in East Pakistan (1972) at 70 quoted in White \textit{supra} n6 at 165.

\textsuperscript{52} Cristescu \textit{supra} n5 at para.279.

\textsuperscript{53} above at p244
autonomy\textsuperscript{55}. Those peoples who did not have structures of autonomy already in place, such as the Serbian population in Bosnia-Herzegovina, were excluded. Martyn Rady argues that whilst the approach was cautious it at least revealed that territorial integrity was no longer the paramount or exclusive consideration in such claims\textsuperscript{56}. However, it is clear from the importance the Committee attributed to \textit{uti possidetis}, which aims to respect the territorial boundaries as understood to exist at the time of independence, that boundary changes are not envisaged as part of the right to self-determination\textsuperscript{57}.

Several writers have suggested that for a meaningful application in the modern state, self-determination must be extended. Ofuatey-Kodjoe argues that if the international community is to achieve justice, peace and security then we must base the principle on three realities. The right must continue to be claimed by ‘oppressed’ groups, such as ethnic minorities and other new groups; in dealing with such situations the principle depends on the support of states who understand that the recipient units of the right must be broad enough to encompass these new groups; and so far as the right includes secession, the states will resist the notion of self-determination for internal minorities. He argues the right should be re-considered and apply to all subjugated people including minorities and tribes, emphasising the logical relationship between human rights and self-determination\textsuperscript{58}. McCorquodale, writing some seventeen years later, has argued along the same lines that if self-determination is viewed as part of the human rights approach, its meaning can be extended to cover a variety of situations including

\textsuperscript{55} Weller, M “The international response to the dissolution of the Socialist Federal Republic of Yugoslavia” AJIL 86, 1992 p569-607
\textsuperscript{57} Yugoslav Arbitration Commission Opinion No 2 92 ILR p168, Discussed in Shaw, M N \textit{International Law} 1997 Univ. Of Cambridge p356-360
\textsuperscript{58} Ofuatey-Kodjoe \textit{supra} n13 at 188.
federations; guarantees of political power to protect group interests; providing for specific recognised group status; or by 'consociational democracy'. He goes on to conclude that the present focus on peoples and territory is too rigid to be able to be used in the present variety of applications and exercises of this right, especially regarding internal self-determination. Robin White is similarly concerned that traditional notions of self-determination have ignored the problems of non-territorial minorities:

The United Nations needs to turn its attention to the plight of minorities and to attempt to provide some effective machinery for assuring self-determination and equal rights for such peoples.

The legal doctrine could be extended to reflect the importance, irrespective of territory, of the subjugation of a group based on its distinctiveness. Once this is understood self-determination can be extended to colonies, minorities and scattered communities. White concurs with this approach, contending that self-determination provides "the key to one of the most pressing social needs for international standard setting in the establishment of unequivocal standards for the protection of identified minorities".

In the CSCE process the Paris Charter expressly recognises the link between political pluralism, democracy and human rights. Although noticeably there is no mention of self-determination, the approach taken in the Helsinki principles, discussed above, clearly links the concept with political pluralism and representative government. The charter recognises:

Democratic government is based on the will of the people, expressed regularly through free and fair elections. Democracy has at its foundation respect for the

59 McCorquodale supra n7 at 877.
60 McCorquodale supra n7 at 883.
61 White supra n6 at 148.
63 White supra n6 at 170.
human person and the rule of law. Democracy is the best safeguard of freedom of expression, tolerance of all groups of society, and equality of opportunity for each person.\(^{64}\)

Self-determination for the Roma and the Roma nation

The structure of Romani society, where leadership and authority tends to come from family associations, is at odds with modern political organisation. Indeed, it has often been asserted that the Roma do not court political organisation. One observer notes:

*The Gypsies have no leaders, no executive committees, no nationalist movement ... I know of no authenticated case of genuine Gypsy allegiance to political or religious causes.*\(^{65}\)

The importance of the notion of a 'genuine' nation to the concept of self-determination has been discussed and it will thus come as no surprise that some Roma representatives have been active in trying to mobilise support for a Roma nation. Commonalties and cultural, geographical routes are emphasised in order to redefine and reconstruct a new homogenised Romani identity.\(^{66}\) This has had the positive effect of introducing the language and concepts of human rights into the public arena. Simultaneously a process of 'ethnogenesis' is taking place.\(^{67}\) Whilst it would be excessively critical to define such a process as essentially 'negative' in nature, it is nevertheless reasonable to be wary, especially given the risk of cultural manipulation and dominance from any such elite. Joseph Pestieau explains the pressure on peoples and minorities to fit into the categories established by international human rights standards:

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\(^{64}\) 30 ILM, 1991 at 194.


\(^{67}\) ibid at 17.
These peoples and minorities are thus encouraged to use all possible means to establish a right which will be recognised only if they can make themselves sufficiently noticed and feared.

Mirga and Gheorghe, themselves members of the Romani elite, trace the development of the claims to a Romani nation. The International Romani Union, who were afforded consultative status in the United Nations in 1979, worked to develop the core attributes of a nation - the anthem and flag, with attempts to create a Romani standardised language receiving encouragement from the Council of Europe. According to their work, the common history of discrimination and persecution is underpinned by the experience of the Porajmos (Romani holocaust) which forges a link between disparate communities.

The Roma National Congress have built on this conception of a Romani nation to lobby for a legally binding 'European Charter on Romani Rights'. The proposal for the charter encompasses the following points: the right to receive protection against racist incitement, discrimination and violence; freedom of movement within communities and the State and freedom of cultural and political organisation; the right to political representation as a national minority; the right to elect a political representation to these bodies and the right of veto in projects concerning the Roma, the right to receive native language instruction and training and the right to run autonomous schools.

The dangers of such an approach are all too obvious. Those Roma who do not have the fortune of being able to speak for their people are having their voices silenced again, only this time the control is exerted by their 'representatives' rather than...

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68 Pestieau, J “Minority rights” Canadian Journal of Law and Jurisprudence vol. IV, 2, (July 1991) 361-373 at 365 - he cites several examples of this process such as the creation of the Islamic state in India which was provoked by the fear of Hindu nationalism following the creation of a secular Indian state.
69 ibid. at 18
governments and gadje observers. This is not to blame the members of the Romani elite or the gadje ‘experts’\textsuperscript{71}, the fault is clearly at the door of the international human rights community and the language it has come to embrace. The language of self-determination and its underlying ideology of one-nation one-state is clearly questionable. James Graff goes so far as to state that “the ghettoized world envisioned by advocates of that right for each such people is racist in nature”\textsuperscript{72}. The individual must be subjected to the will of the whole community if the language of nationalist rhetoric is to be satisfied\textsuperscript{73}.

Practical problems with self-determination for the Roma

The Roma are not a ‘people’ as conceived by traditional attempts at definitions. The absence of a specific territory means that the Roma are deemed ineligible for self-determination, either internally or externally. Writing on the experience of Hungarian Vlach Rom, Michael Stewart observes: “Lacking even the desire for a shared territory, the basis of a nation, Gypsies constitute a kind of awful historical mistake, a blot on the parsimonious schema of ‘one people, one state’ with which we try conceptually to order Europe today”\textsuperscript{74}. Whilst united by many factors, notably geographical origins and the level of persecution experienced, there are substantial barriers in the creation of a Romani nation. As I mentioned in the opening chapter, many of the cultural values of the British Gypsy today are very different from that of the East European Rom. Any


\textsuperscript{71} Kawczynski, R “The politics of Romani politics” Transitions vol.4, 4 Sept 1997 no pagination. The controversial article places much of the blame on non-Romani Gypsy ‘experts’ who often have leading roles in Romani organisations and manipulate the language of human rights to exclude real recognition for the Roma as a genuine minority. It goes without saying that there is no substitute for the involvement of the community itself at all levels of the political process.


\textsuperscript{73} Koskenniemi, M “National self-determination” ICLQ Vol.43, April 1994 p241-269 at 250.
attempt to strive for a modern Romanestan (Romani homeland) (even if it were to be desirable) is clearly at odds with the language of international human rights law.

An alternative method of realising self-determination for the Roma could lie in its application to specific territories where the Roma already comprise a majority of the population. However, such a backward-looking approach may not only serve to increase inter-ethnic tensions with the dominant population in the State, but it could also spell disaster for the cultural development of the Roma themselves. For example, those who still pursue a nomadic or partially nomadic lifestyle, would be likely to find their movement restricted to within territorially controlled regions or between them. In the latter case, the vast range of Roma sub-groups speaking different language varieties and practising different traditions has been noted earlier. Such groups often hold hostility towards other groups, perhaps emphasising and contrasting their true Romani identity with that of the other groups. It is thus possible that travelling Roma will be unwelcome guests in many enclaves and may find themselves ‘encouraged’ into settling in order to pursue the other aspects of their lifestyle in comfort.

To find a solution to the problems posed by Roma self-determination it may be fruitful to examine one political experiment which is already in being.

The Hungarian Experiment in Minority Power-sharing

Historical perspective on the Roma of Hungary

The Roma began to arrive in Hungary in the Middle-Ages. David Crowe has documented the historical experiences of the Roma in Hungary but it is worthwhile noting several particular features which combined to weave the now typical story of an

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74 Stewart, M “The puzzle of Roma persistence: group identity without a nation” in Acton and Mundy Romani Culture and Gypsy Identity (1997) at 84.
unusually persecuted and victimised minority, the unpopularity of which helps to unify the dominant Magyar society.

In the eighteenth century, Roma in the Habsburg lands were the subjects of expulsion followed by attempts to assimilate under decree by the Empress Maria Theresa. As well as forcing them to settle and abandon their horses and wagons, she also introduced a decree to change the name Gypsy to ‘new Hungarian’ (Ujmagyar). Her fourth decree prohibited inter-marriage and the transfer of children to non-Gypsy children at the age of five\textsuperscript{76}.

By the close of the nineteenth century the vast majority of Roma were settled. The Romani language tended to be spoken only by the nomadic Roma, estimated to comprise about 10% of the Roma population at that time\textsuperscript{77}. Nevertheless, the unpopularity of these Roma ‘outsiders’ enabled the Nazis to deport and exterminate an estimated 32,000 Hungarian Roma in the porajmos with few gadje objections\textsuperscript{78}.

Following World War Two, a brand of Stalinist Communism took hold of Hungary and, as in the Czech Republic, the ethnicity of the Roma was denied. The strong linkage between the Communist State and one-nation effectively undermined the willingness of members of minorities to identify themselves as such\textsuperscript{79}, with over 98% of inhabitants declaring themselves as ethnic Hungarian in the 1949 census\textsuperscript{80}.

\textsuperscript{75} Crowe, D A History of the Gypsies of Eastern Europe and Russia (1995) St Martins press NY Ch.3.


\textsuperscript{77} Census results of January 1893 reprinted in Fraser supra n76 at 212.


Hungarian uprising of 1956 led to the emigration of some 150,000 Hungarian Roma to the west.\footnote{Fraser \textit{supra} n76 at 272.}

During the Kadar era, a new minority awareness developed\footnote{Crowe \textit{supra} n75 at 92.} and the government began to consider ways of countering the prejudice towards the Rom\footnote{ibid. at 93.}. Many of the Communist programmes illustrate an ignorance of the Romani culture, indeed their status as an ethnic group was not recognised by the Hungarian Socialist Workers party until the 1980’s.\footnote{Stewart (1997) \textit{supra} n74 at 85.}

Despite the non-recognition of Romani identity, politicians were nevertheless able to identify a ‘Gypsy problem’.\footnote{Human Rights Watch \textit{Struggling for Ethnic Identity - The Gypsies of Hungary} (1995) at 5 HRW, NY.} Re-settlement programmes aimed to improve the housing situation of Roma by destroying the most primitive shanty dwellings and providing loans for house construction.\footnote{Crowe, D “The Roma (Gypsies) in Hungary through the Kadar era” in Nationalities Papers Autumn 1991 297-311 at 300-1.} The programme was hailed a success by the Government\footnote{Crowe \textit{supra} n75 at 95.} but further studies suggest that as many as 100,000 Roma were still occupying shanty housing in the mid-80’s.\footnote{Puxon \textit{Roma: Europe’s Gypsies} (1987) MRG, London at 10}

An aggressive educational programme was adopted to educate a largely illiterate Gypsy population. On the one hand the programme was responsible for dramatically increasing school attendance and literacy. However, as is the case in the Czech Republic, these results were achievable largely due to the numbers of Rom children placed in special schools generally designated for the mentally retarded.\footnote{Brown, J \textit{F Surge to Freedom: the end of Communist Rule in Eastern Europe} (1991) Duke Univ Press, Durham NC at 105 - between 1974-5, 25% of children in special schools were of Gypsy origin and 11.7% of all Rom in schools were in schools for the mentally handicapped, both figures were to rise over the next decade. For the present use of special schools see above Chp 5 p27.}
As far as employment was concerned, analysis by Nigel Swain found extreme low pay levels among Roma and also that Roma tended to be concentrated in the 'harder and dirtier jobs'\textsuperscript{90}. In 1985 Mrs Istvan Kozak, secretary to a Government department dealing with Gypsies, noted that a mere 8% of Roma were skilled workers compared to 30% of non-Roma\textsuperscript{91}. Fuelled by anti-Roma prejudice and lack of formal education, such statistics were to change little in the post-Communist era.

It is no exaggeration to observe that the situation of many Roma in Hungary in the early 1990's is one characterised by extremely poor social and economic conditions with involvement in crime amounting to one-third of the national crime rate\textsuperscript{92}.

**Problems Facing the Hungarian Roma Today**

The number of Roma in Hungary today is typically difficult to identify. One writer dubiously contends that the number of Roma in Hungary after the Second World War, (aprox 60,000) has altered little today\textsuperscript{93}. However, more accurate estimates suggest a figure somewhere between 450,000\textsuperscript{94}-800,00\textsuperscript{95} making them clearly Hungary's largest minority group\textsuperscript{96}.

\begin{itemize}
\item \textsuperscript{90} Markos, E "The fast growing Gypsy minority and its problems" RFE Research No 5, June 1987 p13-16 at 14.
\item \textsuperscript{91} Markos, E "Dim prospects for improving the plight of the Gypsies" RFE Research No 10 Sept 1985 p13-14.
\item \textsuperscript{93} Valki supra n92 at 453.
\item \textsuperscript{95} Kechichian, J A International: Ethnic, Political Aspirations in Eastern Europe Armenian International Magazine 28th November 1991.
\end{itemize}
i) Housing

30% of Roma now live in urban areas - often in slums and ghettos. 14% still live on separated sites despite a general improvement in the state of housing. It soon becomes apparent that many of the supposed improvements in the social situation of the Roma have back-fired largely because of their cultural insensitivity. Temporary, over-crowded accommodation with inadequate utilities is a common story. In a very recent case the local government in Zámoly, Western Hungary, ordered ten Romani families to leave the cultural centre which has been their home since October 1997 after their previous homes became uninhabitable. The families were given eight months to leave their homes and the local government has rejected any obligation to find alternative accommodation.

The preferential loans offered to families as part of the resettlement programme have had mixed successes. Unemployment has meant that many families have been unable to meet utility bills and loan repayments. The situation in the Kunszentmiklós settlement is not untypical. One hundred and fifty families started to build their own homes with preferential credit in 1989 and 1990. However, for the past four years they have been unable to meet repayments as their employment ceased with the privatisation and closure of the two factories in the area. The backlog has now reached an estimated 7,500 US$ per family.

96 Reisch, A.A “First law on minorities drafted” Report on Eastern Europe Dec 13th 1991 p14 - 18 at 15. This article also includes some of the reasons why census figures are so unreliable at p14-15.
100 Magyar Hirlap December 22nd 1997.
ii) Education

Improvements have also been made in the field of education, with the number of Romani children finishing eighth grade rising from 26% in 1971 to 77% in 1993. Segregation is nevertheless widespread and there are numerous obstacles still to be overcome if education is to be extended to higher levels. The infant mortality rate among Roma is twice the national average. This can be partially attributed to factors such as malnutrition and smoking during pregnancy. However, according to the Office of National and Ethnic Minorities, education is the key. Statistics show that infant mortality rates are inversely proportional to the level of education.

iii) Employment and health-care

Despite the common perception that Roma are traditionally unwilling to engage in work, statistics indicate that until the mid-80's when the present economic crisis began to take hold, there was no substantial difference in the employment rate of the two communities. Today however, unemployment is much higher than the national average, in some settlement areas as much as 90-100%. The average income of a

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101 Supra n97 at 25.
102 While 90% of Hungarian children continue education beyond eighth grade, only 4.5% of Roma children do so. According to Karcagi, K Minority/Hungary: Hungarian Gypsy Struggle starts in School, Interpress Service English News 11th January 1996. See Chp 5 for detail on education in Hungary.
104 Statistics in letter concerning statements by the Prime Minister written by the Roma Press Centre, Budapest and distributed to Romnet members in 1998. Prime Minister, Gyula Horn noted that the problems of the Hungarian Roma would be solved if “only they entered employment” in Nepszava 17th January 1998; Wagner, Francis “The Gypsy in Post-war Hungary” Hungarian Studies Review 1987 Vol. 14, 2, 33-43 at 38 (NB this article contains some useful statistics but unfortunately makes some unpleasant generalisations)
105 The national average is estimated at 11%
Romany family is from two-thirds to three-quarters of the Hungarian minimum living standard. This disparity can be attributed to the long-term unemployment background of many Roma as well as discrimination in the workplace. However, the main factor has been the difficult change to a market economy which has left many unskilled workers, disproportionately Roma, unable to find alternative employment. In a survey of 171 adults carried out by one minority self-government, only thirteen had regular work whilst 42% had no form of income at all.

The health profile also shows Roma at a substantial disadvantage. The Roma have a life expectancy on average ten years less than that of the rest of the population as well as higher levels of disability and infant mortality.

iv) Ethnic violence

Post-war Hungary has not tended to be associated with racism and ethnic hatred. It appears however, that anti-Roma sentiment, common in the past, has intensified with the arrival of the new democratic regime. Paul Hockenos notes that in the past resentment towards the Roma was not considered to deserve the ugly title of racism. Today, discrimination and violence persists and is promoted by a cultural crisis over the national identity fuelled by the comparatively high birth-rate of the Roma.

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106 MTI "MTI views Hungarian support program for Gypsies" Budapest 30th Dec 1997.
107 Supra n105 at 27.
109 ibid. at 27.
110 Valki supra n92 at 456.
111 Hockenos supra n98 at 69.
112 Crowe supra n75 notes that between 1984 and 1987 Hungary's population dropped from 10.7 to 10.6 million, while Rom birth-rates were doubling every 20-30 years at p98.
1998, a Gallup opinion poll revealed that 50% of Hungarians expressed dislike of Gypsies, this included 41% of people with an advanced educational qualification.113

Immediately after the installation of the democratically elected Government in 1990, gangs of skinheads attacked Rom ghettos in Eger and Miiskloc. It has been claimed that the vast increase in racist attacks against foreigners in Hungary is inextricably linked to the racial prejudices against the Roma minority. The structures of racist thinking, directed at the Roma, were already in place prior to the collapse of Communism and the popularity of racism spread quickly.114

In September 1992, the homes of two Rom were firebombed and their inhabitants beaten by villagers. Two months later a Romani man was beaten to death by street thugs whilst a farmer shot two for stealing fruit.115 The Human Rights Watch report documented numerous instances of police discrimination and brutality towards Roma.

One poll showed 79% of respondents expressing negative feelings towards the Roma. Complaints centred on the Roma’s poverty - ranging from their reliance on the welfare system to their disproportionate use of housing and education funds. It is fair to state that in most cases there are no arrests and those involving an arrest, police and prosecutors tend to ignore the racial element behind the crime.117

The problem seems more than transitional in nature. As recently as March 1998, one Roma family had their house destroyed for the second time in five years. The family reportedly heard racist taunts earlier that day. They are the only Roma family in the

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113 “Hungarians admit their hatred of other races” The Budapest Sun 15th January 1998
115 Crowe supra n75 at 104.
116 Hockenos (1992) supra n114 at 151.
117 Hockenos (1993) supra n98 at 71 quoting Martin III, president of the Martin Luther King Association, founded in 1991 to bridge the gap between Hungarians and foreigners.
village and since the first incident, where the perpetrators had not been identified, they had had little contact with the other villagers\textsuperscript{118}.

A recent report presented to the Hungarian parliament by the Minister of Justice and the Secretary of State on Minorities noted that the number and gravity of ethnic conflicts is increasing and anticipated a general growth of such conflicts in the future. The report concluded “the present legal practice can not handle these conflicts”\textsuperscript{119}.

There are serious problems of discrimination within the police force. According to sociologist, Gyorgy Csepeli, “Our research has confirmed our presumption: the police are not free of discrimination, alike the members of Hungarian society”. The report highlighted indisposition and frustration of police personnel, their discontent with incomes and a profound dedication towards their profession. However, they also found an inability to detach themselves from Roma prejudices, spurred on by severe pressure from non-Romani residents who expect strict measures to be taken against criminals\textsuperscript{120}.

In one recently documented incident, police reportedly taunted the alleged Romani culprits with racial abuse and ill-treatment. Interestingly, the two victims were reluctant to file a complaint after being made to sign statements stating that they had not been subjected to ill-treatment at the hands of the police prior to their release. However, a representative of the local Roma self-government was able to file the complaint on their behalf and an investigation into the police actions has commenced\textsuperscript{121}. In a similarly documented incident, a Romani man was arrested for allegedly stealing a chicken and was then beaten in the police car by two police officers and a civilian on his journey home. According to the Baja town court, there was insufficient evidence of

\textsuperscript{118} Roma Press Centre “Ethnic Conflict is Damaging” March 16th 1998

\textsuperscript{119} Népszava, January 10th 1997.

\textsuperscript{120} Roma Press Centre “Police and the Roma - Conference” June 26th 1997.

\textsuperscript{121} ERRC press release 21.3.97.
a racial motivation for the violence and the three defendants, including a sergeant and a retired officer, were found guilty of 'violence in official status'\textsuperscript{122}.

Discriminatory attitudes are exhibited at the highest levels of Hungarian society. Prime Minister, Gyula Horn, has recently commented on the unwillingness of the Roma to engage in work and help themselves\textsuperscript{123}. He made reference to the comparatively high number of crimes committed by Gypsies; a fact that is frequently cited as a rationale for institutionalised discrimination. The high level of Roma poverty (unemployment between 40 and 50% compared to the national average of 14% in 1993\textsuperscript{124}) is frequently ignored. The most recent reports suggest that the integration of the Gypsy minority lags far behind that of the other groups and is far from complete\textsuperscript{125}.

Background to the protection of minorities in Hungary\textsuperscript{126}.

In 1979, the Hungarian Roma were granted ethnic group status rather than the status of nationality\textsuperscript{127}. The refusal to grant nationality status was apparently based on the fact that some 75% of Roma spoke Hungarian\textsuperscript{128}. The consequence of the designation was to deprive the Roma of full cultural development supported by the Government. The aim of financial aid and the other paternalist efforts of the Communists was undoubtedly one of cultural assimilation\textsuperscript{129}.

\textsuperscript{122} \textit{Népszava}, February 28th 1997. There have been numerous similar incidents reported; see \textit{Magyar Hirlap}, December 7th 1995 and 10th January 1996 for two further examples.
\textsuperscript{123} Roma Press Centre “New National Gypsy organisation founded” January 16th 1998.
\textsuperscript{124} Crowe \textit{supra} n75 at 103.
\textsuperscript{125} \textit{Supra} n97 at 11.
\textsuperscript{126} ERRC Press release 11.3.97.
\textsuperscript{127} Council of Ministers’ Resolution No 1,019/1979.
\textsuperscript{128} According to the newspaper \textit{Magyar Hirlap} quoted in Crowe \textit{supra} n75 at 99.
\textsuperscript{129} Markos, E “The fast-growing Gypsy minority and its problems” RFE Research 15.6.87 p13-16 at 14.
Martin Kovats observes that the assimilation policy of the Communist era has been replaced by a policy of ‘dialogue’\textsuperscript{130}. This policy of dialogue has concentrated primarily on cultural and political rights, whilst the poverty experienced by the majority of the Hungarian Roma continues to worsen.

The need for Roma cultural development and political participation was apparent by 1989 when the gradual transformation of the Hungarian political system saw the rise of several new Roma organisations lobbying for improved rights in the workplace and improved housing policies\textsuperscript{131}. In the 1990 elections, the second largest political party, Association of Free Democrats (AFD) supported four Gypsy candidates, and two were elected to the new legislature\textsuperscript{132}.

One of the AFD representatives, Aladar Horváth, responded to the incidents of escalating ethnic violence in 1992 by calling for full minority rights for Roma, accusing the Hungarian government of openly deepening his people’s misery\textsuperscript{133}.

Article 68 of the Hungarian constitution of 1990 provides that minorities shall be afforded collective participation in public life; the right to establish local and national self-governments; the fostering of their own culture; the use of their mother tongue and the right to use their names in their own language.

In 1990 the Office for National and Ethnic minorities was established, replacing the Council of Nationalities, for the purposes of carrying out state tasks associated with these minorities\textsuperscript{134}. The tasks of the office includes the preparation and elaboration of government policy; co-ordination of government tasks; maintaining contacts and

\textsuperscript{130} Kovats, M “The good, the bad and the ugly: Three faces of ‘dialogue’ - the development of Roma politics in Hungary” Contemporary Politics Vol. 3 No 1, 1997 passim.

\textsuperscript{131} Crowe notes that many of the organisations were beset with infighting and family rivalry making their success limited supra n75 at 102.

\textsuperscript{132} ibid.

\textsuperscript{133} ibid. at 104

\textsuperscript{134} Gov. resolution no. 34/1990 (VIII.30)
promoting the exchange of opinion between the government and the various minorities; and watching the public opinion on minorities, which includes the operation of a documentation service keeping information on the various minorities and minority policy. The office of 29 people encompasses a Department of Roma/Gypsy issues as well as departments representing other minorities including Germans and Romanians.

The Act on the Rights of National and Ethnic Minorities.

In 1993 the Act on the Rights of National and Ethnic Minorities of 7th July was introduced, providing that the thirteen designated minority groups in Hungary shall have the right to personal autonomy and the right to establish self-governments. The Act is a clear indication of the value of autonomy. Speaking at a conference in early 1990, the then Director of the Secretariat for National and Ethnic Minorities with the Council of Ministers and Hungarian Vice-Minister, captured the essence of a new era based firmly on a recognition of both individual and collective rights:

Autonomy is not the precursor of separatism - there are many who fear the very notion of autonomy...to put it a different way, autonomy guarantees that national minorities will be able to preserve their own identity and feel at home within existing frontiers.

The preamble of the statute is promising in its clear statement as to the value of minority communities to Hungarian society:

The mother tongue, the intellectual and material culture, the historical traditions of the national and ethnic minorities who are Hungarian citizens and live in Hungary, and other characteristic qualities which support their minority status are considered aspects of their identity as individuals and as a community.

135 Res. 34/1990 (VIII.30)
All these are special values, the preservation, cultivation and augmentation of which is not only a basic right of the national and ethnic minorities, but also in the interest of the Hungarian nation, and ultimately in that of the community of governments and nations.

Furthermore, the preamble goes on to stress the importance of cultural autonomy for the realisation of the human rights:

In consideration of the fact that self-governments form the basis of democratic systems, the establishment of minority self-governments, their operation and the resulting cultural autonomy is regarded by the National Assembly as one of the fundamental preconditions of the special enforcement of the rights of minorities\(^{137}\).

Not deterred by the absence of an internationally accepted definition of ‘minority’, Article 1(2) provides several criteria for the recognition of a minority for the purposes of the statute. Along with the standard criteria such as numerical inferiority and a desire on the part of the minority to preserve their ethnic distinctions, there are additional requirements that the minority must have been resident in Hungary for at least one century; and that members of the minority must be Hungarian citizens\(^{138}\) (immigrants, the homeless and foreign citizens are additionally expressly excluded in Article 2).

Article 3(2) recognises the ethnic identity of individuals and their communities as a fundamental human right. Unequivocal support for collective rights is also provided in Article 15 which states that “The preservation, fostering, strengthening and passing on of their minority identity is the unalienable collective right of minorities\(^{139}\). Any policy aiming at assimilation is expressly prohibited by the statute\(^{140}\) and there is a positive

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\(^{137}\) Act on the Rights of Ethnic and National Minorities (1993) No. LXXVIII

\(^{138}\) ibid. at Article 1(2). For the problems of applying criteria based on citizenship See Ch 6 p37.

\(^{139}\) ibid. at Article 15

\(^{140}\) Article 4(1)
obligation placed on the Government to promote equality of opportunity in the political and cultural sphere\textsuperscript{141}.

The most innovative measure of all however, is found in Article 5 (1) which provides “the constitutional right to establish local and national self-governments’. Such a provision translates the rhetoric on the collective rights of minorities per se into a practical possibility. The right to establish minority self-government is reinforced by the right, vesting in members of minorities, to learn of their history, culture and traditions and to communicate in their mother tongue\textsuperscript{142}.

It was recognised in the drafting that minority representation may be of limited value if it is to develop at local level only and the statute further provides that minorities have the right to be represented in the Hungarian National Assembly\textsuperscript{143}. This provision has not yet been implemented and is expected to become effective by the 2002 elections\textsuperscript{144}.

The Act on the Rights of National and Ethnic Minorities is undoubtedly a unique, pioneering step forward in the protection of the rights of minorities and their members. It is interesting to compare these provisions with the main initiatives in the CSCE documents and the Council of Europe Framework convention.


It has already been noted that the standards laid down by the United Nations Declaration on the Rights of Persons belonging to National or Ethnic Minorities

\textsuperscript{141} Article 9

\textsuperscript{142} Article 13, strengthened by the provision in Article 16 which gives minorities the right to cultivate and develop their culture and traditions, and Article 18(4) which guarantees the rights of minorities to hold celebrations and events which help to preserve and maintain their culture and traditions.

\textsuperscript{143} Article 20(1)

\textsuperscript{144} MTI, Budapest “Parliamentary representation of minorities - new proposal” 27th January 1998. The proposal was made by MP Mihaly Bihari of the Hungarian Socialist Party.
provide little in the way of positive obligations on states\textsuperscript{145}. Whilst Article 2 includes a right to participate in decisions involving the minority, there is nothing concerned with regional or national representation in the way envisaged in the Hungarian law\textsuperscript{146}.

The Helsinki Final Act contains a short, simple provision dealing with collective rights to culture and identity stating:

\begin{quote}
The participating states, recognizing the contribution that national minorities or regional cultures can make to co-operation among them in the various fields of education, intend, when such minorities or cultures exist within their territory, to facilitate this contribution, taking into account the legitimate interests of their members\textsuperscript{147}.
\end{quote}

It has already been noted\textsuperscript{148} that the first real concern for minorities occurred during a time of great political upheaval in Europe. The follow-up conference document of 1986 required ‘legislative, administrative and judicial measures be adopted’ to ensure the protection of fundamental human rights to members of national minorities\textsuperscript{149}.

However, it was the Copenhagen document on the Human Dimension part IV which specifically focused and expanded international commitments to the protection of minorities\textsuperscript{150}. A recommendation signed by five States was put to the Conference that ‘minorities should be given the right to an appropriate form of self-government on the territory in which they live’\textsuperscript{151}. The main focus of the Copenhagen document’s minority provisions is in the fields of political participation, education and minority languages.

\textsuperscript{146} supra n127 Article 2(3).
\textsuperscript{147} Helsinki Final Act 1975 Co-operation in Humanitarian and Other Fields, section 4(e).
\textsuperscript{148} see above at Chp.3 p222
\textsuperscript{149} reprinted in (1989) 28 ILM 527.
\textsuperscript{150} Document of the Copenhagen meeting of the Conference on the Human Dimension of the CSCE, June 29th 1990 reprinted in (1990) HRLJ 232.
Education and minority languages

The Copenhagen document provides that persons belonging to national minorities shall have the right to freely use their mother tongue in private as well as public; and to establish and maintain educational institutions\textsuperscript{152}. The State has a duty to 'endeavour to ensure' adequate opportunities for instruction in the mother tongue\textsuperscript{153}.

In the Council of Europe Framework Convention\textsuperscript{154}, it will be recalled that as with the Copenhagen document, there is no recognition of the collective rights of minorities. For example Article 5 which places a positive obligation on states in the fields of education and culture refers explicitly to 'persons belonging to national minorities' rather than minorities per se.

As far as the Hungarian statute is concerned, the rights are more specific and the state's responsibilities are clearly spelt out\textsuperscript{155}. Article 43 supports the teaching of mother tongue languages even in areas where there is no municipal minority government. Furthermore, it is provided that where the parents of eight or more students so request, it becomes\textit{compulsory} to run a minority class or group\textsuperscript{156}. The state takes on the responsibility of funding such an initiative and the policy of training native teachers to provide education in the mother tongue or 'bilingually'\textsuperscript{157}.

\textsuperscript{152} Part IV para 32.1 and 32.2
\textsuperscript{153} Part IV para 34
\textsuperscript{154} Discussed in Ch.6 p255
\textsuperscript{155} The Slovenian constitution recognises collective rights in relation to education also. Article 64 guarantees minorities the right to plan their own educational curricula and the right to be represented at a local level: Blaustein Albert, Flanz Gisbert (eds) \textit{Constitutions of the World}, Slovenia 1990 Dobbs Ferry NY
\textsuperscript{156} Article 43(4)
\textsuperscript{157} Article 46(2)
Rights of group autonomy and self-government compared.

The Copenhagen Document of the CSCE recognises that majoritarian democracy may be insufficient to protect the interests of disadvantaged minority groups. Furthermore, a collectivist approach is adopted whereby ‘appropriate local or autonomous administrations are envisaged’ as one of the means to enable minorities to develop their ethnic religious or linguistic identity. This view is also apparent in the Parliamentary Assembly’s Recommendation on an Additional Protocol to the European Convention on the Rights of Minorities. Article 11 of the draft protocol includes the right of national minorities to representation through local/autonomous authorities. However, the 1994 Framework Convention itself does not support rights which are clearly collective.

The Hungarian Law on National and Ethnic Minorities with its recognition of the need for a collective dimension to human rights protection thus compares favourably to regional human rights standards. The Hungarian experiment is likely to be watched closely by other states with a significant number of minority groups. If successful in reducing ethnic tension and promoting internal stability, the collective rights approach may well be introduced elsewhere. In order to assess success of the project a closer examination of the practice of minority self-government must be considered.

158 Supra n97 at para.35
160 See discussion in Chp Six p264
161 Although Roe notes that there is some suspicion that the law was only introduced to show states with Hungarian minorities a blue-print of how the Hungarian minority should be treated, “Progressive inaction towards minorities” Transition (1997) Vol. 4 no4 no pagination. Prime Minister Antall’s speech of 1990 bears out this suspicion: “the main aim of our minority policy is to gain assertion for human rights, and within this, the rights of minorities, both outside and inside our borders. With regard to the fact that one-third of Magyarmord lives outside our borders, the Hungarian state has a particular responsibility to support everywhere the preservation of the Magyar nation as a cultural and ethnic community” Premier Jozsef Antall presents Government programme, BBC Summary of World Broadcasts, Eastern Europe section EE/0773/c1/1, May 25th 1990. See also Reisch supra n90 at 16.
Minority Self-government in Practice

Gypsies are included as one of the thirteen minorities for the purpose of the statute\textsuperscript{162}. The Gypsy languages of Romani and Beash are also recognised by the 1993 statute\textsuperscript{163}.

Following the local elections of 19th November 1995 there were 792 functioning local minority governments. This number indicated not only that members of minorities welcomed the chance at greater participation but also that there was an unexpected level of support from the majority population. Nevertheless there is still a great deal of voter apathy to be overcome. The Central Registration and Election Office reported that only 40,000 of 3.5 million eligible voters cast their ballots\textsuperscript{164}

The self-governments receive a transfer of assets or subsidies from the state budget. By 1995 there were 477 Roma minority self-governments elected, indicating an obvious need on the part of minority members to have their voice heard\textsuperscript{165}. The local elections of 1998, resulted in 2,779 seats going to representatives of the Roma community, including two mayors\textsuperscript{166}.

The local minority self-governments are empowered to run institutions within their authority, especially in the fields of education; media; promotion of traditions; adult education and socio-cultural animation.\textsuperscript{167} Furthermore, they are able to run businesses, establish scholarships and collect project proposals\textsuperscript{168}. Administrative tasks, such as budgeting and developing an appropriate organisational structure inevitably demand a high standard of education and a variety of business skills; as such they pose a real challenge for the Roma.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{162} Article 2
\item \textsuperscript{163} Article 42
\item \textsuperscript{164} OMRI Daily Digest “Low turn-out at Hungary’s minority elections” 21st November 1995
\item \textsuperscript{165} Supra n158 at 59. This is by far the largest number of minority self-governments (the nearest figure being the 162 German self-governments and the 57 Croat self-governments).
\item \textsuperscript{166} “Most minority seats go to Gypsies and Germans” Posted to Romnet 21st Oct 1998.
\item \textsuperscript{167} Article 27 (3)
\end{itemize}
\end{footnotesize}
In 1995 a Co-ordination Council for Gypsy Affairs was established ‘to manage the problems of the Gypsy minority, to promote the social integration and to co-ordinate the policy national agencies’\textsuperscript{169}. The Council was charged with developing a package of long and medium term measures to promote these objectives\textsuperscript{170}. The same year a Public Foundation was established with the express aim of facilitating measures to decrease ‘the imbalance of the Gypsy minority’\textsuperscript{171}. The Foundation receives a limited sum of $1.1 million per year to help deal with the most serious problems affecting the Roma. Projects include buying land for farmers, loan-guarantees for Gypsy businesses and educational scholarships\textsuperscript{172}.

Both these bodies reflect the realisation that the situation of the Roma minority in Hungary required immediate practical initiatives with full governmental support to redress the comparative inequality of their social, economic and political position.

**Roma Representation in National Government**

Whilst representation in local government is an important step in the realisation of human rights, such representation is also guaranteed at the national level\textsuperscript{173}. Such representation is vital if the prejudices of the public and many politicians are to be redressed, especially given the increasingly populist appeal of some far-right extremist political groups. In the 1990 election campaign the President of the Hungarian Democratic Forum, Istvan Csurka, became noted for his inflammatory, racist language.

In one such article he referred to the Roma:

\textsuperscript{168} Article 27 (4)  
\textsuperscript{170} *supra* n158 at para.2  
\textsuperscript{171} Gov. resolution 1121/1995 (XII.7.) *On the Establishment of the Public Foundation for the Gypsy Minorities in Hungary*.  
\textsuperscript{172} Karcagi *supra* n102
We must end the unhealthy practice of blaming the skinheads for all that is bad among the youth, while leniently acknowledging other sicknesses, crimes and cultural crimes. We can no longer recoil from the fact that there are also genetic reasons behind degeneration. We must acknowledge that disadvantaged groups and strata of society have been with us for too long, groups where the severity of natural selection has not worked."\(^{174}\)

In the April 1998 elections, fascists obtained 5% of the popular vote. In 1995 there was only one Rom in the 386 member state parliament and by 1998 this seat had been lost. One of the biggest problems facing Roma representation at this level is the nature of the Hungarian Roma community itself. Infighting and cultural differences have meant that the two largest Romani organisations - Phralipe and the Lungo Drom were unable to agree to form a coalition party\(^{175}\). Organisation of Romani politics is still a very new experience and hard lessons are inevitable\(^{176}\).

Problems with Implementing the Self-government System

There are several obvious problems with the self-government system. Some can be attributed to teething problems, whereas other criticisms are more serious and require structural changes.

One of the teething problems is the lack of experience of Roma representatives in the decision making process. The Office for National and Ethnic Minorities is apparently addressing this problem by providing a series of regional courses providing legal and administrative information to enable minority members to participate effectively.

\(^{173}\) Article 68(3) \textit{supra} n137
\(^{174}\) Magyar Forum 20th August 1992
\(^{175}\) The plight of the Roma parliament is discussed by Kovats \textit{supra} n130.
\(^{176}\) Barany, Z "Grim realities in Eastern Europe" Transmission 29th March 1995 p3-8 at 6. Ericka Schlager noted in 1994 that 700 out of some 1600 Romani settlements has established Romani Unions. She reported the comments made by some representatives that the minorities law had disrupted Roma political organisation by playing organisations off against each other, Comments to Romnet after a visit to Hungary 12-17 th July 1998 as staff member of the Commission on Security and Cooperation in Europe (unpublished).
There is also a deeper criticism aimed at the policy of self-government, namely that it may increase irredentist tendencies. The strong link between self-government and political participation and the full realisation of human rights is emphasised by the Hungarian statute. Furthermore, the Hungarian Government see the initiative as increasing the feeling of civic responsibility of minority members:

*It is our opinion that the involvement of the minorities in the public life of local communities will lead to the development of an increased sense of responsibility on the part of the minorities. It will also exert a positive influence on their consciousness of identity and civil standing*  

Perhaps the biggest threat to the success of the system lies in the concern that with the extension of the local self-government scheme, the responsibility of the national government towards minorities will reduce. The minorities themselves may find that they are criticised and scapegoated for failing to make dramatic changes in the situation of their people. The Hungarian Government's own report recognises that the expectations placed on Roma self-governments are ‘too great’ to be achievable at present:

*The Gypsy minority self-governments find themselves in a special situation. Whereas the self-governments of the national minorities are active mainly in the fields of education, culture and preserving traditions, the Gypsy governments have additional tasks which relate to social, health and employment questions*  

Lack of funding is a major problem with the system at present. The minority self-governments depend on extra support from their local councils and are encouraged to apply for grants when available. Research by Kovats found that every self-government received the same level of funding, irrespective of size and particular problems: “The amount was far to small to allow self-governments to exercise their rights and fails

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177 *Supra* n97 at 14.
178 ibid. at 28
even to cover the annual administration costs of these bodies and honoraria for representatives\textsuperscript{180}. In the town of Özd, where there is total unemployment in some villages, there have been improvements in the fields of health care and funds have also been directed at education and training. However, the president of the minority government states that many of his staff work without pay in order to reduce the high administrative costs\textsuperscript{181}. Alison Lys concludes: "In theory the Act is wonderful, but in practice it produces an instant ghetto system"\textsuperscript{182}. Related to this criticism is the concern that resources ploughed into the minority self-governments and their elected representatives will be diverted to minority organisations and projects which do not have the full support of the representatives. Article 30(2) of the Act on the Rights of National and Ethnic Minorities allows such organisations, institutions and associations to submit applications for state funding on issues such as culture, education and science, in the same way as local minority self-governments. Nevertheless, it may be presumed that extent of funding given to the self-governments will often operate to curtail funding for other minority-based projects which do not have the backing of the self-government.

Martin Kovats argues from the perspective of a political scientist, that the Hungarian 'dialogue' policy operates to keep the Roma subordinate in society\textsuperscript{183}. The emphasis on cultural and political rights does not help to address the main problems facing the Roma, namely education and unemployment. Furthermore, the minority representatives

\textsuperscript{179} For comments and views on lack of funding and other obstacles see "Self-government in Hungary: the Romani/Gypsy experience and prospects for the future" Project on Ethnic Relations Conference May 9-11th 1997, Budapest; see also the comments of Schlager supra n176.
\textsuperscript{180} Kovats supra n108 at 131
\textsuperscript{181} Roe supra n 161 no pagination.
\textsuperscript{182} in Roe ibid.
\textsuperscript{183} Kovats supra n130
themselves have a vested interest in maintaining a reasonable amount of support for the environment in which they were elected. Kovats argues:

Many of the two thousand plus Roma activists receive some or most of their income from their public duties, making it in their interests to protect and develop the system and their position within it.\(^{184}\)

This can be clearly seen in respect of the right of minority self-governments to veto some local decisions. In many cases it would appear that the veto is not used and it is difficult for representatives to compel the local authorities to consider their views.\(^{185}\)

An atmosphere of compromise and co-operation has been established in which Roma representatives are unlikely to create too much fuss for a government determined to play a part in the new integrated Europe.\(^ {186}\)

Harmonisation of the Law in Other Areas

If Kovats' analysis is accepted, the picture is pessimistic. However, there is some room for optimism. A minority actively involved in planning their own future is an improvement on times gone by. It may not be an entirely negative fact that compromise is the order of the day and there have been some signs that the Government are addressing the economic and social demands of an increasingly vocal minority.

In 1996 an amendment to the criminal code was introduced to enable prosecutions against people who commit racially motivated criminal acts.\(^ {187}\) The previous law had made it possible for a conviction for an offence committed against a national, ethnic,

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\(^{184}\) ibid at 68.

\(^{185}\) Kovats supra n108

\(^{186}\) This is demonstrated in part by the success of Lungo Drom over radicals from the Phralipe organisation.

\(^{187}\) ACT XVII of 1996
racial or religious group\textsuperscript{188}. However, this provision had received criticism following the 'great skin-head trial' of 1992 when the chief prosecutor had been unsuccessful in proving the racial motivation in violence perpetrated by forty eight skinhead youths. The court of capital had reduced the charges to hooliganism, breach of the peace and slander\textsuperscript{189}.

On 21st April 1998 the amended Paragraph 174/B of the Criminal Code was successfully used in the Heves County Court to sentence a nineteen year old man who attacked a student believing him to be of Jewish origin. The legal counsel from the National and Ethnic Minorities Legal Defense Bureau told the Roma Press Centre:

\textit{it is essential that finally there is a valid verdict in Hungary based on paragraph 174/B of the Criminal Code, as racial hatred is on the rise, and therefore it is important that in similar cases courts rule in the same manner}\textsuperscript{190}.

In 1997, the Parliamentary Commissioner of National Minorities and the Commissioner of data protection criticised the police and journalist practice of making public the ethnic identity of crime perpetrators, as a contravention of the rights to free choice and declaration of identity. They found:

\textit{the publication of ethnic affiliation in crime news, warrants and police announcements can be instrumental in strengthening prejudices, and it may implicitly suggest that there is a connexion [sic] between belonging to an ethnic group and criminal activities}\textsuperscript{191}.

Such a move follows criticism of the practice by the head of the Hungarian police forces, Sándor Pintér, whose letter to police departments in November 1996 appears to have received little attention.

\textsuperscript{188} s156 penal Code.
\textsuperscript{189} Beszelo 5.12.92 quoted in Human Rights Watch (1993) \textit{supra} n85 at 21.
\textsuperscript{190} Roma Press Centre "Valid verdict for the felony of violence against the member of a racial group", May 1998.
\textsuperscript{191} \textit{Népszava}, February 5th 1997
A new Hungarian law on child protection has also come into force. At present many Roma children are taken into care as a result of evictions and other social reasons. In some areas the number of Roma in such care reaches 60-70%. The introduction of the new legislation will prevent children being taken into care solely for social reasons and the responsibility for preventing families from becoming homeless will rest with the local government.\textsuperscript{192}

After the establishment of the Co-ordination Council for Gypsy Affairs and the Public Foundation for Gypsy Minorities in 1995, a series of medium and long-term measures were devised in an attempt to improve the living standards of the Roma in Hungary.

An action programme was established in 1995 in the fields of education, employment, housing and non-discrimination. The programme noted the urgency of the situation in concluding: "a package of medium measures must be prepared to improve the living conditions of the Gypsy minority."\textsuperscript{193}

The programme introduced in resolution 1093/1997 specifically focused on the Roma and consisted of a variety of measures and feasibility studies for the next two years.\textsuperscript{194}

In the field of education pre-school programmes for Gypsy children were advocated and policies to increase involvement in secondary education were demanded. One such policy was the extension of the boarding school scheme which enables gifted children and those under-achieving to receive a more concerted, thorough schooling.

The Ministry is aware of the need to increase the number of Romani scholars. At a conference for Gypsy social work students and their teachers in July 1997, the Minister of Culture and Education, Bálint Magyar, spoke of the intention to introduce a special

\textsuperscript{192} Magyar Hírlap "Romani children in State Care in Hungary" October 31st 1997.
\textsuperscript{193} Gov. resolution No.1125/1995 (XII.12) On the most urgent issues of the Gypsy minorities, para.3
\textsuperscript{194} Resolution 1093/1997 (VII.29) On a package of medium term measures intended to improve the living standards of the Gypsies. See also Roma Press Centre "Increasing normative support for
curriculum about Gypsies in higher education that would be compulsory for those becoming teachers.\(^{195}\)

As far as training and employment are concerned, the resolution noted that methods to enhance Gypsy employment and training need to be assessed. One specific initiative has established microregional projects providing land for the socially disadvantaged in smaller regions.\(^{196}\) The central employment and training project established in 1997 to improve the labour market conditions for long term unemployed Gypsies will be continued in an attempt to reduce the unemployment of a greater number.\(^{197}\) Furthermore, positive discrimination is expressly endorsed as a method of giving job opportunities to the socially disadvantaged.\(^{198}\)

In the housing sphere an implementation schedule was directed in order to resolve once and for all the extremely poor standards of housing of many Romani families living in colonies and settlements. The programme noted that the needs of the community itself must be fully taken into account.

The legal rules prohibiting negative discrimination are to be considered in the light of supplementary procedural rules with sanctions to enable de facto equality to be realised.\(^{199}\) Discriminatory attitudes in the police force were recognised and police training is to be updated to include information about the Roma minority so that the service is ‘humane and free from discrimination’. The police have been criticised for attributing blame collectively and for failing to protect the Roma and other minorities.

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\(^{195}\) Roma Press Centre “Bálint Magyar: the government regards the training of Roma intellectuals a prime task” July 2nd 1997.

\(^{196}\) As of 1996, the ‘Social Land Programme’ enabled 124 Roma communities to use vacant land to produce food for themselves: Kovats supra n130 at 58.

\(^{197}\) Supra n194 at para 2.1.2.

\(^{198}\) Ibid at para 2.1.3.

\(^{199}\) The deadline for feasibility studies on this programme was 30th March 1998.
against racist attacks and violence\textsuperscript{200}. The attitudes of the police service will now be continuously monitored\textsuperscript{201}.

A Sub-committee on Human Rights, Minorities and Religious Affairs was formed in June 1997. The Committee on Roma Affairs is charged with reviewing the work of public organisations and foundations as well as the different councils dealing with the Roma. The establishment of the sub-committee should be welcomed given the rapidly proliferating number of bodies dealing with the Roma situation.

**Self-Determination or Autonomy? Fitting the Hungarian Approach into the International Language of Human Rights.**

It has been noted that the Hungarian law goes beyond the minority rights standards laid down in the Framework Convention and the focus on greater political participation fits more easily into the purposive language of self-determination. Perhaps such an approach could be seen as the future direction of self-determination?.

At the Eighth Session of the Commission on Human Rights it was suggested that a concrete definition should be applied to the right of self-determination\textsuperscript{202}. It should enumerate the right 'to create an independent State' and the right 'to secession or union with another people or nation'. Such a formulation was rejected in preference for the abstract wording of the covenants; concern having been expressed that such an approach would limit the scope of the right. In reality however, self-determination is very much limited as a right, not just by the accompanying provisos of territorial

\textsuperscript{200} Human Rights Watch (1993) \textit{supra} n85 at 31. The Martin Luther King Association (1991) documented 90 skinhead attacks between January 1991 and April 1992. Police were on the scene in less than twelve occasions: in three they refused to intervene; in one the victim was arrested; in at least one case the victim was assaulted and in two further cases, they refused to register the complaint.

\textsuperscript{201} \textit{supra} n194 at para 5.3.

\textsuperscript{202} \textit{Official Records of the Economic and Social Council,} fourteenth session supplement No.4 (E/2256) para.34.
integrity and its application to ‘peoples’ only, but also because of its limited interpretation by states; it is still strongly linked with secession and demands for independence. The existence of a ‘democratic’ electoral system is considered to provide sufficient representation for all members of the state and therefore the demand for self-determination is considered redundant.

Some states are recognising the fact that the international human rights standards are not only minimal and basic standards that need further elaboration, but that there are some situations that challenge the present ‘individual’ focus of those instruments and demand a new approach in the scope and content of these standards.

Self-determination is the only expressly collective right in these instruments and such a development could come in the extension of the concept of internal self-determination and indeed the ‘internal’ aspect is gradually becoming more acceptable. However, the widening of the concept to envelop internal minorities, as advocated by some authors, seems to be unlikely, given its association with independence and secession. Such an extension may even be counter-productive anyway, depriving the right of much of its meaning. As internal self-determination is applied to more groups, the totality of measures presently included is likely to be reduced and watered down to avoid any developments towards demands for independence from smaller minority groups.

The Language of Autonomy

In dealing with internal self-determination, the language of autonomy is often preferred. One of the reasons for this may be the vagueness of the term which is clearly indicated by its absence from major international human rights documents. If there is no specifically defined human right to autonomy, states are probably happier to consider demands for autonomy without fear of international criticism.
To have any real meaning, autonomy must have individual and collective dimensions. Personal autonomy is very significant in the individualist tradition - notions of free choice and expression are obvious examples where the right of the individual to decide what is the best course of action is left to their personal discretion. Personal autonomy is thus a key concept lying behind the international human rights instruments.

The collective dimension of autonomy is less well developed; presumably as it may be seen to run at odds with individualistic notions. A flexible approach is required, not simply linked to self-government but also including political and cultural representation to ensure that democracy does not simply mean rule by the majority but rule by the people. Such political representation is a pre-requisite to the realisation of other rights but remains largely outside the sphere of minority rights provisions.

The content of autonomy according to Hannum covers basic issues such as language; social services; education; access to the civil services; land and natural resources as well as representative local government structures203. Taking the example of education which is already included under Article 27 of the ICCPR, Hannum emphasises that under that provision the state is given no positive obligation to assist minority education structures204, thus the state can promote one education system for all pupils irrespective of cultural differences. However, in situations where autonomy is sought there is likely to be a consensus as to the best method of schooling for that community. Thus with financial support, the communication promoted by autonomy regimes would appear more likely to yield positive results.

203 Hannum (1990) supra n24 at 458.
204 ibid. at 461
Other areas where collective autonomy could be developed.

There are several states that have introduced a system of autonomy for specific groups. Such autonomy may be complete - for example the particular group could be given a veto over national legislation or guaranteed a certain number of seats in the national Parliament, or partial whereby a particular group is given a limited jurisdiction over specific aspects of importance to that group - for example, the Aaland Islanders of Finland have home rule in relation to language and education\textsuperscript{205}; and the cultural councils established in Belgium which focus on issues such as culture, education, language use, museums and leisure\textsuperscript{206}. Hannum’s study of various autonomy arrangements notes the use of partial autonomy:

...there are several entities that have been granted “autonomy” not as a response to desires for political self-government, but rather as a means of guaranteeing to certain social or ethnic groups a degree of independence from governmental interferences in matters of particular concern to these groups, e.g. cultural autonomy or religious freedom\textsuperscript{207}

Conclusion

It is clear that the Roma fall outside the traditionally conceived interpretations of self-determination. Whilst some writers have suggested an expansion of the concept to include under-represented minorities there remains a long way to go before collective rights become part of accepted human rights discourse. A focus on the individual and collective dimensions of autonomy may provide a way forward without ignoring fears of secession and the pressures of presenting a homogeneous Romani identity which relies on out-dated concepts of the ‘true-Romany’ and the pure nation.

\textsuperscript{205} Aland Autonomy law, articles 35,37, 38, 39
\textsuperscript{206} Blaustein and Flanz supra n155 Belgium Constitution (as amended) 1971 Article 3c, 59b, 59c
\textsuperscript{207} Hannum, H “The concept of autonomy in international law” AJIL (1980) 858-889 at 883.
Only a greater involvement in the political process is likely to have any effect on mobilising ethnic identity at the grassroots level. Debates over the Romani flag and a charter enumerating Romani rights are inherently beneficial in that they stimulate debate and understanding of what it means to have such an identity. But this debate demands flexibility - reflecting the different experiences of a geographically diverse population as well as commonalities. The autonomy of the individual must not be sacrificed to the 'good' of the community. If the community itself is to survive the modernisation inherent in the democratic process it must encourage rather than stifle such debate.

Development of the collective aspects of autonomy alongside the present emphasis on individual autonomy could enable personal growth in the context of the community. Local self-government and participation in national government are crucial components of the collective identity of minorities. They are also crucial in educating the public at large as to the traditions, customs and values of the minority as it interacts with the dominant political forces. Hungary's experiment has been described as being significant on two levels:

First, it reinforced the shared desire to improve minority rights and to establish and refine mechanisms to protect individual self-expression, cultural identity, and minority rights. Second, it underscored the fact that the efforts to develop and enhance these mechanisms are not necessarily inherently antagonistic to the larger goals of the societies in which the minorities live.\(^{208}\)

Hungarian developments will be watched with interest by all those advocating greater recognition of group identity. The granting of Roma minority status and the emergence of a new wave of Roma politicians should at least serve to keep the complex issues facing the Roma in Hungary on the front burner. Perhaps it can be said that: "the

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\(^{208}\) Livia Plaks, Executive Director PER supra n.179
greatest issue, though, is the mutual fear and distrust that clouds relations between Hungary's Gypsies and non-Gypsies, a problem that lies beyond the scope of any legislative solution.\(^{209}\)

As Kovats has argued, cultural rights are nothing without economic and social stability.\(^{210}\) Poverty in all its forms is the greatest obstacle to the realisation of equality.\(^{211}\) Discrimination by local councils in housing and skin-head attacks (where there is no sense of police/political urgency to combat the violence) can not be blamed on the old regime.\(^{212}\) Such practices are nourished in an environment of deprivation and poverty. It is argued that Romani participation in the governing forces of the state can serve to recognise and overcome these barriers to equality. However, the success of such policies depends to a large extent on the importance attributed to addressing pervasive economic and social disadvantage.

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\(^{209}\) Crowe supra n75 at 106.

\(^{210}\) Kovats supra n130 at 69.

\(^{211}\) See also Kovats supra n108 especially the views of the representatives of Kakucs, My翠regyh\H aza and Csepel.

\(^{212}\) Human Rights Watch supra n85 at 67.
CHAPTER EIGHT:
CONCLUSION

Introduction

Habermas argues that in order for law to be considered legitimate in a democratic state it must safeguard the autonomy of all citizens to an equal degree. The way that the legal system treats its minorities is a good indicator of legitimacy and it follows, as recognised by President Havel in the opening to this thesis, that the treatment of the Roma, as such a uniquely misunderstood and thus unpopular minority, provides a measure of the commitment to autonomy and thus democracy.

Looking at the theories behind collective and individual rights, it can be seen that there are some powerful and pervasive arguments put forward for the extension of human rights to certain groups in order to safeguard the autonomy of all people.

Problems with Individualism

In practice, individual rights often fail the Roma. An education policy based specifically on the needs of individuals in a climate of formal equality fails to consider the importance of cultural identity in formulating and developing personality. Formal education is often viewed as a replacement rather than a supplement to education in

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the home, as a result, as Liégeois has argued, Roma children lag behind their classmates and are seen as slow developers².

There is rarely any opportunity for Roma children to learn in their mother tongue or learn anything of their own culture and how it relates to the dominant culture³. Such cultural understanding is a two way process. The experiences of Gadje children in school reinforces the prejudices of their parents; they are told nothing of the Romani culture. Consequently, the Romani child is perceived as being educationally inferior and socially impoverished. A self-fulfilling prophecy emerges: the Roma pupil is not taught anything that she or he can relate to and thus ceases coming to school. The Gadje educators interpret this as further evidence of social and intellectual deprivation.

The fallacy of the neutral legal order

A neutral policy of equality towards minority groups, whilst attractive in a utopian egalitarian world, can cause great injustice in societies where certain groups are perceived as inherently inferior. Van Dyke argues that blindness to group difference promotes the inaccurate assumption that societies are homogeneous⁴. Everyone is an atomical individual; collective identity is a private matter and must therefore be irrelevant in policy. The recognition of collective identity is apparently incompatible with the liberalist conception of the good life which enables each individual to choose freely the ends they desire. The reality of this view may be questionable yet this is the goal on which liberalism is based -personal autonomy and freedom of choice. But what use is freedom of choice if only one choice is approved in state policy?

² See Ch5 p169
³ See Ch5 passim
Rawls' two founding principles of justice may well maximise choice and opportunity for each member of society. However, Rawls requires that people make these choices behind a hypothetical veil of ignorance; thus they are stripped of their culture, as well as their class, religion and social position. Rawls' resultant basic system of liberties corresponds to the development of human rights standards in the Western tradition. However, what relevance do these human rights standards have to those who are not able to conceive of themselves in such abstract terms?

Academics from the Third World have been critical of individual-centred human rights and it has been conceded by some liberal writers, that the language of individual rights is at odds with the culture of many communities. Referring specifically to the Roma, Liégeois writes:

_The individual is that which his belonging to a group makes him. He is neither known nor recognised as an individual, but by the situation within the group, which determines his identity both for himself- his self-designation- and for others._

Despite the argument that liberalism allows many versions of the good life to be pursued, we see that those with an entirely different conception are labelled as undeveloped and primitive. The irony of this approach can be clearly seen in the present Western concern to promote again the value of the extended family which would relieve the state of the burden of health care and help provide basic education to its members. Habermas notes that ethnic conflict is fuelled in the liberal legal order which, far from being ethically neutral, is permeated by ethical values.

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5 Rawls, _A Theory of Justice_ (1973) OUP, Oxford
6 Ibid passim.
8 Donnelly, J "Human rights, individual rights and collective rights" in Berting _Human Rights in a Pluralist World: Individuals and Collectivities_ (1990) Roosevelt Study Centre, Meckler Netherlands at39-62 with comments on Aboriginal communities at 52-3
10 Habermas _supra_ n1 at 125-6
This underlining dilemma must be recognised before an adequate critique of the prevailing human rights standards can be understood. The two tenets of international human rights standards: non-discrimination and equality, are ambiguous terms\textsuperscript{11}. The notion of non-discrimination itself implies that every person is treated equally with the same standards of justice. Yet when we treat each person equally it soon becomes apparent that de facto inequalities may be unaffected and even promoted. As a result, international human rights documents have recognised that affirmative action measures do not constitute discrimination for the purposes of international law. The \textit{ICERD} provides that in some cases:

\begin{quote}
\textit{...special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purposes of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms}\textsuperscript{12}.
\end{quote}

These measures should be of temporary duration with the aim of eliminating the effects of past discrimination. As a result, they can be seen to have the long-term objective of promoting assimilation. Affirmative action says to the recipient: “once you attain the same position as us, your privileges end”. Thus, affirmative action has been a strong element of the US melting-pot ideology. Cultural identity is gradually undermined through the promotion of blanket equality.

Here we can refer again to Will Kymlicka’s criticism of the liberal state’s policy of benign neglect. Kymlicka argues that it is unrealistic to presume that the government which represents the dominant cultural group in most societies can be neutral to the needs of non-dominant cultural groups\textsuperscript{13}. The clearest example of this can be seen with

\textsuperscript{11} See Chp3 p81
\textsuperscript{12} Article 2(2) ibid.
\textsuperscript{13} Kymlicka \textit{supra} n4 at 127
respect to religious holidays. However, it can also be viewed in education policies and in the official recognition of a particular language. From this analysis it is apparent that group rights and collective rights are already recognised in international law. The dominant cultural group has its members' rights protected and maintains its own boundaries through bureaucracy and the legal system. The identity of the dominant group is thus protected. It is thus fallacious to argue that collective rights are anomalous in international law (although on this reasoning it is possible to see how an extension of collective rights could potentially threaten the stability of the state). In fact it could be coherently argued, that the extension of collective rights to minority groups is essential to the notion of equal treatment. It is surely discriminatory to protect the dominant interests and fail to provide a similar protection for the non-dominant interests.

Practical Applications of minority-based rights

Increasingly, the interests of minorities are coming to be perceived as essential in maintaining peace and security in Europe. The principal role of the High Commissioner on National Minorities in the OSCE is to act as an early warning mechanism in times of impending conflict. The crisis in the Balkan states suggests that the repression of minority identity is a major trigger in societal divisions and demands for secession are not promoted by a recognition of minorities but are caused instead by the denial of minority identity.

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15 See Ch6 p262-3
16 As has been strongly argued in the UN discussion on the definition of self-determination - Chp 7 at 280-290
The Council of Europe and the Organisation on Security and Co-operation in Europe have been anxious to situate the question of minority rights at the forefront of the international agenda. Having analysed the situation of minorities throughout Europe for a great deal longer, and with considerably more expertise than the present author, they have persistently relied on an individualist solution to the problems of minorities.\(^{17}\) It is not simple to dismiss the individualist perspective, it has a great many attractions. However, it has clearly been a product of its time. The aftermath of two World Wars when individual rights were systematically destroyed by the oppressive policies of particular groups led the United Nations to emphatically reject rights afforded to particular groups, emphasising instead the universality of individual human rights. The dangers of collective rights in the absence of adequate safeguards for the protection of individual rights are not disputed. They include: the artificial maintenance of group boundaries; the dilemma of the illiberal minority that disrespects the particular interest of its members; and the difficulty of finding genuine representatives of the collective interest. It is for these reasons that it is essential to regard minority rights as complementary, rather than alternatives, to individual rights. In case of conflict, the latter should prevail thus enabling people who are dissatisfied with aspects of their culture to question and to adopt aspects of other cultures in the spirit of cosmopolitanism.

The argument that group rights are not justiciable deserves some attention in the light of the Hungarian experiment in power-sharing. The Hungarian experience suggests that group based rights can be justiciable if applied in a flexible manner. It is not possible to be dogmatic and advocate group-based rights in a specific range of

\(^{17}\) See Ch 6 passim
situations. The Hungarian Act on the Rights of National and Ethnic Minorities is described as ‘an effort to implement a new theory of human rights based upon collective rights’\(^{18}\). There is a recognition of the right of groups to representation through self-government and involvement in the national legislature\(^{19}\). The criteria for self-government status under the legislation is based on reality rather than arbitrary, supposedly objective characteristics. The Act does not extend to recent immigrant populations who have migrated by choice, it is necessary for the group to establish that they have been present in Hungary for at least one century. Any member of the community may stand in the local elections, however, they tend to have the support of one of the major Romani organisations.

Minority self-governments are a recent development and the evaluative response has not been uncritical. However, this criticism centres on the dynamics of the relationship with central government, primarily in terms of funding and support\(^{20}\). The criticism does not appear to target the role of the self-governments themselves and it seems clear that demands are being made by the Roma community and in some case these demands are being addressed for the first time. It is to be hoped that with the work of an estimated two thousand Romani activists in Hungary, the institutions of Hungarian society will no longer be able to ignore the specific needs and interests of the Romani minority. In the past, attempts at assimilating, excluding and generally marginalising Romani culture have depended on their absence from the public arena. As a result of this gradual political awakening, there is increasing international pressure to support

\(^{19}\) See Ch 7 p309
\(^{20}\) For comments and views on lack of funding and other obstacles see “Self-government in Hungary: The Romani/Gypsy experience and prospects for the future” Project on Ethnic Relations Conference May 9-11th 1997, Budapest
the identity of the Roma, through methods such as multi-ethnic education programmes and the protection of nomadism. These approaches are based on the recognition of the Roma as a minority requiring special group rights; they compliment efforts to strengthen laws against racial hatred and discrimination.

Minority and Individual Rights in Synthesis

Collective rights are an extension of and in many ways a prerequisite to individual rights. The right to self-determination, a collective right, is already recognised as the cornerstone of two international covenants. At present, there is too much concern with precise definitions rather than moving forward with solutions. A flexible approach is needed with respect to definitions. Perhaps a group is unable to satisfy all of Capotorti's definitional criteria, nevertheless, they have certain commonalties and are routinely discriminated against and labelled as inferior. Such a group should not be denied recognition of special rights reserved for only those perceived as 'true minorities'.

Most writers appears to concede that voluntary immigrant groups should not be entitled to respect for their collective rights and this is the approach adopted by Article 27 ICCPR. Van Dyke argues however that it would surely be an injustice to make the dominant language the sole language of instruction in schools if the immigrant child is unfamiliar with that language, just as it would be wrong also to let

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23 See Chp 6 p241
them go through school without learning the dominant language. If a policy of blanket neutrality is applied in the name of equality, for example promoting housing and education, the individual rights of all the members are threatened and the collective rights of minority identity is entirely undermined.

Perhaps then it could be argued, as have John Packer and Jack Donnelly, that adequate realisation of individual rights is the key to the protection of group interests. This is a sound argument if the group is in a dominant position in society and is able and chooses to articulate its demands i.e. if freedom of expression is not hampered by deeper, entrenched inequalities. It may then be argued, on the basis that rights are not equivalent to duties, that a person who chooses not to articulate their demands does not require or deserve their demands to be protected. This was the attitude of the Czech Minister who argued that as the Roma have not asked for minority language teaching they can have no need for it. Such a simple explanation cannot be regarded as legitimate. The Roma are not experienced in asking society for the things that they believe will improve their lives. This is a cultural statement and is probably true of many other cultures. Just because they do not ask for respect does not mean that they do not desire it. The challenge for a liberal democracy is to meet the desires and needs of the group if its members choose not to articulate them through traditional individualist language.

This brings me to the related point of cultural relativism. Human rights are universally accepted but not universally understood. To many cultures, including the Roma,
individual rights outside the cultural boundaries are meaningless. A greater recognition of the value of cultural identity would promote the notion of human rights for individuals within the group. Individual group members may feel more free to question group values in a relatively secure group environment, than one that is threatened with assimilation. On this reading, group rights serve to promote a human rights dynamic, that questions and seeks to justify the provision of human rights for all.

Perhaps it may be contended that we should not be concerned for groups that do not wish to be liberalised and integrated. Are we to adopt an ethnocentric policy and force the international individualist language on groups that do not recognise the importance of the individual aside from the group?

If individual and group rights are seen as complementary it is apparent that freedom of expression does not exist unless excluded groups are provided with the means to exercise that expression. It is possible that this is interpreted as an enlightened reading of the traditional human rights documents. Complementarity can be seen with the overall societal goal of human rights recognition; namely to promote equal respect and greater tolerance. Group-based rights, by allowing groups to articulate their own history and their demands for the future, enable greater respect for diversity. Nowhere is this more apparent than in the classroom, where intolerance is either nourished or eliminated.

The question remains as to how far group rights can provide any solutions to the problems of discrimination and disadvantage experienced by Europe's largest minority group.

27 See Ch 2 p35
The Dangers of the Collectivist Approach.

The paradox of pluralism in practice

Whilst it may be true that expression of diversity is a good for society as a whole, society's interests may be overwhelmed by the application of collective rights to certain groups. This can be seen particularly in the debate on education. It may seem ironic that segregated education is often advocated as the solution to educational marginalisation and exclusion of minority groups. If the needs of Roma children cannot be met at present via the national curriculum in mainstream education, it is argued, they should be given separate education in classes where all the children share the same expectations and interests. There are several examples of segregated education in Hungary that aim to provide a more appropriate education for Roma children, specifically geared to employment opportunities.\(^{28}\)

In this context a dilemma emerges: how can intolerance in the wider society be reduced and diversity promoted, if certain groups are separated from the educational system. In this respect, pluralism can be seen at odds with the overriding liberalist notion of equal respect. This has led to the pluralist-integration approach which seeks to combine a limited form of collective recognition with the overlapping need to function in society at large. Consider for example, education in the mother tongue: the pluralist multi-ethnic approach demands that children receive education in their mother-tongue; when coupled with the intergrationist approach the mother tongue would be taught alongside the dominant language of instruction.\(^{29}\) As a result, cultural

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\(^{28}\) See Ch 5 p 194

boundaries are not artificially maintained by segregation and the child’s notion of Self is not undermined through assimilation.

**Framing Collective Rights in International law**

Whilst it has been argued that collective rights are not entirely alien to the language of international human rights, it would be a gross over-statement to contend that they are accepted as desirable. International law recognises the rights of states and individuals, the limited recognition afforded to peoples pales into insignificance when juxtaposed with the interests of the state to territorial integrity.

There is no positive right to minority identity. Article 27 of the *ICCPR* provides that members of minorities ‘shall not be denied the right’ to enjoy culture and practice their religion. The reticence to include a positive right to enjoy one’s culture is explained by Nowak as “the fear marking the entire historical background of Article 27 that effective, collective protection of minorities might threaten national unity in some States”30. Since 1966 there has been a definite but gradual realisation that a liberal democracy demands more than this negative formulation. Individual identity is framed by a ‘struggle for recognition’ which depends on dialogue, both positive and negative, with others31. It is inappropriate to view individuals as anomic units removed from their social and cultural framework32.

International law has not kept up with current political thinking in this respect. The approach of the Council of Europe Framework Convention on the Rights of Persons Belonging to National Minorities expands on the formulation in Article 27 but makes

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30 Nowak, M *supra* n 24 at 495
31 The phrase is borrowed from Habermas and receives support in the writings of Taylor *supra* n 1 *passim*. 
little significant alteration to its negative construction\textsuperscript{33}. The United Nations' Declaration on the Rights of Minorities is similarly limited in scope\textsuperscript{34}. There is no support in either document for a legally recognised collective right nor, it is submitted, is their likely to be in the foreseeable future. The Hungarian experiment in minority self-government, whilst endorsed in international human rights instruments such as the Framework Convention, is something of an anomaly\textsuperscript{35}. Consent-based as it is, the international political arena is unlikely to see the biggest collective powers devolving limited powers to smaller collective entities.

The recognition of cultural identity through active citizenship

If collective rights are not immediately realisable in the present construction of international human rights law, is there any way in which the Roma and members of other minorities can become full citizens of the society in which they live?. Individual rights as presently construed do not appear to provide the answers. Cultural identity of minorities may indeed be undermined by the emphasis on individualism. Habermas articulates a notion of active citizenship based on two levels of integration: "The ethical integration of groups within their own collective identities must be uncoupled from the abstract political integration that includes all citizens equally"\textsuperscript{36}.

Political integration forges loyalty to a common political culture, the legitimacy of which is partially derived from its mutual respect and neutrality for subcultures and their particularist conceptions of the good life. He notes the radical criticism of

\textsuperscript{33} For criticisms of the individualist theory see Ch 2 \textit{passim}

\textsuperscript{34} See Ch 6 p264

\textsuperscript{35} UN Res. 47/135 of 18.12.92

\textsuperscript{36} Other examples of collective rights do exist. For example the Belgium system of power sharing between Dutch and French speakers and the autonomy of the Aaland Islands within Swedish sovereignty. These examples are detailed in Van Dyke \textit{supra} n24.
liberalism that it represents one particular vision of the good life, however he contends that as long as liberalism does not seek to privilege that particular vision at the expense of others, it remains legitimate. The right to equal respect endowed in each subculture may be interpreted in a variety of ways; it may demand affirmative action or self-administration. In the political, public sphere, the citizens are encouraged to actively articulate their private interests in the spirit of democracy. The aim of this division is to protect autonomy: both public and private. Habermas’ theory is applied to the unequal status of women:

The individual rights that are supposed to guarantee women the autonomy to shape their private lives cannot even be appropriately formulated unless those affected articulate and justify in public discussion what is relevant to equal or unequal treatment in typical cases. Safeguarding the private autonomy of citizens with equal rights must go hand in hand with activating their autonomy as citizens of the nation.37

Thus a legitimate democracy must be concerned to avoid the privileging of a particular set of values, and instead attempt to provide a system based on equal respect for all people and the life context that shape these identities.

This notion of full or active citizenship is supported by Paul Close in Citizenship, Europe and Change:

Citizens are those people who have acquired full citizenship rights—the full range of legal rights necessary for full membership of (or full inclusion within) society. But such rights in themselves are insufficient for real citizenship. Citizens are divided between those who are able to realise citizenship rights and those who are unable; between those who really enjoy and experience full inclusion, participation and membership and those who do not. Between those who have sufficient enabling resources to allow them to be included as full members of society and those who have insufficient, between those who enjoy the power to be real citizens and those who do not.38

36 Habermas supra n1 at 133-134
37 Ibid at 116
In Chapter Four, the denial of citizenship rights in the Czech Republic was discussed. It was further noted that even when the Roma have satisfied the citizenship criteria, there have been clear efforts to maintain the division between the true citizen and the Romani ‘outsider’. The extent of violent attacks on Roma, public hostility expressed through opinion polls, and the comparative social and economic deprivation to which they are exposed, suggest that the Roma are excluded from full citizenship in the Czech Republic and indeed across Europe.

The public dialogue that is so significant in Habermas’ analysis of full citizenship is resisted in the Czech Republic. The efforts to encourage the Roma into public debate have been illusory and may appear to be aimed at satisfying European Union membership criteria rather than creating a real active citizenry. When considered in this way only the Hungarian government has made any noticeable efforts to engage the Roma in public dialogue and promote the notion of active citizenship.

The right of recognition

Common to both the work of Habermas and the collectivist thinkers is a belief in the value of cultural identity and recognition. If the culture of a group is not recognised as worthy of equal respect, the individual herself will find her identity rejected. The present individualist bias of human rights instruments does not give sufficient weight to the importance of cultural identity. This need not necessarily be done through the introduction of collective rights. There are dangers in the collective rights approach which few writers are not prepared to acknowledge. The human rights instruments are

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39 See Ch 4 *passim*
40 O’Nions, H “Bonafide or bogus?” 3 Web JCLI 1999
equally uncommitted to promoting a concept of active citizenship. The liberal vision of universal human rights for all is not value-free as Dworkin suggests\(^42\). It promotes a particular vision of autonomy as the greatest good and is significantly cooler concerning attitudes that prioritise group identity. Through the failure of liberalism to recognise it's own inherent bias, collective rights have been ignored and consequently individual rights of minorities have been eroded.

**New developments in the Recognition of the Roma**

Increasingly Roma representatives are being consulted about policy initiatives and national governments are having to treat the Roma issue seriously. This is particularly noticeable in those states which are seeking to become members of an integrated Europe. Bulgaria's National Ethnic and Demographic Council is drafting a program to co-operate with representatives of the Roma community with the aim of improving the high unemployment rate (90% in some areas), police mistreatment and Gadje violence towards the Roma. A Romany Cultural and Information Centre is to be opened\(^43\). This may mark the beginning of official recognition that the Roma need recognition as individuals and members of a distinct culture.

In April 1993, the Romanian Government established the Council for National Minorities to serve as a forum for discussion of minority issues and problems and to make recommendations to Government. The Council is composed of representatives of all seventeen recognised minorities and fourteen Government representatives \(^44\). Suspicion has been raised that this move coincides with the Romanian desire to join the

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\(^{42}\) Dworkin, R "Liberalism" in Hampshire, Stuart *Public and Private Morality* (1978) Cambridge Univ Press *passim*

\(^{43}\) Reuters "Bulgaria to promote integration of its Gypsies" 7.4.98

\(^{44}\) C/E FDOC6901 19th July 1994
European Union. Such suspicions appear to be well-founded; representatives of the Hungarian Democratic Federation have left the Council due to the lack of political will to implement recommendations and the Roma representatives withdrew from the Council in September 1993 after the violence in Hidreni. Recent developments are also causing concern in Hungary where reports suggest that the Government have abdicated their responsibilities towards the Roma, claiming that problems must now be addressed by under funded minority self-governments.

Fortunately however, there is now a critical international eye focused on the treatment of the Roma throughout Europe. A rise in the number of non-governmental organisations, particularly those with an active Roma participation, demonstrates that a public space for the Roma is beginning to emerge. The Roma Participation Programme’s general principles state:

Through active participation and civil rights work in the societies in which they live, Roma themselves must contribute to the eradication of prejudices and stereotypes. Roma must recognise that responsibility for shaping their future lies not only with the majority, but most importantly with themselves.

Such effective participation needs to draw on “common roots and transnational perspectives beyond national citizenship, narrow group affiliation, or country of residence”.

The solution is thus presented as a transnational strategy. The problems of the Roma are similar across Europe: they stem from marginalisation and non-recognition. In the past the will power to improve the situation of the Roma has been absent. Increasingly

45 Die press 26th April 1993
48 Roma Participation Project “About the RPP” Reporter see App 2 for details.
49 Ibid.
however, the need to afford all groups in society equal respect is beginning to evolve as a logical development of international human rights standards. This development is way overdue and there remains a gross under-valuing of the importance of cultural identity in the international human rights instruments. These instruments have so far failed to protect Europe’s largest minority group from regular violations of individual rights. The situation of the Roma clearly illustrates the need for human rights instruments that are not simply a blanket reflection of Liberal values but strive to be truly universal, representing the interests of a mosaic of cultures in a pluralist-integrationist framework.
Appendix 1

Estimated Roma/Gypsy population in selected European countries¹

<table>
<thead>
<tr>
<th>STATE</th>
<th>MINIMUM</th>
<th>MAXIMUM</th>
</tr>
</thead>
<tbody>
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<td>100,000</td>
</tr>
<tr>
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<td>300,000</td>
<td>500,000</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>90,000</td>
<td>120,000</td>
</tr>
</tbody>
</table>

¹ Source: Gypsy Research Centre, University of Rene Descartes 1994
APENDIX 2: Roma/Gypsy Organisations which have assisted in the preparation of this thesis.

The author has included contact details where available to enable further information to be requested.

ACERT: Advisory Council for the Eductaiion of Romany and other Travellers. Moot House, Harlow, Essex


CZECH HELSINKI CITIZENS ASSEMBLY, PRAGUE Opatovicka 24, Praha 1, DR

EUROPEAN ROMA RIGHTS CENTRE, 1085-Budapest, Josses krt. 33
BUDAPEST HUNGARY. Publishers of a regular newsletter and detailed reports on the situation in particular countries,

THE GYPSY COUNCIL FOR EDUCATION, WELFARE AND CIVIL RIGHTS
c/o Aveley Clinic, Hall road, Aveley Essex RMT5 4HD

HOST (Citizens solidarity and tolerance movement) - PO Box 13, 12800 Praha 2 CR

HUMAN RIGHTS WATCH, 485 Fifth Avenue New York, NY 10017-6104

INTERFACE JOURNAL OF TRAVELLER EDUCATION - CENTRE DE RECHERCHES TSIGANES, 106 Quai de Clichy, F-92110-Clichy, France.

INTERNATIONAL HELSINKI FEDERATION FOR HUMAN RIGHTS - PUBLISHERS OF HUMAN RIGHTS AND CIVIL SOCIETY NEWSLETTER. Rummelhardtgasse 2/18, 1090 Vienna, Austria.

LAU MAZIREL (REPRESENTING INTERESTS OF PEOPLE WITH A NOMADIC CULTURE) PUBLISHERS OF THE DUTCH JOURNAL O’DROM, NETHERLANDS

MINORITY RIGHTS GROUP 379 Brixton Rd, London SW9 7DE

OPEN MEDIA RESEARCH INSTITUTE, PARTICULARLY THEIR OMRI DAILY DIGEST DETAILING NEWS ACROSS CENTRAL AND EASTERN EUROPE

OSCE, Office for Democratic Institutions and Human Rights, PARTICULARLY THE CONTACT POINT FOR ROMA AND SINTI ISSUES Krucza 36/Wspolna 6, 00-522 Warsaw, Poland
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