

**THE RIGHT TO EDUCATION OF ROMA CHILDREN
IN THE CZECH REPUBLIC, HUNGARY, ROMANIA
AND SLOVAKIA**

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ABSTRACT

The purpose of this thesis is to examine the educational disadvantage currently being suffered by Roma children in the Czech Republic, Hungary, Romania and Slovakia, and to identify the most appropriate human rights mechanism with which to remedy the situation. Education is vitally important for oppressed minorities such as the Roma since, without it, individuals will be unable to fully access the complete range of their fundamental rights and so will be unable to challenge the disadvantage and discrimination that they suffer.

This thesis first submits, therefore, that the traditional liberal democratic model of governance as featured in contemporary Europe is insufficient to adequately address the needs of minorities. To address this insufficiency, states must recognise a version of multiculturalism that both embraces critical pluralism and is compatible with liberal theory. Secondly, this thesis suggests that the individualistic focus of rights protection should be enhanced through an increased recognition of children's rights so that the individual child is firmly entrenched as an autonomous rights holder.

The type of education system that would exist in such a rights environment should serve to develop the autonomy and competence of individual children but also to facilitate their security within their own culture. This type of multicultural education can only be achieved if the various international instruments concerning the right to education can be required to place a more onerous burden on states parties when it comes to minority accommodation. At a domestic level, this thesis suggests that the most appropriate means by which to accommodate the Roma within the national education systems of the four countries would be through a culturally sensitive mainstreaming approach adapted from that used in England.

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INTRODUCTION

Historically, the Roma represent “the classic case of social exclusion and marginalisation, of oppression, banishment, enslavement, and are the repeated victims of genocide.”¹ Even today, the Roma arguably remain the most oppressed ethnic minority² in Europe. Additionally, due to their uniquely vulnerable position, Roma children can be said to suffer even more from discrimination and social marginalisation than Roma adults. This thesis has grown from the hypothesis that education is the best means by which minority groups such as the Roma can free themselves from poverty and disadvantage. Education should allow children to develop into well-informed, autonomous adults who are secure in their own culture as well as able to compete on an equal footing with other interest groups represented in society. It is only through comprehensive educational attainment that a person can be properly equipped to access the full range of their human rights and interests. A culturally sensitive education which reflects the contributions that various minority groups have made to national society will also serve to facilitate cultural understanding and break down barriers between minorities and the majority population.

¹ Arthur Ivetts, *Roma/Gypsies in Europe – The Quintessence of Intercultural Education* (Proposal for address to UNESCO 2003) 2 <<http://gypsyromatravellerleeds.co.uk/information/downloads/UNESCOForReal.doc>> [last accessed 20/02/13]

² Aimee Kanner Arias and Mehmet Gurses ‘The complexities of minority rights in the European Union’ (2012) 16 *Int. J. Of Human Rights* 2 321-336; Peter Vermeersch ‘Ethnic minority identity and movement politics: The case of the Roma in the Czech Republic and Slovakia’ (2003) 26 *Ethnic and Racial Studies* 5 879-901; Rachel Guglielmo and Timothy William Waters ‘Migrating Towards Minority Status: Shifting European Policy Towards Roma’ (2005) 43 *JCMS* 4 763–86; Nicolae Gheorghe and Thomas Action ‘Minority, Ethnic and Human Rights for the Roma’ in Will Guy (ed.) (2001) *Between Past and Future: The Roma of Central and Eastern Europe* (University of Hertfordshire Press) 54-70; James A. Goldston. “Race and Ethnic Data: A Missing Resource in the Fight against Discrimination” in Andrea Krizsan (ed.) (2001) *Ethnic Monitoring and Data Protection: The European Context* (Central European University Press–INDOK) 19-41

This thesis therefore sets out to answer a number of questions: First, how best might the human rights of minorities such as the Roma be guaranteed? Secondly, how effective are current international obligations concerning the right to education? Thirdly, to what extent are the countries under particular consideration here currently meeting their obligations when it comes to minority accommodation and the right to education? Finally, what would be the most appropriate domestic approach when it comes to guaranteeing the right to education of Roma children?

1.1 A Note on Terminology

Throughout this thesis use of the term ‘Gypsy’ has been avoided, save for instances of direct quotation or where it is necessary to the discussion, since it is “generally considered to be a pejorative exonym.”³ The term ‘Roma’ is preferred as it is the accurate representation, both from a minority and a majority standpoint, of a unique ethnic group and lacks the troubling historical baggage associated with ‘Gypsy’. The term Roma is also linked to the struggle for the acceptance of Gypsies as equal citizens of Europe with a unique ethnic identity.⁴

It must, however, be recognised that European Roma today “are a heterogeneous community with many different cultural values as well as linguistic and religious diversity.”⁵ The overarching term ‘Roma’ is used here due to the common ancestry of the various ‘Gypsy’ groups⁶ which has led to an underlying core of similar values and traditions. As the European High Commissioner on National Minorities has noted:

³ Angus Bancroft, ‘Gypsies to the Camps! Exclusion and Marginalisation of Roma in the Czech Republic’ (1999) 4(3) *Sociological Research Online* n 1 <<http://www.socresonline.org.uk/4/3/bancroft.html>> [last accessed 20/02/13]

⁴ Roni Stauber and Raphael Vago, ‘Introduction’ Roni Stauber and Raphael Vago (eds), *The Roma: A Minority in Europe* (Central European University Press 2007) xiii

⁵ István Pogány, ‘Minority Rights and the Roma of Central and Eastern Europe’ (2006) 6(1) *Human Rights Law Review* 17 – 18

⁶ For example: Kalderash, Gitanos, Sinti, Romnichal and Erlides

“... there are significant commonalities perceived as binding the Roma together; commonalities in origin, language, culture, historical experience and present-day problems in the region. In addition to a Romani cultural heritage, including a strongly itinerant tradition that is both the cause and effect of their history, the Roma also share the use (or remembrance) of a common, though highly variant language, also known as Romani or Romanes.”⁷

There is one additional unifying factor missing from the above quote; there is, as Angus Bancroft has commented, “one experience common to almost all Roma in Europe, namely the degree of discrimination and hostility that they face from the rest of society.”⁸ Ultimately therefore, for the purposes of this thesis, the term ‘Roma’ should be interpreted as referring to all those peoples who share a common Romani ancestry.⁹

1.2 The Roma: Background Information

A Minority in Europe

The Roma are said to be “one of the oldest surviving minority groups in Europe.”¹⁰ The Roma “first arrived in Europe at the end of the thirteenth century, at a time when the Ottoman Turks were taking over the Christian Byzantine Empire in order to spread the Muslim faith and extend their political influence.”¹¹ Due to their nomadism as well as the ethnic differences between themselves and the settled European populations, the Roma were frequently identified as outsiders and as the ‘Other’. There was considerable confusion and misapprehension on the part of the Europeans as to the ethnicity and origins of the Roma,

⁷ Report of the High Commissioner on National Minorities *Roma (Gypsies) in the CSCE Region* CSCE (1993) CSCE 240 3 < www.osce.org/hcnm/36441 > [last accessed 20/02/13]

⁸ Angus Bancroft, *Roma and Gypsy Travellers in Europe* (Ashgate 2005) 47

⁹ Where the term ‘Gypsy’ or ‘Traveller’ is used in quoted materials, the original term will be preserved.

¹⁰ Helen O’Nions, *Minority Rights Protection in International Law: The Roma of Europe* (Ashgate 2007) 3

¹¹ Ian Hancock, *We are the Romani People* (University of Hertfordshire Press 2007) 1

with the popular belief that they arrived in Europe from Egypt, giving rise to the term ‘Gypsy’.

However, linguistic evidence has now demonstrated that the Roma originate from the Northern Indian castes who migrated across Europe between 500 and 1000 AD.¹² This initial lack of understanding about the Roma can be seen to have echoed down through history with clear divisions between the Roma and the majority populations of Europe still existing today.

The roots of the social and ethnic divide between the Roma and all the other peoples of Europe can be traced back to the sixteenth century¹³ when nomadic Roma were to be found across Europe: “Despite an earlier benevolence towards them, by this time attitudes had turned against the Roma. They were accused of petty theft and their practices of healing and fortune telling offended against the techniques of the Church.”¹⁴ Racism was also responsible for growing prejudice founded on the Roma’s appearance and perceived Islamic background.¹⁵ The following decades brought forth a growth in intolerance and an anxiety about civil unrest. In this climate of extreme upheaval, the Roma were the “near perfect scapegoat, and universal intolerance towards them was well in place by the end of the sixteenth century.”¹⁶

The common thread that binds each of the four European countries considered in this thesis is their treatment of the minority Roma population. As well as the type of historical disadvantage discussed above, there seem to be two central problems affecting all of these

¹² For further information on this aspect of Roma origin and migration see: Angus Fraser, *The Gypsies* (Blackwell 1992) Chapter One

¹³ Arthur Ivetts, *Roma/Gypsies in Europe – The Quintessence of Intercultural Education* (Proposal for address to UNESCO 2003) 2 <<http://gypsyromatravellerleeds.co.uk/information/downloads/UNESCOForReal.doc>> [last accessed 20/02/13]

¹⁴ Arthur Ivetts Ibid 2

¹⁵ Ibid

¹⁶ Margaret Brearley, *Roma/Gypsies of Europe: a persecuted people* (Institute for Jewish Policy Research 1996) 3 <<http://abs.sagepub.com/content/45/4/588.full.pdf+html>> [last accessed 20/02/13]

countries: political upheaval and economic instability. When countries are facing internal problems such as these, it is both easy for minority populations to become scapegoats and unlikely that there will be significant resources and popular will available to remedy minority disadvantage.

The consequences of this suspicion and mistrust are still in evidence today with the Roma being perceived, almost universally, as “the problem”.¹⁷ Across Europe there is still pervasive racism towards, and discrimination against, the Roma:¹⁸ “In social and educational policy they are either forgotten about or are treated in a way which frequently results in discriminatory provision. Their social exclusion is fortified by negative responses from the non-Roma world in most aspects of their daily lives and which betray common deeply held prejudices based on erroneous historical stereotypes ... as to the character of the Roma people.”¹⁹ In consequence, the vision for an integrated society depends on a requirement, if not a demand, for significant change by the Roma themselves. Successful integration of the Roma is thus seen as conditional on ‘them’ changing to fit in with the ideals of the majority society.

Additionally, it is worth noting that educational problems experienced by the Roma in Europe are more acutely present in less developed countries.²⁰ Largely as a result of economic coercion and the Communist industrial drives, the overwhelming majority of the “Roma in

¹⁷ There are many newspaper reports demonstrating such sentiments but see for example: <<http://praguemonitor.com/2009/04/22/rising-extremism-and-roma-problem>> [last accessed 20/02/13] <<http://www.dailymail.co.uk/news/worldnews/article-1312583/Cameron-lends-Sarkozy-support-row-Roma-gypsies-expulsion-rages.html>> [last accessed 20/02/13]

¹⁸ See the News archives of the European Roma Rights Centre for numerous examples.

¹⁹ Arthur Ivetts Op Cit 2

²⁰ Although Roma issues, most often related to immigration status and popular fear of crime, in Western European countries such as France and Italy receive more publicity here in the UK. See for example: BBC News ‘Vigilantes burn Roma camp in Marseille, France’ 28/09/12 < <http://www.bbc.co.uk/news/world-europe-19756468>> [last accessed 03/03/13]; Angelique Chrisafis ‘Roma raids intensify in France as Socialists seek ways to end PR disaster’ *The Guardian* 21/08/12 < <http://www.guardian.co.uk/world/2012/aug/21/roma-raids-france-francois-hollande>> [last accessed 03/03/13]; Tom Kington ‘68% of Italians want Roma expelled – poll’ *The Guardian* 17/05/08 < <http://www.guardian.co.uk/world/2008/may/17/italy>> [last accessed 03/03/13]

Eastern Europe now live on the fringes of the cities and towns, usually in concentrated groups.”²¹ As Istvan Pogany has said, “all too often Gypsies are to be found in overcrowded tenements in the poorer parts of towns and cities across Central and Eastern Europe. In rural areas, Gypsies frequently occupy substandard houses many of which are located, pariah-like, at the edge of villages.”²² Pogany further notes that “the situation of the Roma has worsened dramatically since the collapse of Communism in Eastern Europe.”²³

While the type of upheaval associated with the fall of Communism might be said to logically result in disadvantage and strife for the citizenry, such trouble should really only be of temporary duration. For example, the accession of all of the Eastern European countries to the European Union was conditional upon a number of agreements relating to human rights protection, including some specifically targeted at the Roma.²⁴ In theory then, many of the hardships endured by the Roma populations in these countries should have been overcome, at least substantially, before EU membership was granted. However, despite the numerous benefits that EU membership has brought to the countries of Eastern Europe, minority groups such as the Roma have continued to experience disadvantage and discrimination.²⁵

This is not to say that the situation of the Roma has been completely overlooked. For example, in a report to the Council of Europe, Rapporteur Josephine Verspaget highlighted the contemporary position of disadvantage experienced by many Roma:

²¹ István Pogány Op Cit 7

²² István Pogány, *The Roma Cafe* (Pluto Press 2004) 1

²³ Where the right to work was enshrined in the political ethos. As István Pogány has commented: “Since 1990, in the transition from command to market economies, Roma poverty and social exclusion have worsened dramatically, swiftly reversing the painstaking socio-economic gains experienced by most Gypsies during the socialist era.” in István Pogány, ‘Refashioning rights in Central and Eastern Europe’ (2004) 10(1) *European Public Law* 87

²⁴ Accession of new Member States to the European Union (EU) is governed by Article 49 of the EU Treaty and by the ‘Copenhagen criteria’ (as enunciated in the June 1993 Declaration of the European Council in Copenhagen. The specific requirements for accession, with emphasis on those countries under particular consideration here, will be discussed later in this thesis.

²⁵ An issue that will be discussed in depth in Chapter 3

“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 expectancy ... If nothing is done, the situation for most Gypsies will only worsen in the next generation.”²⁶

This is not the only recognition at an international level of the particular disadvantage experienced by the Roma. It was noted in a 2003 World Bank report:

“Roma are the most prominent poverty risk group in many of the countries of Central and Eastern Europe. They are poorer than other groups, more likely to fall into poverty, and more likely to remain poor. In some cases poverty rates for Roma are more than 10 times that of non-Roma. A recent survey found that nearly 80% of Roma in Romania and Bulgaria were living on less than \$4.30 per day ... Even in Hungary, one of the most prosperous accession countries, 40% of Roma live below the poverty line.”²⁷

Despite such comments about the contemporary disadvantage suffered by the Roma, comments which it can be seen have been made at a high international level, actual progress seems to be slow. For example, Aidan McGarry has recently reiterated that “Roma are one of the most discriminated and marginalized groups in the European Union.”²⁸ Indeed, the

²⁶ Parliamentary Assembly of the Council of Europe Report on Gypsies in Europe, 11 January 1993, Doc 6733 at para. 29 from <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc93/EDOC6733>. [last accessed 20/02/13]

²⁷ Dena Ringold, Mitchell Orenstein and Erika Wilkens, *Roma in an Expanding Europe: Breaking the Poverty Cycle* (International Bank for Reconstruction and Development 2003) 1 – 2 from István Pogány, Op Cit n22 8

²⁸ Aidan McGarry ‘The dilemma of the European Union’s Roma policy’ (2012) 32 *Critical Social Policy* 126, 132. Also see European Roma Rights Centre/European Roma Policy Coalition (ERRC/ERPC) (2011) ‘EU Framework Weak on Discrimination Against Roma’, 5 April, Budapest.

European Commission noted in 2011 that “Roma in Europe [still] face prejudice, intolerance, discrimination and social exclusion in their daily lives.”²⁹

Similarly, according to a 2013 statement by the European Roma Rights Centre:

“Discrimination, social exclusion and poverty dominate the lives of many of the estimated 10 to 12 million Roma living in the European Union and candidate countries today, nearly half of whom are children and youth.”³⁰

It is deeply troubling that, despite such widespread recognition of the situation of the Roma in Europe, discrimination and disadvantage are still rife today. In response to this social and political reality, the Roma have “augmented their own way of life with numerous cultural adaptations that have been an essential response for their survival in the hostile circumstances in which they have so frequently found themselves. Roma communities now frequently exhibit isolationism, ethnic denial, self-imposed marginalisation and a deeply hidden inner pride in their ethnic and cultural heritage.”³¹

Roma in the Educational Systems of Europe

It has been suggested that most of the Roma’s contemporary problems are indubitably rooted in poor education and the resultant limitations in the job market.³² It is for this reason submitted that a comprehensive and effective education is vital if the Roma are to be able to overcome the disadvantages discussed above. According to Mark Halstead there are several reasons why education is key to achieving equality for minority groups such as the Roma:

²⁹ European Commission ‘An EU Framework for National Roma Integration Strategies Up to 2020’ COM(2011) 173 at 1

³⁰ ERRC ‘DARE-Net project: Desegregation and Action for Roma in Education-Network’ 22/12/13 <<http://www.errc.org/article/dare-net-project-desegregation-and-action-for-roma-in-education-network/4094>> [last accessed 28/02/13]

³¹ Csaba Fényes, Christina McDonald and Anita Mészáros (eds), *The Roma Education Resource Book* (1999) 1 <<http://www.osi.hu/iep/minorities/ResBook1/ResBookAll.htm>> [last accessed 20/02/13]

³² Zoltan Barany, *The East European Gypsies: Regime Change, Marginality and Ethnopolitics* (Cambridge University Press 2002) 317

1. “First, the school system is the earliest mainstream social institution with which young people come into sustained contact, and the extent to which schools respect and accommodate diversity sends out strong signals about the values which society as a whole places on diversity.
2. Secondly, educational attainment levels are a key determinant of opportunities for finding employment and improving future life chances.
3. Thirdly, schools provide an opportunity to develop bonds and friendships across different ethnic and faith groups, and the education curriculum is itself a mechanism by which pupils are able to develop an understanding of the different groups within their community.”³³

While the specific educational difficulties experienced by Roma children in Europe will be discussed in detail in Chapter Three of this thesis, each of them is directly related to the more general example of discrimination and disadvantage discussed above. A knock-on effect of living in isolated settlements is that many Roma have “found themselves either far from school or having to attend schools which offer very low-quality accommodation.”³⁴ Perhaps the most disturbing example of such educational isolationism is segregated schooling – where the children may be placed in special schools for those with mental impairments or compelled to attend ‘Roma only’ schools which offer poor facilities and a significantly reduced syllabus.³⁵ According to Claude Cahn, “around Europe, from Spain to Italy to Greece and in nearly all of the countries of the former Communist Block, Roma live and are schooled segregated from non-Roma.”³⁶ In a report from the European Commission

³³ J Mark Halstead, ‘British Muslims and Education’ 104 in Tufyal Choudhury (ed), *Muslims in the UK: Policies for Engaged Citizens* (Open Society Institute 2005)

³⁴ Save the Children, *Denied a Future? The Right to Education of Roma, Gypsy and Traveller Children* (Save the Children UK 2001) 7

³⁵ See for example: European Roma Rights Centre *Persistent Segregation of Roma in the Czech Education System* (ERRC 2011)

³⁶ Claude Cahn, ‘Human Rights and the Roma: What’s the Connection?’ from Claude Cahn (ed), *Roma Rights: Race, Justice and Strategies for Equality* (International Debate Education Association 2002) 18

against Racism and Intolerance which was presented to the European Court of Human Rights during *D.H. and Others v the Czech Republic*³⁷ concern was still being raised that:

“Roma children continued to be sent to special schools which, besides perpetuating their segregation from mainstream society, severely disadvantaged them for the rest of their lives ... parents making such decisions continued to lack information concerning the long-term negative consequences of sending their children to such schools, which were often presented to parents as an opportunity for their children to receive specialised attention and be with other Roma children.”³⁸

In addition to this problem of segregation, Roma children must also overcome overt racism on the part of teachers and fellow pupils as well as adapt to learn from a curriculum which either fails completely to reference Roma culture or else serves only to reinforce negative stereotypes.

It must be acknowledged that some steps have been taken to try and alleviate the educational disadvantage suffered by Roma children. However, as Claude Cahn concludes, to date, actions undertaken have been too weak and too few to make significant inroads, due to the massive problem of contemporary anti-Romani racism in Europe, as well as the legacies of generations of discrimination and racism against Roma.³⁹

1.3 Geographical Scope: Country Specific Information

As the preceding section makes clear, the Roma encounter prejudice and hostility in all walks of life and are almost universally viewed as an unwanted Other. The Roma seem to be

³⁷ 57325/00, Council of Europe: European Court of Human Rights, 13 November 2007 <<http://www.unhcr.org/refworld/docid/473aca052.html>> [last accessed 20/02/13]

³⁸ *D.H. and Others v. Czech Republic*, 57325/00, Council of Europe: European Court of Human Rights, 13 November 2007, para 25 available at: <http://www.unhcr.org/refworld/docid/473aca052.html> [last accessed 20/02/13]

³⁹ Claude Cahn Op Cit 19

outsiders in every society. Of course, this means that the problems experienced by the Roma are truly global problems. In order to narrow down the focus of this thesis to allow for a thorough and accurate investigation and the formation of potential solutions that could be applied more widely, it was decided to concentrate on four specific countries.

These four countries – the Czech Republic, Hungary, Romania and Slovakia – were selected because they exemplify particular challenges when it comes to educational provision for Roma children. Although the human rights landscape in each of these countries will be discussed in detail later, it is useful to note from the outset key facts relating to Roma population⁴⁰ and public education spending:

Czech Republic

- Total Population: 10.5 million;⁴¹
- Roma Population: 140,000⁴² (1.3%) to 300,000;⁴³ (3%)
- Public Spending on Education: 4% of GDP.⁴⁴

The Czech Republic has been the subject of significant litigation with regards to the education of the Roma⁴⁵ and so has also been exposed to fairly considerable political, media and popular scrutiny.

⁴⁰ Due to potential issues of ‘critical mass’ when it comes to the viability of implementing measures designed to assist the Roma population.

⁴¹ Czech Republic Country Profile from the website of the European Union http://europa.eu/about-eu/countries/member-countries/czechrepublic/index_en.htm [last accessed 20/02/13]

⁴² Census determination of Roma population. There is no racial census in the Czech Republic so this figure is based on those who officially declare themselves to be Romani speakers. NationMaster, Czech Language Statistics, available at <<http://www.nationmaster.com/country/cz-czech-republic/lan-language>> [last accessed 20/02/13]

⁴³ Upper estimate of the Roma Education Fund: Roma Education Fund ‘Advancing Education of Roma in Czech Republic’ 9 (2007) available at http://www.romaeducationfund.hu/documents/Czech_report.pdf; see also *Romani World* ‘The Impact of Irresponsible Human Resources Planning on the Economies of Central Europe’ 18/03/03 <<http://www.romaniworld.com/ecopr-1.htm>> [last accessed 20/02/13]

⁴⁴ The most recent figures available as to public expenditure on education in the Czech Republic are from 12 January 2012 and are available on the website of the European Commission at <[http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Public_expenditure_on_education,_2008_\(1\)_\(%25_of_GDP\).png&filetimestamp=20111117102037](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Public_expenditure_on_education,_2008_(1)_(%25_of_GDP).png&filetimestamp=20111117102037)> [last accessed 20/02/13]

Despite, or perhaps because of this, the Roma Education Fund commented back in 2007 that “the education of Roma in the Czech Republic has shown visible improvement lately.”⁴⁶ This is a surprisingly bold claim, seemingly at odds with general international opinion⁴⁷ and evidence presented to the European Court of Human Rights, and thus one that necessitates examination, both in terms of how any progress might be being achieved and also with regard to the efficacy of EU-level monitoring mechanisms. An examination of the education of Roma children in the Czech Republic will unsurprisingly involve a detailed consideration of segregated education, a topic of the utmost importance in the context of this thesis as the difference between this and ‘separate but equal’ education will be considered in detail in Chapters Four and Five.

Hungary

- Total Population: 10 million;⁴⁸
- Roma Population: 190,046 (1.9%)⁴⁹ to 600,000 (5.9%);⁵⁰

⁴⁵ Most notably in the *DH and Others* case mentioned earlier in this chapter, with this and other legal challenges being discussed more fully in Chapters 3 and 4.

⁴⁶ Roma Education Fund (2007) *Advancing Education of Roma in the Czech Republic* (Country Assessment and the Roma Education Fund’s Strategic Directions) 8

⁴⁷ For example, Thomas Hammarberg, the Council of Europe’s former Commissioner for Human Rights, commented “with thousands of Roma children effectively excluded from the mainstream education system in the Czech Republic and condemned to a future as second class citizens every year ... it is now time to speed up the implementation of the inclusive education agenda” in Thomas Hammarberg *Human Rights of Roma and Travellers in Europe* (Council of Europe 2012); see also Paulo Santiago, Alison Gilmore, Deborah Nusche and Pamela Sammons *OECD Reviews of Evaluation and Assessment in Education: Czech Republic* (Organisation for Economic Cooperation and Development 2012) 129; European Roma Rights Centre *Parallel Report by the European Roma Rights Centre, Life Together and the Group of Women Harmed by Forced Sterilization concerning the Czech Republic* (ERRC 2012) 3; United Nations Committee on the Rights of the Child *Concluding Observations: Czech Republic* (2 September 2011) available at <<http://www2.ohchr.org/english/bodies/crc/crcs57.htm>> [last accessed 01/03/13]

⁴⁸ Hungary country profile from the website of the European Union http://europa.eu/about-eu/countries/member-countries/hungary/index_en.htm [last accessed 20/02/13]

⁴⁹ Hungary Demographics Profile 2012 at http://www.indexmundi.com/hungary/demographics_profile.html [last accessed 20/02/13]

⁵⁰ Upper estimate of the Open Society Institute from Open Society Institute ‘Equal Access to Quality Education for Roma’ Vol 1 (2007) available at http://www.soros.org/initiatives/roma/articles_publications/publications/equal_20070329/roma_20070329.pdf at 200 - 201 [last accessed 20/02/13] See also: Claude Cahn (2007) *The Unseen Powers: Perception, Stigma and Roma Rights* (European Roma Rights Centre) <http://www.errc.org/cikk.php?cikk=2870> [last accessed 20/02/13]; *National Geographic* ‘Roma in Hungary’ 01/06/12 <http://www.geographic.hu/index.php/fotopalyazat/fotopalyazat/nyomtathato.php?act=napi&id=794> [last

- Public Spending on Education: 5.2% of GDP.⁵¹

It has been suggested that “there is a positive attitude toward inclusive education among all important stakeholders and political structures in Hungary.”⁵² Furthermore, Hungary is particularly noteworthy for the number of Roma-centric education initiatives⁵³ that have been trialled with varied degrees of success. When considering the best means of achieving educational parity between Roma students and their majority population counterparts it is important and useful to consider initiatives that have previously been trialled. Even initiatives that ultimately failed to have the desired results may be of use if their critical flaws can be identified and remedied. Hungary is also the location of the Gandhi School, a Roma only secondary school, which will be discussed in Chapter Five in the context of the desirability or otherwise of ‘separate but equal’ education.

Romania

- Total Population: 21.5 million;⁵⁴
- Roma Population: 619,007 (3.1%)⁵⁵ to 2.5 million (11.5%);⁵⁶

accessed 20/02/13]; *The New York Times* ‘Hungary Vows to Meet EU Criteria by 2003’ 21/09/2000 <http://www.nytimes.com/2000/09/21/news/21iht-qanda.2.t.html> [last accessed 20/02/13];

⁵¹ The most recent figures available as to public expenditure on education in Hungary are from 12 January 2012 and are available on the website of the European Commission at [http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Public_expenditure_on_education,_2008_\(1\)_\(%25_of_GDP\).png&filetimestamp=20111117102037](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Public_expenditure_on_education,_2008_(1)_(%25_of_GDP).png&filetimestamp=20111117102037) [last accessed 20/02/13]

⁵² Roma Education Fund (2007) *Advancing Education of Roma in Hungary* (Country Assessment and the Roma Education Fund’s Strategic Directions) 9

⁵³ Including the foundation of the Gandhi High School in Pécs, Hungary, the only Roma-only highschool Europe. This school will be discussed further in Chapter 5.

⁵⁴ Romania country profile from the website of the European Union http://europa.eu/about-eu/countries/member-countries/romania/index_en.htm [last accessed 20/02/13]

⁵⁵ Romanian 2011 census (translated through Google Translate from the original Romanian), available at <http://www.insse.ro/cms/files/statistici/comunicate/alte/2012/Comunicat%20DATE%20PROVIZORII%20RPL%202011.pdf> [last accessed 20/02/13]

⁵⁶ Upper estimate of the Open Society Institute from Open Society Institute ‘Equal Access to Quality Education for Roma’ Vol 1 (2007) available at http://www.soros.org/initiatives/roma/articles_publications/publications/equal_20070329/2roma_20070329.pdf

- Public Spending on Education: 4.4% of GDP.⁵⁷

Romania is noteworthy for having the greatest critical mass of Roma population and also for being home to a number of Roma-centric education strategies. Indeed, the Roma Education Fund has recently suggested that the Romanian Ministry of Education has demonstrated “a commitment to improving the education of Roma through the introduction of compulsory preschool education ..., support for desegregation, promotion of intercultural curricula and affirmative action measures and financial incentives.”⁵⁸ The example of Romania therefore provides a useful opportunity to consider the efficacy of preschool education in promoting ultimate education parity and also of the role that interculturalism⁵⁹ can play in fighting discrimination and promoting inter-community understanding. Additionally, Romania has most recently faced a particular challenge due to the forced evictions of the Roma population from countries such as France.⁶⁰ This both serves to highlight the perception of the Roma as undesirable in even stable and ‘advanced’ societies like France and also illustrates the need for flexible budgeting when it comes to minority protection. Further, these cross-jurisdictional problems can offer insight into the importance of a unified approach to tackling minority issues, an approach that might be best spearheaded by a transnational authority such as the EU or the United Nations.

Slovakia

at 342 - 343 [last accessed 20/02/13] See also: *Romanian Times* 02/03/12 ‘More Gypsies in Romania Census Shows’ http://www.romaniantimes.at/news/General_News/2012-02-03/19571/More_gypsies_in_Romania_census_shows [last accessed 20/02/13]; *EU Business* 22/09/10 ‘Romanian President asked France to stop Roma expulsions’ <http://www.eubusiness.com/news-eu/romania-france-roma.68r> [last accessed 20/02/13]

⁵⁷ The most recent figures available as to public expenditure on education in Romania are from 12 January 2012 and are available on the website of the European Commission at [http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Public_expenditure_on_education,_2008_\(1\)_\(%25_of_GDP\).png&filetimestamp=20111117102037](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Public_expenditure_on_education,_2008_(1)_(%25_of_GDP).png&filetimestamp=20111117102037) [last accessed 20/02/13]

⁵⁸ Roma Education Fund (2011) *Country Assessment: Romania* (Roma Education Fund Country Report Series)

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⁵⁹ What this thesis would term multiculturalism, although the distinction between the two terms and the possible desirability of a move towards speaking in terms of ‘interculturalism’ will be discussed in detail in the following chapter.

⁶⁰ See for example Yasha Maccanico (2011) *Collective expulsions of Roma people undermines EU’s founding principles* (Statewatch Analysis) and <http://www.guardian.co.uk/world/2012/aug/09/french-police-roma-camp-repatriations> [last accessed 20/02/13]

- Total Population: 5.4 million;⁶¹
- Roma Population: 89,920 (1.7%) to 390,000;⁶² (7.3%)
- Public Spending on Education: 3.6% of GDP.⁶³

According to the Roma Education Fund, “while the Slovak education system can boast various achievements, it also features some serious systemic weaknesses that affect Roma children.”⁶⁴ Despite the apparent openness of the Slovak education system to adopt initiatives that would aid the Roma – scholarships and free meals, teaching assistants, per capita financing and preparatory classes etc – it seems that the “education system has a severe and built-in systemic problem that brings about extensive, up-front discrimination against Roma students: a large percentage ... are de facto segregated in special schools.”⁶⁵

Ultimately then, while these four countries are clearly not the only countries where the Roma suffer discrimination and educational disadvantage, they each offer excellent examples of the kind of difficulties faced by Roma children and also of the various attempts that have been made to remedy the situation. A detailed examination of the situation in these four countries

⁶¹ Slovakia country profile from the website of the European Union http://europa.eu/about-eu/countries/member-countries/slovakia/index_en.htm [last accessed 20/02/13]

⁶² While official census figures have the Roma population as being 89,920 (1.7%), figures provided by the Open Society Institute indicate the population to be far greater. Open Society Institute ‘Equal Access to Quality Education for Roma’ Vol 2 (2007) available at http://www.soros.org/initiatives/roma/articles_publications/publications/equal_20071217/equal_20071218.pdf at 413 414 [last accessed 20/02/13]

⁶³ The most recent figures available as to public expenditure on education in Slovakia are from 12 January 2012 and are available on the website of the European Commission at [http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Public_expenditure_on_education,_2008_\(1\)_\(%25_of_GDP\).png&filetimestamp=20111117102037](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Public_expenditure_on_education,_2008_(1)_(%25_of_GDP).png&filetimestamp=20111117102037) [last accessed 20/02/13]

⁶⁴ Roma Education Fund (2007) *Advancing Education of Roma in Slovakia* (Country Assessment and the Roma Education Fund’s Strategic Directions) 8; Amnesty *Still separate, still unequal: Violations of the right to education for Romani children in Slovakia* (Amnesty International 2007) <http://www.right-to-education.org/sites/r2e.gn.apc.org/files/Slovakia_Still_Separate_Still_Unequal.pdf> [last accessed 01/02/13]

⁶⁵ Ibid

will therefore serve as a useful model that can be transposed to other countries in which the Roma population are experiencing similar difficulties.

1.4 The International Protection of Human Rights

As Claude Cahn has commented, “although human rights are universal, human rights abuses frequently fall disproportionately against certain groups.”⁶⁶ The Roma are one such group and Zoltan Barany has suggested that “the unique situation of the Roma lies in the fact that they are a transnational, non-territorially based people who do not have a ‘home state’ to provide a haven or extend protection to them.”⁶⁷ One of the central aims of this thesis is therefore to establish a means by which the human rights of the Roma can be better guaranteed at both an international and a domestic level. Although the primary concern of this thesis is the right to education, it must be recognised that education is just one of numerous internationally guaranteed human rights and so it cannot be looked at in the abstract. In order to analyse the best means by which to guarantee education, that particular right must be firmly situated within the mechanism for guaranteeing human rights in general.

A Multicultural Society

In Chapter Two the analysis of international rights protection will begin with a discussion of the kind of societal structure best able to facilitate such guarantees of human rights. All too often, particularly in Central and Eastern Europe, “national and ethnic minorities have been viewed as a threat to the ‘purity’, unity of purpose or historic mission of the state.”⁶⁸ It is against this background of nationalism that discrimination against the Roma flourishes and

⁶⁶ Claude Cahn Op Cit 18

⁶⁷ Zoltan Barany, *The East European Gypsies: Regime Change, Marginality and Ethnopolitics* (Cambridge University Press 2002) 2

⁶⁸ István Pogány Op Cit 79

so, it is submitted, a more unified, multicultural⁶⁹ society is the best setting in which to protect minority groups.

This idea as to the desirability of a unified society was recognised in the context of the Roma rights movement at the first Romani congress of the European Union in 1994:

“We are European citizens and as such we must have free access in Europe. There must be integration of the minorities into Europe, yet still maintaining their individual cultures. Europe is multi-cultural, multi-language, multi-nationality, etc., and the Gypsy peoples are members of the rich tapestry of this European Community; our culture, language, music and art, form part of the rich tapestry of this European heritage.”⁷⁰

The above statement actually raises an important additional point in the context of this thesis: while a unified society is vital, the preservation within such a society of minority cultures is equally important.

The type of multicultural society envisioned by this thesis is clearly not present in any of the four countries. As Istvan Pogany has commented, “the liberal, pluralist ideology which underpins modern international human rights instruments is difficult to reconcile with the nationalistic, exclusivist political and social currents that are to be found, to some degree, in every post-Communist state.”⁷¹ There appears in fact to be a lack of willingness at both a governmental and a popular level in Eastern Europe to embrace the differing minority cultures which exist within each nation. Such an attitude will hamper integration since:

⁶⁹ Or intercultural

⁷⁰ Gypsy Council for Education, Culture, Welfare and Civil Rights (1994) *The first Romani Congress of the European Union* Seville 18 – 21 May 1994 from Helen O’Nions, Op Cit 18

⁷¹István Pogány Op Cit 79

“national governments operate under a pervasive lack of political will for Roma integration, and the European authorities advocate and invest in a formalistic application of minority rights, while all ignore the core social tension around the issue of Roma integration. This social tension ... forms a powerful shield against the successful application of legal norms and effective social policies for Roma inclusion”⁷²

It is acknowledged that there has been some limited recognition of the importance of culture and multiculturalism at an international level. The Council of Europe’s Framework Convention, for example, affirms that “a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity.”⁷³ The Preamble goes on to state that “the creation of a climate of tolerance and dialogue is necessary to enable cultural diversity to be a source and a factor, not of division, but of enrichment for each society.”⁷⁴ However, such theoretical ideals have yet to be practically applied and this thesis will, in Chapter Two, identify the form that a truly multicultural society must take if the rights of minorities are to be fully guaranteed.

Group Rights

After establishing the best means by which a multicultural society might be achieved, this thesis will necessarily move on to discuss whether the functioning of such a society will require an alternative approach to human rights protection. It will be demonstrated in Chapter Two that the current focus of international rights protection is the individual, with each person being said to be equally deserving of the full remit of recognised human rights.

⁷² Iskra Uzunoa ‘Roma integration in Europe: Why minority rights are failing’ (2010) 27(1) *Arizona Journal of International & Comparative Law* 283 – 323, 285

⁷³ Preamble to the Framework Convention

⁷⁴ *Ibid*

However, such an approach arguably fails to recognise the inherent differences that exist between people as well as the fact that equal treatment does not always result in equal outcome. This idea is of course illustrated by the fact that the Roma continue to suffer disadvantage and discrimination when compared to members of the majority population even though, as individuals, the Roma are theoretically afforded the very same range of human rights as everyone else. It seems to follow in fact that minorities such as the Roma actually suffer discrimination as a result of their group membership rather than as a result of any individual characteristic of their own. This, coupled with the obvious group element that recognition of multiculturalism must necessarily entail, seems to suggest that some means of group rights protection may be desirable. This thesis will therefore examine the theory of group rights and assess whether a group rights approach to human rights protection for the Roma would be practical or even desirable. Ultimately, this thesis will argue against any substantial strengthening of group rights since, it will be submitted, there are more appropriate means of better guaranteeing the rights of Roma children.

Children's Rights

Although group rights are one potential alternative means by which the human rights of the Roma might be better protected, it is suggested that a more appropriate alternative approach exists in the form of greater recognition of children's rights. While a strengthening of group rights carries the inherent danger of the group disempowering vulnerable individuals such as children, a children's rights approach would serve to keep the child as the focus of rights protection and so avoid him/her becoming a mere instrument of his/her parents, group or culture. One of the central contentions of this thesis is that a principal purpose of every education system should be to facilitate the development of each child into a competent, autonomous adult who is secure in their own culture while at the same time able to function

and compete in majority society if they so wish. It seems to logically follow therefore that the right to education should belong to the children themselves rather than to parents, guardians or educators. This thesis suggests that children are individuals capable and deserving of being rights holders rather than merely objects of their parents, their culture or their society. As Maud de Boer-Buquicchio, the Deputy Secretary General of the Council of Europe, has commented: “Children are not ‘mini persons’ with ‘mini rights’.”⁷⁵ In order to position each child as the holder of his or her own right to education, it is submitted that a greater international recognition of children’s rights is required. This thesis will therefore continue on in Chapter Two to discuss the current international status of children’s rights and to critically assess whether an increased recognition of children’s rights would help to remedy the disadvantage suffered by Roma children in Europe.

1.5 The Right to Education

Once the ideal environment in which to guarantee minority rights has been established, this thesis will move on in Chapter Three to examine in detail the right to education. This examination will necessarily involve first considering the purpose of the right to education. It is contended that education should enable opportunity and the realisation of potential, but it is also important to the development of self-esteem and identity.⁷⁶ Furthermore, if delivered sensitively and appropriately, education can serve to break down barriers and prejudice between communities. As Jean-Pierre Liegeois states, “the ultimate goal of any school is to give each child the means and tools he requires in order to achieve autonomy”.⁷⁷ It is for this reason that the mainstream education system must be sensitive to the needs of minority

⁷⁵ Maud de Boer-Buquicchio, ‘Preface’ in Geraldine Van Bueren, *Child Rights in Europe* (Council of Europe Publishing 2007) 11

⁷⁶ Kristin Henrard, ‘Education and Multiculturalism: the Contribution of Minority Rights?’ (2000) 7 *Int. Journal on Minority and Group Rights* 393, 394

⁷⁷ Jean-Pierre Liegeois, *The Education of Gypsy and Traveller Children* (University of Hertfordshire Press 1993) 208

cultures, instructing pupils about the foundations of their identity rather than alienating them.⁷⁸ In keeping with the earlier assertion that the child as an individual should be the principal rights holder when it comes to education, it is contended that a key purpose of any education system should be to facilitate the growth of each child into an autonomous individual who is secure in their own culture whilst also able to compete fully within mainstream society.

After establishing the desired purposes of the right to education, this thesis will move on to consider how best to allow the minority students access to education on an equal footing with the majority population whilst still ensuring that the education they are provided with is culturally sensitive as well as academically vigorous.

It is now generally accepted that the cultures of religious and ethnic minorities contribute to the richness of a pluralistic society and, equally, that one of the most important rights that such minority groups hold is their right to preserve their separate identity.⁷⁹ Jane Fortin suggests that such a right cannot be fully exercised unless minority groups are able to maintain cultural continuity “by educating their children to understand and respect their own customs, religion and culture.”⁸⁰ Culturally sensitive education of this sort serves to ensure that traditions are not lost and that group identity is passed down from one generation to the next. Difficulty lies in identifying and implementing an educational system which provides this level of cultural sensitivity whilst also ensuring that minority children are educated in a way, and to a level, which allows them to coexist peacefully and equally with the majority population of their home state. It will thus be demonstrated that the rights based approach to

⁷⁸ Helen O’Nions Op Cit 133

⁷⁹ Jane Fortin, *Children’s Rights and the Developing Law* (3rd ed, Cambridge University Press 2009) 406

⁸⁰ Ibid

education must be formulated so that a democratic pluralistic society⁸¹ can be ensured wherein minority culture and identity is respected whilst the minorities themselves join with the majority population in accepting a set of shared values for the society as a whole. Where separation is to occur, it must never become segregation and, equally, measures must be taken⁸² to guarantee social cohesion but never total assimilation.

In light of this discussion, this thesis will then move on to critique the current international formulation of the right to education. The basic right of every child to an education is laid down in a variety of international instruments⁸³ and in Chapter Three of this thesis these instruments will be considered in turn to determine the level of protection that they provide for the educational needs of children and their parents, what obligations they place on the states parties concerned, and any areas that exist for improvement which may help to redress the disadvantage currently suffered by Roma children in Europe.

In undertaking this analysis of the various international instruments, this thesis will present a sliding scale of levels of accommodation in education that may be offered to minority students. At one end of this scale, the lowest level of accommodation, would be legal provisions that guarantee basic access to education but which go no further. This could take the form of a straightforward non-discrimination provision stating that no one shall be denied the right to education. The reason that this is a low level of minority accommodation is that it fails to recognise that equality of opportunity does not always equal equality of outcome and, also, that minority groups often need extra help or additional means of assistance due to their pre-existing disadvantage. At the extreme end of the accommodation scale, is a legal mandate for 'separate but equal' education that places a child's culture at the heart of education. Such

⁸¹ As described by Fortin Op Cit 406

⁸² For example, ensuring the learning of the majority language

⁸³ Helen O'Nions Op Cit 160

a form of education would involve minority students being educated in separate, culturally-sensitive schools that reflected their particular educational needs but also equip them to compete in mainstream society should they wish to do so. The level of education provided in such schools would be comparable with that of mainstream schools and as such a 'separate but equal' education system which facilitated intercommunity dialogue and understanding would be very different from segregated education.

Of course, the efficacy of each of the various human rights instruments can only be judged having in mind the success of implementation. It is therefore vital to consider the means by which each of the four countries have incorporated international standards on the right to education into their domestic laws and policies.

1.6 Education at the Domestic Level

This thesis will, in Chapter Four, move on to analyse the domestic educational law and policies of each of the four European countries. The same type of thematic analysis as discussed above will be used to determine the level of minority accommodation provided by the relevant domestic law and policy. The domestic policy of each of the four states will therefore be analysed to determine, first, whether it is compatible with the international educational obligations which the state must meet and, secondly, where exactly each state falls on the scale of minority accommodation. Throughout the analysis, the practical educational difficulties identified in Chapter Three as being currently suffered by Roma children in Europe will be borne in mind so as to determine whether educational policies which might, on the face of it at least, appear to be adequate or even progressive are actually so effective in practice.

Once the various domestic policies have been analysed so as to determine whether each country is meeting its international obligations and, if so, why Roma children are still experiencing practical educational disadvantage, this thesis will move on to consider alternative means by which the right to education might be practically achieved in Europe. This consideration will take the form of two quite different case studies, the first of traveller education in England and the second of indigenous education in Canada. The case studies will serve to highlight good practice and innovative ideas that could be adopted elsewhere in Europe as well as to identify any specific flawed practices which must be avoided. These two particular case studies were selected since they provide detailed insight into two very different means of accommodating minority groups within the educational system. While traveller education in England provides an example of minority accommodation within the mainstream, indigenous education in Canada takes the form of ‘separate but equal’ schooling. While the political and social situation in both England and Canada is very different from that experienced by the Roma in the four countries, each of the case studies does serve to present a potential new approach to the education of minorities that could, perhaps with certain adaptations, be implemented in each of them.

1.7 Concluding Remarks

The call for equality for the Roma is getting louder. With respect and regulations concerning human rights and equal opportunities at the forefront of thinking in the modern world, it is a sad reflection on mainstream society that the Roma continue to be discriminated against and marginalised. The treatment of “the Roma population in both European Union and accession countries has become a litmus test of a humane society.”⁸⁴ They represent “a picture of

⁸⁴ Henry Kamm, ‘Havel call Gypsies “Litmus Test”’ *New York Times* (New York 10 December 1993) 11 <<http://www.nytimes.com/1993/12/10/world/havel-calls-the-gypsies-litmus-test.html>> [last accessed 20/02/13]

widespread suffering that is now one of the most pressing political, social and Human Rights issues facing the enlarged Europe.”⁸⁵

Education is rightly held up as being one of the vital human rights and as a right worthy of the highest level of protection, but, until words are matched by deeds, the right to education can never be considered to be fully realised:

“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.”⁸⁶

The disadvantage and discrimination suffered by the Roma has been allowed to continue for far too long. The full realisation of their right to education is vital if Roma children are to be able to free themselves from the cycle of poverty and deprivation that has historically trapped their people. It is only through education and the knock-on social benefits that accompany it that the Roma community as a whole can achieve social and political parity with the rest of their European neighbours.

⁸⁵ European Commission *The Situation of Roma in an Enlarged EU* (European Commission Publications Office 2004) 10

⁸⁶ CSCE per Deputy Secretary General of the Council of Europe *Human Dimension Seminar on Roma in the CSCE Region* 1994 CSCE, Warsaw para 9 <www.osce.org/odihr/19704> [last accessed 20/02/13]

GUARANTEEING THE RIGHTS OF MINORITY CHILDREN IN A MULTICULTURAL SOCIETY

2.1 Introduction

While the right to education is the central focus of this thesis, it is important to recognise from the outset that it does not exist in isolation and is but one of many human rights protected by international law. Before an effective analysis of the right to education can be carried out it is therefore vital to establish the wider context in which the right to education must operate. Once the current human rights environment has been thus established, it is possible to move on to consider any potential alternative means by which the full remit of internationally protected rights might be better guaranteed. It is only after identifying the most appropriate means by which the complete spectrum of human rights can best be guaranteed for previously disadvantaged minority groups such as the Roma that the right to education can be properly contextualised and evaluated.

Given the level of disadvantage and discrimination detailed in Chapter One of this thesis, it is clear that Roma children in Europe are being failed. This thesis contends that one of the key reasons behind this failure is that each of the four countries follows a traditional liberal democratic approach to human rights protection.⁸⁷ This thesis will argue that a liberal multicultural approach to society which embraces critical pluralism is the most effective way

⁸⁷ Where it is sufficient for each individual to be considered 'a citizen' and so no one need be afforded additional, specific rights.

to guarantee a cohesive national community of benefit to both minorities and majority society.⁸⁸

Education is crucial to this desire for a cohesive society. As Mark Halstead suggests, there are several reasons why education is so important for an integrated, cohesive society:

1. “First, the school system is the earliest mainstream social institution with which young people come into sustained contact, and the extent to which schools respect and accommodate diversity sends out strong signals about the value which society as a whole places on diversity.
2. Secondly, educational attainment levels are a key determinant of opportunities for finding employment and improving future life chances.
3. Thirdly, schools provide an opportunity to develop bonds and friendships across different ethnic and faith groups, and the education curriculum is itself a mechanism by which pupils are able to develop an understanding of the different groups within their community.”⁸⁹

Before moving on to consider the right to education, however, this chapter will consider the extent to which the kind of multicultural society envisaged is already mandated for in international law. This will necessarily lead on to consideration of whether a liberal multicultural society necessitates the recognition of group rights.⁹⁰ While this thesis acknowledges the existence and importance of the concept of culture and the related group dynamic⁹¹ in international law, it is ultimately contended that an individual rights approach

⁸⁸ This concept will be explained in detail in the following section.

⁸⁹ J Mark Halstead, ‘British Muslims and Education’ 104 in Tufyal Choudhury (ed), *Muslims in the UK: Policies for Engaged Citizens* (Open Society Institute 2005)

⁹⁰ And, indeed, to what extent group rights are already recognised at an international level.

⁹¹ That is the importance of group membership to an individual seeking to fully realise their cultural rights.

is still to be preferred, but suggests that the current approach should be varied to include an increased recognition of children's rights.⁹²

2.2 Multiculturalism – Theoretical Interpretations

The central aim of this thesis is to establish means by which the educational disadvantage suffered by Roma children in Europe can be effectively addressed. However, given the level of general disadvantage and discrimination that the Roma population as a whole suffer,⁹³ it is clear that an approach which concentrates solely on the education systems of the four countries will be insufficient to guarantee Roma children the same level of educational opportunity and outcome that the majority of society enjoys. The key word here is society. No education system exists in a vacuum removed from the aims, realities and goals of the national society as a whole. The fact that Roma children, both historically and currently, suffer such a great degree of educational disadvantage is a clear indicator that something is amiss in society more generally. The right to education is an internationally guaranteed human right and so there should be no obstacles to accessing education in a country which is properly and effectively fulfilling its international human rights obligations. Therefore, before moving on to focus particularly on the right to education, it is incumbent to begin the substantive body of this thesis by considering the wider issue of the international protection of the rights of minorities.

The starting point for this discussion is once again the society in which Roma children are living. The Roma are a minority in Europe and so they live in societies dominated by other cultures. Unfortunately for the Roma, rather than being treated as a valuable addition to national society, they are perceived as being an undesirable 'Other' and so remain on the

⁹² To this end, the concept of children's rights will then be discussed in detail

⁹³ As described in Chapter One of this thesis.

periphery of society. This of course leads to disadvantage for the Roma as a group but it is also disadvantageous for mainstream society too. Unity of citizens leads to the most stable basis for a state where each individual, whether from a minority or from the majority population, feels engaged with state policies and institutions and so is committed to working towards individual as well as national betterment. This type of engagement can only be fully achieved within a cohesive community. According to Maleiha Malik, a cohesive community is one where:

1. “There is a common vision and all communities have a sense of belonging;
2. The diversity of people’s different backgrounds and circumstances is appreciated and positively valued;
3. Those from different backgrounds have similar life opportunities; and
4. People from different backgrounds develop strong, positive relationships in the workplace, in schools and within neighbourhoods.”⁹⁴

The type of cohesive community envisaged by Malik does not currently exist in any of the four countries. As discussed in Chapter One, the Roma are excluded from the national vision and feel disenfranchised from the national decision making process. They have little sense of belonging to their home countries as their cultural background and circumstances are not positively valued by mainstream society. Roma children do not have similar life opportunities to children from the majority population due to the educational disadvantage they suffer as well as the discrimination that the Roma as a whole face within all social, economic and political fields. As a knock-on effect of this catalogue of disadvantage and discrimination, the Roma do not get to form positive relationships with people from mainstream society.

⁹⁴ Maleiha Malik, ‘Discrimination, Equality and Community Cohesion’ 55 in Tufyal Choudhury (ed), *Muslims in the UK: Policies for Engaged Citizens* (Open Society Institute 2005)

The initial argument of this thesis is therefore that, in order to better accommodate the Roma and other minority groups as well as to ensure national stability and unity, a means by which each of the four countries can achieve a truly cohesive society must be identified. Of course, this will not be a straightforward process as it first involves identifying a theoretical conception of society that best accommodates minority groups while at the same time still protects the interests of the majority. It can be contended that Europe as a whole is a continent founded on the principle of liberal democratic nation states⁹⁵ and any theoretical conception of society that is proposed for the four countries must be compatible with this political underpinning.

The study of groups, the Roma in this case but any group in practice, “raises particular challenges for traditional liberal political theory, which finds it difficult to incorporate groups rather than individuals into discussions about rights and justice.”⁹⁶ This difficulty often manifests in minority groups, and so the individual members of these groups, not being afforded the level of rights protection that the liberal democratic idealist might expect them to receive. Such an idea might seem surprising at first but, after considering that the traditional liberal approach to the problem of minorities is to merely recognise every individual as a citizen, it becomes clear that such a liberal democratic approach is insufficient because it ignores the group dimension.⁹⁷

While adherents of the traditional liberal democratic approach to minorities would probably consider it to be culturally ‘neutral’ and so desirable as it treats everyone ‘equally’, this thesis contends that such an approach can actually lead to discrimination, disadvantage and societal fragmentation. The major problem is that, rather than being merely ‘neutral’ to cultures, the

⁹⁵ Vivien A Schmidt, *Democracy in Europe: The EU and National Politics* (Oxford University Press 2006) <<http://www.sscnet.ucla.edu/soc/faculty/favell/schmidt.pdf>> [last accessed 26/02/13]

⁹⁶ Maleiha Malik, ‘Discrimination, Equality and Community Cohesion’ 63 in Tufyal Choudhury (ed), *Muslims in the UK: Policies for Engaged Citizens* (Open Society Institute 2005)

⁹⁷ Ibid 55

traditional liberal model can actually result in assimilation, where the object is to transform the minority into some version of the majority.⁹⁸ To assimilate means “to mould, to the extent possible, the minority in the image of the dominant group, by requiring the minority to learn the language of the majority, to follow the cultural practices of the majority, and generally to adjust its social practices and rituals to conform to those of the majority.”⁹⁹ Such an approach clearly fails to take the notion of minority culture seriously and, in doing so, prevents both the individual and society in general from enjoying the benefits that a diversity of cultures can bring.

This variety of assimilation essentially results from the idea that “the universalism of individual rights is the best response to the possibility of discrimination which is inherent in any classification of people on a cultural basis – usually to some extent naturalised by a reference to race.”¹⁰⁰ It is this idea that leads to the belief that a neutral public sphere which only recognises individuals should offer a guarantee of protection. However, in its most radical form, such a belief involves uprooting people from their cultural and/or minority heritage and so sacrificing aspects of individual identity at the altar of nationhood and citizenship.¹⁰¹ A particularly disturbing example of this can be seen in the Australian policy

⁹⁸ Andrew Mason ‘Political Community, Liberal-Nationalism and the Ethics of Assimilation’ (1999) 109(2) *Ethics* 261 – 286; Will Kymlicka ‘Minority Nationalism with Liberal Democracies’ 100 – 126 in Desmond Clarke and Charles Jones (eds) *The Rights of Nations: Nations and Nationalism in a Changing World* (Cork University Press 1999); David A. Reidy ‘Pluralism, liberal Democracy and Compulsory Education: Accommodation and Assimilation’ (2001) 32(4) *Journal of Social Philosophy* 585 – 609; Brian Barry ‘Liberalism and Multiculturalism’ (1997) 4(2) *Ethical Perspectives* 3 – 14; Robert van Krieken ‘Assimilation and Liberal Government’ 39 - 47 in Tim Rowse (ed) *Contesting Assimilation* (Perth, Australian Public Intellectual Network 2005); Irene Bloemraad, Anna Korteweg & Gokce Yurdakul ‘Citizenship and Immigration: Multiculturalism, Assimilation and Challenges to the Nation-State’ (2008) 34 *Annual Review of Sociology* 153 – 179.

⁹⁹ Adeno Addis, ‘Individualism, Communitarianism, and the Rights of Ethnic Minorities’ (1992) 67 *Notre Dame L Rev* 615, 620

¹⁰⁰ Michel Wieviorka, ‘Is multiculturalism the solution?’ (1998) 21 *Ethnic and Racial Studies* 881, 894

¹⁰¹ Robert van Krieken ‘Between Assimilation and Multiculturalism: Models of Integration in Australia’ (2012) 46(5) *Patterns of Prejudice* 500 – 517; John Delany ‘Liberalism, Aboriginal Rights and Cultural Minorities’ (1991) 20(2) *Philosophy & Public Affairs* 168 – 185; Dinesh Bhugra ‘Migration, Distress and Cultural Identity’ (2004) 69(1) *British Medical Bulletin* 129 – 141; Glenda Norquay and Gerry Smyth (eds) (2002) *Across the Margins: Cultural Identity and Change in the Atlantic Archipelago* (Manchester University Press); Talal Asad

that existed until the mid-20th century whereby Aboriginal children were taken from their families, and fostered in homes or institutions, to ensure a complete break with their culture and traditions.¹⁰² Such a practice would most likely be abhorrent to the majority, but it still offers an alarming example of where such an extreme liberal democratic could lead.

While the situation for Roma children in Europe is not identical to that of the Aboriginal children mentioned above, they are still suffering extreme disadvantage, both in the field of education and elsewhere, in countries which follow a liberal democratic model that focuses on the individual. By failing to acknowledge that these Roma children are products of their culture and backgrounds, the states in question are ultimately presenting them with an impossible choice to either assimilate within the mainstream¹⁰³ or be abandoned on the periphery of society. Therefore, if the Roma and other minorities in society are to be facilitated into a cohesive community alongside the majority population, the countries under consideration here will have to move further away from an extreme liberal democratic approach to minorities.

Of course, where one extreme exists (in this case extreme liberal democracy) it is logical that an opposite extreme must also exist. In this case, the opposite extreme would be an exclusive minority rights approach whereby the rights and wants of minority groups were completely accommodated while the requirements of the national population as a whole were ignored. Even though such an approach recognises that minorities have specific requirements in order to fit within a cohesive society, it is ultimately just as unpalatable as the ‘neutral’ state that results from an extreme liberal democratic approach.

‘Multiculturalism and British identity in the wake of the Rushdie affair’ (1990) 18(4) *Politics and Society* 455 – 480.

¹⁰² For more detail on this, see: Peter Read *The Stolen Generations: The Removal of Aboriginal Children in New South Wales 1883 to 1969* (4th rev edn, 2009) <<http://indigenousartmagazine.com/upload/3282/StolenGenerations.pdf>> [last accessed 26/02/13]

¹⁰³ It is indeed arguable that Roma children may not actually be able to assimilate, even if they should wish to do so, due to language issues and racial discrimination.

This thesis therefore contends that the most effective societal model, one which accommodates both minorities and the national majority population, is ‘multiculturalism’. While multiculturalism has recently become something of a controversial term,¹⁰⁴ this thesis contends that it is still a valuable approach to guaranteeing rights protection. Although international law has yet to provide an authoritative definition of multiculturalism,¹⁰⁵ it is helpful to begin with an explanation of the ordinary meaning of the phrase:

*Multiculturalism – the acknowledgement and promotion of cultural pluralism as a feature of many societies (...) multiculturalism celebrates and seeks to protect cultural variety, for example, minority languages. At the same time it focuses on the often unequal relationship of minority to mainstream cultures.*¹⁰⁶

To add a bit more depth to the concept, multiculturalism is used as “a descriptive term implying a poly-ethnic society; an ideology that accepts that ethnic groups wish to maintain their language and cultural traditions within a state; a ‘principle for social policies’ that aims to eliminate structural disadvantages and to ensure substantial equality and access; and policies that include special institutions designed to implement the principles of participation, access and equality.”¹⁰⁷ A multicultural approach on the part of the four states is therefore desirable since it would result in an official acknowledgement that the Roma¹⁰⁸ wish to

¹⁰⁴ See, for example: Sir Trevor Phillips ‘Multiculturalism’s legacy is ‘have a nice day’ racism’ *The Guardian* 28/05/04 <<http://www.guardian.co.uk/society/2004/may/28/equality.raceintheuk>> [last accessed 02/03/13]; David Cameron ‘My war on multiculturalism’ *The Independent* 05/12/11 <<http://www.independent.co.uk/news/uk/politics/cameron-my-war-on-multiculturalism-2205074.html>> [last accessed 02/03/13]; Matthew Weaver ‘Angela Merkel: German multiculturalism has “utterly failed”’ *The Guardian* 17/10/10 <<http://www.guardian.co.uk/world/2010/oct/17/angela-merkel-german-multiculturalism-failed>> [last accessed 02/03/13]

¹⁰⁵ Indeed, this thesis contends that such a definition would actually be both impractical and undesirable due to the evolving and complex nature of the concept.

¹⁰⁶ David Jary and Julia Jary, *Harper Collins Dictionary of Sociology* (1991) from Michel Wieviorka, ‘Is multiculturalism the solution?’ (1998) 21 *Ethnic and Racial Studies* 881

¹⁰⁷ Bhiku Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (2nd edn, 2006) 3 from Alexandra Xanthaki, ‘Multiculturalism and International Law: Discussing Universal Standards’ (2010) 32 *Human Rights Quarterly* 21, 23

¹⁰⁸ And, of course, other minority groups.

maintain their language and cultural traditions while at the same time wishing to be securely situated within their national community. Such an acknowledgement would then necessitate state governments rethinking their approach to minorities demanding amendments to social policies and the restructuring of national institutions in order to encourage minority participation and facilitate equal access.

It must be acknowledged that multiculturalism is not always a popular policy approach and that some consider multiculturalism to be an inherently divisive concept on the grounds that it promotes segregation and situates religious and cultural attachments in the public sphere rather than the private.¹⁰⁹ Popular dissatisfaction with ‘multiculturalism’ as presented in news media has actually led Christian Joppke to suggest that multiculturalism has fallen out of favour in both policy and theory.¹¹⁰ It does seem true that multiculturalism has become a politically charged word (and one that has arguably taken on a life outside of its theory) and it is no doubt for this reason that ‘interculturalism’ seems to occur far more frequently now in discussion.¹¹¹ However, this seems to have been a semantic change rather than a change of substantive theory since, as Charles Taylor has demonstrated, there seems to be no difference in the concrete policies necessitated by either theory.¹¹² Taylor suggests that much of the dissatisfaction with ‘multiculturalism’ stems from a “fundamental misunderstanding of the dynamics of immigration into liberal democracies” and that ‘interculturalism’ is now being

¹⁰⁹ In France, for example, this concept that such religious and cultural attachments should not be supported or encouraged by the state and should remain firmly rooted in the private sphere is enshrined in the constitution.

¹¹⁰ Christian Joppke ‘The retreat of multiculturalism in the liberal state: theory and policy’ (2004) 55(2) *British Journal of Sociology* 237 – 257; also Han Entzinger ‘Changing the rules while the game is on: From multiculturalism to assimilation in the Netherlands’ in Y. Michal Bodeman & Gokce Yurdakul (eds) *Migration, Citizenship, Ethnos: Incorporation Regimes in Germany, Western Europe and North America* (New York, Palgrave 2006); Scott Poynting & Victoria Mason ‘The New Integrationism, the State and Islamophobia: Retreat from multiculturalism in Australia’ (2008) 36 *International Journal of Law, Crime and Justice* 230 – 246.

¹¹¹ For example: Bruce Maxwell, David Waddington, Kevin McDonough, Andree-Anne Cromier & Marina Schwimmer ‘Interculturalism, Multiculturalism and the State Funding and Regulation of Conservative Religious Schools’ (2012) 62(4) *Educational Theory* 427 – 447; Jagdish Gundara *Interculturalism, Education and Inclusion* (London SAGE 2001); Will Kymlicka ‘Multicultural States and Intercultural Citizens’ (2003) 1(2) *Theory and Research in Education* 147 – 169.

¹¹² Charles Taylor ‘Interculturalism or Multiculturalism?’ (2012) 38 *Philosophy & Social Criticism* 413 – 423.

used to assuage mainstream fears while still affording cultural protection to minorities.¹¹³ The move to talking of ‘interculturalism’ is thus understandable from a public perception point of view but does nothing to detract from the viability of multiculturalism as a theory of society. For this reason, it is argued that ‘multiculturalism’ is still a valid goal for cohesive, integrated societies to aspire to and so, in this thesis at least, a semantic change to ‘interculturalism’ will not be made.

Popular dissatisfaction and misunderstanding are, however, not the only difficulties facing those who advocate for multiculturalism. Additionally, not all cultures are amenable to multiculturalism and so Joseph Raz notes that it “is suitable in those societies in which there are several stable cultural communities both wishing and able to perpetuate themselves.”¹¹⁴ Amy Gutmann goes a step further when she suggests that a society capable of supporting multiculturalism must involve:

... mutual respect for reasonable intellectual, political and cultural differences. Mutual respect requires a widespread willingness and ability to articulate our disagreements, to defend them before people with whom we disagree, to discern the difference between respectable and disrespectable disagreement, and to be open to changing our own minds when faced with well-reasoned criticism. The moral promise of multiculturalism depends on the exercise of these deliberative virtues.¹¹⁵

It is perhaps true that the national majority population of the four countries is not yet wholly amenable to multiculturalism. After all, if the majority respected Roma culture and wished to enter into social dialogue with the Roma, then the majority of the forms of disadvantage that

¹¹³ Ibid 414

¹¹⁴ Joseph Raz, ‘Multiculturalism: A Liberal Perspective’ (Winter 1994) *Dissent* 79 <<http://www.dissentmagazine.org/article/?article=2341>> [last accessed 26/02/13]

¹¹⁵ Amy Gutmann, ‘Introduction’ (1992) in Charles Taylor *Multiculturalism and ‘The Politics of Recognition’* (Princeton University Press 1992) 24

the Roma currently suffer would no longer exist.¹¹⁶ However, it is only through a multicultural approach to society that countries can achieve a fully cohesive society and, as will be discussed later, also meet the intention as well as the letter of their international human rights obligations. Additionally, as Michel Wieviorka has suggested, “in reality multiculturalism –meaning the existence of cultural identities under tension in a democratic society which they may possibly contribute to destructuring – is not so much the problem leading to a divisive society, as a response to the modern production of identities with a proposal for a political and institutional procedure for dealing with them.”¹¹⁷

The exact role of culture within multiculturalism is perhaps not always clear. In his analysis of Roger Sandall’s critique of the “culture cult”,¹¹⁸ George Crowder strongly supports Sandall’s attack on “cultural relativism or ‘culturalism’, the idea that there are no moral universals, that morality is wholly relative to cultural outlook, and that each culture is morally authoritative.”¹¹⁹ Any attempt to suggest that a practice is ethically right simply because it is culturally permissible does seem foolhardy and also potentially dangerous since it could be used to justify the mistreatment of people. However, Sandall includes ‘multiculturalism’ within his attack¹²⁰ and this is nowhere near such a persuasive argument. Crowder suggests that there are in fact two main forms of multiculturalism – radical multiculturalism that stems from the culturalist or relativist view¹²¹ (and arguably lacks the requirement for mutual respect highlighted by Gutmann) and moderate multiculturalism that has developed from

¹¹⁶ Mutual respect for Romani culture in the education sphere might, for example, necessitate full access to mainstream schools, a syllabus that reflected the contribution that the Roma had made to national society, and the opportunity for Romani language instruction. These are issues that will be developed further in Chapters 3 to 5.

¹¹⁷ Michel Wieviorka, ‘Is multiculturalism the solution?’ (1998) 21 *Ethnic and Racial Studies* 881, 892

¹¹⁸ Roger Sandall, *The Culture Cult: Designer Tribalism and Other Essays* (Westview Press 2001)

¹¹⁹ George Crowder, ‘Pluralism and Multiculturalism’ (2008) 45 *Society* 247, 248

¹²⁰ Ibid

¹²¹ Effectively, demanding respect for all cultures equally regardless of content.

liberal universalism¹²² – and that Sandall has included only the first stream within his critique.¹²³

While it is true that radical multiculturalism is undesirable, moderate multiculturalism has a number of advantages for both minorities and the majority population. Moderate multiculturalism flows from the belief that a flourishing culture is a key element of an individual's wellbeing and so each individual's culture should be given some degree of official recognition and support. Crowder suggests that “there will be limits to the kind and degree of respect and support that are justified in each case, limits set by reference to the other components of individual wellbeing as marked out by the standard liberal list of individual rights.”¹²⁴ Effectively, “cultural practices will not be tolerated if they violate basic rights or undermine individual autonomy.”¹²⁵ This seems to be the same kind of liberal multiculturalism envisioned by Will Kymlicka¹²⁶ and Joseph Raz.¹²⁷ Key to this interpretation of multiculturalism is cultures fitting into wider society in their own distinctive way – integration then rather than assimilation.

The way to overcome any worries about the efficacy and nature of multiculturalism on the part of states parties is to demonstrate first that multiculturalism is compatible with a liberal democratic political ideology and, second, that there are actually different approaches to multiculturalism and so it is possible to adapt the concept to gain the most benefit for both majority and minority populations. On the first point, the clearly liberal justification for multiculturalism, as suggested by Will Kymlicka, is “based on the assumption that the

¹²² The idea that membership of a flourishing culture is a component of individual wellbeing and that, consequently, an individual's culture should be accorded some level of public respect and support.

¹²³ George Crowder, ‘Pluralism and Multiculturalism’ (2008) 45 *Society* 247, 248

¹²⁴ Ibid; Also Fred D’Agostino ‘Pluralism and liberalism’ 239 – 240 in G.F. Gaus and Chandran Kukathas *Handbook of Political Theory* (London, SAGE 2004)

¹²⁵ Ibid

¹²⁶ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (2nd edition, OUP 1996)

¹²⁷ Joseph Raz, ‘Multiculturalism: A Liberal Perspective’ (Winter 1994) *Dissent* 67 - 79 <<http://www.dissentmagazine.org/article/?article=2341>> [last accessed 26/02/13]

flourishing of culture is a necessary ‘precondition’ for individual freedom.”¹²⁸ This is hugely important given the undeniable individualist bias of both European political theory and international human rights law. It is also particularly important in the context of this thesis given the contention that one of the key results of an effective education system is that children are moulded into autonomous individuals who are capable of making informed choices about their future position both within their minority culture and within their national society as a whole. Once it is realised that the recognition and protection of the group is vital to the development and sovereignty of the individual, multiculturalism suddenly becomes far more palatable within traditional liberal democracies. As to the second point, this thesis contends that the different approaches that can be taken towards multiculturalism depend on the view that is taken on pluralism.

A clear benefit of multiculturalism in general is that it entails pluralism, where differences are recognised and celebrated. George Crowder suggests that there are two key pluralistic claims: “there are ethical universals, and these are sometimes incompatible with one another.”¹²⁹ From this pluralist view point, “cultures are essentially generalized rankings of values – that is, systems that commend some particular ranking of goods across a range of situations.”¹³⁰ This implies that some degree of give and take will always be required in a pluralistic society. It is this mutual give and take that helps to guarantee integration rather than assimilation and ensures that the majority as well as the minority have their views heard and considered.¹³¹ Seemingly many such rankings would carry equal weight and so citizens will be able to justifiably disagree as to the ideal societal model. It seems that “the optimal political

¹²⁸ Ranjoo Seodu Herr, ‘Liberal Multiculturalism: An Oxymoron?’ (2007) 38 *The Philosophical Forum* 23, 24

¹²⁹ George Crowder, ‘Pluralism and Multiculturalism’ (2008) 45 *Society* 247, 250

¹³⁰ *Ibid* 251

¹³¹ This is of course of particular importance to ‘unpopular’ minorities and indigenous peoples whose views might otherwise be easily overlooked by the majority.

framework from a pluralist perspective will be one that accommodates reasonable disagreement concerning the ‘good’ instead of endorsing and imposing one particular version of the good.”¹³² Liberalism seems to have the greatest potential to meet such a requirement. This would of course have to be a multicultural liberalism which uses a framework of individual rights and responsibilities to ensure that a wide variety of cultures¹³³ are viable within any given society.

Pluralism is thus compatible with and indeed best served by liberal democracies. Pluralism may however take different forms. Adeno Addis suggests that there are in fact two kinds of pluralism: the first being paternalistic¹³⁴ pluralism and the second being critical pluralism.¹³⁵ While both of these varieties of pluralism attempt to provide certain rights for minorities, there is considerable difference between the two.

Paternalistic pluralism seeks to protect the culture of minorities as the ‘Other’.¹³⁶ It seems that the toleration for minority culture is here motivated by a desire to prevent specific minority groups and their cultures from being annihilated by the actions of the majority. The minority group are not regarded as being capable of engaging with the majority as a means of safeguarding their own interests and so are denied the resources and support structures that might allow them to do this. This kind of pluralism actually echoes the popular opinion in Europe that the Roma are completely removed from the mainstream as some kind of peculiar ‘Other’. Pierre van den Berghe suggests that an example of this kind of paternalistic pluralism can be seen in government dealings in Australia, Canada, New Zealand, and the

¹³² George Crowder, ‘Pluralism and Multiculturalism’ (2008) 45 *Society* 247, 251

¹³³ And so ways of life.

¹³⁴ Or complacent

¹³⁵ Adeno Addis, ‘Individualism, Communitarianism, and the Rights of Ethnic Minorities’ (1992) 67 *Notre Dame L Rev* 615, 620

¹³⁶ *Ibid*

United States where the indigenous peoples were treated in the same way as a ‘vanishing species of nonhuman fauna’ would be treated.¹³⁷ Effectively, the indigenous peoples were being preserved as some sort of quaint and interesting ‘Other’ rather than being engaged with on an equal footing. This type of paternalistic pluralism could be said to be just as dehumanising as forced assimilation and negation since it is based on an assumption that the minority has little to impart to the majority and therefore cannot be regarded as a partner in dialogue.¹³⁸ Such a view of pluralism would clearly be insufficient to address the disadvantage suffered by the Roma. While their culture would in theory be protected, there would be no mechanism to facilitate intercommunity dialogue to work towards a cohesive national community founded on mutual understanding.

Critical pluralism can be said to take a different approach to paternalistic pluralism in that it implies an aim to do more than just protect a minority. Adeno Addis suggests that this type of pluralism is committed to doing two things: first, to actively intervene to provide the minority with the resources it needs to flourish and, secondly, to develop institutional structures to enable the majority to satisfactorily accept the minority as a dialogue partner.¹³⁹ Critical pluralism therefore seems to provide a far better model for understanding the notion of minority cultural rights, and that “an ideal of politics in a heterogeneous public must be the affirmation of group differences while simultaneously linking those groups in a process of institutional dialogue.”¹⁴⁰ Critical pluralism recognises the importance of social groups and cultural membership in the lives of individuals as well as the exclusionary consequences when their existence is denied. This variety of pluralism is sometimes referred to as value

¹³⁷ Pierre L Van den Berghe, ‘Protection of Ethnic Minorities: A Critical Appraisal’ 343 in Robert G. Wirsing (ed) *Protection of Ethnic Minorities: Comparative Perspectives* (Pergamon Press 1981)

¹³⁸ Adeno Addis, ‘Individualism, Communitarianism, and the Rights of Ethnic Minorities’ (1992) 67 *Notre Dame L Rev* 615, 621

¹³⁹ Ibid; David A. Reidy ‘Pluralism, liberal Democracy and Compulsory Education: Accommodation and Assimilation’ (2001) 32(4) *Journal of Social Philosophy* 585 – 609

¹⁴⁰ Adeno Addis Op Cit 621

pluralism. George Crowder states that, properly understood, value pluralism “is about the plurality not of cultures but of human values or goods.”¹⁴¹ He suggests this to be “a fundamentally universalist view which, while sensitive to cultural differences where legitimate and relevant, generates universal norms of a liberal nature.”¹⁴²

The most effective variety of pluralism to remove disadvantage suffered by minorities such as the Roma while at the same time accommodating majority beliefs through universal norms and fostering cohesive communities, therefore seems to be critical [or value] pluralism. The additional benefit of this type of pluralism, both to the functioning of liberal democracies and to the educational arguments contained in this thesis, is its support of personal autonomy. It has been established that under critical pluralism “both local traditions and abstract rules represent particular value rankings, which may be challengeable for good reason in particular cases.”¹⁴³ It seems logical therefore that “pluralists should be willing to question the relevance of such rankings”¹⁴⁴ and assess them based on their own experiences and judgements. A further logical progression is that pluralists thus recognise the importance of personal autonomy since there is no ready-made solution available to relieve them of the burden of choosing for themselves. Given the importance of personal autonomy to the functioning of a pluralistic society, it is necessary for that society to uphold and value autonomy - a principle key to liberalism.

Ultimately then, this thesis contends that the traditional liberal democratic model of governance is insufficient to adequately address the needs of minority groups and also fails to guarantee the kind of cohesive community which would benefit both minorities and mainstream society. The most effective means to address the difficulties posed by the

¹⁴¹ George Crowder, ‘Pluralism and Multiculturalism’ (2008) 45 *Society* 247

¹⁴² Ibid

¹⁴³ George Crowder Op Cit 251

¹⁴⁴ Ibid

traditional liberal democratic model would be to recognise a version of multiculturalism that is compatible with liberal theory and also serves to promote integration rather than assimilation. Key to this version of multiculturalism would be the presence of critical [or value] pluralism where differences in society are recognised and evaluated in order to generate universal norms for the benefit of society as a whole.¹⁴⁵ Such pluralism considers how cultural practices are necessary for the development of individual autonomy, but also provides checks and balances to avoid illiberal minority practices and also safeguard majority goods. Additionally, this critical pluralism is valuable since it endorses the view that where any separation occurs, equal treatment must still exist. Effectively, this is a recognition that true pluralism must allow for the fact that, sometimes, minority groups desire some level of separation from the mainstream but that, in the course of this separation, they are not to be in any way disadvantaged in terms of facilities or opportunities etc.¹⁴⁶ This concept of ‘separate but equal’ will be expanded on further in Chapters Four and Five of this thesis.¹⁴⁷ The role that pluralism can play within the educational sphere will be discussed in the following chapter since the potential of educational pluralism has been recognised at an international level. UNESCO has considered the broader function of education in a pluralist society and has grouped its findings under four pillars: “learning to know, learning to do, learning to live together and learning to be.”¹⁴⁸ The value that such educational pluralism can have in

¹⁴⁵ While it is arguable that this has never been achieved with a group as marginalised as the Roma, examples of a change in society’s perceptions towards previously marginalised groups can be found in Canada and Australia where the indigenous populations were historically subject to severe discrimination and forced assimilation. In both countries there has been a (sadly not universal) move towards recognising the richness that indigenous cultures can bring to the national identity and understanding that in some cases the values of the minority can overrule the desires of majority society.

¹⁴⁶ So, for example, if a minority wish to conduct the education of their children in a separate school then the children who attend such a school should not be disadvantaged when it comes to teaching methods, subject content and ultimate educational attainment. This will necessarily entail cooperation between the minority group and the national government and is a concept which will be considered in detail in the following chapters.

¹⁴⁷ And an illustrative example of the concept will be provided in the form of a case study on on-reserve education of First Nations students in Canada.

¹⁴⁸ Jacques Delors, *Learning: The Treasure Within, Report to UNESCO of the International Commission on Education for the Twenty-first Century* (UNESCO 1996) 18 <<http://www.unesco.org/delors/>> [last accessed 26/02/13]

tackling discrimination and breaking down barriers between communities makes its likely absence one of the central criticisms of ‘separate but equal’ education.

This chapter will now move on to consider the extent to which, if at all, this understanding of multiculturalism is already mandated in international law.

2.3 Multiculturalism – International Law

Alexandra Xanthaki argues that “although the scarcity of references to the term ‘multiculturalism’ suggests otherwise, on closer inspection, current international human rights law endorses the components of multicultural policies and reflects a multicultural vision.”¹⁴⁹ It is certainly true that multiculturalism is not expressly mentioned in any of the international human rights documents. However, there has been some limited use of the term by various UN bodies. In a 2006 report by the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination and all Forms of Discrimination mention was made of multiculturalism and of the fact that political agendas seem to focus on protecting national identity without thought of minority interests.¹⁵⁰ Unfortunately no consideration was given to the demands, and potential benefits, of multiculturalism. Asbjorn Eide,¹⁵¹ Chairperson of the UN Working Group on Minorities, and the Committee on the Elimination of Racial Discrimination¹⁵² have also made reference to multiculturalism as a concept, but it has not yet been given thorough, serious consideration at a UN level. However, while states may well not be under express international obligation to introduce multicultural policies, there are three

¹⁴⁹ Alexandra Xanthaki ‘Multiculturalism and International Law: Discussing Universal Standards’ (2010) 32 *Human Rights Quarterly* 21, 22

¹⁵⁰ Doudou Diene, *Political Platforms Which Promote or Incite Racial Discrimination*, Updated Study U.N. ESCOR, Comm’n on Hum. Rts., 62nd Sess., 15 – 18 U.N. Doc. E/CN.4/2006/54 (2006)

¹⁵¹ Asbjorn Eide, Chair, UN Working Group on Minorities, Statement at the Ninth Session: *Reflections on the Present and Future Role of the United Nations Working Group on Minorities* (12 May 2003) <<http://www2.ohchr.org/english/issues/minorities/docs/eide.doc>> accessed 20 October 2011

¹⁵² *Summary Record of the 1724th Meeting*, U.N. GAOR, Comm. On Elim. Of Racial Discrim., 67th Sess., 1, U.N. Doc. CERD/C/SR.1724 (2005)

key elements of a multicultural society concerning which international obligations do exist – equality, non-discrimination¹⁵³ and culture.

While the importance of culture is given relatively limited recognition at an international level, it is a truism that equality and non-discrimination are in fact the central principles which underpin international human rights law. While the principles of non-discrimination and equality are interrelated, there are subtle differences between them - the former means that all individuals should be treated equally according to law; the latter implies equal distribution of rights and interests in a given society. Both of these principles support the theory that human rights are universally applicable and that no personal characteristic should entitle a person to greater protection than that afforded to any other individual.¹⁵⁴ These two principles are enshrined in the laws of nearly every state¹⁵⁵ and the observance of both equality and non-discrimination is indeed vital if the rights of minorities are to be protected.¹⁵⁶ Given the fundamental role that they should, at least in theory, play in the protection of rights of minorities, it is important to examine both the principles of equality and non-discrimination to evaluate their actual impact on the situation of Roma children in Europe.

Equality

Equality is a fundamental component of a democratic society and it is well recognised that “a corollary exists between equality and non-discrimination.”¹⁵⁷ As such, guarantees of equality

¹⁵³ These first two concepts are fairly uncontroversial since they are central to the prevalent individualistic approach to international human rights law.

¹⁵⁴ Paul Sieghart, *The International Law of Human Rights* (Clarendon 1983) 75

¹⁵⁵ Although in reality, as Jay Sigler has suggested, the enforcement of non-discrimination policies varies drastically from state to state – Jay Sigler, *Minority Rights: A Comparative Analysis* (Greenwood Press 1983) 178 – 179

¹⁵⁶ *Ibid* 149

¹⁵⁷ Christopher McCrudden, ‘Equality and Non-Discrimination’ in David Feldman (ed), *English Public Law* (OUP 2007) 581 - 668

can be found in all those international instruments designed to protect human rights. An example of such a guarantee can be found in Article 20 of the EU Charter,¹⁵⁸ which states “everyone is equal before the law.” Article 20 is a clear example of that general form of equality guarantee, specifying that all of those resident within the EU have the right to expect the same level of legal protection. Article 20 is, however, of particular importance in the context of this thesis since, as Clare McGlynn states, “the inclusion of such a statement in a chapter which goes on to detail the rights of the child, the elderly, and the disabled, and which includes a general non-discrimination provision on the grounds of age,¹⁵⁹ must be interpreted to include children.”¹⁶⁰ Seemingly then all children are equal before the law and, consequently, adults and children are equal before the law to the same measure. This is an especially important provision in that it seems to recognise children as being equally deserving of rights protection as adults and that, impliedly at least, that children are therefore capable of being informed, autonomous rights holders. Such an interpretation is given additional strength by the fact that an early draft of the Charter referred to “men and women” being equal before the law, wording that would have impliedly excluded children from equal status with adults.¹⁶¹

Equality has clearly been aptly termed “a ‘treacherously simple concept’ since there is in fact a diverse spectrum of opinions as to what equality really is and what a society should do to incorporate and promote it.”¹⁶² According to Holtmaat, “the differing interpretations of

¹⁵⁸ For further discussion of equality as encapsulated in the EU Charter see: Grainne de Burca ‘The Drafting of the EU Charter of Fundamental Rights’ (2001) 26 *European Law Review* 126 - 138

¹⁵⁹ At Article 20

¹⁶⁰ Clare McGlynn (2006) *Families and the European Union: Law, Politics and Pluralism* (Cambridge, CUP) 71; see also Helen Stalford ‘EU Law and Children’s Rights: A Case Study of EU Family Law’ (2010) 10 *Contemporary Issues in Law* 1 - 24

¹⁶¹ Draft Charter of Fundamental Rights, Charte 4422/00, 28 July 2000, Article 20

¹⁶² Rikki Holtmaat, *The Concept of Discrimination* (Academy of European Law Conference Paper, 2004) 2 <http://www.era.int/web/en/resources/5_1095_2953_file_en.4193.pdf> [last accessed 26/02/13]

equality effectively fall within two categories: those involving formal equality and those involving substantive equality.”¹⁶³

Formal equality is basically the notion of equal treatment and does not take into account the fact that equal application of the rules to unequal groups or individuals can have unequal results. Consequently, formal equality is about treating all people the same¹⁶⁴ and can lead to inequalities for groups that have been disadvantaged by a system that fails to take different needs into account. This formal approach to equality “supports the view that a person’s individual or physical characteristics should be seen as irrelevant in determining whether they have the right to some social benefit or gain.”¹⁶⁵ From a theoretical point of view this is attractive since, ideally, every person should be treated the same. It is however an idealistic viewpoint that does not adequately take practicalities and entrenched differences into account. In practical terms, formal equality could involve every child having the right to take the entrance exam for secondary school but would lead to inequality for minority groups such as the Roma who may not speak the language of the exam as their first language or who have not had access to the same level of primary education.

Formal equality can also be suggested to prevent arbitrary decision-making processes,¹⁶⁶ “protecting against defects being introduced into the decision-making process and ensuring that irrational and unfair decisions based on arbitrary criteria are kept out.”¹⁶⁷ However, it has been suggested that “the supposed value of formal equality is merely an illusion since it is

¹⁶³ Ibid

¹⁶⁴ From Aristotle’s principle that “things that are alike should be treated as alike” as described in J A K Thompson (trs) Aristotle, *The Nicomachean Ethics* (Penguin Classics 2004)

¹⁶⁵ The Equal Rights Trust, *The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality* (2007) 2 <<http://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Non-discrimination,%20Formal%20and%20Substantive%20Equality.pdf>> [last accessed 26/02/13]

¹⁶⁶ Such as when policies or people selectively disadvantage others due to a particular irrelevant trait, for example refusing someone who would otherwise be perfectly suitable for employment a job due to their race or their sex.

¹⁶⁷ Rikki Holtmaat Op Cit 2

questionable whether the law and indeed the judiciary can claim to be truly neutral to all parties.”¹⁶⁸ Additionally, another clear flaw inherent in formal equality is that it requires comparison to be made. The selecting of the comparator¹⁶⁹ is a notoriously difficult and unsatisfactory process. In the United Kingdom for example the comparator used is predominately “white, adult, male, able-bodied and heterosexual.”¹⁷⁰ This need for a comparator “assumes the existence of a universal person, an idea which neglects the variety and diversity of modern society.”¹⁷¹ This need to be measured against a comparator would be disadvantageous for minority groups such as Roma children who are far removed from the characteristics embodied in the legal universal person.

The second variety of equality is termed “substantive equality”.¹⁷² This goes “beyond the concept of equal treatment and takes into account the differences in the needs that exist between groups and individuals: Consequently, substantive equality is concerned with achieving equitable outcomes.”¹⁷³ Unlike formal equality which “dictates behaviour through applying rules and procedures consistently, substantive equality seeks to invest a certain moral principle [namely social redistribution] into the application of equality.”¹⁷⁴

One disadvantage of this approach is that “it places too little emphasis on the importance of accommodating diversity by adapting existing structures.”¹⁷⁵ It could be suggested that the

¹⁶⁸ Jarlath Clifford ‘Locating Equality: from Historical Philosophical Thought to Modern Legal Norms’ (2008) 1 *The Equal Rights Review* 11 – 23, 16

¹⁶⁹ The comparator can be either real or hypothetical.

¹⁷⁰ For discussion of the role and failings of this comparator see: Sandra Fredman *Discrimination Law* (Oxford OUP 2011) 168 – 169; Sarah Hannett ‘Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination’ (2003) 23(1) *Oxford Journal of Legal Studies* 65 – 86; Manuela Tomei ‘Discrimination and equality at work: A review of the concepts’ (2008) 142(4) *International Labour Review* 401 – 418.

¹⁷¹ Rikki Holtmaat *The Concept of Discrimination* (Academy of European Law Conference Paper, 2004) 3

¹⁷² Catherine Barnard & Bob Hepple ‘Substantive Equality’ (2000) 59(3) *The Cambridge Law Journal* 562 - 585

¹⁷³ Hugh Collins ‘Discrimination, Equality and Social Inclusion’ (2003) 66(1) *Modern Law Review* 16 – 43, 17

¹⁷⁴ Rikki Holtmaat Op Cit 4

¹⁷⁵ Bhikhu Parekh, ‘A Case for Positive Discrimination’ 261 – 280 in Bob Hepple and Erica M Szyszczak (ed), *Discrimination: The Limits of the Law* (Mansell Publishing Ltd 1992)

focus on certain disadvantaged groups diverts attention away from the disadvantageous treatment that lead to disadvantage.¹⁷⁶ By concentrating on measures to alleviate the disadvantage suffered by minority groups such as the Roma it is possible that the underlying causes of the disadvantage will not be fixed.

Non-Discrimination

Before considering requirements for non-discrimination, it is important to first establish what is meant by discrimination. In its most straightforward sense, discrimination would appear to be the unjust or prejudicial treatment of certain persons or categories of persons.¹⁷⁷ With this in mind, it should be no surprise that one of the central aims of international human rights law is to stamp out such treatment.

Perhaps the best illustrative example of non-discrimination provisions in international human rights law can be found in the International Covenant on Civil and Political Rights¹⁷⁸ (hereafter ICCPR) due to the heavy emphasis that is placed on non-discrimination in that Covenant. Indeed, Bertrand Ramcharan has suggested that “equality and non-discrimination constitute the single dominant theme of the Covenant,”¹⁷⁹ which also serves once again to illustrate the close interrelationship between these two principles. The Human Rights Committee, the body tasked with overseeing the application of the ICCPR’s principles, has provided guidance on what exactly can constitute discrimination for the purposes of the Covenant. In General Comment 18 the Committee states:

¹⁷⁶ Ibid 268

¹⁷⁷ Sandra Fredman *Discrimination Law* (Oxford OUP 2011) 109 – 153

¹⁷⁸ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 23 March 1976, in accordance with Article 49. Full text available at <<http://www2.ohchr.org/english/law/ccpr.htm>> [last accessed 26/02/13]

¹⁷⁹ Bertrand Ramcharan, ‘Equality and Non-Discrimination’ from Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights* (Oxford University Press 2000) 519

“the term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”¹⁸⁰

This is a usefully clear definition and highlights the expansive grounds on which an individual can suffer from discrimination. The Roma as a group should be particularly aided by the prohibition on adverse differential treatment on the grounds of “race”, “language” and “national or social origin”.

The ICCPR contains three comprehensive prohibitions on discrimination. Article 2(1), for example, states:

Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

While the grounds on which discrimination can occur for the purpose of Article 2(1) are admirably wide, it must be noted that it will only apply to differential treatment in regard of rights recognised in the Covenant. The same is true of Article 3, which states:

¹⁸⁰ CCPR, General Comment No. 18: Non-Discrimination 10/11/1989 para 7 <<http://www.unhcr.ch/tbs/doc.nsf/0/3888b0541f8501c9c12563ed004b8d0e?Opendocument>> [last accessed 26/02/13]

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Although Article 3 is particularly concerned with equality between the sexes, it is similar to Article 2(1) in that it is designed to prohibit discrimination only when it comes to the enjoyment of Covenant rights. This is of course a useful variety of non-discrimination since it would be counterproductive to guarantee that variety of civil and political rights contained in the ICCPR without formally ensuring that such rights would be equally applicable and available to all people. However, the ICCPR is particularly noteworthy when it comes to non-discrimination provisions since it also includes a freestanding prohibition on discrimination. Article 26 states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

By guaranteeing to “all persons equal and effective protection against discrimination on any ground”, Article 26 is clearly moving behind the scope of rights contained within the ICCPR itself. The expansive nature of Article 26 has been commented on by the Committee:¹⁸¹ Article 26 does “not merely duplicate the guarantee already provided for in Article 2 but provides in itself an autonomous right.”¹⁸² Article 26 therefore serves to “prohibit

¹⁸¹ In General Comment 18 it was confirmed that “while Article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, Article 26 does not specify such limitations.”

¹⁸² CCPR, General Comment No. 18: Non-Discrimination 10/11/1989 para 12; also *Broeks v The Netherlands* (172/84) 09/04/87; *Young v Australia* (941/2000) 06/08/03; *Gueye et al. v France* (196/83) 03/04/89; *Karakurt v Austria* (965/2000) 04/04/02

discrimination in either law or fact in any field regulated and protected by public authorities.”¹⁸³

It is clear, therefore, that the ICCPR has non-discrimination as one of its central tenets. The heavy “emphasis on non-discrimination in the ICCPR is appropriate; discrimination is at the root of virtually all human rights abuses.”¹⁸⁴ However, it is interesting to note that the Committee has confirmed that not every difference in treatment will constitute discrimination.¹⁸⁵ So long as “the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant”¹⁸⁶ then the differentiation in question will not be discriminatory. While the idea of what constitutes “reasonable and objective” is potentially a very subjective matter, this statement by the Committee is of particular importance for minority groups, such as the Roma, who suffer deeply entrenched levels of discrimination and disadvantage since it clarifies that special measures are permissible. This relates back to the two varieties of equality that were discussed earlier since, it must be recognised, sometimes groups that have suffered particular disadvantage may need more than non-discrimination provisions in order to be placed on an equal footing with other groups. Sometimes special targeted measures, often of a temporary duration, are needed to assist such groups in moving towards equality.

It is also important to recognise that, on a theoretical level, discrimination can be said to potentially occur in two distinct forms:

¹⁸³ Ibid. This arguably makes it a more extensive non-discrimination provision than those found in the European counterparts to the ICCPR, for example Article 14 of the European Convention on Human Rights. The differences between the various international rights documents will be discussed later in this thesis.

¹⁸⁴ Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights* (Oxford University Press 2000) 519

¹⁸⁵ CCPR, General Comment No. 18: Non-Discrimination 10/11/1989 para 13; Also: Linda Camp Keith ‘The United Nations International Covenant on Civil and political Rights: Does it make a Difference in Human Rights Behaviour?’ (1999) 36(1) *Journal of Peace Research* 95 - 118

¹⁸⁶ Ibid

Direct discrimination involves less favourable treatment of the complainant than that of someone else on prohibited grounds in comparable circumstances. Indirect discrimination occurs when a practice, rule, requirement or condition is neutral on its face but impacts disproportionately upon particular groups.¹⁸⁷

The difference between these two varieties of discrimination can be illustrated with an example from the education arena: If a school has a blanket ban on Roma pupils then that would be direct discrimination. However, if a school relies on entry examinations that have the effect of making it unlikely that Roma pupils will gain entrance to the school even though they are able to take the tests, then that would be indirect discrimination. From the Committee's definition of discrimination found in General Comment 18¹⁸⁸ – whereby any distinction that has the “purpose or effect” of restricting anyone's rights or freedoms is prohibited – it is clear that the ICCPR prohibits indirect discrimination as well as direct discrimination. This provides another example of the expansive approach to non-discrimination that has been taken in the ICCPR.

From the above discussion it is possible to see the current approach to non-discrimination that is being taken at an international level. However, while it is clear that both the principles of equality and non-discrimination are deeply entrenched in international law and that they are thus driving forces behind human rights guarantees, the principle of culture is perhaps more controversial.

Culture

¹⁸⁷ Lord Lester of Herne Hill QC and Sarah Joseph ‘Obligations of Non-Discrimination’ in Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights* (Oxford University Press 2000) 533

¹⁸⁸ As above

It seems clear that multiculturalism in all its forms involves the recognition and protection of culture in the public sphere. Although multiculturalism as a phrase is noticeably absent from international human rights instruments, international law has recognised the importance of culture for the individual. The 2001 UNESCO Universal Declaration on Cultural Diversity,¹⁸⁹ for example, notes that “culture is at the heart of contemporary debates on identity and social cohesion and affirms that respect for the diversity of cultures is necessary for international peace.”¹⁹⁰ The defence of culture is viewed as “an ethical imperative, inseparable from respect for human dignity.”¹⁹¹ The Declaration supports cultural pluralism¹⁹² and links the protection of culture to human rights.¹⁹³

Human rights treaties have likewise recognised the importance of culture by recognising a right to culture. Beginning with the recognition of the right of “everyone to participate in the culture of the community” enshrined in Article 27(1) of the Universal Declaration on Human Rights,¹⁹⁴ cultural participation has been the focus of international documents.¹⁹⁵ The International Covenant on Civil and Political Rights is also notable for its recognition in Article 27 of the importance of minority identity. Article 27 states:

‘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 practice their own religion, or to use their own language.’

¹⁸⁹ Full text available at <<http://www2.ohchr.org/english/law/diversity.htm>> accessed 20 October 2010

¹⁹⁰ Universal Declaration on Cultural Diversity, adopted 2 Nov. 2001, UNESCO Gen. Conf., 31st Sess., Preamble 6 – 7, UNESCO Doc. CLT.2002/WS/9 (2002)

¹⁹¹ Article 1

¹⁹² Article 4

¹⁹³ Article 2

¹⁹⁴ Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A. Res. 217A (III) U.N. GAOR, 3rd Sess. (Resolutions, pt. 1), at 71, art. 27(1), U.N. Doc. A/810 (1948)

¹⁹⁵ For example, Article 15 of the International Covenant on Economic, Social and Cultural Rights

The existence of such cultural recognition in the ICCPR seems to suggest the limitations of a focus on non-discrimination were recognised and hence the importance of ‘differential treatment ... in order to ensure [minorities] real equality of status with the other elements of the population’¹⁹⁶ was acknowledged. The original draft of Article 27 was designed to protect ‘minorities’ in general but, due to numerous objections, the final version was limited to protecting the rights of “persons belonging to minorities”.¹⁹⁷ Effectively, while recognising the importance of minority culture, Article 27 stops short of moving away from the traditional individualistic focus of international law to recognise the minority itself as the rights bearer. A collective element has been retained with the phrase “in community with the other members of their group” but this seems to be due to concern that, otherwise, any individual would be able to claim the benefits of minority identity. It does, however, still stand as important international legal recognition that an individual cannot be wholly separated from their cultural identity.

The application of Article 27 in relation to the importance of group membership and the impact that this might have on the rights of particular individuals was discussed in *Länsman v Finland*,¹⁹⁸ which concerned the rights of the indigenous Sami population. *Länsman v Finland* was significant in that it stressed the importance of striking a balance between the interests of individuals and the group. It seems that the rights of an individual may be impinged upon so long as any interference is proportionate and necessary for the protection of the group as a whole.¹⁹⁹ The Committee effectively suggests that the group can be

¹⁹⁶ Commission on Human Rights Fifth Session 1949, A/2929, Chapter 6, s183 from Helen O’Nions, *Minority Rights Protection in International Law: The Roma of Europe* (Ashgate 2007) 193

¹⁹⁷ See Commission discussions at 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).

¹⁹⁸ *Länsman et al v Finland*, Communication No. 511/1992, UN GAOR, 52nd Session, UN Doc CCPR/C/52D/511/1992 < http://www.escr-net.org/usr_doc/HR's_Committee_Decision.html > [last accessed 26/02/13]

¹⁹⁹ *Ibid* para 9.4

protected by such an infringement since, without the continued existence of the group, the individual would not have any cultural rights to protect.

The International Covenant on Economic, Social and Cultural Rights²⁰⁰ (hereafter ICESCR) commits its States Parties to working towards the granting of economic, social and cultural rights to individuals. However, like its sister document the ICCPR, the ICESCR contains in Article 1 the right of all peoples to self-determination and so encompasses this limited recognition that rights can be extended beyond a purely individualistic focus. Further, as Article 15 recognises the right to participate in cultural life, the ICESCR recognises that individuals do not live within vacuums and that the need to enjoy a group cultural identity and to have the support of peers is necessary if certain of the individualistic rights are to be realised. Additionally, Article 5(e)(vi) of the International Convention on the Elimination of All Forms of Racial Discrimination recognises “the right to equal enjoyment and participation in cultural activities and Article 31 of the Convention on the Rights of the Child recognises the right of children to participate fully in cultural rights and the arts.”²⁰¹

The importance of culture has also been recognised by the Council of Europe, with Article 5(1) of the Framework Convention for the Protection of National Minorities requiring states “to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture.” Additionally, Article 5(2) requires that “Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities.” This recognition of culture is important since, this thesis contends, minority children must feel secure with their culture if they are able to grow into informed, autonomous adults who are capable of decision making. This does not mean that minority culture should take precedence over majority culture, simply that the ideal society in which individual’s

²⁰⁰ All the countries of Europe are States Parties to the ICESCR

²⁰¹ Alexandra Xanthaki, ‘Multiculturalism and International Law: Discussing Universal Standards’ (2010) 32 *Human Rights Quarterly* 21, 26

rights can be guaranteed is a society which features and respects a plurality of cultures.²⁰² The dangers of assimilation having previously been noted, the prohibition contained in Article 5(2) could be a useful tool for occasions where members of minority groups do wish to maintain some degree of separation from the mainstream. This separation would however have to be subject to checks and balances in order to avoid potentially damaging isolationism and to ensure that individual members of minority groups retained their freedom of choice.

So then, while it is clear that there is some recognition of the concept of culture in international law, this recognition raises an additional question of importance to this thesis – does the recognition of culture and a drive for a liberal multicultural society necessitate the recognition of group rights?

2.4 Group Rights Recognition

Having identified the conception of multiculturalism that would best accommodate and support the Roma of Europe in their struggle for equality and assessed the extent to which elements of that multiculturalism are currently mandated for in international law, a new question quickly presents itself – does this conception of a multicultural society necessitate a recognition of group rights or can it best be achieved through an individual rights perspective?

Perhaps the first justification that springs to mind for the recognition of group rights is the fact that those who are being disadvantaged, for example Roma children within the educational sphere, suffer discrimination purely by virtue of their group membership. It seems practically impossible to see how any individual could truly stand alone. According to Charles Taylor, to think of such an individual is to think of:

²⁰² Gavan Titley (2004) *Resituating Culture* (Council of Europe) 113

“... a void in which nothing would be worth doing, nothing would deserve to count for anything, [for] the self which has arrived at freedom by setting aside all external obstacles and impingements is characterless, and hence without defined purpose, however much this is hidden by such seemingly positive terms as ‘rationality’ or ‘creativity’”²⁰³

As Will Kymlicka has argued, state neutrality to minority groups masks the fact that minority groups, unlike the dominant culture, are vulnerable to the decisions of non-minority groups: “Dominant majority groups are able to out-vote and outbid the minority groups regarding the resources crucial to the survival of the latter’s culture.”²⁰⁴ Individuals are not being singled out due to any individual characteristic of theirs but because the society which they inhabit cannot see beyond their group affiliation. Effectively, it is also the group en masse who is being oppressed.

Iris Marion Young identifies a set of criteria, which she terms “the five faces of oppression”, that can be used to evaluate whether or not a particular group is oppressed.²⁰⁵ Malik has summarised these criteria as:

1. “A group is oppressed if it suffers systematic violence, in which members of the group are targeted and experience violence because they belong to the group.
2. A group is oppressed when its members experience exploitation due to the transfer of the results of their labour to another social group. For example, unskilled or marginal workers in a poorly paid profession are low paid compared with those in a more privileged employment position.

²⁰³ Charles Taylor *Hegel and Modern Society* (Cambridge University Press 1979) 157

²⁰⁴ Will Kymlicka *Liberalism, Community and Culture* (New Edition, Clarendon Press 1991) 196

²⁰⁵ Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990) Chapter 2

3. A group is oppressed when it experiences marginalisation, such as when its members are either excluded or expelled from useful participation in the economic, political, cultural and institutional life of a society.
4. A group is oppressed if it lacks power over its own ability to control participation in economic or political activity (powerlessness).
5. A group is oppressed if it experiences cultural alienation.²⁰⁶

It seems that the Roma are an oppressed group according to each of these criteria.

Alexandra Xanthaki states that, even if one recognises the importance of culture, “there can still be some scepticism about the recognition of cultural membership in the public sphere.”²⁰⁷ This scepticism about the situation of cultural membership stems from the perceived dangers of cultural attachment that were discussed earlier in this chapter and from the desired sovereignty of the individual. However, it is unrealistic of course in any society to expect individuals to have unchecked autonomy. Charles Taylor and Will Kymlicka both suggest that moral autonomy will only develop through the kind of self-understanding that stems from contact with other people.²⁰⁸ Kymlicka, for example, argues “that each individual needs the security of the cultural framework from which she makes her choices.”²⁰⁹ A cultural right “is a group right, for by its very nature, culture is a communion of its members rather than the sum of the attitudes and life-projects of the various individuals within the group.”²¹⁰

²⁰⁶ Maleiha Malik ‘Discrimination, Equality and Community Cohesion’ 64 in Tufyal Choudhury (ed), *Muslims in the UK: Policies for Engaged Citizens* (Open Society Institute 2005)

²⁰⁷ Alexandra Zanthaki Op Cit 28

²⁰⁸ Charles Taylor *Hegel and Modern Society* (Cambridge University Press 1979) 157; Will Kymlicka *Liberalism, Community and Culture* (New Edition, Clarendon Press 1991) 196

²⁰⁹ Will Kymlicka, Ibid

²¹⁰ Adeno Addis, ‘Individualism, Communitarianism, and the Rights of Ethnic Minorities’ (1992) 67 *Notre Dame L Rev* 615, 658

However, while it is clearly arguable that recognition of the importance of culture necessarily involves recognition of the importance of group membership to individuals, it is actually far from certain that such recognition necessitates a group rights approach. In order to consider this issue further, therefore, it is important to see what level of recognition has already been given to the group in international law.

2.4.1 The Position of the Group in International Law

It must first be acknowledged that the legal status of the group is closely linked to the international recognition of the importance of culture as discussed above. Consider again 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.

The idea that culture can only be truly enjoyed in community with others is clear here. However, this does not mean that Article 27 should be read as creating a group right to culture. A close reading of the Article in fact suggests it concerns the right of an individual to choose with whom to associate rather than the rights of the group. It is “persons belonging to such minorities” who are referenced as being rights holders rather than the minority groups themselves. Article 27 of the Covenant does not therefore create a space for group rights within “the moral ontology of individualism”,²¹¹ but rather reaffirms the individual as the central figure of the rights movement. Effectively, the outcome of this Article is that the

²¹¹ Will Kymlicka Op Cit 140

individual choices of a particular group of individuals must not be more constrained than those of any other group of individuals.

It has been suggested that other international rights documents perhaps go further than the Covenant when it comes to the status of groups and the importance of culture. Article 2(2) of the International Convention on the Elimination of All Forms of Racial Discrimination, for example, states:

States Parties shall, when the circumstances do so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing the full and equal enjoyment of human rights and fundamental freedoms.

While Article 27 of the Covenant requires the state to remain neutral when it comes to individual choice, Article 2(2) here allows the state to actively intervene to assist minority groups. Adeno Addis has suggested that the special measures contemplated here are not dependent on any individual injustice or individual suffering.²¹² It follows then that they would be responding to group injustice and so consequently concern group rights. There is, however, a limit on such special measures in that they must be temporary. Adeno Addis suggests that this means that the notion of group rights is in fact being recognised in instrumental terms.²¹³ Addis is however perhaps overstating the position of Article 2(2). Provisions such as Article 2(2) seek to provide conditions that will allow members of minority groups to make choices with as much freedom as members of majority society. It is suggested that, although special measures provisions are targeted at minorities who are

²¹² Adeno Addis Op Cit 639

²¹³ Ibid

perceived as being disadvantaged in society, it is the individual members of the minority group who actually benefit from the provisions. Such special measures are not applied in a blanket fashion to all members of a particular minority group but are instead used selectively as circumstances warrant, to assist particular individuals to achieve parity with their peers from the majority population. This view that the individual rather than the group should be the object of special measures provisions has been echoed by World Conference to Combat Racism and Racial Discrimination:

‘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.’²¹⁴

It is clear that, even though the need for special measures arises from ingrained group disadvantage, it is still the individual and not the group who is the rights holder capable of realising such measures. Thus, while the international permissibility of special measures is a positive recognition that minorities suffer due to their group affiliation and so pure equality provisions may not in practice be sufficient for the avoidance of disadvantage, these provisions fall short of being group rights.

While ICERD does not go so far as to create group rights, it must be recognised that other international human rights instruments do make some limited reference to the group. Take for example Article 23(1) of the International Covenant on Civil and Political Rights:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

²¹⁴ UN Doc A/33/262 (1978) at 20 - 21

‘Family’ is here classed as a group and a group worthy of protection at that. However, despite this classification, the family as a unit does not become a rights holder. In international law it is individuals who are capable of exercising their right to a family life rather than the family as a whole having such a right. It is submitted that Article 23(1) is simply a further international recognition of the importance of group membership, whether the group be the family or a minority, to the individual rather than a means by which to create a group right.²¹⁵

Ultimately then, this analysis of the current level of recognition of the group in international exemplifies that it is the individual who is firmly entrenched as the rights holder. While there has clearly been reference to the importance of groups and group membership to the individual, there has been no attempt to position the groups themselves as rights holders. It seems therefore that the current approach to the protection of cultural rights involves recognising that an individual can only enjoy their culture in community with others and that group membership and support can be vital if individuals are to be able to realise their full range of human rights.

Despite being concerned with the best means by which to guarantee the human rights of minorities such as the Roma, the current approach towards group rights taken by the various international human rights instruments should be supported. It is submitted that, while multiculturalism is vital if the rights of minorities are to be effectively guaranteed, the protection of a plurality of cultures does not necessitate a group rights approach. This key concept of multiculturalism can arguably be achieved through recognition of the importance of group membership to individuals rather than through granting the group itself rights

²¹⁵ For more discussion on this see: Terri Libesman ‘Can International Law Imagine the World of Indigenous Children?’ (2007) 15 *International Journal of Children’s Rights* 283 – 309; Philip Vuciri Ramaga ‘The Group Concept in Minority Protection’ (1993) 15(3) *Human Rights Quarterly* 575 – 588; Peter Jones ‘Human Rights, Group Rights and Peoples’ Rights’ (1999) 21(1) *Human Rights Quarterly* 80 – 107.

holding powers. There are a number of reasons why a group rights approach would be both unnecessary and undesirable and they will be presented in detail below.

2.4.2 Problems with a Group Rights Approach

It is submitted first that the principal problem with a group rights approach is that it is wholly unnecessary for the protection of minority rights. Group rights are controversial and as such have not been given space in any of the international human rights instruments. This thesis is concerned with improving the level of rights protection afforded to minorities such as the Roma and so it is vital to find solutions that could be given practical application. Controversial ideas are by definition going to be divisive and unpopular and as such are unlikely to find support among governments. While this in itself would not be enough to discount a group rights approach if it was determined to be the most appropriate means by which to guarantee minority rights, this is not in fact the case. This thesis suggests that an individual rights approach would actually be far more appropriate as well as being practically achievable.²¹⁶

Even in a multicultural society, the individual can be of primary importance and so an individual rights approach can be eminently suitable to guarantee human rights in such a society. As Michel Wieviorka has remarked:

“This has two aspects: one referring to the individual’s desire to participate as fully as possible in modernity, by having access not only to money, and consumption, but also to education and health, and, in the last resort, to work and to employment or political life. The other ... refers to the subjectivity of individuals; to the fact that they each

²¹⁶ This is not of say though that the current mode of individual rights protection is perfect and so this thesis will consider the value of an increased recognition of children’s rights later on in this chapter.

desire to be constituted as a subject, to construct their own existence, and to define their choices without being subjected to predetermined norms or roles.”²¹⁷

This seems to indicate that the modern individual has something of a paradoxical relationship with the idea of group culture. On one hand, individuals may well want to participate and assert their membership of a collective,²¹⁸ while on the other hand they may want to avoid over-dependence on the group and demonstrate that, as an individual, they are more than merely an aspect of their collective. Individuals are rarely keen to relinquish their personal autonomy and freedom for the sake of their group identity.²¹⁹ A formal affiliation with a particular group is often more palatable, both to the individual and to society as a whole, when it comes about through personal choice rather than through compulsion.

While it is clearly arguable that group rights are unnecessary for minority protection (since the importance of group membership to individuals can be supported within an individual rights format), it could also be claimed that group rights are actually undesirable due to the potentially harmful ramifications of such an approach.²²⁰ If the ideal society is one featuring a cohesive community and a unification of culture, then anything which may cause social division would be hugely undesirable.²²¹ It is possible that a group rights approach which results in measures protecting particular minority groups may actually serve to entrench difference and so a desire for forcible separation. Such entrenchment may actually erode an

²¹⁷ Michel Wieviorka, ‘Is multiculturalism the solution?’ (1998) 21 *Ethnic and Racial Studies* 881, 893

²¹⁸ For example an historical legacy, a language, a religion or a group experience.

²¹⁹ Although the likelihood of this willingness to relinquish individual identity this may vary from group to group. For example see: Carol Goodenow & Oliva Espin ‘Identity Choices in Immigrant Adolescent Females’ (1993) 28 *Adolescence* 173 – 184; Tom Tyler & Steven L. Blader ‘Identity and Cooperative Behaviour in Groups’ (2001) 4(3) *Group Processes intergroup Relations* 207 – 226; Jay Fernback ‘The Individual within the Collective: Virtual Ideology and the Realization of Collective Principles’ in Steve Jones (ed) *Virtual Culture* (London SAGE 2002)

²²⁰ Natan Lerner *Group Rights and Discrimination in International Law* (Martinus Nijhoff Publishers 2003) 29 – 47; Caroline Dick *The Perils of Identity: Group Rights and the Politics of Intragroup Difference* (UBC Press 2011); Bernadette Mayler ‘The Limits of Group Rights: Religious Institutions and Religious Minorities in International Law’ (2007) 2(22) *Journal of Civil Rights and Economic Development* 535 – 554

²²¹ Maleiha Malik, ‘Discrimination, Equality and Community Cohesion’ 55 in Tufyal Choudhury (ed), *Muslims in the UK: Policies for Engaged Citizens* (Open Society Institute 2005)

individual's right to criticise and move between cultures and so would actually serve to limit their human rights.²²² A corollary of this would be the potential for the protection of harmful practices on the part of minorities. As Helen O'Nions comments, "support and resources given to minorities may lead to the entrenchment of cultural values, some of which may be less than liberal."²²³ A rights approach that actually served to assist in the oppression or undervaluing of individuals would never be appropriate. Similarly, allowing the operation of two potentially conflicting rights approaches (since group rights and individual rights seem destined to clash at some point if both systems were to coexist) would be both undesirable and practically unworkable.

Following on from this idea of the unworkable nature of two competing rights systems are two problems with the practicalities of utilising a group rights approach at all. The first such problem would of course be determining which minority groups are deemed to be group rights worthy. The issue here is that there is no singular, authoritative international definition of what constitutes a minority group.²²⁴ There are, however, a number of persuasive definitions and so, as Helen O'Nions has proved, it is possible to identify certain key factors, such as numerical inferiority and non-dominance, which always seem relevant to minority determination.²²⁵ Still, it seems that the process of defining a minority would be far from a clear-cut matter. It follows therefore that decisions as to who belongs to a minority and what kinds of obligations are envisaged by minority protection are bound to cause disagreements. Since, if a group rights approach were to be implemented, being classified as a minority would lead to the acquisition of different/additional rights, there may be a lack of popular

²²² Nathan Glazer 'Individual Rights against Group Rights' 123 – 138 in Will Kymlicka *The Rights of Minority Cultures* (Oxford OUP 1995); Peter Jones 'Cultures, group rights and group-differentiated rights' 38 – 57 in Maria Dimova-Cookson & Peter Stirk *Multiculturalism and Moral Conflict* (Routledge 2010)

²²³ Helen O'Nions, *Minority Rights Protection in International Law: The Roma of Europe* (Ashgate 2007) 55

²²⁴ For a discussion of the difficulties in defining 'minority' see for example: Gulara Guliyeva 'Defining the Indefinable: A Definition of "Minority" in EU Law' (2012) 9 *European Yearbook of Minority Issues* 179 – 210

²²⁵ Helen O'Nions *Op Cit* 180 – 184

desire to provide such perceived benefits to unpopular groups. The Roma in Europe are one such unpopular group and so ascribing official minority status to them in each of the four countries may be problematic.²²⁶ This would therefore necessitate the formulation of a single, authoritative definition of a minority but this would likely prove equally divisive. Perhaps such problems of definition could be overcome by common sense since, as Peter Leuprecht has remarked:

‘Let us not hide behind legal hair-splitting as to whether this or that definition of minorities applied to the Roma. Let us be honest. We all know that the Roma are a minority and a particularly vulnerable one.’²²⁷

Although, given the historical disadvantage and contemporary discrimination suffered by the Roma in Europe, it would be dubious indeed to trust to common sense when it comes to rights provision.

²²⁶ Aside from minority groups, the other official variety of group recognised by international law is indigenous persons. UN Special Rapporteur Martinez Cobo has presented the following authoritative definition of indigenous peoples:

“Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of that society and are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

Their historical continuity may consist of the continuation for an extended period reaching into the present of one or more of the following factors:

- Occupation of ancestral lands, or at least parts of them;
- Common ancestry with original occupants of these lands;
- Culture in general or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood and lifestyle);
- Language (whether used as the daily language, as mother-tongue, as habitual means of communication at home or in the family, or as the pain, preferred, habitual, general or normal language);
- Residence in certain parts of the country or in certain regions of the world;
- Other relevant factors.”

Given the historically nomadic lifestyle of the Roma in Europe, it can be seen that they lack ancestral lands and have no affinity with a particular country or region. Neither do they show common ancestry with the original occupants of the land. Although the Roma do exhibit a culture decidedly different to that of the majority and have an obvious wish to preserve that culture for future generations, their lack of historical continuity within Europe prevents them from being considered an indigenous people under international law.

²²⁷ CSCE *Human Dimension Seminar on Roma in the CSCE Region*, Consolidated Summary. 20 – 23 September 1994 at p 7 para 7. CSCE, Warsaw from Helen O’Nions, Op Cit n119 185

The second and associated problem with the practicalities of a group rights approach would be actually identifying the rights requiring protection. Since all minorities are inherently different from one another, it follows that the rights such groups both desire and require are different too. Laying out the scope of group rights would therefore be incredibly difficult.²²⁸ Even within minority groups themselves there can be different rights requirements. The Roma can be seen as an example here since, as Chapter One of this thesis explained, there are actually a number of often quite disparate groups both geographically and culturally who fall together under the heading of 'Roma'. As such, it might be suggested that there is no singular, common Roma identity from which group rights can be drawn. There is a risk here therefore that a group identity would have to be imposed on the Roma before any group rights could be formulated and so such rights would be unsuitable or unnecessary for many of the individuals deemed to belong to the group. Once again there is a risk of oppression brought about through the idea of collectivity.

Ultimately then, group rights are both an unnecessary and an undesirable means of guaranteeing the human rights of minority groups such as the Roma. It seems that the individual is still the most appropriate body in which rights should vest. However, this does not mean that group membership is unimportant since without the existence of the group it would be impossible for an individual to maintain their right to culture. It is vital then that this importance of group membership is reflected within the individual rights approach as being key to the individual's identity.²²⁹ In order to strengthen the protection afforded to

²²⁸ Ian Shapiro & Will Kymlicka *Ethnicity and Group Rights* (New York University Press 2000)

²²⁹ Will Kymlicka 'Interpreting Group Rights' (1996) 6(2) *The Good Society* 8 – 11; Nathan Glazer 'Individual Rights against Group Rights' in Will Kymlicka *The Rights of Minority Cultures* (Oxford OUP 1995); Ian Shapiro & Will Kymlicka *Ethnicity and Group Rights* (New York University Press 2000); Natan Lerner *Group Rights and Discrimination in International Law* (Martinus Nijhoff Publishers 2003); Peter Jones 'Human Rights, Group Rights and Peoples' Rights' (1999) 21(1) *Human Rights Quarterly* 80 – 107; Addis, A. 'Individualism, Communitarianism, and the Rights of Ethnic Minorities' (1992) 67 *Notre Dame L Rev* 615; Chandran Kukathas 'Are there any Cultural Rights?' (1992) 20(1) *Political Theory* 105 – 139; Judith Baker *Group Rights* (University of Toronto Press 1994);

culture and group membership it therefore may be necessary still to alter in some way the current approach to individualism that is found within the international rights instruments. Since this thesis is particularly concerned with guaranteeing the rights of Roma children, it is submitted that the most appropriate means of rights protection would be the strengthening of individual rights mechanism through an increased recognition of children's rights.

2.5 Children's Rights Recognition

As established above, the international regulation of human rights is currently centred on the individual. Since the various international instruments which guarantee human rights are framed around the interrelated principles of non-discrimination and equality, all individuals are seen as being equally deserving of protection. Of course, in a practical sense, all people are not the same and certain categories of people require levels of protection that the majority perhaps do not. It is this failure to perceive the unique vulnerabilities that can exist in society that has resulted in individual rights failing historically disadvantaged groups such as the Roma. Children represent a clear example of a category of person who exists in such a uniquely vulnerable position and this is amplified for children from minority groups who can be doubly disadvantaged. Such a denial of rights is evident in the public realm of children's involvement in education, as well as in the private realm of the family.²³⁰ Recognition of the precarious position of children in society has led to the argument that children have rights as human beings but also require special care and protection.²³¹ As a response to this, since the beginning of the twentieth century "the development of international law on the rights of the

²³⁰ Bob Franklin, 'Children's Rights: An Introduction' Bob Franklin (ed), *The New Handbook of Children's Rights* (Routledge 2005) 21

²³¹ UNICEF 'Convention on the Rights of the Child' <<http://www.unicef.org/crc/>> [last accessed 26/02/13]

child has paralleled in part the development of the general body of international human rights law.²³²

Children's rights could be an invaluable tool for countering the historical and contemporary disadvantage suffered by Roma children, both in terms of the right to education and their other fundamental rights. A children's rights approach involves firmly positioning the individual child as the holder of his or her own fundamental human rights,²³³ whereas a more conventional individual rights approach might permit the child to become a mere tool of his/her parents, state or culture. This thesis places particular emphasis on the right to education since education is considered to be the key with which every individual can unlock the full range of their human rights. In order to allow this to happen, one of the central purposes of education must be to facilitate each child's growth into an informed, autonomous adult who is secure in their own culture as well as able to compete on an equal footing in majority society if they wish to do so. Allowing the child to be used as a 'rights pawn' would hamper such development into an autonomous adult and so it is vital that the child is positioned as a secure holder of rights from the very beginning. Importantly, an increased recognition of children's rights can be developed within an individual rights model – there is no requirement for the development of group rights – and so, while not without controversy, would be practically achievable. It is additionally suggested that the 'best' setting for children such as the Roma to effectively exercise their rights and to be able to develop into autonomous adults is a multicultural society informed by critical pluralism.

2.5.1 The Theory of Children's Rights

²³² Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995)

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²³³ Phil Jones & Sue Welch *Rethinking Children's Rights: Attitudes in Contemporary Society* (London, Continuum 2010); Phil Jones & Gary Walker *Children's Rights in Practice* (London, SAGE 2011); Priscilla Alderson *Young Children's Rights: Exploring Beliefs, Principles and Practice* (Jessica Kingsley 2008); David Archard *Children: Rights & Childhood* (Routledge 2004).

Before moving on to consider children's rights in practice it is important to understand fully the philosophical underpinning of such rights, both in terms of the general reception that child rights theory has met with at an international level as well as the detail of the arguments that could be offered both for and against the recognition of additional rights for children.

First, rights are important "if children are to be treated with equality and as autonomous beings."²³⁴ Effectively, international human rights law recognises that every individual's autonomy is just as important as that of every other individual. This is particularly important in the context of this thesis since it will be argued in the following chapter that the central purpose of education should be to facilitate the development of children into autonomous adults who are capable of self-maintenance and informed decision making. A children's rights approach would emphasise the individuality of the child and so would facilitate this move towards competent autonomy. It is not sufficient for education to remain a formal procedure targeted at children en masse with no recognition that each child is a legal individual in the same way as each adult. Additionally, a children's rights approach "could address the problem experienced by children, alongside other minority groups, of being the focus of various specialised branches of law and policy, all with their own distinctive character, with no coherence or similarity in objectives."²³⁵ Jane Fortin further suggests that "by placing the differing aspects of childhood in a framework of rights, rather than, for example, in a medical or educational-based context, the boundaries between the various disciplines start becoming irrelevant, with a far more coherent outcome being possible."²³⁶ This is important since children are dependent on the various social institutions far more than

²³⁴ Michael Freeman, 'Taking Children's Rights More Seriously' (1992) 6(1) *International Journal of Law and the Family* 52, 52

²³⁵ Jane Fortin, *Children's Rights and the Developing Law* (3rd edn, CUP 2009) 3

²³⁶ *Ibid*

adults and so it is necessary that these institutions work together in a coherent manner to ensure that each child is being afforded the best possible level of opportunity and outcome.

It must be recognised that the concept of children's rights is still rather controversial, not just because of the belief that all individuals are already afforded equal rights protection. While there are a number of specific arguments which have been raised to counter calls for an increased recognition of children's rights [and which will be dealt with in detail below], the first hurdle which must be overcome is the far larger claim that, conceptually, human rights are not suitable to be exercised by children themselves. Such a claim flows from the popular "power" theory of rights. According to Tom Campbell, critics of children's rights²³⁷ ascribe to the "power" theory of rights whereby rights are defined "as normative powers to determine the obligations of others by the exercise of the will of the right holder."²³⁸ The assumption is then said to follow that "children do not have the relevant volitional capacities to claim rights and so children cannot be properly said to have any rights whatsoever."²³⁹ It could be suggested that a parent would serve as a proxy rights holder for his/her child[ren] but this would be unsatisfactory in that it differentiates arbitrarily the rights-worthiness of different individuals. Rather the stress on capacity and participation which underpins the prevalent and adult-centric 'power' theory of rights is inadequate as an expression of the individual moral significance of all people, including, of course, children. Such a stress on static capacity and on participation loses sight of the focus on each child as an individual which should be central to all human rights provisions. It is equally undesirable in that it fails to take into account the perceived goal of human rights – allowing the child to grow into an autonomous adult – which involves recognition that such an adult must be able to participate fully in

²³⁷ At least for children of all ages

²³⁸ Tom D Campbell, 'The Rights of the Minor: As Person, As Child, As Juvenile, As Future Adult' (1992) 6(1) *International Journal of Law and the Family* 1, 2

²³⁹ *Ibid*

society and that they may well not be able to do so if they are prevented from enjoying full human rights protection when they are children.

Rather than focusing on a ‘power’ theory of rights, a truly multicultural society should thus follow the ‘interest’ theory of rights. Tom Campbell states that the “‘interest’ theory of rights, upon which this suggestion is based, requires the identification of “those interests which are to be protected and furthered by rights.”²⁴⁰ Campbell expands on this by asserting that, in the case of children, “it is helpful to distinguish between their interests as persons (which they have in common with all other persons), as children (which they have as immature and dependent persons), as juveniles (which they develop as they approach maturity) and as future adults (which relate to their future interests as adults).”²⁴¹ Interestingly, Campbell’s analysis would allow for a refined interpretation of the “best interests” of the child principle²⁴² found in the UN Convention on the Rights of the Child whereby the emphasis is on the rights of the child as an individual rather than those of the future adult. If rights are defined in accordance with the interest theory then, “assuming that children have interests, it follows that they must have rights.”²⁴³ Take for example the interest that children have in receiving a decent education, once that is acknowledged then it seems only logical that the child as an individual rather than as a product of parents, school or society should be able to exercise their right to education. There is no presumption here that the interests are expressions of rational capacity on the part of the children.²⁴⁴ Similarly there would seem to be no requirement for the ‘give and take’ – where one must shoulder a certain responsibility

²⁴⁰ Tom Campbell Op Cit 1

²⁴¹ Ibid

²⁴² The ‘best interests’ of the child is one of the key principles underpinning the Convention on the Rights of the Child and will be discussed in detail later in this chapter.

²⁴³ Tom Campbell Op Cit 2

²⁴⁴ Ibid

in return for receiving a certain right²⁴⁵ – which seems to be a characteristic of the ‘power’ theory of rights.

Once this ‘interest’ theory of rights is properly understood it can be seen to be logical and actually far from radical. It is compatible with an individualistic approach to rights protection and also deals effectively with the potentially thorny issue of the hypocrisy of holding children to a capacity which not all adults could actually meet. When the idea of rights protection is reconceptualised to be based on the idea of individual interests leading to individual rights many of the arguments raised against increased recognition of children’s rights are easily negated. However, since such arguments are still prevalent, detailed rebuttals will now be offered for each of them since, while relatively few theorists have accepted Bertrand Russell’s suggestion that “no political theory is adequate unless it is applicable to children as well as to men and women,”²⁴⁶ the arguments that have been offered in opposition to such an idea have been generally unconvincing:

Children lack sufficient rationality to truly exercise rights

It has been alleged that children are irrational and incapable of decision-making and so are imperfect vessels for rights to vest in. Further to this idea is the argument that children lack the wisdom that is gained from experience and so are prone to making mistakes. From looking at these two interrelated arguments, it would seem that society bases its denial of rights to children on the paternalistic idea of the necessity to protect children from harm stemming from their own actions. This idea that children lack the required level of rationality with which to truly exercise rights can be defeated on a number of grounds. Perhaps most

²⁴⁵ See for example the suggestion that rights and responsibilities are “two sides of the same coin – that the exercise of rights must be matched by the exercise of responsibility within the same person” in Gerison Lansdown, *Taking Part: Children’s Participation in Decision Making* (IPPR 1995) 29

²⁴⁶ Bertrand Russell, *Principles of Social Reconstruction* (Allen and Unwin 1971) from Bob Franklin, ‘Children’s Rights: An Introduction’ in Bob Franklin (ed), *The New Handbook of Children’s Rights* (Routledge 2005) 100

importantly, it can be suggested that “children do reveal a competence for rational thought and do make informed decisions.”²⁴⁷ Such decisions may not seem important on the grand scale for they tend to involve issues like choosing a television program to watch or who to play with at break time but they do nevertheless demonstrate a consideration of facts and an evaluation of potential outcomes. Judy Miller conducted a study of nursery age children and was able to observe that the children were ““making decisions all the time.”²⁴⁸ Freddy Mortier criticises the contemporary understanding of competence by asserting the “inherently normative character of contemporary judgements’ and concluding that there is ‘no neutral way of defining competence.’²⁴⁹ It seems foolish indeed to suggest that a child is incapable of decision-making due to a lack of decision-making experience since such a suggestion implies a kind of limbo that, if followed to its ultimate conclusion, the adult that the child eventually grows into would also be incapable of competent decision-making. As Joel Feinberg remarked, “even children, after a certain point, had better not be ‘treated as children’ else they will never acquire the outlook and capability of responsible adults.”²⁵⁰

A focus on the perceived lack of rationality of children also fails to recognise two important practical considerations when it comes to determining the ‘rights worthiness’ of individuals. The first is that there is nothing inherently wrong with making mistakes since such a situation provides an excellent learning opportunity for children and adults alike. Secondly, adults do not all share an equal level of rationality. Consequently, the arguments advanced to deny children certain or additional rights could also be used to justify rights to certain adults if

²⁴⁷ Freddy Mortier, “Rationality and Competence to Decide in Children” (1999) 85 in Eugene Verhellen (ed), *Understanding Children’s Rights* (University of Ghent 1999) 79 – 100

²⁴⁸ Judy Miller ‘Young Children as Decision Makers’ in Christopher Cuninghame (ed), *Realising Rights* (Save the Children 1999) 71 from Bob Franklin, ‘Children’s Rights: An Introduction’ in Bob Franklin (ed), *The New Handbook of Children’s Rights* (Routledge 2005) 23

²⁴⁹ Freddy Mortier Op Cit 79 – 100

²⁵⁰ Joel Feinberg, (1980) “Legal Paternalism” in *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy* (Princeton, USA: Princeton University Press) 110 in Bob Franklin, ‘Children’s Rights: An Introduction’ in Bob Franklin (ed), *The New Handbook of Children’s Rights* (Routledge 2005) 24

capacity is the central consideration.²⁵¹ Some adults may well be perceived by wider society as being terrible decision-makers but it is very unlikely that this perception will result in the adult in question suffering the loss of their position as a recognised rights holder.

Children and Double Standards

Children are of course inherently different from adults. It could be suggested that most children have lesser abilities than adults, are more vulnerable, and are more in need of nurturing and protection. These reasons²⁵¹ are seen as providing justification for the existence of the double standard in society whereby there is one set of rights for adults (providing them with opportunities to exercise their powers) and another for children (providing them with protection and at the same time keeping them under adult control).²⁵² A double standard can obviously be considered unjust where the distinction upon which it relies is not relevant.²⁵³ It therefore has to be considered whether age is a relevant point of distinction. While certain rights are of course universally applicable,²⁵⁴ others are decidedly age specific²⁵⁵ and so could lead to the exclusion of children and even, in certain cases, adults. A significant part of the problem stems from the issue that, if rights such as universal suffrage are to be given to adults and denied to children, a precise age must be picked as the divide between childhood and adulthood. Although many countries consider eighteen to be the age at which adulthood is reached, there is no universally recognised age at which childhood ends as it is an issue heavily influenced by cultural and societal considerations. Further, there are few people who

²⁵¹ Michael Freeman, 'The Limits of Children's Rights' in Michael Freeman and Philip Veerman, *The Ideologies of Children's Rights* (Martinus Nijhoff Publishers 1992) 35

²⁵² Ibid 34

²⁵³ For example, the colour of a person's skin is no reason to deny them the right to vote and so the double standard applied in South Africa during the Apartheid was obviously unjust.

²⁵⁴ Rights to life, liberty, freedom from torture etc

²⁵⁵ Age is relevant in rights such as the right to vote and the right to join a trade union and, contrarily, an absence of age is required to exercise the right to education. Importantly, with regards to this last issue, it is important to remember that although adults can be too old to attend school, they are not categorically barred from attaining education as there are specific initiatives available to adult learners. Conversely, and here the double standard lies, children are categorically barred from the right to vote etc.

seriously believe that there is a difference in a person's capacity when they are say eighteen years and one day old as compared to when they are seventeen years three hundred and sixty four days old. It seems clear therefore that the drawing of a line between the two age categories is ultimately arbitrary but the law dislikes uncertainty and so it would rather separate people into categories where adults have full rights while children have few or none.²⁵⁶

Children are incapable of self maintenance

It could be suggested that children are not entitled to be rights bearers because they are incapable of self sufficiency. This argument is based on Kant's theory that "children ... attain majority and become masters of themselves ... by ... attaining to the capability of self maintenance."²⁵⁷ However, in reality the requirement for self maintenance fails to adequately distinguish between adults and children but instead simply differentiates between "those who are capable of self maintenance and those who are not."²⁵⁸ Such an argument could also be used to justify the exclusion of disabled people or the elderly or those who are sick since they may not be able to demonstrate the traditional interpretation of self maintenance but this would be highly unpalatable in a democratic society. Once again this illustrates a double standard as to who society is willing to deem unfit to hold rights.

*The "Caretaker Argument"*²⁵⁹

The "caretaker argument" is that the parent²⁶⁰ has the "right to restrict a child's freedom and to make decisions in a child's best interest, guided by the principle that the child must

²⁵⁶ Wilhelm Aubert, *In Search of the Law* (Martin Robinson 1983) 93 from Michael Freeman, 'The Limits of Children's Rights' in Michael Freeman and Philip Veerman, *The Ideologies of Children's Rights* (Martinus Nijhoff Publishers 1992) 35

²⁵⁷ Immanuel Kant, *Lectures on Ethics* (Methuen 1930) 118 in Bob Franklin, 'Children's Rights: An Introduction' in Bob Franklin (ed), *The New Handbook of Children's Rights* (Routledge 2005) 26

²⁵⁸ Michael Freeman, 'The Limits of Children's Rights' in Michael Freeman and Philip Veerman, *The Ideologies of Children's Rights* (Martinus Nijhoff Publishers 1992) 35

²⁵⁹ Postulated by David Archard, *Children; Rights and Childhood* (Routledge 1993) 51 – 57

eventually come to acknowledge the correctness of the decision made on their behalf.”²⁶¹ For example, although a child may be reluctant to attend school, their parent realises that education is necessary if they are to become a rational and autonomous adult and, further, that the child themselves will realise this too when they become older. It is due to the caretaker argument placing “such a high value on individual autonomy and critical rationality in decision-making that intervention in children’s affairs is judged permissible.”²⁶² As David Archard has commented, “the caretaker thesis thinks self determination too important to be left to children”.²⁶³ This idea that children need to be shielded from deciding on their own best interests has fortunately been significantly eroded in recent years and children’s own opinions are fairly regularly sought in determining welfare and family law issues.²⁶⁴

Idealistic view of childhood

Aside from those who disparage the logic of children’s rights, Michael Freeman suggests that there are also “those who argue that, however important rights are, it is not necessary to recognise children’s rights.”²⁶⁵ Such a view seems to be predicated on two doubtful presumptions. First, it could be suggested that adults always act in the best interests of children.²⁶⁶ According to Joseph Goldstein et al, arguments of this sort tend to rely on “a laissez-faire attitude towards the family whereby, seemingly, the only right for children

²⁶⁰ or some other rational adult

²⁶¹ Bob Franklin, ‘Children’s Rights: An Introduction’ in Bob Franklin (ed), *The New Handbook of Children’s Rights* (Routledge 2005) 27

²⁶² Ibid

²⁶³ David Archard Op Cit 52

²⁶⁴ Alison Clark and June Statham ‘Listening to young children: Experts in their own lives’ (2005) 29(1) *Adoption and Fostering* 45 – 50; Christine Hallett and Alan Prout (eds) *Hearing the Voices of Children, Social Policy for a New Century* (London, Routledge 2003)

²⁶⁵ Michael Freeman, ‘The Limits of Children’s Rights’ in Michael Freeman and Philip Veerman, *The Ideologies of Children’s Rights* (Martinus Nijhoff Publishers 1992) 30

²⁶⁶ A criticism arguably founded on the idea that family life should be left in the private sphere and thus be subject to only limited interference. This belief of course conveniently ignores all instances of parents failing to act in the best interests of their children.

which they would accept is the child's right to autonomous parents."²⁶⁷ Such commentators would argue that "a policy of minimum coercive intervention by the state accords with their firm belief as citizens in individual freedom and human dignity".²⁶⁸ Of course no conclusive evidence has been offered as to whose individual freedom and whose human dignity is being upheld. It is hard to see how it could be children's. Secondly, it has been contended that childhood as a kind of golden age when children are innocent and so should be spared the rigours of adult life. John Holt, for example, argues that this understanding of childhood is most aptly represented by a "walled garden" metaphor where children "being small and weak are protected from the harshness of the outside world until they become strong and clever enough to cope with it".²⁶⁹ This idea progresses to the belief that, since childhood should be an innocent and carefree time, there is actually no practical requirement for children's rights. As Mekada Graham has discussed, even if this view of the carefree nature of children's lives is believed, "at best it represents an ideal state of affairs and, in reality, in does not actually reflect the varied lives of many modern children."²⁷⁰

Liberating Children

Following on from this belief in the golden age of childhood is the argument that the recognition of children's rights is the first step on the road to liberating children and so, perhaps indirectly, to exposing them to harm. Those who seek to criticise children's rights have suggested that such rights would, albeit inadvertently, lead to children having to cope with adult responsibilities such as entering the workforce before they are physically and

²⁶⁷ Joseph Goldstein, Anna Freud and Albert J Solnit, *Before the Best Interests of the Child* (Free Press 1979) 18 and 189 Op Cit 30

²⁶⁸ Ibid 12

²⁶⁹ John Holt, *Escape from Childhood* (Penguin 1975) from Bob Franklin, 'Children's Rights: An Introduction' in Bob Franklin (ed), *The New Handbook of Children's Rights* (Routledge 2005) 18

²⁷⁰ Mekada Graham 'Changing Paradigms and Conditions of Childhood: Implications for the Social Professions and Social Work' (2011) 41 *British Journal of Social Work* 1532 – 1547

mentally able to cope.²⁷¹ However, such arguments as to the liberation of children concentrate on the extreme rather than the likely impact of children's rights. Further, even the most ardent proponents of children's rights would preserve some protective legislation since it is recognised that children do not always think and act in their own best interests.²⁷²

Putting Rights into Practice

Aside from the theoretical objections that have been raised to the recognition of children's rights, the final most prevalent objection rests on the practical matter of putting rights into practice. It is true that there would be practical hurdles to overcome before children's rights could be more widely implemented in the 'real world'. First, there is the unfortunate recognition that government's words do not always match government's deeds. As Freeman comments, "the passing of laws is only a beginning: it is a signal that must be taken up by society's institutions."²⁷³ Laws that are unsuccessfully or inefficiently implemented may actually cause harm. Secondly, "the passing of laws can have unfortunate side-effects and unintended consequences."²⁷⁴ Any attempt to reform or alter existing structures, even if done with the intention of further protecting children, could have adverse effects on children's rights. Thirdly, "rights without services are meaningless."²⁷⁵ In nearly all societies children have very little market influence and power. There could be said to be little point in creating an improved legal framework and recognising the existence of children's rights unless resources are reallocated so that children are able to access this new source of justice.

²⁷¹ Martin Hoyles, *Changing Childhood* (Low Pay Unit 1979) 5 from Michael Freeman, 'The Limits of Children's Rights' in Michael Freeman and Philip Veerman, *The Ideologies of Children's Rights* (Martinus Nijhoff Publishers 1992) 36

²⁷² *Ibid.* Although really it is debatable whether people of any age can really be said to always think and act in their own best interest.

²⁷³ Michael Freeman, 'The Limits of Children's Rights' in Michael Freeman and Philip Veerman, *The Ideologies of Children's Rights* (Martinus Nijhoff Publishers 1992) 39

²⁷⁴ For example, Prohibition laws in the USA had the unforeseen effect of benefiting the criminal activities of the Mafia.

²⁷⁵ Michael Freeman *Op Cit* 41

Importantly though, none of these practical considerations are fatal to the concept of children's rights but instead must just be borne in mind during the drafting of any relevant instruments or policy measures.

Ultimately then, while an individualist base to international human rights protection is the preferred approach, in conjunction with the international recognition of the importance of culture, the current approach to individual rights would be greatly improved if it were modified to include a greater recognition of children's rights.

2.5.2 Children's Rights in International Law

There has certainly been some recognition of children's rights at an international level. Such recognition has primarily come in the form of the UN Convention on the Rights of the Child which, as well as being groundbreaking in its focus on the child as an individual rather than as a future adult or merely a product of his/her parents, is of course particularly significant to this thesis because of the articles concerning the right to education²⁷⁶ and the importance of culture.²⁷⁷

*The UN Convention on the Rights of the Child*²⁷⁸

According to Geraldine Van Bueren, "the UN Convention on the Rights of the Child has substantially increased general awareness of children's rights."²⁷⁹ It is based upon the premise that international law is a valuable tool for those seeking to improve the daily lives of children.²⁸⁰ The Convention, which has attracted almost universal support,²⁸¹ embraces a

²⁷⁶ Article 28 and Article 29

²⁷⁷ Article 31 and Article 30 and Article 5

²⁷⁸ Full text available at <<http://www2.ohchr.org/english/law/crc.htm#art31>> [last accessed 26/02/13]

²⁷⁹ Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995)

xix

²⁸⁰ Ibid

²⁸¹ Only the USA and Somalia are not signatories.

“comprehensive set of civil, economic, social and cultural rights which it argues the global community of children should enjoy as a minimum.”²⁸²

a) Interpreting the Convention

Before looking at the specific rights contained within the Convention which are of particular importance to this thesis, it is important to understand the principles of interpretation that underpin the Convention since these principles demonstrate how children’s rights could be implemented and enforced at a greater general level. Firstly it has been suggested that the “54 Articles of the Convention embrace a wide range of rights which are grouped under three broad categories and are labelled the ‘three Ps’ –rights to provision, protection and participation.”²⁸³ These include the most basic “right to life, the right to adequate health care, food, clean water, shelter and education (provision), rights to protection against sexual abuse, neglect and exploitation (protection) and rights to privacy and freedom of association, expression and thought (participation).”²⁸⁴ It is interesting to note that the right to education is classed as a provision right which fits well within the ‘interest’ theory of rights discussed above. Children have an interest in receiving an education and that interest is met with the right to provision of education. Once education is framed as a provision right it becomes far harder for opponents of children’s rights to raise arguments based on children’s lack of capacity to participate in the decision making process.

In addition to the division of the Convention rights into the “three P’s”, Priscilla Alderson has identified four features of the rights contained in the Convention:

1. “First, rights are “limited” and relate to obligations which may not always be met.

²⁸² Bob Franklin (ed), *The New Handbook of Children’s Rights* (Routledge 2005) 20

²⁸³ Colin Wrings, “Children’s Welfare Rights: A Philosopher’s View” (1995) 19 in Mary John (ed), *Children in Our Charge: The Child’s Right to Resources* (Jessica Kingsley 1996)

²⁸⁴ Ibid

2. Secondly, rights are “inspirational” since their realisation will reflect available resources.
3. Thirdly, rights are “conditional” rather than absolute and will be influenced by the capacities of the child, the character of national law and other factors.
4. Finally, rights are “shared” and acknowledge that everyone enjoys an equal claim to the same rights.”²⁸⁵

Each of these four features points to the fact that the rights found in the Convention have a finite nature, although they are flexible in the sense that the child’s capacities will influence their operation, they are not so flexible as to allow new rights to grow from them and Alderson has suggested that they are weakened by the fact that they are desirable rather than compulsory.²⁸⁶ The idea that Convention rights are limited and inspirational is troubling since it implies a certain leeway as to states’ obligations. States may thus be able to avoid full implementation by citing social or economic conditions that prevent complete fulfilment of obligations. However, a commitment to the Convention implies a commitment to the principles enshrined within it and so both states and individuals need to be fully aware of what exactly they can expect – both in terms of rights and obligations – from the Convention.

Turning now to the specifics of interpretation, underpinning the Convention are two principles which must be considered when interpreting the rights enshrined within it: “the best interests of the child and the evolving capacities of the child.”²⁸⁷ The term “best interests”²⁸⁸ broadly describes the well-being of a child: “Such well-being is determined by a variety of individual circumstances, such as the age, level of maturity of the child, the

²⁸⁵ Priscilla Alderson, *Young Children’s Rights* (Save the Children 2000) 23

²⁸⁶ Ibid

²⁸⁷ Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995) 45

²⁸⁸ Article 3(1)

presence or absence of parents, the child's environment and experiences."²⁸⁹ It has been argued that the best interests of the child is essentially a principle of compassion²⁹⁰ since it is recognised that only adults are in a position to make decisions on behalf of children due to children's lack of experience and judgement. However, the phrase 'best interests of the child' is better understood as an indicator of the central importance of the child as an autonomous individual whose rights are just as valid as those of an adult.

Although now common in domestic legislation, the best interests of the child is not expressly incorporated into many other international human rights instruments.²⁹¹ This lack of incorporation could be due to the belief that the rights approach of the international treaties is at odds with the traditional best interests approach which could be seen as undermining the child's autonomy. Therefore, the inclusion of the best interests of the child in the Convention on the Rights of the Child, suggests that this traditional concept should be remoulded.²⁹² Article 3(1) of the Convention provides that "in all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies the best interests of the child shall be a primary consideration." The reference to "all actions" makes the provision broad enough to encompass all state agencies and to include action and inaction. It is not certain, however, to what extent Article 3 should be read as including private welfare agencies and institutions.²⁹³

²⁸⁹ UN High Commissioner for Refugees, *Guidelines on Determining the Best Interests of the Child* (UNHCR May 2008) <http://www.essex.ac.uk/armedcon/story_id/000821.pdf> 14 [last accessed 26/02/13]

²⁹⁰ Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995) offers the example of *Chapsky v Wood* [1881] 26 Kan. 650 where custody was awarded to a grandmother who had brought up her granddaughter, rather than to the girl's biological father, as the court's paramount consideration was that of the girl's welfare, which would be protected by the girl living with her grandmother.

²⁹¹ For example, neither the European Convention on Human Rights nor the International Covenant on Civil and Political Rights include such a reference.

²⁹² Joachim Wolf, "The Concept of Best Interest" in Michael Freeman and Philip Veerman, *The Ideologies of Children's Rights* (Martinus Nijhoff Publishers 1992) 128

²⁹³ UN Doc E/CN.4/L 1575

The concept of the evolving capacities of the child, reflecting children's different rates of development, is incorporated in Article 5 of the Convention on the Rights of the Child. Article 5 highlights the importance of "appropriate direction and guidance" and so removes any implication that the decision maker has an unlimited discretion to provide any type of direction for the child during the entire period of childhood. Although children in different cultures mature at different rates, the principle is fundamental and universal; as the child becomes more mature so the direction lessens.²⁹⁴ Article 5 is of further importance since it situates the child within its culture by recognising the importance of extended family and community. Such a recognition effectively acknowledges that a child is not an isolated individual and so must require cultural protection if that child is to be able to fully enjoy its human rights. The recognition of the importance of family and community to Roma children could be an important step towards the acceptance of children's rights.

The evolving capacities of the child and the best interests of the child are "umbrella principles" underpinning the exercise of all the rights in the Convention. Consequently, they are both so fundamental that it is unlikely that States Parties will be permitted to enter a reservation limiting their application.²⁹⁵ It is only by considering the two principles of interpretation together that the 'best interests' standard becomes an instrument of progress for children's rights since the requirement for the child in question to be consulted during any proceedings serves to balance the paternalism of the best interests principle.²⁹⁶

b) Specific Provisions of the Convention

Although all of the rights guaranteed within the Convention are necessary and important, some of the provisions are of particular relevance to improving the educational situation of

²⁹⁴ Geraldine Van Bueren Op Cit 50

²⁹⁵ Article 51 (2) Convention on the Rights of the Child

²⁹⁶ Geraldine Van Bueren Op Cit 51

Roma children in Europe. To begin with, the Convention includes a blanket non-discrimination principle in Article 2 which demands that the Convention's provisions apply to all children without regard to "race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."²⁹⁷ Article 2 (1) States Parties shall "respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."

Article 2 echoes the non-discrimination provisions discussed above and so, while it is clearly a child-centric provision, is compatible with the general body of international rights protection. Article 2 is an important starting point when considering how recognition of children's rights could help remedy the disadvantage suffered by Roma children in Europe since it demonstrates that each of the target countries have formally accepted that children as individuals can suffer discrimination and that such suffering is unacceptable.

A number of the Convention provisions also recognise the importance that culture and community has to children. Since this thesis argues that a pluralist, multicultural society would be the best environment in which to guarantee the rights of minority children, such recognition is certainly a boon since it demonstrates an understanding that each child's culture is important to them and so impliedly endorses a policy of liberal multiculturalism. This recognition of the importance of culture is additionally important since it implies that

²⁹⁷ Article 2 (1): States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

national education systems²⁹⁸ should be culturally sensitive. Those Convention provisions dealing with the importance of culture are Article 5, Article 30 and Article 31.

Article 5²⁹⁹ is perhaps a slightly looser recognition of culture being concerned, as it is, most specifically with families and communities, but it does mandate a respect for culture as provided by local custom. The full text of Article 5, as well as recognising the importance of the community, provides additional guidance for this thesis in that it stresses that the rights in the Convention will be exercised 'by the child'. Children are here officially recognised as being rights worthy and, although mention of 'evolving capacities' is still necessarily made, Article 5 demonstrates the pragmatic approach taken in international law towards preserving the child as an autonomous individual.

Articles 30 and 31 deal more explicitly with the importance of culture to children:

Article 30 In those states in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

Article 30 therefore recognises that states can be made up of numerous different groups and that minorities have a right to enjoy their own culture. This leads to an assumption that the state should not hinder cultural practices and also to the idea that different cultures should be accommodated. Use of a minority language of course ties in to the right to enjoy minority

²⁹⁸ As well as other national institutions

²⁹⁹ Article 5 States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

culture and both of these rights have an impact on the kind of education that a child who is a member of a minority can expect to receive,³⁰⁰ both in terms of any accommodations that the national educational system can be expected to make and also any provision of special measures which can be implemented to address historical disadvantage. Article 30 is also interesting in that it states that children shall not be denied these rights “in community with other members of his or her group” and so it offers an example of group rights recognition at an international level. This once again links into the idea of group suffering that was discussed earlier in this chapter and of the suggestion that special measures targeted at particular groups, so long as they are limited and appropriate, are acceptable from an international rights perspective.

Article 31 develops this assertion as to the importance of culture:

Article 31 (1) States Parties recognise the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts. (2) States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Once again the Convention places a burden on states not just to respect cultural practices but to promote the rights of children to engage fully in cultural life. Such promotion would clearly best be accomplished through some variety of cultural recognition within the education system as that is the first national institution which most children come into contact with and the one in which they spend most time. This also ties in to the limited recognition of group rights which this thesis advocates and to the suggestion that the object of human rights

³⁰⁰ This concept will be discussed in more detail in the following chapter

should be to guarantee that children are provided with the necessary rights and amenities to ensure that they can also be autonomous individuals.

The final specific rights of particular importance to this thesis are Articles 28³⁰¹ and 29,³⁰² both of which concern the right to education. Both Article 28 and Article 29 are of the utmost importance when it comes to analysing exactly what children belonging to a minority can expect from their national education system and also what States Parties to the Convention should expect to have to provide. The specifics of the right to education, both as contained within the Convention on the Rights of the Child and within other international instruments, and how a multicultural, pluralist society which emphasises individual [including children's] rights could best guarantee such a right will be discussed in the following chapter.

³⁰¹ Article 28 (1) States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
 - (b) Encourage the development of different forms of secondary education, including 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 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.
- (2) States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
- (3) States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

³⁰² Article 29 (1) States Parties agree that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- (c) The development of respect for the child's parents, his or her own cultural 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 civilizations different from his or her own;
- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- (e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

So it can be seen that there is already an important international recognition of children's rights in the form of the Convention on the Rights of the Child and that the Convention contains a number of provisions which are of particular importance in the context of this thesis. Of course the Convention is not a perfect instrument for guaranteeing the protection of children's rights. Indeed, it has been suggested that it is "a very mixed bag in terms of the variety and range of rights which are being claimed, the problems inherent in enforcing those claims, the financial and material resources necessary to meet them and the social, political and economic consequences of granting them."³⁰³ It is for this reason, as well as the numerous positives found in the Convention, that this thesis contends that a greater recognition of children's rights is necessary in order to produce a truly multicultural society and so protect all of the human rights of Roma children in Europe and, indeed, of minority children everywhere.

2.6 Conclusion

In conclusion, the current liberal democratic model followed by most of Europe is insufficient to guarantee rights protection for the Roma since a 'neutral' state which focuses on equal citizenship fails to take into account the importance of, and difficulties associated with, an individual's culture. In order to address the difficulties in the current societal model and so build a cohesive national community, a move towards liberal multiculturalism is recommended. Such a variety of multiculturalism should necessarily involve critical pluralism, which allows for the recognition and protection of minority cultural issues but which also requires give and take on the part of both the minority and the majority.³⁰⁴

³⁰³ Bob Franklin, 'Children's Rights: An Introduction' Bob Franklin (ed), *The New Handbook of Children's Rights* (Routledge 2005) 20

³⁰⁴ Chandran Kukathas 'Are there any Cultural Rights?' (1992) 20(1) *Political Theory* 105 – 139

This type of multiculturalism is built around the concepts of culture, equality and non-discrimination, and it has been demonstrated that each of these concepts, to some degree at least, are already protected in international law. All three should best be able to flourish within a liberal environment and so should therefore be philosophically compatible with the political systems of each of the four countries. Additionally, international obligations mean that they should already be accommodated in these countries to some degree at least.

The discussion of liberal multiculturalism raises a question about whether group rights protection is necessary. While this thesis agrees that minority individuals often suffer disadvantage purely due to their group membership and also that the Roma count as a minority group for the purposes of international law, ultimately group rights protection should be limited to a comprehensive and effective implementation of the currently protected cultural rights. The reasoning behind this with regard to the right to education will be discussed more thoroughly in the following chapter but, essentially, this is because human rights are essentially necessary for the autonomy and freedom of choice of individuals: “The individual must have the choice to exit the cultural group, should she feel restricted by its cultural values and practices.”³⁰⁵ For this reason it would be dangerous to concentrate too much power in the hands of the group.

However, this thesis does recognise that some further modification of an individual rights approach is necessary. Since minority children suffer from double disadvantage – both as minority members and as children – they are seen as being in need of additional protection that the adult individual does not need. To this end, this thesis advocates an increased recognition of children’s rights, including their right to culture, working in conjunction with regular individual rights.

³⁰⁵ Alexandra Xanthaki, ‘Multiculturalism and International Law: Discussing Universal Standards’ (2010) 32 *Human Rights Quarterly* 21, 42

This thesis will now move on to consider specifically the international protection of the right to education.

THE RIGHT TO EDUCATION: INTERNATIONAL LEGAL STANDARDS

3.1 Introduction

While the previous chapter considered the general situation of Roma children in Europe with regard to human rights, this chapter will concentrate on one right in particular – the right to education. It has already been established that the current individualistic basis behind international human rights law is not always sufficient to protect minorities from discrimination and ensure equality in their treatment. It will now be demonstrated that a traditional emphasis on the individual – one that fails to recognise the particular educational difficulties suffered by children from minority groups – also gives rise to problems with respect to the right to education.³⁰⁶ While education is held to be a fundamental human right and one on which access to many of the other fundamental rights depends, Roma children in Europe are not generally able to enjoy fully their educational rights.³⁰⁷ There are many obstacles to 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 Roma children attend school with any regularity³⁰⁸ and up to 90% of adults in some regions are illiterate.³⁰⁹ The Roma are disadvantaged in the field of education for a

³⁰⁶ Helen O’Nions, *Minority Rights Protection in International Law: The Roma of Europe* (Ashgate 2007) 131

³⁰⁷ As Grover and Yanakieva have noted, “Roma young children bear a triple burden. First, they are subject to the stigma and discrimination that are associated with poor Roma communities. Second, like other young children who are dependent and voiceless, they too are most likely to have their needs and rights overlooked ... Third, mainstream early care and educational institutions are conventionally insensitive to the cultural and linguistic background of Roma communities; this reinforces Roma young children’s exclusion from service provision, thereby deepening disparities and increasing marginalisation and vulnerability.” Deepa Grover & Elena Yanakieva *Starting at the Beginning: The Meaningful inclusion of Roma children in early childhood development services* (UNICEF 2009) 17

³⁰⁸ EC Res. 189/C 153/02 (No C153/3-4) 1989 from

<<http://www.scie-socialcareonline.org.uk/repository/fulltext/0021901.pdf>> [last accessed 26/02/13]

³⁰⁹ Jean-Pierre Liegeois and Nicolae Gheorghe, *Roma/Gypsies: A European Minority* (Minority Rights Group 1996) 12

number of reasons.³¹⁰ A crucial contributor to the problem is, no doubt, the attitude of educators as exemplified by national education policies – all too often education systems have been used to promote assimilation rather than coexistence. Discrimination can also be seen to exist at all levels of the education process. A culturally insensitive education system is not the only obstacle that Roma children must overcome, however, as many Roma living in Europe today live in conditions of such extreme poverty and disadvantage that schooling becomes a practical impossibility.³¹¹ In addition to this, many Roma parents disapprove of formal education and consider schooling of that kind to be irrelevant to the lives of their children.³¹² Of course, despite these verifiable reasons for the Roma's lack of attainment in education, as a vital human right, the right to education should be protected and guaranteed in international law in such a way that the disadvantage mentioned above ought to be overcome.

This chapter will therefore begin by establishing the particular educational difficulties faced by Roma children in Europe. After the situation on the ground has been established, this chapter will move on to consider the nature of the international right to education and to evaluate the various international and regional human rights instruments concerned with education. This thesis contends that guaranteeing the right to education is not a straightforward task and that there is in fact a sliding scale of accommodation – which will be discussed in detail in sections 4 and 5 of this chapter – on which each of the human rights instruments occupy a different location. Each human rights instrument will therefore be considered in turn in order to determine the level of educational accommodation that it provides for Roma children.

³¹⁰ See Section 2 of this chapter

³¹¹ United Nations Development Report, *Avoiding the Dependency Trap: A Regional Human Development Report on the Roma in Central and Eastern Europe* (UNDP 2003) 53 <<http://roma.undp.sk/>> [last accessed 26/02/13] 1

³¹² Wilkin, A., Derrington, C., Foster, B., White, R. & Martin, K. 'Improving Educational Outcomes for Gypsy, Roma and Traveller Pupils: What Works?' (Department for Children, Schools and Families Research Report DCSF-RR170 2009) 10 - 13; Roma Education Fund *Roma Inclusion in Education* (REF 2010) 10 – 30; Dimitrina Petrova 'The Roma: Between a Myth and the Future' (2003) 70(1) *Social Research* 111 – 161; Magdlena Slavkova & Yellis Erolova *A Study into the Attitude to Education of the Roma Population in the Municipality of Nova Zagora* (Sofa 2005) <<http://www.ncedi.government.bg/en/INTERNATIONAL%20CENTRE%20FOR%20MINORITY%20RESEARCH%20AND%20CULTURAL%20RELATION1.htm>> [last accessed 28/02/13].

3.2 The Particular Educational Difficulties Experienced By Roma Children in Europe

While the detail of the various human rights instruments will be discussed later in this chapter, each of these instruments focuses on ‘formal’ education. It is important that, although it may at first seem obvious that formal education is important to everyone, the benefits may not be immediately obvious to a Roma child struggling against poverty and discrimination on a daily basis. The school curriculum rarely reflects Romani cultural identity and so Roma children are unlikely to learn anything of their own language, history or traditions. Jean-Pierre Liégeois has gone so far as to suggest that current educational provisions in Europe leave Roma children facing a difficult choice: they can reject their cultural identity and perhaps face censure at home or else they can reject the education system.³¹³ This lack of inclusion of Roma culture is a clear indicator of a lack of plurality in the various national education systems since it demonstrates that, in the main, only the dominant national culture is catered for in any depth.³¹⁴ In the face of such difficulties it is perhaps unsurprising that many Roma children demonstrate reluctance to attend school.³¹⁵ Ultimately, of course, the lack of understanding of Roma culture will only be overcome if the majority of Roma children attend mainstream schools. Once those in charge of the education system learn more of the culture and history of their Roma students, they can begin to adapt teaching and lesson plans to help overcome the prejudice and discrimination that have historically dogged the Roma throughout their schooling.

³¹³ Jean-Pierre Liégeois, *The Education of Gypsy and Traveller Children* (University of Hertfordshire Press 1993) 16

³¹⁴ Chapter Four of this thesis will go on to consider education provision at a national level in more detail and to consider how changes in the rights approach to education could have positive effects on education at a grassroots level.

³¹⁵ World Bank *Toward An Equal Start: Closing the early learning gap for Roma children in Eastern Europe* (World Bank 2012) 12 – 14; Council of Europe *Education of Roma/Gypsy Children in Europe: The training of Roma school mediators and assistants* DGIV/EDU/ROM(2004)11 5 – 6; European Monitoring Centre on Racism and Xenophobia *Roma and Travellers in Public Education: An Overview of the situation in the EU Member States* (EUMC 2006) 21 – 46; UNICEF *Roma School Participation, Non-Attendance and Discrimination in Romania* (UNICEF 2011) 28 -89; Roma Education Fund *Roma Inclusion in Education* (REF 2010) 10 – 30

Arguably, the right to education is one of the most vital human rights since “it influences future life chances and acts as the main vehicle for social mobility.”³¹⁶ Jean-Pierre Liégeois further suggests that “the ultimate goal of any school is to give each child the means and tools he requires in order to achieve autonomy.”³¹⁷ One of the central assertions of this thesis echoes Liégeois’ sentiment that a successful education system is one which fosters autonomy so that each child is able to develop into an adult who is capable of making informed choices and competing within mainstream society. If Roma children are to be able to free themselves from the cycle of poverty and disadvantage then they must be encouraged to attend school and be provided with an education suited to their needs. In order to achieve true autonomy, it is argued therefore that the education system must facilitate children from minorities such as the Roma to feel secure within their own minority culture but also to be able to move within and compete with mainstream society should they wish to do so.³¹⁸ Although older Roma may see formal education as a way of diluting their culture and breaking up communities, if the education system is sensitive to minority cultures then it can actually be a tool for instilling understanding and respect for diverse cultural values.³¹⁹

This thesis contends that the Roma suffer numerous obstacles to their access and success in education. As Helen O’Nions contends, “some inevitably arise 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.”³²⁰ It is submitted that these obstacles to education fall within two broad categories: first, there are issues which could be said to be internal to the Roma community while, secondly, there are factors which stem from the workings of external forces. It is important to recognise from the outset that these two distinct heads of educational disadvantage exist since the

³¹⁶ European Monitoring Centre on Racism and Xenophobia *Roma and Travellers in Public Education: An overview of the situation in the EU Member States* (Vienna, EUMC 2006) 6

³¹⁷ Jean-Pierre Liégeois, *The Education of Gypsy and Traveller Children* (University of Hertfordshire Press 1993) 208

³¹⁸ Arguably, of course, all minority groups would benefit from their culture being reflected/strengthened in the national education system. For more, see: David Pena-Rangel ‘The ties that bind us: Kymlicka on culture and education’ (2013) 11(1) *Theory and Research in Education* 23 – 41

³¹⁹ This issue will be discussed further below

³²⁰ Helen O’Nions, *Minority Rights Protection in International Law: The Roma of Europe* (Ashgate 2007) 146

specific issues contained within each of them may well require very different steps to be taken to remedy them. When dealing with a situation as potentially complex as minority access to education it is highly unlikely that there will be a single catch-all solution to the difficulties experienced by a disadvantaged group such as the Roma. With this in mind, the numerous obstacles to education will now be discussed:

Obstacles to Education that Exist Within the Roma Community

Perhaps of central importance here is recognition that the educational disadvantage being suffered by Roma pupils in contemporary Europe is nothing new. As Chapter One discussed, the Roma have a legacy of disadvantage that stretches back hundreds of years. While the educational situation of Roma children may have risen in prominence due to more modern concepts of attainment and success within the education system, it is clear that a history of disadvantage is bound to have inter-generational effects.³²¹ Where a disconnect exists between a minority groups conception of the role and importance of education and the majority's own opinion, it seems clear that a conflict of ideologies will exist.

As mentioned above, the importance of formal education may not be obvious when considered in the context of the Roma community. If a community lacks a history of educational attainment and can see little practical use in formal qualifications, then it is likely that parents will feel no particular compulsion to send their children to school.³²² This is especially true if the family's economic situation is such that a child's earning potential is valued more highly than their right to education.³²³ It is suggested that this disbelief in the validity of formal education is the case for many of the Roma in Europe who instead believe that education is best provided through family and community participation. In this case, it is logical to assume that such familial and community attitudes will have

³²¹ Kate Bird *The intergenerational transmission of poverty: An overview* ODI Working Paper 286 (London, Overseas Development Institute 2007) 1 – 4

³²² Roma Education Fund *Roma Inclusion in Education* (REF 2010) 6 - 7

³²³ Nicholas Burnett et al 'Needs Assessment: Summary Report' Background document prepared for the Roma Education Fund Donors' Conference, Paris, December 2 – 3 2004 (Roma Education Fund 2005) 12

a negative impact on the children's own attitudes towards formal schooling. This difference in opinion as to the purpose and method of schooling is certainly not limited to the Roma and will be discussed again in Chapter Five during the course of the case study on indigenous education in Canada. However, the changing of entrenched attitudes – particularly if they are based on parents' own negative experiences of formal education – is hard to achieve and so this particular issue can only be overcome by a dual effort on the part of the Roma themselves and the national education authorities.

Even where the importance of children receiving a formal education has been acknowledged, Liégeois suggested that the official curriculum is perceived as offering little of practical value to the Roma.³²⁴ A curriculum which concentrates academic disciplines may seem to have little bearing on day-to-day Roma life. A child who wishes to concentrate on such academic disciplines and who wishes to complete their formal education may therefore encounter hostility from within both their family and their community.³²⁵ Such treatment is bound to have a negative impact on educational attainment even when the child is able to attend those lessons which better correspond with the traditional Roma conceptions of education. The main features of a traditional Roma education can be identified as “the importance of family life, oral communication, experiential learning and the importance of particular values, notably experience, initiative, solidarity, keeping one's word, respecting elders and defence of the family.”³²⁶ The clear problem with such an education is that it is isolating; children are equipped to live within the traditional conception of their community but no more. This would be hugely unsatisfactory: education should ideally serve to help children feel secure within their own culture but also enable them to compete on an equal footing with the majority population if they so wish.

This historical isolation from formal education, as well as a distrust of the knowledge provided, has resulted in additional practical obstacles to education that are experienced by Roma children in

³²⁴ Jean-Pierre Liégeois, *The Education of Gypsy and Traveller Children* (University of Hertfordshire Press 1993) 177

³²⁵ *Ibid*

³²⁶ Felix Etxeberria, 'Education and Roma children in the Basque region of Spain' (2002) 13(3) *Intercultural Education* 291, 295

contemporary Europe. The first and perhaps most serious of these is the tendency for such Roma children to have only a limited understanding of the dominant language of their country. A limited understanding of the language being used in teaching is of course going to be a huge hindrance to learning, not least because, as Kristin Henrard has commented, the use of a single language of instruction can, despite conforming to the formal idea of equality, have “significant disadvantages for those not taught in their mother tongue.”³²⁷ This limited understanding of the dominant language could best be resolved by an educational system which embraces the kind of pluralistic multiculturalism discussed in Chapter Two and so has the capacity to allow for at least some provision of mother-tongue teaching. The second such practical obstacle is the inability of Roma parents to assist their children with their formal learning.³²⁸ The history of educational disadvantage experienced by the Roma has resulted in a large percentage of the adult population either being completely illiterate³²⁹ or else having significant gaps in their knowledge of the subjects that their children might be taught in mainstream school. Of course, this lack of formal educational attainment on the part of adults is a key reason why so many of the Roma in Europe demonstrate low levels of employment and so are living in poverty. Unfortunately, parental illiteracy has an extremely negative impact on the level of attainment in education of children. As a recent World Bank study has shown, “many Roma children lack a strong early learning and care support mechanism at home.”³³⁰ This is clearly not a problem which is easily fixed as improving the education of parents as well as their children will require considerable commitment in terms of both time and resources.

³²⁷ Kristin Henrard, ‘Education and multiculturalism: the contribution of minority rights?’ (2000) 7 *Int. Journal on Minority and Group Rights* 393, 395

³²⁸ Dena Ringold, Mitchell A. Orenstein & Erika Wilkens *Roma in an Expanding Europe: Breaking the Poverty Cycle* (Washington, World Bank 2005) 15 available at <[http://lnweb18.worldbank.org/eca/ecshd.nsf/ECADocByUnid/EDF5EC59184222F8C1256D4F0053DA41/\\$FILE/FULL%20Report%20in%20English.pdf](http://lnweb18.worldbank.org/eca/ecshd.nsf/ECADocByUnid/EDF5EC59184222F8C1256D4F0053DA41/$FILE/FULL%20Report%20in%20English.pdf)> [last accessed 27/02/13]. More generally, see: Augustin de Coulon, Elena Meschi & Anna Vignoles *Parents’ Basic Skill and Children’s Cognitive Outcomes* (London: Centre for the Economics of Education 2008) < <http://cee.lse.ac.uk/ceedps/ceedp104.pdf>> [last accessed 28/02/13].

³²⁹ See for example: Baha’i World News Service Empowering Roma mothers to break the cycle of illiteracy 03/08/2006 < <http://news.bahai.org/story/467>> [last accessed 02/03/13]; Claude Cahn et al *Roma in the Education Systems of Central and Eastern Europe* (ERRC 1998) 4; SOROS Foundation ‘Illiteracy of Roma people – a problem twice as large in Romania than in Bulgaria’ < http://soros.ro/en/communicate_detaliu.php?comunicat=201> [last accessed 03/03/13]. This study found that approximately 25% of Romanian Roma were illiterate, while 12% of Bulgarian Roma were.

³³⁰ World Bank *Toward an Equal Start: Closing the Early Learning Gap for Roma Children in Eastern Europe* (World Bank Publication 2012) 7

An inability on the part of parents to assist their children with the learning process³³¹ as well as the general reticence as to the importance of academic study on the part of the Roma community as a whole³³² is the major reason why a conception of the right to education as a right to be exercised by parents would not benefit the educational situation of Roma children. If parents and the Roma community as a whole do not consider formal education beyond the early childhood level to be a necessary experience then neither parents nor the group is a suitable body in which to vest educational rights. The right to education is thus best formulated as an individual right belonging to the child so that each child is permitted autonomy over the ability to decide their own future. Having said that, as recognised in Chapter Two, certain human rights – notably the right to enjoy one’s culture – can only be exercised in community with others and so, while this falls short of requiring a formal group rights approach, it does necessitate some formal recognition of the important status of the group to each individual child.

Obstacles to Education that Stem from External Sources

While high levels of parental illiteracy has been identified as an obstacle to education that currently exists within the Roma community, it is not the only means by which parents’ experiences of formal education can serve as an obstacle to their children’s educational attainment. Where parents have been subject to bullying and systematic discrimination during their own schooling, then they are likely to be extremely wary of exposing their children to similar treatment. It is an unfortunate fact that Roma pupils are likely to experience discrimination from a range of sources within the education system.³³³ While they are perhaps most likely to be bullied by fellow pupils, discrimination can also come from

³³¹ An inability which of course stems for the historical educational disadvantage that the Roma have experienced.

³³² Discussed above

³³³ World Bank *Toward an Equal Start: Closing the Early Learning Gap for Roma Children in Eastern Europe* (World Bank Publication 2012) 43

teachers and from non-Roma parents of their classmates.³³⁴ While prejudice on the part of teachers may manifest in attitudes ranging from outright contempt to low expectations of Roma pupils,³³⁵ prejudice on the part of non-Roma parents is also harmful for a number of reasons: First, through prejudice passed on to their children and secondly through objections to integrated education.³³⁶ Discrimination of this kind, which stems from the perceived difference and inferiority of the Roma, is the most heinous of external factors causing obstacles to education since, as well as being extremely damaging in and of itself, it arguably contributes to the existence of the other external obstacles.

It is generally accepted that the best means by which to tackle prejudice and discrimination is through the process of learning and understanding and so it would seem that school would be the ideal environment in which to do so. However, while the kind of multiculturalism envisaged by this thesis would lead to a culturally sensitive education system that is well equipped to foster understanding between communities, this is not the kind of education system that actually exists in contemporary Europe.³³⁷ In the same way that the prejudicial attitudes of teachers can have an adverse impact on the schooling of minority pupils, so can an education system which fails to accommodate minorities and acknowledge the contribution that they have made to national society.

The existence of culturally insensitive education systems – and thus schools which are unable to accommodate minority pupils – is therefore the second major obstacle to educational attainment that Roma children in Europe must face.³³⁸ While a multicultural education system would arguably be beneficial to the majority population as well as to minorities, it is a theory that has yet to find favour in the majority of European countries. However, this is not to say that the issue of minority

³³⁴ Roma Education Fund *From Segregation to Inclusion: Roma Pupils in the United Kingdom A Pilot Research Project* (REF/Equality 2011) 33

³³⁵ Jean-Pierre Liegois *School Provisions for Ethnic Minorities* (University of Hertfordshire Press 1998) 270

³³⁶ Helen O’Nions *Minority Rights Protection in International Law: The Roma of Europe* (Ashgate 2007) 153

³³⁷ The domestic education policies of each of the ten Eastern European countries under particular consideration in this thesis will be analysed in detail in Chapter Four.

³³⁸ European Monitoring Centre on Racism and Xenophobia *Roma and Travellers in Public Education: An overview of the situation in the EU Member States* (Vienna, EUMC 2006) 9

accommodation within the education system has not been raised. Save the Children, for example, have noted the failure of school curricula to reflect Roma culture:

“While the practice of overt negative portrayal in school books of the ‘Gypsy stole the Chicken’ type has more or less ended, Roma and Traveller people are rarely visible in textbooks and resources used in classrooms even when these contain portrayals of other minority groups. Although suitable texts exist, these are not widely distributed. There are still almost no references in mainstream curricula to the history of the Roma peoples in Europe and their participation in key historical processes, despite a presence that dates back some 600 years.”³³⁹

Although the Roma are a minority in Europe, they are still present in large numbers and have played an important role in national life and development and so school syllabi should reflect the contribution that the Roma and other minority groups have made to the national identity.³⁴⁰ The removal of overtly racist material from classrooms is of course a positive measure but it is troubling that there has been little adoption of teaching materials that emphasise the positive contributions that the Roma have made to society. This seems to indicate unwillingness on the part of both education authorities and individual schools to take even fairly easy steps to better accommodate their Roma pupils. Even where schools have attempted to institute specific positive initiatives targeting their Roma pupils, there have been major problems due to issues of funding as well as hostility from the local community.³⁴¹ A lack of central government support for such initiatives has proved fatal to their chances for lasting success. It seems clear that without significant compulsion on the part of national authorities, the majority of schools in Europe will continue to fail to institute a curriculum that accurately reflects the history and contribution of the Roma. This failure to explore the true role of the Roma in the life of the nation will have two disadvantageous results: the Roma children themselves

³³⁹ Save the Children *Denied a Future? The Right to Education of Roma, Gypsy and Traveller Children* (Save the Children 2001) Save the Children, UK Summary 32 - 33

³⁴⁰ UNICEF *The Right of Roma Children to Education Position Paper* (UNICEF 2011) 56

³⁴¹ Save the Children Op Cit 42

will continue to feel marginalised and unworthy, while their peers from the majority population will continue to be exposed to only negative portrayals of the Roma as a people.

Both of the previously highlighted examples of external obstacles to education that Roma children must face – both the deeply entrenched prejudicial attitudes of people at all levels of the education system as well as the complete failure of national systems to accommodate the Roma within mainstream schooling – can be said to have combined to lead to the disturbing practice of Roma children being segregated from mainstream education and placed in special schools.³⁴² 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 rolls.³⁴³ The allocation of Roma pupils to such special schools provides a troubling example of the potentially disadvantageous outcome that a formal approach to equality can have. While national governments and education authorities may seek to justify the segregation of Roma pupils on the grounds that the pupils were placed in special schools after educational testing, Claude Cahn has pointed out that such tests are necessarily flawed if they “fail to take into account the disadvantageous starting point of Roma children.”³⁴⁴ Issues that have previously been discussed, such as a lack of understanding of the dominant language and the inability of parents to assist their children with study, mean that Roma pupils are at a disadvantage as compared to their majority population peers when it comes to formal testing. Although such tests are theoretically equal since everyone has the chance to sit the examination, in reality not everyone has an equal chance to pass in the practical sense. In fact, Thomas Acton has argued that “the nature of assessment tests used throughout Europe reveals less about the ability of the candidates than about the ethnocentric perspectives of the testers.”³⁴⁵

³⁴² European jurisprudence on this issue will be discussed in detail later in this chapter when the efficacy of the European Convention on Human Rights will be discussed.

³⁴³ See for example: Friedman, E., Kriglerova, E.G., Kubanova, M. & Slosiarik, M. *School as Ghetto: Systemic Overrepresentation of Roma in Special Education in Slovakia* (Roma Education Fund 2009) available online at <http://www.romaeducationfund.hu/sites/default/publications/school_as_ghetto.pdf> [last accessed 27/02/13]

³⁴⁴ Claude Cahn et al, ‘Roma in the educational systems of Central and Eastern Europe’ 71 – 86 in Claude Cahn (ed) *Roma Rights: Race, Justice and Strategy for Equality* (International Debate Education Association 2002)

³⁴⁵ Thomas Acton, (1984) from Jean-Pierre Liégeois, *The Education of Gypsy and Traveller Children* (University of Hertfordshire Press 1993) 85

Additionally, it must be acknowledged that, influenced by their own troubled educational experiences, Roma parents often consent to their children being educated outside of the mainstream environment.³⁴⁶ In some cases “parents have withdrawn their children from mixed-schools and in a few of these examples schools have chosen to retain segregated teaching in order to placate this racism.”³⁴⁷ However, it is submitted that such acquiescence by parents does not constitute informed consent since they may not be fully aware of the inferior education that their child[ren] will actually receive. In the vast majority of cases, the quality of the education offered at these special schools is poor, featuring a limited curriculum to that studied in mainstream schools. Therefore, children who attend such schools are left unable to compete fully with children in the mainstream who are educated in line with the standard national curriculum.

It is thus clear that Roma children in contemporary Europe are experiencing great educational disadvantage and it is equally clear that there are numerous reasons for this disadvantage. However, it must be remembered that the right to education is a recognised human right protected by the various human rights instruments. This internationally recognised right to education should impose a range of obligations on states to address any and all deeply entrenched problems.

3.3 The Human Right to Education

Far more important than any particular syllabus, learning pattern or exam structure, “education is a fundamental human right and is essential for the exercise of all other human rights.”³⁴⁸ It is argued

³⁴⁶ As in *DH and Others v Czech Republic* (No. 57325/00), a summary of which is provided by the European Roma Rights Centre at <<http://www.errc.org/cikk.php?cikk=3559>> [last accessed 03/03/13]

³⁴⁷ Savelina Danova, ‘Patterns of segregation of Roma in education in Central and Eastern Europe’ in Edwin Rakosh and Maxine Sleeper (eds) *Separate and Unequal: Combating Discrimination against Roma in Education* (Public Interest Law Initiative 2005) 7

³⁴⁸ *The Right to Education*, General Comment No. 13, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 21st Sess., 45, U.N. Doc. E/C.12/1999/10 (1999) [hereinafter General Comment No. 13] 1, 31; Katarina Tomasevski (2006) *Human Rights Obligations in Education* (London, Enfield Publishing) 47

that education should enable opportunity and the realisation of potential, as well as the development of self-esteem and identity.³⁴⁹ To reiterate, the right to education is of particular importance when it comes to addressing the disadvantages experienced by minority groups since it is arguable that education is effectively the key to unlocking all other fundamental human rights as well as the best means by which to alleviate poverty and social disadvantage.³⁵⁰

It is clear that one of the central aims of education is to promote individual freedom and empowerment and to yield important developmental benefits.³⁵¹ This thesis contends that the autonomy of each child is vital if that child is to grow into an adult who is capable of making informed decisions and of exercising fully their complete range of human rights allowances. It is certainly no exaggeration to say that, at an international level, education is considered to be:

“... 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 ever greater role, the right to education is nothing less than the right to participate in the life of the modern world.”³⁵²

Furthermore, if delivered sensitively and appropriately, education can serve to break down barriers and prejudice between communities. As Jean-Pierre Liegeois states, “the ultimate goal of any school is to give each child the means and tools he requires in order to achieve autonomy”.³⁵³ Additionally, education could be described as “all activities by which a human group transmits to its descendants a

³⁴⁹ Kristin Henrard, ‘Education and Multiculturalism: the Contribution of Minority Rights?’ (2000) 7 *Int. Journal on Minority and Group Rights* 393, 394

³⁵⁰ For more on the overarching importance of a human right to education see: K.D. Beiter *The protection of the right to education in international law* (Leiden, Martinus Nijhoff 2006); Brian Howe and Katherine Covell, *Empowering children: children’s rights education as a pathway to citizenship* (Toronto, University of Toronto Press 2005)

³⁵¹ UNESCO, <<http://www.unesco.org/en/right-to-education/>> [last accessed 26/02/13]

³⁵² United Nations Economic and Social Council ‘Progress Report on the Implementation Process of the Education For All Objectives’ A/52/183, E/1997/74 18 June 1997 Introduction.

³⁵³ Jean-Pierre Liegeois, *The Education of Gypsy and Traveller Children* (University of Hertfordshire Press 1993) 208

body of knowledge and a moral code which will enable the group to subsist.”³⁵⁴ A respect for cultural values and opinions is vital if this goal is to be achieved. Currently, the older generations of Roma see little value in formal education and often perceive it as a threat to their culture and community. This is particularly the case in families who speak a minority Roma dialect but whose children would be educated in the majority language.³⁵⁵ 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.³⁵⁶ The question thus becomes, what can be done to allow the minority students access to education on an equal footing with the majority population and to ensure that the education they are then provided with is culturally sensitive while still being as academically rigorous as that provided in the mainstream?

It is now generally accepted that the cultures of religious and ethnic minorities contribute to the richness of a pluralistic society and, equally, that one of the most important rights that such minority groups hold is their right to preserve their separate identity.³⁵⁷ Jane Fortin contends that such a right cannot be fully exercised unless minority groups are able to maintain cultural continuity by educating their children to understand and respect their own customs, religion and culture.³⁵⁸ Culturally sensitive education of this sort serves to ensure that traditions are not lost and that group identity is passed down from one generation to the next. Difficulty lies in identifying and implementing an educational system which provides this level of cultural sensitivity whilst also ensuring that minority children are educated in a way, and to a level, which allows them to coexist peacefully and equally with the majority population of their home state. The current educational disadvantage suffered by Roma children in Europe for example clearly illustrates that this is a difficulty that has not yet been overcome while an analysis of the current state of international and regional provisions governing

³⁵⁴ Klaus Beiter, *The Protection of the Right to Education by International Law* (Martinus Nijhoff 2005) 19; Stephen Ball ‘Big policies/small world: an introduction to international perspectives in education policy’ (1998) 34 *Comparative Education* 2 119 – 130

³⁵⁵ Office for Standards in Education (OFSTED) *The Education of Travelling Children* (1996) 20

³⁵⁶ Helen O’Nions *Minority Rights Protection in International Law: The Roma of Europe* (Ashgate 2007) 133

³⁵⁷ Jane Fortin, *Children’s Rights and the Developing Law* (3rd ed, CUP 2009) 406

³⁵⁸ *Ibid*

education has highlighted the fact that the current system of human rights protection³⁵⁹ is not equal to the task of eradicating this disadvantage.

Striking a balance between the competing needs of different communities is particularly difficult in the field of education. Fortin discusses how it could be suggested that society would most benefit from all children being educated in multicultural schools where ideas and beliefs could be shared and cultural barriers broken down, but that, conversely, it could also be said that a refusal to establish separate schools could disadvantage minority groups, eroding their cultural identities, and so hurting the richness of society in general.³⁶⁰ It is important to consider the educational interests of minority children from both perspectives: consideration must be given to the legal rights of minority children and parents to request a separate education as being their minority group's right and to the role that the state government is required to play in such a situation, as well as steps that could be taken for minority children³⁶¹ who wish to pursue a wholly mainstream education.

This, briefly, then is what is meant by the right to education. Of course, in actuality, there are numerous important international and regional instruments concerned with upholding the right to education and they will now be considered in detail.

3.4 International Standards

The right to education is protected by a number of international instruments. These instruments will now be considered in turn to determine the level of protection that they provide for the educational needs of children and their parents, what obligations they place on the states parties concerned, and any areas that exist for improvement which may help to redress the disadvantage currently suffered by Roma children in Europe. However, before turning to consider each of the international (and later

³⁵⁹ A discussion of the individualist basis of international human rights law is available in the previous chapter.

³⁶⁰ Jane Fortin Op Cit 407

³⁶¹ And their parents

regional) human rights instruments, it is important to note that the accommodation of minority students, such as the Roma, within an education system is not a straightforward process.

It is contended that there is a sliding scale of levels of accommodation in education that may be offered to minority students. At one end of this scale, the lowest level of accommodation, would be legal provisions that guarantee basic access to education but which go no further. This could take the form of a straightforward non-discrimination provision stating that no one shall be denied the right to education. The reason that this is a low level of minority accommodation is that it fails to recognise that equality of opportunity does not always equal equality of outcome and, also, that minority groups often need extra help or additional means of assistance due to the fact that their 'starting position' in education (and other areas of national life) is lower than that of mainstream citizens. It follows therefore that, at the other end of the accommodation scale, is a legal mandate for 'separate but equal' education. Such a form of education would involve minority students being educated in separate, culturally-sensitive schools that reflected their particular educational needs but also equipped them to compete in mainstream society should they wish to do so. The level of education provided in such schools would be comparable with that of mainstream schools and as such a 'separate but equal' education system would be very different from the segregated education discussed above. However, it is once again suggested that where any separation was to occur, steps would have to be taken to maintain dialogue and so foster understanding between communities.

Now that this concept of differing levels of educational accommodation has been established, it is possible to evaluate each of the international human rights instruments concerned with education to see where they would fall on the accommodation scale:

UNESCO Convention against Discrimination in Education (1960)³⁶²

³⁶² Convention against Discrimination in Education (1960) Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organisation on 14 December 1960. <<http://portal.unesco.org/la/convention.asp?KO=12949&language=E&order=alpha>> accessed 20 October 2011

The United Nations Convention against Discrimination in Education (hereafter CDE) aims to tackle overt discrimination within the field of education and so prohibits both segregated education³⁶³ and the provision of an inferior standard of education to certain persons or groups.³⁶⁴ The aim, therefore, of the CDE is, on the one hand, to prohibit any discrimination in education and, on the other hand, “to promote equality of opportunity and treatment for all persons in the educational field.”³⁶⁵ The CDE has binding force and the States Parties to it must incorporate its provisions in their national constitutions or domestic law. Consequently, the states parties must give effect to those provisions in their national legal systems and in their education policies. All of the four states under consideration in this thesis – Czech Republic, Hungary, Romania and Slovakia – are states parties to the CDE. Clearly, therefore, none of those four states should have national systems which permit segregated education.

Article 1 of the CDE serves to clarify the aims of the Convention and also provides the official definitions of the key terms ‘discrimination’ and ‘education’. Since discrimination in Article 1(1) includes distinction, exclusion or limitation based on race, the CDE clearly prohibits the segregation of Roma students based solely on their Roma heritage.³⁶⁶ However, Article 1 is fundamentally weakened because it does not recognise that indirect discrimination may be brought about through educational testing. Segregated education can still be achieved through tests which are, on the face of

³⁶³ Article 1(a)

³⁶⁴ Article 1(b) Convention against Discrimination in Education (1960) Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organisation on 14 December 1960.

³⁶⁵ Hector G Espiell, *Significance of the Convention against Discrimination in Education (1960)* (France, UNESCO 2005) 4 <<http://unesdoc.unesco.org/images/0014/001429/142908m.pdf>> [last accessed 26/02/13]

³⁶⁶ Article 1

1. For the purposes of this Convention, the term ‘discrimination’ includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:

(a) Of depriving any person or group of persons of access to education of any type or at any level;

(b) Of limiting any person or group of persons to education of an inferior standard;

(c) Subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or

(d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.

2. For the purposes of this Convention, the term ‘education’ refers to all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given.

it, neutral but which actually favour in practice those from mainstream society backgrounds.³⁶⁷ This type of non-discrimination provision offers the lowest type of accommodation of minority groups since, while overt discrimination is forbidden, it fails to recognise indirect discrimination or the inequality for disadvantaged groups that a neutral position can lead to.

The obligations of the states parties to the CDE deriving from the provisions of Articles 3 and 4 are particularly significant.³⁶⁸ These two Articles contain the provisions relating to the commitments made by the states parties to the Convention. These principles having been set, the States that have ratified the CDE (with no reservation being possible) must, under their obligation to implement the Convention, “take all the domestic legislative and regulatory measures necessary to abrogate any domestic policies that are contrary to the Convention and to adopt those that will bring their legislation in line with it.”³⁶⁹ Article 3³⁷⁰ requires that states “discontinue any administrative practices that involve discrimination in education” and that there be no “discrimination in the admission of pupils to educational institutions.”

This Article therefore builds on the concept of discrimination established in Article 1 so that it includes an obligation to “abrogate any statutory provisions and any administrative instructions and to discontinue any administrative practices” which could cause discrimination in education. It is open to interpretation therefore whether the phrase “involve discrimination” as used in Article 3(a) means that Article 3 actually recognises that discrimination can be brought about through indirect means such as testing and other administrative practices. This helps to make the non-discrimination requirements of

³⁶⁷ Julia White *Pitfalls and Bias: Entry testing as a factor in overrepresentation of Romani children in special education* (REF 2012)

³⁶⁸ Hector G Espiell, *Significance of the Convention against Discrimination in Education (1960)* (France, UNESCO 2005) 6 <<http://unesdoc.unesco.org/images/0014/001429/142908m.pdf>> [last accessed 26/02/13]

³⁶⁹ Ibid

³⁷⁰ Article 3

In order to eliminate and prevent discrimination within the meaning of this Convention, the States Parties thereto undertake:

- (a) To abrogate any statutory provisions and any administrative instructions and to discontinue any administrative practices which involve discrimination in education;
- (b) To ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions;

the CDE slightly stronger than the bare minimum form of protection although it does not move the CDE to any significant degree further along the scale of accommodation. Similarly, under Article 4³⁷¹ states are required to make “primary education free and compulsory” and to make “secondary education in its different forms generally available and accessible to all.” Importantly, states must also ensure that “the standards of education are equivalent in all public educational institutions of the same level and that the conditions relating to the quality of education provided are also equivalent.”

So Article 4 also serves to strengthen non-discrimination provision since it places a positive obligation on states parties to “formulate, develop and apply a national policy which will promote equality of opportunity and of treatment in education.” Such a call for equality of opportunity is certainly positive but is perhaps unfortunate since it could allow states parties to continue to use discriminatory testing practices when it comes to school allocation so long as every student is given the opportunity to take the test in question. However, it is arguable that Article 4 takes an important step beyond merely guaranteeing access to education when it mandates that primary education should be “free and compulsory”. By making primary education free and also ensuring that it is compulsory, Article 4 is facilitating access to primary education by removing the financial obstacle that tuition fees would create and also by preventing reticence or community distrust from allowing minority students to avoid school attendance.

Interestingly, according to Article 2 of the CDE the “establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in

³⁷¹ Article 4

The States Parties to this Convention undertake furthermore to formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to promote equality of opportunity and of treatment in the matter of education and in particular:

- (a) To make primary education free and compulsory; make secondary education in its different forms generally available and accessible to all; make higher education equally accessible to all on the basis of individual capacity; assure compliance by all with the obligation to attend school prescribed by law;
- (b) To ensure that the standards of education are equivalent in all public educational institutions of the same level, and that the conditions relating to the quality of the education provided are also equivalent;
- (c) To encourage and intensify by appropriate methods the education of persons who have not received any primary education or who have not completed the entire primary education course and the continuation of their education on the basis of individual capacity;
- (d) To provide training for the teaching profession without discrimination.

keeping with the wishes of the pupils parents” would not constitute discrimination so long as this separation was not designed to “secure the exclusion of any group” but rather to provide additional educational facilities compatible with existing national standards. Article 2 therefore clearly prohibits segregation and, while stopping short of mandating for “separate but equal” schooling, it does clarify that such non-mainstream schooling would not be considered discriminatory so long as attendance was optional and standards were comparable with the mainstream. This would therefore be compatible with the establishment of separate schools that teach principally in the Romani language. However, importantly, the attendance of such a school would have to be optional and the school would still have to meet the established national educational standards. Therefore, it mandates for separation rather than segregation. While this falls short of the most extreme level of minority accommodation in education since there is no requirement to provide ‘separate but equal’ education, this is a positive step beyond merely guaranteeing equal access since it involves a recognition that minority groups (whether religious or otherwise) may wish to conduct the education of their children and that such education could be carried out to a standard comparable with the mainstream. Article 2 is certainly not radical or particularly burdensome on states parties but it is, at least, a positive recognition that ‘one size fits all’ education is not always desirable.

This idea that minorities have the right to carry out their own educational activities is developed further in Article 5. Article 5(1)³⁷² recognises the right of these minorities to carry on their own educational activities, subject to a number of provisos. As argued above, education should serve to allow children to develop into informed and autonomous individuals who are capable of self-maintenance and also of fully exercising their human rights. Article 5(1)(a) of the CDE has a similar aim. Education is here said to be directed to “the full development of the human personality” – so, effectively, to facilitating the development of children into autonomous adults – and “to strengthening

³⁷² Article 5

1. The States Parties to this Convention agree that:

(a) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms; it shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace;

of respect for human rights and fundamental freedoms”. Article 5(1)(a) further echoes the idea that the education system is the best means for combating prejudice and for spreading understanding between the different groups in society – both of which are essential in creating a truly multicultural society.

The right of minorities to establish educational activities is however clearly focused on the rights of parents or guardians to choose the schooling appropriate for their children, with Article 5(1)(b) stating that “it is essential to respect the liberty of parents and ... legal guardians” when it comes to choosing schools for their children. This adult-centric approach will be shown to be prevalent in the majority of the international human rights instruments. However, it is the children themselves who are the individuals in which the right to culturally appropriate education should vest. Fortunately, at least the importance of preventing children from becoming isolated from mainstream society is recognised, with Article 5(1)(c)(i) stating that the right to educational separation must “not [be] exercised in a manner which prevents members of ... minorities from understanding the culture and language of the community as a whole.” Further, it is usefully reiterated that the standard of education in any such separate school must not be lower than that available in mainstream schools.³⁷³

In failing to place a positive obligation (either financial or practical) on states parties to provide ‘separate but equal’ education the CDE is sticking to a very “safe” level of minority accommodation. While it is permissible for minorities to conduct their own education, to do so must be compatible with the states own national laws. The recognition of the desire for separate minority education is still positive but the CDE has here missed an opportunity to strong underpinning for ‘separate but equal’ education, the extreme of minority accommodation.

³⁷³ Article 5(1)(c)(ii): That the standard of education is not lower than the general standard laid down or approved by the competent authorities;

From the text of Article 5 it is clear however that admissions processes that “deny equal access to education to the Roma as well as the inferior standard of the curriculum being taught at segregated schools breach the Convention.”³⁷⁴ The wording of the provisions is, however, such that any state wishing to avoid allegations of discriminatory practices within their national education system could allege that segregation is voluntary and based on informed parental consent,³⁷⁵ making it compatible with the letter if not the spirit of the CDE. Unless there is a robust means for examining such claims then states may be fairly easily able to justify the segregation (no doubt phrased as separation) of minority students. Furthermore, since the wording of the CDE does not prohibit separate schooling based on disability, states could seek to justify the segregation of Roma children in special schools by suggesting that the children in question were developmentally disabled and so needed specialist care.³⁷⁶

By taking the positive measures mentioned above to implement the CDE, states parties will contribute to the process of undertaking activities at the national level aimed at creating conditions favourable to equality of opportunity with regard to educational access and would reinforce the right to education.³⁷⁷ Such measures, if fully realised, should serve to help alleviate some of the disadvantage suffered by Roma children, at least during the primary stage of their education. Ultimately then, the CDE certainly meets the most basic level of minority accommodation in that its non-discrimination provision requires a basic form of equal access to education and, in fact, goes slightly beyond this by

³⁷⁴ Helen O’Nions *Minority Rights Protection in International Law: The Roma of Europe* (Ashgate 2007) 161

³⁷⁵ As mentioned above, Roma parents are not always equipped to make decisions in what is popularly perceived to be the best interests of their children and so will agree to the children attending segregated schools for a number of reasons (for example, in the belief that the children would face bullying in mainstream schools or perhaps that, since formal education is not important, it is easier to agree to what state officials suggest).

³⁷⁶ Helen O’Nions *Op Cit* 161 Also, although brought under the auspices of the European Convention, this was the factual scenario in the case of *DH and Others v Czech Republic* (Application No. 57325/00. Judgment of 7 February 2006) where 18 Czech nationals of Roma origin were assigned to special schools for children with learning difficulties, where they received education from a more basic curriculum. The Czech government sought to justify the schooling provided to these 18 by offering evidence that intelligence tests had suggested that the children were developmentally disabled and so were not suited to mainstream education. This case will be discussed in further detail below.

³⁷⁷ Hector G Espiell, *Significance of the Convention against Discrimination in Education (1960)* (France, UNESCO 2005) 8 <<http://unesdoc.unesco.org/images/0014/001429/142908m.pdf>> [last accessed 26/02/13]

requiring primary education to be free and compulsory. However, the CDE fails to radically advance the cause of minority accommodation as, while it mentions the permissibility of minority groups conducting their own education, it fails to provide any obligation on states parties to facilitate this and, in fact, suggests that such separate education will only be permissible if it is compatible with the States' current laws, arguably a useful guarantee as to the quality of education to be provided.

International Covenant on Economic, Social and Cultural Rights (1966)

The International Covenant on Economic, Social and Cultural Rights (hereafter ICESCR) is a multilateral treaty adopted by the United Nations General Assembly and is monitored by the UN Committee on Economic, Social and Cultural Rights. All of the four countries are states parties to the ICESCR. The ICESCR commits its states parties to work towards “the granting of economic, social and cultural rights to individuals.”³⁷⁸ The Committee is permitted to “make general recommendations to the UN General Assembly on appropriate measures”³⁷⁹ that should be taken to realise the Covenant rights. All state parties are required to “submit regular reports to the Committee outlining the legislative, judicial, policy and other measures they have taken to implement the Covenant rights while the Committee must address its concerns and recommendations to the states parties in the form of ‘concluding observations’.”³⁸⁰ When the Optional Protocol to ICESCR enters into force,³⁸¹ an individual complaints mechanism will be established.³⁸²

³⁷⁸ Mashood A Baderin and Robert McCorquodale (eds) (2007) *Economic, Social and Cultural Rights in Action* (Oxford, OUP)

³⁷⁹ Under Article 21

³⁸⁰ Committee on Economic, Social and Cultural Rights
<<http://www2.ohchr.org/english/bodies/cescr/index.htm>> [last accessed 26/02/13]

³⁸¹ The Optional Protocol was adopted by the UN General Assembly on 10 December 2008 and opened for signatures on 24 September 2009. The Optional Protocol will enter into force when ratified by 10 states parties. As of September 2012 the Optional Protocol has 8 states parties and 40 signatories.

³⁸² Catarina de Albuquerque ‘Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights – The Missing Piece of the International Bill of Human Rights’ (2010) 32 *Human Rights Quarterly* 1 144 – 178; Sital Kalentry, Jocelyn E. Getgen & Steven Arriff Koh ‘Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR’ (2010) *Human Rights Quarterly* 32 253 – 310; Arne Vandenberg and Wouter Vandenhoe ‘The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An Ex Ante Assessment of its Effectiveness in Light of the Drafting Process’ (2010) 10 *Human Rights*

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 ICESCR.³⁸³ It is Article 2³⁸⁴ which places a requirement on states parties to take positive action towards allowing every individual to achieve the rights contained in ICESCR. In Article 2(1) the ICESCR places immediate obligations on states parties as well as obligations of a progressive nature. It is useful to note that Article 2(1) recognises that the best means for states parties to take such steps is through economic and technical means and so implies that an investment of time and resources should be expected by states parties still needing to take steps to meet their obligations. At Article 2(2) the ICESCR contains a familiar non-discrimination provision – “the rights enunciated in the present Covenant will be exercised without discrimination of any kind” – which should prevent discrimination in education (and in access to other rights guaranteed within the Covenant) on the grounds of Roma heritage. This clearly demonstrates that the ICESCR meets the basic level of minority accommodation discussed above.

Article 13(1)³⁸⁵ provides that everyone has an equal right to education and, in keeping with the language of the CDE, defines the purpose of education “to include the promotion of understanding and tolerance among all nations and all racial, ethnic or religious groups”. Education is perceived as a necessary tool in creating a cohesive society based on “understanding, tolerance and friendship”

Law Review 2 207 – 237; Claire Mahon ‘Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (2008) 8 *Human Rights Law Review* 4 617 – 646

³⁸³ Helen O’Nions Op Cit 131

³⁸⁴ Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

³⁸⁵ Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

between groups. This echoes the contention of this thesis that education should allow children to feel secure in their minority identity but also to compete in mainstream society. However, it is apparent from the text of Article 13 that there is no recognition of, and thus no recommendations for alleviating, the specific educational problems faced by certain minority groups. For groups suffering disadvantage as extreme as that experienced by Roma children in the field of education, sometimes a straightforward guarantee of equality is not sufficient and may even be harmful. In such cases, recourse to special measures might be one of the most effective ways of remedying the situation.

Article 13(2)³⁸⁶ recognises that primary education should be free and that free secondary and further education should be progressively introduced, again a positive step towards a greater level of minority accommodation. One of the great hurdles that minority groups face is their tendency to be financially disadvantaged when compared to the majority population and so, if education at all levels was dependent on the payment of fees, they would be far less likely to attend.³⁸⁷ This would be a variant of indirect discrimination which would mean that, despite the non-discrimination provision in the ICESCR guaranteeing basic access to education, minority children would in practice be denied the right. Although Article 13(2)(a) stipulates free primary education must be compulsory, there is no requirement as to the quality of such provision. It is important firstly that education in general is of a high standard and so will equip pupils to deal successfully with the fast-paced world of national and international life, and secondly that the education provided to minority groups like the Roma is of the same high standard as that provided to members of the majority population.

³⁸⁶ 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

- (a) Primary education shall be compulsory and available free to all;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
- (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

³⁸⁷ Unfortunately, the abolition of fees does not remove all financial burdens associated with education. Minority students may well still experience difficulty in purchasing education supplies and in securing reliable transport to school.

By affirming that states must “have respect for the liberty of parents and ... legal guardians to choose [schools] for their children,” Article 13(3)³⁸⁸ disappointingly echoes the sentiments of Article 5(1)(b) of the CDE in that it conceptualises the right to education as a right to be exercised by parents or guardians rather than by the child. Keeping the child as the object of a human right that must be exercised by an adult maintains the status quo under international human rights law and does nothing in particular to advance the rights of children to culturally appropriate education.

Article 14³⁸⁹ considers the steps that states parties must take if they have not yet guaranteed the provision of compulsory, free primary education. Those states which had not done so at the time of becoming a Party to the Covenant must “within two years ... work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.” This is a weakly worded Article. First, it allows states parties two years to work out and adopt a detailed plan of action for introducing compulsory, free primary education. Secondly, it sets no strict time limit for when the plan must be fully realised, referring instead to ‘a reasonable number of years.’ Allowing such leeway for states parties to fulfil the requirements of the Covenant could be said to devalue the right to education by failing to present it as a vital and pressing issue.³⁹⁰ Without access to decent, free primary education Roma children will have no hope of breaking the cycle of educational disadvantage and progressing to secondary school and beyond. When the exact extent of the disadvantage in the field of education that the Roma suffer, along with the knock-on effect that this has on their ability to access other

³⁸⁸ 3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

³⁸⁹ Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

³⁹⁰ Sital Kalantry, Jocelyn E. Getgen & Steven Arriff Koh ‘Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR’ (2010) *Human Rights Quarterly* 32 253 – 310

fundamental human rights, is considered, such a weakly permissive approach to fulfilling Covenant obligations seems wholly unacceptable.

It can be said therefore that the ICESCR has gone beyond the minimum level of minority accommodation in education as it has a basic non-discrimination provision but also requires primary education to be free and for free secondary and further education to be progressively introduced. Unfortunately, the child is here seen to be the object of a right to education that must be exercised by a parent or guardian. The ICESCR does not go as far as the CDE in that it fails to make provision for minority groups to establish their own schools.

International Convention on the Elimination of All Forms of Racial Discrimination (1966)

The Convention on the Elimination of All Forms of Racial Discrimination (hereafter ICERD) is a second-generation³⁹¹ human rights instrument which commits its states parties to “the elimination of racial discrimination and the promotion of understanding among all races.”³⁹² Each of the four countries are state parties to the ICERD. The Convention includes an individual complaints mechanism which effectively makes it enforceable against its states parties.³⁹³ The Convention is monitored by the Committee on the Elimination of Racial Discrimination.³⁹⁴

According to the ICERD racial discrimination is “any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying

³⁹¹ As categorised by Czech jurist Karel Vasak at the International Institute of Human Rights in Strasbourg in 1979, a second-generation human rights instrument is one related to equality that began to be recognised by governments after World War One. Such instruments ensure that different members of the citizenry enjoy equal conditions and treatment. For more see: Eva Brems *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers 2001) 98

³⁹² ICERD Article 2(1); for more detail on the use of human rights to tackle racism in general and the role of ICERD in particular see: Sandra Fredman (2001) *Discrimination and human rights: the case of racism* (Oxford, OUP)

³⁹³ This has led to the development of a limited jurisprudence on the interpretation and implementation of the Convention.

³⁹⁴ Cindy Galway Buys ‘Application of the International Convention on the Elimination of All Forms of Racial Discrimination’ (2009) 103 *American Journal of International Law* 2 294 – 299

or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”³⁹⁵

Due to its expansive approach to what can constitute racial discrimination, Patrick Thornberry has suggested that ICERD is “still foremost among global instruments on race and its essential principle has a strong claim to the status of a peremptory norm of international law.”³⁹⁶

The issue of access to education is dealt with by the ICERD³⁹⁷ with discrimination in the field of education being expressly prohibited by Article 5(e)(v):

Article 5

In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

(e) Economic, social and cultural rights, in particular:

...

(v) The right to education and training;

...

This is the basic type of non-discrimination provision that is becoming increasingly familiar. It can be seen from a close reading of Article 5 that educational segregation is not expressly prohibited here in the ICERD. While it is certainly positive that states parties are required to take steps to prohibit and eliminate racial discrimination, this Article could have been worded more strongly so as to

³⁹⁵ ICERD Article 1(1)

³⁹⁶ Patrick Thornberry ‘Confronting Racial Discrimination: A CERD Perspective’ (2005) 5 *Human Rights Law Review* 239 – 270, 240

³⁹⁷ ICERD Article 3 providing, inter alia, that states parties undertake to prevent, prohibit and eradicate all practices of racial segregation and apartheid.

specifically prohibit segregation in education (and other areas of life), particularly segregation that is brought about through indirect means as well as by clear racial discrimination.³⁹⁸

Interestingly, the ICERD does accept that, in some situations, special measures of a temporary duration may be necessary to remedy the disadvantageous positions occupied by some minority groups:

Article 1

...

(4) 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.

Therefore, temporary initiatives with the aim of establishing special educational programmes³⁹⁹ or developing the curriculum⁴⁰⁰ in order to reflect and indeed accommodate the contribution of the Roma to society and allow them help to progress onto an equal footing with mainstream society, would not constitute racial discrimination under international law.⁴⁰¹ Alfredson and de Zayas have suggested that this need for special measures stems from “the requirement to ensure suitable means, including

³⁹⁸ For more on the limitations and deficiencies of ICERD see: Drew Mahalic and Joan Gambee Mahalic ‘The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination’ (1987) *Human Rights Quarterly* 9 74 – 101

³⁹⁹ For example, the West Midlands Consortium Education Service for Travelling Children <<http://grtwestmidlands.org.uk>> [last accessed 26/02/13]

⁴⁰⁰ For example, for greater use of distance learning as demonstrated by the National Centre for Distance Learning in France <<http://www.european-agency.org/country-information/france/national-overview/complete-national-overview>> [last accessed 26/02/13]

⁴⁰¹ Helen O’Nions, *Minority Rights Protection in International Law: The Roma of Europe* (Ashgate 2007) 162

differential treatment, for the preservation of minority characteristics and traditions which distinguish them from the majority of the population.”⁴⁰² Following on from this reasoning, and in keeping with the principles established in the ICERD, it is clear that states are permitted to implement special measures to help the Roma, and minority groups like them, attain educational parity. There is little guidance on the types of measures that States could use and the circumstances in which they should be implemented but it does seem clear that these special measures would be targeted at individual members of minority groups rather than at the group as a whole.⁴⁰³ As well as the special educational initiatives mentioned above, special measures to help guarantee the educational rights of Roma children in Europe could take the form of one-to-one lessons, additional coaching in the majority language and even more direct affirmative action along the lines of the American model.⁴⁰⁴ It must be recognised, however, that although the ICERD clearly permits special measures so long as they don’t lead to disadvantage for any particular group, states are not as yet compelled to introduce such measures. Doing so would seem to depend both on available resources and, more problematically, on governmental desire to take extra action to assist specific minority groups. For historically “unpopular” groups such as the Roma it is, currently, unlikely that popular opinion in the government or the national populace will favour the granting to them of special measures unless there is a specific and enforceable requirement to do so.

This recognition of the necessity of special measures clearly elevates the ICERD from providing only a basic level of accommodation of minority groups since it permits, although doesn’t positively require, states parties to take additional steps in order to ensure that minority students achieve educational parity. While this does not go so far as requiring ‘separate but equal’ schooling, it is a recognition of the entrenched nature of the disadvantage suffered by many minority groups and of the fact that basic guarantees of equality will not be sufficient to remedy the situation. A positive

⁴⁰² Gudmundur Alfredson and Alfred de Zayas ‘Minority Rights: Protection by the United Nations’ (1993) 14 *Human Rights Law Journal* 2

⁴⁰³ Claudia Tavani *Collective Rights and the Cultural Identity of the Roma: A Case Study of Italy* (Martinus Nijhoff Publishers 2012) 81

⁴⁰⁴ For further details of affirmative action in the United States see <<http://www.affirmativeaction.org/>> [last accessed 26/02/13]

requirement for states parties to implement special measures to assist minority groups who have been identified as suffering particularly severe educational disadvantage would be an even more encouraging step along the scale of minority accommodation.

Ultimately then, the ICERD offers a basic guarantee of access to education for all groups but then goes on to detail how additional steps in the form of special measures may well be necessary if only to make that equality guarantee meaningful in practice. Furthermore, the ICERD is innovative in that the Committee have recognised that standards in education are just as important as access to education and so have made recommendations specifically designed to help the Roma achieve educational parity. It is unfortunate however that the Committee can only recommend and so can't compel states parties to implement Committee recommendations.

Convention on the Rights of the Child (1989)

The Convention on the Rights of the Child (hereafter CRC) sets out the civil, political, economic, social and cultural rights of children.⁴⁰⁵ All of the four countries are states parties to the CRC. The Convention generally defines “a child as any human being under the age of eighteen, unless an earlier age of majority is recognised by a country’s national laws.”⁴⁰⁶ The implementation of the CRC by its states parties is monitored by the Committee on the Rights of the Child.⁴⁰⁷ Mandatory reports by the states parties are examined by the Committee and then concerns and recommendations are issued to the State party in question in the form of “concluding observations”.⁴⁰⁸ The Committee does not

⁴⁰⁵ For a complete analysis of all the provisions of the CRC as well as discussion on the implications of ratification see: Jonathan Todres, Mark E. Wojcik and Cris R. Revaz (eds) (2006) *The United Nations Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of US Ratification* (New York, Transnational Publishers Inc); Marta Santos Pais and Susan Bissell ‘Overview and implementation of the UN Convention on the Rights of the Child’ (2006) 367 *The Lancet* 9511 689; Rachel Hodgkin and Peter Newell (1998) *Implementation Handbook for the Convention on the Rights of the Child* (New York, United Nations)

⁴⁰⁶ Article 1. Further discussion on the age boundaries of childhood can be found in the previous chapter

⁴⁰⁷ A detailed description of the make-up and workings of the Committee can be found at <<http://www.ohchr.org/Documents/Publications/FactSheet10Rev.1en.pdf>> [last accessed 26/02/13]

⁴⁰⁸ Committee on the Rights of the Child <<http://www2.ohchr.org/english/bodies/crc/>> [last accessed 26/02/13]

currently have the competence to hear individual complaints,⁴⁰⁹ although a third optional protocol on Communications Procedure opened for signature in 2012 and will enter into force upon ratification by 10 Member States.⁴¹⁰

Article 2 of the CRC reiterates the basic principle of non-discrimination⁴¹¹ in relation to any of the substantive rights.⁴¹² It is clear that this includes a prohibition on discrimination in the field of education. This non-discrimination provision therefore provides the guarantee of access which forms the most basic kind of minority accommodation.

Article 3⁴¹³ reiterates the interpretive principle underpinning the CRC that the “best interests of the child”⁴¹⁴ should be the “primary consideration” when assessing Convention rights. This requirement is particularly interesting in the field of education since the majority of the international human rights instruments frame the right to education as being one exercised by parents on behalf of their children.⁴¹⁵ It has been argued that the central purpose of education is to facilitate each child growing to become an autonomous and informed adult, and that this can best be achieved if the right to education is conceived of as an individual right where the individual in question is the child and not

⁴⁰⁹ The CRC has met with considerable criticism over this. See for example: Christina Lyon ‘Interrogating the concentration on the UN CRC instead of the ECHR in the development of children’s rights in England?’ (2007) 21 *Children and Society* 2 147 – 153

⁴¹⁰ Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure <http://treaties.un.org/doc/source/signature/2012/CTC_4-11d.pdf> [last accessed 26/02/13]

⁴¹¹ Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians or family members.

⁴¹² Helen O’Nions, *Op Cit* 161

⁴¹³ Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.

⁴¹⁴ On the development of the ‘best interests’ principle see: Sharon Detrick *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Préparatoires* (Martinus Nijhoff Publishers 1992) 131 – 141

⁴¹⁵ This issue, along with that of both parents and governments potentially seeking to indoctrinate children through education, will be considered in greater detail later in the chapter

some other person acting on their behalf.⁴¹⁶ This use of the “best interests of the child” principle therefore clearly elevates the CRC above the other international instruments when it comes to accommodating the educational needs of children themselves.⁴¹⁷ Indeed, further strength is given to this argument by Article 28, which lays down in some detail the format of the right to education as envisioned by the CRC. According to Article 28,⁴¹⁸ States Parties are required to “recognize the right of the child to education,” a phrase that clearly positions the child as rights holder. Further, and similarly to the ICESCR, Article 28 stipulates⁴¹⁹ that free primary education must be compulsory and calls for appropriate measures (such as removing any financial burden) to be introduced to make secondary education accessible to all. Once again, these are vital steps which go beyond the notional idea of equality of access to education and help to further accommodate the needs of minority groups by making that access practically achievable.⁴²⁰

Article 29 of the CRC elaborates on Article 28 as well as on the ICESCR provisions by expressly stating what the purpose of education should be and by recognising the significance of cultural identity and family life:

Article 29

⁴¹⁶ For more on this idea of the CRC in particular serving to facilitate children’s development see: Martin Woodhead ‘Promoting young children’s development: implications of the UN Convention on the Rights of the Child’ in Linda Miller, Caroline Cable and Rose Drury (eds) *Extending Professional Practice in Early Years* (London, Sage 2011)

⁴¹⁷ As discussed earlier in this thesis, children are in a particularly vulnerable position when it comes to rights protection and also have different needs than adults. For more on this see: Catrin Horsman ‘The particular needs of children and adolescents – not just little adults’ (2009) 5 *The Foundation Years* 2 75 - 78

⁴¹⁸ Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including 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 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.

⁴¹⁹ In Article 28, as above.

⁴²⁰ For more on the necessity for free education see: Katarina Tomasevski (2006) *State of the right to education worldwide: fee or free* (Copenhagen, University of Lund)

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural 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 civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

As discussed above, one of the central aims of an education system should be to encourage children to reach their maximum potential and to facilitate their development into autonomous, informed adults. Children may never develop the capacity to form their own views nor those required to exercise any freedom of thought, conscience or religion, as secured by Article 14(1) of the CRC, unless the state intervenes to prevent parents educating them in such a way that undermines their capacity for independent thought.⁴²¹ This idea of education entrenched here in Article 29 is to allow children to develop informed powers of freedom of thought. Article 29 thus takes a broader view of “education” than that of the provisions previously discussed. As Laura Lundy has commented:

“Article 29 expands on children’s rights ‘through’ education: not only must education be directed to the development of the child’s personality and respect for human rights and preparation for a life in a free society ... but it must also develop respect for the child’s parents

⁴²¹ Jane Fortin, *Children’s Rights and the Developing Law* (3rd edition, CUP 2009) 411

and culture as well as the country in which they are living, the country from which they originate and for civilisation different from his or her own.”⁴²²

Article 29(1)(a) therefore recognises the centrality of a child’s autonomy to the aims of the right to education and of the idea that each child should be permitted to develop to their fullest potential so that they grow to become autonomous and informed adults. The importance of a child’s culture to their sense of security and development is recognised at Article 29(1)(c) while Article 29(1)(d) reiterates the idea that a cohesive society can only be achieved if there is general respect for all cultures found in society and that such respect is best fostered through the education system. Article 29 continues:

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

This is a positive, if brief, mention of the idea that groups other than the state may desire and be competent to run their own schools. It is certainly not a mandate for ‘separate but equal’ schooling but does emphasise that any non-mainstream schools must still meet the minimum standards laid down by the State. It might initially appear unfortunate that Article 29 omits a guarantee as to mother tongue education. Roma children, along with other minority groups, may well speak a minority language at home and have only limited understanding of the majority language. Without guarantees that at least some teaching will be done in their own language, Roma children may be unable to understand what is being taught even if education of a reasonable standard is being notionally provided for them.

⁴²² Laura Lundy ‘Children’s rights and educational policy in Europe: the implementation of the United Nations Convention on the Rights of the Child’ (2012) 38 *Oxford Review of Education* 4 393 – 411, 396

It has already been shown that international human rights law recognises the right of each state to impose ‘minimum standards of education’⁴²³ on schools which are separate from those of the mainstream. Article 29(1) of the CRC is again important here because of the expectation for children to be developed to their ‘fullest potential’, which can be seen as another way of requiring minimum standards to be maintained. The question thus remains, what standards does the state have the right to set and what level of control can they exercise over these separate schools?

Although not directly comparable with the situation of the Roma, international case law does exist concerning state supervision of religious schools. These religious schools are still minority schools, although any separate Roma schools would necessarily be for pupils of a particular race rather than religion, and so cases concerning them can provide authoritative guidance for Roma parents/community groups keen to establish their own schools. A quite substantial body of case law can be found in the United States of America dealing with the issue of state⁴²⁴ interference with religious schools. The Supreme Court had held, following *Prince v Massachusetts*,⁴²⁵ that that state had an absolute right to interfere with parental authority over children, even in religious matters,⁴²⁶ although this right was limited by the finding in *Wisconsin v Yoder*⁴²⁷ that, although the state has a compelling interest in the education of all children, state law could still be held to infringe the free exercise of parent’s religion and culture. Unfortunately, no clear rule emerges from these cases⁴²⁸ although they do suggest that states have a right to interfere in education but that such interference should be exercised in a way that is in keeping with parent’s cultural and religious conviction.

⁴²³ ICESCR Article 13(3) as mention above

⁴²⁴ In this case, state is given its American meaning rather the European meaning of ‘country’

⁴²⁵ 321 US 158 (1944). The case concerning the Supreme Court upholding conviction against a Jehovah’s Witness mother for allowing her children to help her distribute pamphlets, thereby contravening labour laws

⁴²⁶ Paras 165 – 166

⁴²⁷ 406 US 205 (1972). The case concerned the right of Amish parents to cease their children’s education after the 8th grade. For detailed analysis see: Richard Arneson & Ian Shapiro ‘Democratic Autonomy and Religious Freedom: A Critique of Wisconsin v Yoder’ in Ian Shapiro *Democracy’s Place* (Cornell University Press 1996)

⁴²⁸ The situation is no clearer in the United Kingdom as the case of *R v Secretary of State for Education and Science ex p Talmud Torah Machzikei Haddass School Trust* (1985) shows

This is clearly a difficult balance to maintain and so, despite the obvious benefits of permitting pluralistic education policies, Sebastian Poulter is still doubtful over where the limits of such pluralism should fall.⁴²⁹ It could well be difficult in practical terms to determine exactly when the expected 'minimum standards' are breached by a particular traditional approach to education. If states are to be expected to supervise and interfere with minority schooling, then the boundaries must be clearly established from the outset. Despite this, in theory at least, the Roma community could set up their own schools that would be monitored to ensure that they conformed to the standard of mainstream schools but which could be culturally sensitive and also teach practical skills in accordance with Roma traditions. The main difficulty with this would be the fact that, unlike the religious groups previously mentioned, the Roma are not a single, united group and nor do they have access to an abundant stream of resources. So long as states have only limited obligations to fund separate schooling, the Roma will have difficulty in getting any such establishment opened.

Fortunately, Articles 30 and 31 deal even more explicitly than Article 29 with the importance of culture to children:

Article 30

In those states in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

Article 30 therefore recognises that states can be made up of numerous different groups and that minorities have a right to enjoy their own culture. This leads to an assumption that the state should not hinder cultural practices and also to the idea that different cultures should in fact be accommodated within a state. Use of a minority language of course ties in to the right to enjoy minority culture and

⁴²⁹ Sebastian Poulter, *Ethnicity, Law and Human Rights: The English Experience* (OUP 1998) 21

both of these rights have an impact on the kind of education that a minority child can expect to receive,⁴³⁰ both in terms of any accommodations that the national educational system can be expected to make and also any provision of special measures which can be implemented to address historical disadvantage. Article 30 is also interesting in that it states that children shall not be denied these rights “in community with other members of his or her group” and so it offers an example of a recognition at an international level of the importance of group membership to individuals. This once again links into the idea of group suffering that was discussed earlier in this chapter and of the suggestion that special measures targeted at particular groups, so long as they are limited and appropriate, are acceptable under international law.

Further guidance on Article 30 of the CRC is available in General Comment No. 11 (2009)⁴³¹ of the Committee on the Rights of the Child, which concerns “Indigenous children and their rights under the Convention”. The primary objective of General Comment No. 11 “is to provide States with guidance on how to implement their obligations under the Convention with respect to indigenous children”⁴³² but it is also potentially of relevance to minority children as indigenous and minority children are often grouped together in the CRC.⁴³³ The discussion of Article 30 begins with recognition of the close linkage between it and Article 27 of the ICCPR, with both Articles specifically providing for the right, in community with other group members, to enjoy one’s culture.⁴³⁴ The right established is conceived as “being both individual and collective and is an important recognition of the collective traditions and values in indigenous cultures.”⁴³⁵ This idea of Article 30 as involving a right that is both individual and collective is developed further when the Committee consider the requirements of the “best interests of the child” principle.⁴³⁶ While it is emphasised in Paragraph 30 of General Comment 11 that “the best interests of the child cannot be neglected or violated in preference for the best

⁴³⁰ This concept will be discussed in more detail in the following chapter

⁴³¹ Full text available at <http://www2.ohchr.org/english/bodies/crc/docs/GC.11_indigenous_New.pdf> [last accessed 26/02/13]

⁴³² Para 12

⁴³³ For example in Article 30

⁴³⁴ Para 16

⁴³⁵ Ibid

⁴³⁶ Paras 30 - 33

interests of the group”, it is recognised that a child can only exercise his or her cultural rights collectively with members of their group.⁴³⁷ Where a conflict may exist between the rights of a particular indigenous child and of indigenous children in general, the Committee suggest that in decisions regarding one individual child, for example a court decision, the best interests of that specific child is the primary concern⁴³⁸ but “that considering the collective rights of the child is part of determining the child’s best interests.”⁴³⁹ This recognition by the Committee of the collective element of the right in Article 30 clearly goes far beyond the scope of the rest of the international human rights instruments which, while recognising the importance of culture, have failed to adequately recognise the communal element of the right.⁴⁴⁰ In fact, this is the most advanced recognition of the importance of the group to the individual to be found in any of the international human rights instruments. By recognising the importance of the group, the CRC takes great strides towards the most complete level of minority accommodation in relation to education. Additionally, it is recognised that Article 30 places an obligation on States whereby positive measures of protection are required.⁴⁴¹ As discussed earlier, the permissibility of special measures is a noticeable step beyond guaranteeing basic access to education and towards inclusivity of minority groups in a practical sense, so a requirement for positive measures is here truly innovative.

Article 31 develops the assertion as to the importance of culture further:

⁴³⁷ Para 31

⁴³⁸ Para 32

⁴³⁹ Ibid

⁴⁴⁰ The expansive approach of the Committee here, albeit only in specified relation to indigenous children, can be contrasted with the attitude of the Human Rights Committee of the International Covenant on Civil and Political Rights, the sister document to the ISESCR discussed above. In General Comment No. 31, concerning the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, the Committee state in paragraph 9: “The beneficiaries of the rights recognized by the Covenant are individuals. Although, with the exception of article 1, the Covenant does not mention the rights of legal persons or similar entities or collectivities, many of the rights recognized by the Covenant, such as the freedom to manifest one’s religion or belief (article 18), the freedom of association (article 22) or the rights of members of minorities (article 27), may be enjoyed in community with others. The fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals (article 1 of the Optional Protocol) does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights.” CCPR/C/21/Rev.1/Add.13 26 May 2004, full text available at <<http://www.unhcr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?Opendocument>> [last accessed 26/02/13]

⁴⁴¹ Para 17 being then developed in para 20

Article 31

(1) States Parties recognise the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

(2) States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Once again the Convention places a burden on states not just to respect cultural practices but to promote the rights of children to engage fully in their cultural life. Such promotion would clearly best be accomplished through some variety of cultural recognition within the education system as that is the first national institution which most children come into contact with and the one in which they spend most time. This also ties in to the limited recognition of group rights which this thesis advocates and to the suggestion that the object of human rights should be to guarantee that children are provided with the necessary rights and amenities to ensure that they can also be autonomous individuals.

To sum up, it can be seen that the CRC is by far the most advanced of the international human rights instruments when it comes to minority accommodation.⁴⁴² As Laura Lundy has remarked, “even though the substantive rights to education are often worded broadly and in some cases qualified heavily, it [the CRC] remains the most comprehensive, widely known and generally accepted articulation of school children’s rights across the world.”⁴⁴³ The CRC of course contains the standard non-discrimination provision which guarantees the basic notional form of equality of access, but it

⁴⁴² Although some commentators have suggested that the CRC, while having made a great impact in the field of rights protection, will need to be updated soon if it is to remain relevant and effective: Philip E. Veerman ‘The ageing of the United Nations Convention on the Rights of the Child’ (2010) 18 *International Journal of Children’s Rights* 4 585 – 618

⁴⁴³ Laura Lundy ‘Children’s rights and educational policy in Europe: the implementation of the United Nations Convention on the Rights of the Child’ (2012) 38 *Oxford Review of Education* 4 393 – 411, 395

goes on to require the provision of free primary education and the development of free secondary education as a means of achieving true equality of access. The CRC is particularly advanced in terms of minority accommodation though because, as well as requiring special measures of protection to be implemented and allowing for non-state entities to establish their own schools, the right to education is firmly framed as a right of the child rather than of the parent or guardian. This might not always be a popular approach, either with the State or with specific parents or guardians, but this thesis contends that it is the only means for ensuring minority students receive true parity of education and that the education delivered is able to fulfil its central purpose.

3.5 European Standards

Now that the UN's human rights standards concerning education have been considered, this thesis will move on to consider the relevant European human rights provisions. This will necessarily involve both a consideration of Council of Europe instruments and of the various relevant measures issued under the auspices of the European Union. The same approach to these European standards shall be taken as was taken to analyse those of the UN. Therefore, each of the European standards shall be assessed to see where it stands on the scale of minority accommodation in education.

European Convention on Human Rights (1952)

The European Convention on Human Rights (hereafter ECHR) is an international treaty designed to protect human rights and fundamental freedoms in Europe. Each of the four countries are state parties to the ECHR. The ECHR established the European Court of Human Rights⁴⁴⁴ and any person who feels that his or her rights under the Convention have been violated by a state party can bring a case before the Court. Judgements of the Court are binding on the States concerned, with “the Committee

⁴⁴⁴ Section II (Articles 19 to 51) sets up the Court and details its rules of operation. Also see Donna Gomien *Short Guide to the European Convention on Human Rights* (Council of Europe Publishing 2005)145 – 153.

of Ministers of the Council of Europe being tasked with monitoring the implementation of judgements.”⁴⁴⁵ The ECHR is currently the only international human rights agreement to provide such a high degree of individual protection and this is certainly to be commended. Although this of course benefits non-minority persons as well as those belonging to minorities, it is of particular significance in the context of minority accommodation since it provides for effective recourse and remedies for members of minorities who are more likely to suffer oppression and disadvantage. States parties are also able to bring cases against other states parties before the Court, but this remains a rarely used power.

In keeping with the general international desire to ensure non-discrimination and equality, the ECHR contains a prohibition of discrimination in Article 14.⁴⁴⁶ This prohibition is similar to the other non-discrimination provisions that were discussed above, but is broad in some ways yet narrow in others. On one hand, Article 14 protects against discrimination based on any of a wide range of grounds (including “association with a national minority”) and makes it clear that the list of grounds mentioned within the Article itself is not exhaustive. On the other hand, Article 14’s scope is clearly limited to discrimination with respect to rights under the Convention.⁴⁴⁷ So, applicants must prove discrimination in the enjoyment of a specific Convention right, although not necessarily a breach of the substantive provision itself.⁴⁴⁸

⁴⁴⁵ Laurence Helfer ‘Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime’ (2008) 19(1) *European Journal of International Law* 125 - 159

⁴⁴⁶ Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

⁴⁴⁷ Although it should be noted that Protocol 12 extends this prohibition to cover discrimination in any legal right, even when that legal right is not protected under the Convention, provided that it is protected under national law in the relevant State

⁴⁴⁸ For example, a claim of discrimination in relation to freedom of expression would involve an alleged breach of Article 14 in conjunction with Article 10

As it was originally drafted, the ECHR did not deal with the right to education per se and so this deficiency was remedied by Protocol 1 Article 2:⁴⁴⁹

Protocol 1 Article 2

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 religions and philosophical convictions.

It is interesting to note, once again, Protocol 2 Article 1 is framed in a very adult-centric way – protecting the rights of parents to have their children educated in accordance with their beliefs.⁴⁵⁰ It is unfortunate that the right to education as envisioned in Protocol 1 seems to be a right exercised by parents rather than by the child themselves⁴⁵¹ so it could be said to be a regressive formulation when compared to that of the CRC. If the aim of education is to allow the child to develop autonomy then it is dangerous to place the exercising of the right in the hands of parents who might, without thought of the potential disadvantages involved for the individual child, wish for the child to remain rooted solely within their own culture. Seeing the child as merely the instrument of the parents rather than an autonomous individual capable of exercising his or her own rights clearly fails to adequately recognise the legal status of the child as a valid rights holder. The cultural rights of children must be protected in order for that child to feel secure with his/her minority identity but the protection must be child-centric in the sense that the child is also aided in gaining an understanding and appreciation of outside cultures.

⁴⁴⁹ On the rationale behind Protocol 1 Article 2: David Harris, Michael O'Boyle, Ed Bates & Carla Buckley Harris, *O'Boyle & Warbrick: Law of the European Convention on Human Rights* (Oxford OUP 2009) Chapter 19.

⁴⁵⁰ Fortin offers this Protocol 1 Article 2 of the European Convention on Human Rights as an example, highlighting that 'no person shall be denied the right to education' and then expands on this to require 'respect [for] the right of parents to ensure such education and teaching in conformity with their own religion and philosophical convictions.' Jane Fortin, *Children's Rights and the Developing Law* (3rd edition, CUP 2009) 410

⁴⁵¹ Peter van Dijk & Godefridus van Hoof *Theory and Practice of the European Convention on Human Rights* (Martinus Nijhoff Publishers 1998) 648 - 651

On the positive side, 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.⁴⁵² Unfortunately, an examination of the European jurisprudence reveals that the Court is not particularly consistent in its determination of the existence of discrimination in the field of education. In *Timishev v Russia*,⁴⁵³ for example, the Court held that, in a democratic society, “the right to education, which was indispensable to the furtherance of human rights, played such a fundamental role that a restrictive interpretation of Article 2 of Protocol 1 would not be consistent with the aim or purpose of that provision.”⁴⁵⁴ Here the applicant, an ethnic Chechen, alleged that Russian national law permitted his children to be denied the right to education due to his not being able to prove registration of permanent residence in Russia.⁴⁵⁵ The Court found that the right to education guaranteed access to elementary education and that since such success was of central importance for a child’s development, the denial of access to education based on parents’ residence status amounted to a breach of Article 2.⁴⁵⁶ So in *Timishev* the requirement that “no person shall be denied the right to education” was interpreted widely to require states “to guarantee to anyone within their jurisdiction a right of access to educational institutions existing at a given time and the possibility of drawing, by official recognition of the studies which that person has completed, profit from the education received.”⁴⁵⁷

Conversely, in *Kjeldsen, Busk Madsen and Pederson*⁴⁵⁸ the Court took a far more restrictive approach in its interpretation of Protocol 1 Article 2. In this case the applicants were parents of school age children who had unsuccessfully attempted to have their children exempted from sex education.⁴⁵⁹ They lodged a complaint under Article 2 contending that compulsory sex education and its integration

⁴⁵² Article 34 of the ECHR allows the Court to hear individual or group applications alleging a violation of a protocol right, from Helen O’Nions, *Minority Rights Protection in International Law: The Roma of Europe* (Ashgate 2007) 164

⁴⁵³ [2005] ECHR 55762/00

⁴⁵⁴ Judgement at (2)

⁴⁵⁵ Paras 10 and 22 – 27

⁴⁵⁶ Judgement at (2)

⁴⁵⁷ Para 63

⁴⁵⁸ [1976] ECHR 5095/71

⁴⁵⁹ Para 14

into the Danish curriculum was a violation of their right as parents “to ensure that education and teaching was in conformity with their own religious and philosophical convictions.”⁴⁶⁰ The Court held that “the disputed Danish legislation did not offend the applicant’s religious and philosophical convictions to the extent forbidden under Article 2 when it was interpreted in light of the whole of the Convention.”⁴⁶¹ The purpose of the instruction was found to be solely to provide information and the Danish government did not seek to indoctrinate pupils.⁴⁶² It was likewise held, in relation to Article 14, that there was nothing in the contested legislation that amounted to discrimination.⁴⁶³ This is a fairly restrictive interpretation since it effectively holds that, although the sex education was contrary to the parents’ religious and cultural beliefs, formal education in general was not and so, since no indoctrination was intended by the school authorities, the applicants’ right under Article 2 had not been breached. While this may at first appear to exhibit hostility towards minorities and their beliefs, this judgement could also be perceived as supporting the idea of the autonomy of children in that it allows for the provision of information which parents would rather their children did not have so long as this provision does not amount to indoctrination. It is the provision of information which parents and minority groups as a whole might not agree with which will allow the child to make an informed decision about where they ultimately want to orientate their life in relation to both their minority group and mainstream society.

Significantly, there are a number of Roma-centric cases which illustrate the interplay between Protocol 1 Article 2 and Article 14 and the stance that the Court has taken on the issue of discrimination within the field of education. In *DH and Others v Czech Republic*⁴⁶⁴ the applicants were a group of Roma children who, after psychological testing, had been placed in special schools, which followed a more basic curriculum, with their parents’ consent.⁴⁶⁵ The applicants complained that they had been discriminated against with regards to their right to education under Article 2 taken

⁴⁶⁰ Paras 36 – 43

⁴⁶¹ Paras 49 – 55

⁴⁶² Para 50

⁴⁶³ Para 56

⁴⁶⁴ [2007] ECHR 57325/00

⁴⁶⁵ Paras 19 – 22

in conjunction with the anti-discrimination provision of Article 14.⁴⁶⁶ The applicants admitted that special schools could serve a legitimate purpose but relied on statistical evidence that, in their area, the majority of children in special schools were Roma children even though Roma children represented only a small proportion of pupils overall.⁴⁶⁷ The Grand Chamber decided by a majority verdict that there had been a violation of Article 14 read in conjunction with Article 2 Protocol 1. Effectively, it was found that “the Czech government had engaged in indirect discrimination against Roma children as their placement in special schools constituted a discriminatory denial of their right to education and so violated the Convention.”⁴⁶⁸ The Court clarified and strengthened a number of principles related to equality in the context of the European Convention. In particular, the Court recognised that “indirect discrimination is prohibited by the European Convention in the same way as direct discrimination.”⁴⁶⁹ The ruling also confirmed that “once an applicant alleges indirect discrimination in that the effect of such a measure or practice is discriminatory, the burden shifts to the state to prove that the difference in impact has an objective and reasonable justification.”⁴⁷⁰ Equally important for disadvantaged groups such as the Roma who must rely heavily on support from NGOs, the Court clarified that “reliable and significant statistics may be used to establish *prima facie* discriminatory impact.”⁴⁷¹ This recognition of indirect discrimination coupled with the fact that a violation of Article 14 can be found from a pattern of racial discrimination backed up by relevant and authoritative statistics is a hugely positive development since it sends out a warning to governments who may have similar policies of segregation and offers hope to those who wish to demonstrate and gain relief from a breach of their right to education that arose indirectly through entrenched racist policies.

⁴⁶⁶ Para 3

⁴⁶⁷ Paras 103 – 104

⁴⁶⁸ Para 124

⁴⁶⁹ Paras 185 – 195

⁴⁷⁰ Paras 196 – 204

⁴⁷¹ Para 164. For a discussion of the importance of NGOs in drafting and monitoring human rights treaties in general, see: Gamze Erdem Turkelli and Wouter Vandenhoele ‘The Convention on the Rights of the Child: Repertoires of NGO Participation’ (2012) 12(1) *Human Rights Law Review* 33 – 64

However, while the ultimate decision in *DH and Others* is clearly positive, change at a national level occurs slowly. As recent research by the Open Society Justice Foundation had shown, “victory in court and real change are two different things.”⁴⁷² This research involved interviewing the families involved in the *DH and Others* case and members of their community to see what impact victory in court had had on education provision. Unfortunately, the research proved that “Roma children still face discrimination in the Czech school system. Most still end up in inadequate, third-rate schools.”⁴⁷³ The judgement of the Grand Chamber has seemingly proved unenforceable and thus has had only a negligible impact so far on the educational discrimination suffered by Roma children.

It is not only in the Czech Republic that European jurisprudence has proved ineffective at stamping out school segregation. In *Orsus and Others v Croatia*⁴⁷⁴ the applicants were another group of Roma students who had attended separate classes, with only Roma pupils, in primary schools in Croatia.⁴⁷⁵ They had also been told that they must leave school at fifteen although non-Roma pupils could stay on.⁴⁷⁶ The applicants submitted that the teaching in the Roma-only classes was “significantly reduced in volume and in scope compared to the officially prescribed curriculum.”⁴⁷⁷ They claimed that the described situation was racially discriminatory and violated their right to education as well as their right to freedom from inhuman and degrading treatment. The Grand Chamber held that “the segregation of Roma pupils in special classes based solely on language deficiencies was an example of racial discrimination” and so breached Article 2 Protocol 1 and Article 14.⁴⁷⁸ Although once again the Grand Chamber has found in favour of the Roma applicants it is troubling that this case had to come so far to reach a favourable verdict considering that *DH and Others* had recently been decided. It is of course arguable that the gap between the two cases⁴⁷⁹ was too short for the *DH and Others*

⁴⁷² Open Society Justice Foundation *Failing Another Generation: The Travesty of Roma Education in the Czech Republic* (New York 2012) 5

⁴⁷³ Ibid

⁴⁷⁴ [2008] ECHR 15766/03; see also *Sampasis and Other v Greece* application no. 32526/05

⁴⁷⁵ Para 5

⁴⁷⁶ Ibid and para 20

⁴⁷⁷ Para 21

⁴⁷⁸ Paras 57 -64

⁴⁷⁹ And indeed the *Sampasis* case

judgement to act as a deterrent but this does not justify the findings of the 2012 Open Justice Foundation study.

Ultimately segregation is therefore clearly prohibited under the ECHR and case law to date at the European level has demonstrated some willingness to find in favour of Roma applicants and to find racism in a pattern of action that a state may allege served a valid purpose. Only after the educational mechanisms that lead to segregation have been fully dismantled can minority groups such as the Roma have truly equal and sufficient access to the right to education.⁴⁸⁰ Decisions of the European Court of Human Rights seem to rely heavily on political will “to transform the judges’ words into real life improvements for children’s everyday lives.”⁴⁸¹ Until governments are willing or compelled to make major structural changes to the education system then Roma children will continue to be marginalised.

Unfortunately, the ECHR is far less accommodating to minorities than the CRC.⁴⁸² Although it contains the standard non-discrimination provision, it does not move beyond this⁴⁸³ – not even in the more limited ways such as those found in the ICESCR or in ICERD for example. Very little is in fact said about the substance of the right to education let alone the means which must be taken to guarantee it. It is additionally disappointing that, where the right to education is discussed in Article 2 Protocol 1, it is formulated as a right of parents or guardians rather than a right of the child. Additionally, as Neville Harris has suggested, the negative formulation of Article 2 Protocol 1 whereby “no-one shall be denied the right to education” has been interpreted by the European Court

⁴⁸⁰ For further discussion of these education mechanisms and of structural difficulties within the Czech System see: Tara Bedard *Persistent Segregation of Roma in the Czech Education System* (ERRC 2008) <http://www.romaeducationfund.hu/sites/default/files/publications/czech_education_assessment_2008.errc_ref_new.pdf> [last accessed 03/03/13]

⁴⁸¹ Open Society Justice Foundation *Failing Another Generation: The Travesty of Roma Education in the Czech Republic* (New York 2012) 27

⁴⁸² Oren Gross ‘Once more unto the Breach: The systemic failure of applying the European Convention on Human Rights to Entrenched Emergencies’ (1998) 23 *Yale Journal of International Law* 437 – 499; Kristin Henrard *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (Martinus Nijhoff Publishers 2000) 131 – 141

⁴⁸³ Peter van Dijk & Godefridus van Hoof *Theory and Practice of the European Convention on Human Rights* (Martinus Nijhoff Publishers 1998) 643 – 646

of Human Rights as a right of access to whatever educational establishment that the state provides rather than to any particular form of education, with the end result that few cases relating to education that have been brought before the Court have been successful.⁴⁸⁴

Framework Convention for the Protection of National Minorities (1995)

The Council of Europe began discussing the idea of according specific protection for national minorities as early as 1949⁴⁸⁵, but it was not until Recommendation 1134 (1990)⁴⁸⁶ that a firm commitment was made to the issue and a list of necessary principles drawn up. The Framework Convention for the Protection of National Minorities followed on from Recommendation 1134 in 1995 and was “the first legally binding multilateral instrument devoted to the protection of national minorities in general.”⁴⁸⁷ The Framework Convention for the Protection of National Minorities has in fact been said to be the most comprehensive multilateral treaty devoted to minority rights⁴⁸⁸ and sets forth a number of principles according to which Member States must develop specific policies to protect the rights of minorities.⁴⁸⁹ Each of the four countries are state parties to the Framework Convention. The aim of the Framework Convention is to specify the legal principles which states parties undertake to respect in order to ensure the protection of national minorities. Since minority situations differ greatly from country to country, the “drafters of the Convention opted for ‘programmatic’ provisions that establish principles and objects that should guide States in protecting

⁴⁸⁴ Neville Harris ‘Education: hard or soft lessons in human rights’ in Colin Harvey (ed) (2005) *Human Rights in the Community* (Oxford, Hart Publishing) 81 – 112; see also A Bradney ‘The convention right to education and the Human Rights Act 1998’ (1999) *European Human Rights Law Review* 4 395 – 410

⁴⁸⁵ Council of Europe (1995) Framework Convention for the Protection of National Minorities and Explanatory Report (Strasbourg) H(1995)010 11 – the full text at <[http://www.coe.int/t/dghl/monitoring/minorities/1_AtGlance/PDF_H\(1995\)010_FCNM_ExplanReport_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/1_AtGlance/PDF_H(1995)010_FCNM_ExplanReport_en.pdf)> [last accessed 26/02/13]

⁴⁸⁶ Recommendation 1134 (1990) on the Rights of Minorities from *Assembly Debate* on 1 October 1990 (14th sitting) – full text at <<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta90/EREC1134.htm>> [last accessed 26/02/13]

⁴⁸⁷ Marcia Rooker, *The International Supervision of Protection of Romany People in Europe* (University of Nijmegen Press 2004) 13

⁴⁸⁸ <http://www.ohchr.org/Documents/Publications/GuideMinorities8en.pdf> p. 1

⁴⁸⁹ For commentary on the Framework Convention see: Marc Weller (2006) *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford, OUP); Anders Ronquist ‘The Council of Europe Framework Convention for the Protection of National Minorities’ (1995) 6 *Helsinki Monitor* 38

their minority populations.”⁴⁹⁰ For this reason, the Convention can be seen to involve a series of obligations on the part of Member States rather than a collection of rights to be enjoyed by individuals belonging to minorities. As well as ensuring that the signatory states respect the rights of national minorities, the Framework Convention also requires state parties to “undertake to combat discrimination, promote equality, preserve and develop the culture and identity of national minorities, guarantee certain freedoms in relation to access to the media, minority languages and education and to encourage the participation of national minorities in public life.”⁴⁹¹

Perhaps the most important principle contained in the Convention is that in Article 1, which states that the protection of national minorities is an integral part of the protection of human rights:

Article 1

The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation.

This is important for a number of reasons: It is vital to recognise that national minorities may need different or additional rights protection from members of majority society. Additionally, no society can claim to have adequate rights recognition if minority differences are not recognised and if steps are not taken to ensure that all groups receive protection before the law. This recognition that minority groups are often in a particularly precarious position when it comes to protection of their rights echoes the earlier discussion regarding the particular vulnerability of Roma children.

Perhaps unsurprisingly given its focus on protecting national minorities, multicultural education is arguably endorsed in the Framework Convention. Article 12 requires:

⁴⁹⁰ <http://www.ohchr.org/Documents/Publications/GuideMinorities8en.pdf> p. 2

⁴⁹¹ The full text of the Framework Convention is available at pp 2 – 10: <[http://www.coe.int/t/dghl/monitoring/minorities/1_AtGlance/PDF_H\(1995\)010_FCNM_ExplanReport_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/1_AtGlance/PDF_H(1995)010_FCNM_ExplanReport_en.pdf)> [last accessed 26/02/13]

Article 12

(1)The Parties shall, where appropriate, take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority.

(2)In this context the Parties shall inter alia provide adequate opportunities for teacher training and access to textbooks, and facilitate contacts among students and teachers of different communities.

(3)The Parties undertake to promote equal opportunities for access to education at all levels for persons belonging to national minorities.

Article 12 raises several important issues. First, Article 12(3) requires that Member States promote equal opportunities for access to education of all levels to persons belonging to national minorities. This indicates the importance of encouraging minority students to complete the full course of education⁴⁹² and, when read in conjunction with Article 4(2), suggests that Member States can use affirmative action as a means to facilitating minority access to education.⁴⁹³ Secondly, the importance of education as a means of achieving social cohesion seems to be recognised in Article 12(1), which speaks of taking measures to facilitate an exchange of knowledge about culture, history, language and religion between minority groups and the majority population. Thirdly, Article 12(2) is noteworthy because it considers the kind of practical steps that may assist in achieving knowledge transfer and understanding between communities. The importance of teacher training and appropriate textbooks and resources in encouraging minority educational attainment will be discussed in detail in the following chapter.

⁴⁹² Rather than merely mandating for primary level education as some of the international human rights instruments do

⁴⁹³ For further discussion of the practical implications of this see: Kinga Gal 'The Council of Europe Framework Convention for the Protection of National Minorities and its Impact on Central and Eastern Europe' (2000) *Journal of Ethnopolitics and Minority Issues in Europe* 1

However, despite these positives, it must be noted that a number of limiting/qualifying phrases are to be found in Article 12: Parties shall “where appropriate” take measures and Parties shall provide “adequate” opportunities. The use of these types of phrases could be interpreted as limiting the obligations placed on Member States and/or allowing them to shirk responsibilities under the Convention. This issue has actually been addressed by the Council of Europe, who stated:

“The programmatic provisions are worded in general terms and often contain qualifying phrases such as ‘substantial numbers’, ‘a real need’, ‘where appropriate’ and ‘as far as possible’. While this level of generality might seem to weaken the rights guaranteed under the Convention, it gives States Parties the flexibility to translate the Convention’s objectives into national laws and policies that are most appropriate. However, this flexibility does not release States from their obligation to implement the Convention’s provisions in good faith and in a manner that results in the effective protection of national minorities.”⁴⁹⁴

While this may not be a wholly convincing argument, it does take into account the need to consider the practical situation in Member States and recognises the need for a balancing of resources.

Education is also the subject of Article 13:

Article 13

(1) Within the framework of their education systems, the Parties shall recognise that persons belonging to a national minority have the right to set up and to manage their own private educational and training establishments.

(2) The exercise of this right shall not entail any financial obligation for the Parties.

⁴⁹⁴ Council of Europe (2001) Pamphlet No. 8 of the UN Guide for Minorities
<http://www.ohchr.org/Documents/Publications/GuideMinorities8en.pdf> 2 [last accessed 26/02/13]

Article 13 echoes articles in some of the previously discussed human rights instruments in that it recognises that some minority groups may find it desirable to operate their own schools. This right to operate independent schools is, however, qualified in two respects: the schools must fit within the existing national education system and there is no financial obligation on national governments to fund such schools. The first qualification is not particularly onerous and could perhaps even be seen as positive since an obligation to fit within the national education system could serve to provide vital checks and balances on the quality of provision in any minority schools and so would help prevent minority students becoming “ghettoised”. This is particularly useful in the context of this thesis since it is contended that one of the central aims of education should be to facilitate movement between cultures and to allow minority students to compete on an equal footing with their majority counterparts.⁴⁹⁵ The lack of financial obligation to provide such schools is perhaps more troubling. In difficult economic times it is understandable that Member States would wish to avoid greater financial burdens and also that it would be harder to justify targeted spending that would only benefit a small percentage of the population. However, this does then leave a significant practical problem for any minority groups who do wish to establish their own school(s).

Leading on from this idea of the permissibility of separate minority education is recognition of the desirability of preserving and learning minority languages., with Article 10 stating that “people belonging to national minorities have the right to use freely and with interference [their] minority language.” Language is often an important part of minority identity and so it is logical that the use of such languages is specifically guaranteed. The importance of minority languages is developed further in Article 14⁴⁹⁶ since the right to learn a minority language is also guaranteed. The national education

⁴⁹⁵ For discussion of movement between cultures and multicultural accommodation, see: Will Kymlicka ‘Multicultural Odysseys’ (2007) 6 *Ethnopolitics* 4, 585 - 597

⁴⁹⁶ Article 14

(1)The Parties undertake to recognise that every person belonging to a national minority has the right to learn his or her minority language.

(2)In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language.

system is the logical place for such instruction to occur and so Article 14(2) allows for pupils “being taught the minority language or for receiving instruction in this language.” It is important to note though there is no total, positive obligation on Member States to provide this. Once again the limiting phrases of “if there is sufficient demand” and “adequate opportunities” are used and so potentially curtail the obligations on Member States. The text here deliberately refrains from defining ‘sufficient demand’ so as to leave “a flexible form of wording which again allows states to take into account their countries’ own particular circumstances.”⁴⁹⁷ The opportunities for being taught the minority language or for receiving instruction in this language mentioned in paragraph (3) are “without prejudice to the learning of the official language or the teaching in this language. Indeed, knowledge of the official language is a factor of social cohesion and integration.”⁴⁹⁸ It is also a factor in allowing a minority child to make an informed decision about to what extent if any he or she wishes to become involved in mainstream culture.

However, while there are practical and financial reasons for limitations such as those found in Article 14, the lack of concrete guidance on what would constitute a critical mass of students to merit such language education is troubling. While this is all very encouraging for the future of multicultural education, there is still no imposition of positive obligations on states and mother tongue teaching will depend on resources, numbers and demand.⁴⁹⁹ Helen O’Nions has raised the troubling issue of the Czech Government’s claim that bilingual education provision for the Roma has not been treated as an issue of importance since there has been no ‘demand’ for it by Roma parents.⁵⁰⁰ As discussed earlier in this Chapter, both formal education and general interaction with state authorities are often seen as irrelevant and unappealing by the majority of Roma parents, who no doubt base these opinions on their own historic negative experiences. It is not surprising that these parents have not availed

⁴⁹⁷ Council of Europe (1995) *Commentary on the Provisions of the Framework Convention* (Strasbourg) H(1995)010 para 76

⁴⁹⁸ *Ibid* para 78

⁴⁹⁹ Helen O’Nions, *Minority Rights Protection in International Law: The Roma of Europe* (Ashgate 2007) 165

⁵⁰⁰ *Ibid*: This comment originates from the Czech Government’s report to the ICERD and has been criticised by the Committee: ICERD *Summary Record of the 1255th Meeting: Czech Republic* 30 March 1998 CERD/C/SR.1255.

themselves of this particular right. Given the level of education that these parents themselves would have received, it is debateable as to whether they even know of the existence of such a right. This problem could of course be combated by categorically placing the child in the position of rights holder and so removing the weight of the parents' interests. While international human rights law strives to uphold the twin ideals of equality and non-discrimination, loopholes such as this one should not be permitted to exist. This problem could be tackled partially at least by having the child rather than the parents as the rights holder since it would then be the child's need which determines the necessity for bilingual education.

Bearing in mind the permissibility of affirmative action and of minority language education, Article 3⁵⁰¹ emphasises choice on the part of members of minorities as to whether to exercise these rights. One of the central contentions of this thesis is that education should serve to securely position minority students within their own culture but that it should also allow them to function effectively within the majority culture if they wish to do so. Additionally, not every member of a minority group wishes to be treated as such and, while minority language education may be popular, not every minority individual approves of affirmative action. It is perhaps with these very issues in mind that Article 3(1) specifies that "members of national minorities have the right to be treated or not be treated" as such. This idea of opting out of special minority protection could also be useful in the context of avoiding ghettoisation in special schools and other potentially disadvantageous practical results of measures which may be portrayed as being minority friendly.

The Framework Convention is therefore quite unique in its approach to minority accommodation in that it favours minority education within the mainstream as a way of spreading tolerance and

⁵⁰¹ Article 3

(1) Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice.

(2) Persons belonging to national minorities may exercise the rights and enjoy the freedoms flowing from the principles enshrined in the present framework Convention individually as well as in community with others.

understanding and, while still avoiding ‘separate but equal’ education, does require additional accommodation in the form of mother-tongue education (with some reservations).

(Revised) European Social Charter (1996)

The (Revised) European Social Charter is another Council of Europe innovation and sets out rights and freedoms and establishes a supervisory mechanism guaranteeing their respect by the states parties. Each of the four European countries under consideration in this thesis are states parties to the Charter. The Charter guarantees those rights and freedoms which concern all individuals in their daily existence, for example housing, health, education, employment and social and legal protection.⁵⁰² The European Committee of Social Rights is “the body responsible for monitoring compliance in the states party to the Charter and states parties are required to submit annual reports showing how they implement the provisions of the Charter in law and in practice.”⁵⁰³ Under the 1995 Additional Protocol to the Charter complaints of violations of the Charter may be lodged with the Committee, although only certain organisations are entitled to do so.⁵⁰⁴

There is a Charter provision specifically dealing with education:

Part II Article 17

With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation

⁵⁰² Full text of the Charter available at <<http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm>> [last accessed 26/02/13]

⁵⁰³ Robin R. Churchill and Urfan Khaliq ‘The Collective Complaints System of the European Social Charter: an effective mechanism for ensuring compliance with economic and social rights?’ (2004) 15 *European Journal of International Law* 3 417 – 456

⁵⁰⁴ A special list of NGOs has been compiled made up of those NGOs enjoying participatory status with the Council of Europe. The list is available online from the Council of Europe website at <http://www.coe.int/t/ngo/particip_status_intro_en.asp> [last accessed 26/02/13]

with public and private organisations, to take all appropriate and necessary measures designed:

... 2. to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.

There is of course an implicit requirement of non-discrimination and equality of access here as the Charter mentions the right of children and young people in general. The Charter goes further than most of the other international human rights measures dealing with education⁵⁰⁵ in that it calls upon states parties to provide free and compulsory primary AND secondary education. These steps help to render the basic guarantee of access workable to all, which is especially important to disadvantaged minority groups who might not be able for financial reasons to fully enjoy their right to education even though they are not expressly discriminated against. While primary education is undeniably vitally important since it provides children with their first experience of formal learning and teaches them the basic skills and academic disciplines needed for life, secondary education is just as important. As mentioned above, unemployment is a huge problem for the Roma community. Although a primary education is clearly necessary, a secondary education is important to ensure that Roma pupils are educated to the same level as their mainstream counterparts and so can be competitive in the labour market. Similarly, formal education is not viewed as particularly important by the majority of the Roma population and so making both primary and secondary education compulsory might be the only way to ensure that Roma pupils complete all school levels.

The Charter therefore does not have a great deal to say about education but can be seen to go beyond the most basic level of minority accommodation in that it mandates for free primary and secondary education rather than just relying on a straightforward non-discrimination principle which guarantees a notional right of access to education.

⁵⁰⁵ With the notable exception of Protocol 1 of the European Convention on Human Rights

The EU Charter of Fundamental Rights

Protection of the right to education (and, indeed, of other fundamental rights) can also be found within the auspices of the European Union. In June 1999, the Cologne European Council concluded that “the fundamental rights applicable at European Union (hereafter EU) level should be consolidated in a Charter to give them greater visibility.”⁵⁰⁶ This appears to have been a wise conclusion since “hitherto the Union’s ... rights regime was piece-meal and was dependent on the largesse of the Court of Justice in developing and protecting rights.”⁵⁰⁷ Uncertainty of this kind would of course have an adverse impact on the efficacy of rights protection. The member states of the EU “aspired to include in the Charter the general principles set out in the European Convention on Human Rights⁵⁰⁸ and those derived from the constitutional traditions common to the EU countries.”⁵⁰⁹ To satisfy this aspiration, the Charter therefore recognizes a range of personal, civil, political, economic and social rights as belonging to EU citizens and residents.⁵¹⁰ To further strengthen the protection offered by the Charter, following the entry into force of the Lisbon Treaty⁵¹¹ in December 2009, it was given binding legal effect equal to the EU Treaties.⁵¹² It is important to remember though that the Charter still only applies to Member States when they are implementing EU law and that it does not extend the competencies of the EU beyond that provided for by the Treaties. However, the EU must take care to always act and legislate consistently with the Charter as the European Court of Justice will strike down any EU legislation that contravenes it.

⁵⁰⁶ Cologne European Council June 1999 available via http://europa.eu/legislation_summaries/justice_freedom_security/combating_discrimination/133501_en.htm [last accessed 02/03/13]

⁵⁰⁷ Clare McGlynn (2006) *Families and the European Union: Law, Politics and Pluralism* (Cambridge, CUP) 17

⁵⁰⁸ If any of the rights correspond to rights guaranteed by the ECHR, the meaning and scope of those rights is to be the same as defined by the Convention, though EU law may provide for more extensive protection.

⁵⁰⁹ Ibid

⁵¹⁰ This inclusion of ‘residents’ can be of particular importance to minority groups who may have been denied citizenship in their country of residence as happened to groups such as the Roma during the break up of Czechoslovakia and Yugoslavia.

⁵¹¹ For additional discussion on the impact on the Lisbon Treaty on the development of children’s rights in particular, see: Helen Stalford ‘Are we there yet? The Impact of the Lisbon Treaty on the EU Children’s Rights Agenda’ (2011) 19 *International Journal of Children’s Rights* 3, 7 - 29

⁵¹² Article 1(8)

The Charter was clearly intended to provide substantial protection to those residing within the EU. As Romano Prodi commented:

“In the eyes of the European Commission, by proclaiming the Charter of Fundamental Rights, the European Union institutions have committed themselves to respecting the Charter in everything they do and in every policy they promote ... The citizens of Europe can rely on the Commission to ensure that the Charter will be respected.”⁵¹³

In addition:

“... the Charter will be the law guiding the actions of the Assembly ... From now on it will be the point of reference for all the Parliament acts which have a direct or indirect bearing on the lives of citizens throughout the Union.”⁵¹⁴

With this in mind it is perhaps unsurprising that the majority of commentators were in favour of using the Charter to formalise the protection of fundamental rights within the EU.⁵¹⁵ However, the Charter has not proved immune from criticism, with some questioning “its legal ambiguity, its resort to the ‘rusty and trusty formulae of yesteryear’ around which consensus already exists and its success in distracting attention from the real human rights issues facing the Union.”⁵¹⁶ In order to see whether such criticisms are valid, it is necessary now to analyse the provisions of the Charter in detail.

⁵¹³ Romano Prodi, President of the Commission (Nice, 7 December 2000) available at http://www.europarl.europa.eu/charter/default_en.htm [last accessed 26/02/13]

⁵¹⁴ Nicole Fontaine, President of the European Parliament (Nice, 7 December 2000) available at http://www.europarl.europa.eu/charter/default_en.htm [last accessed 26/02/13]

⁵¹⁵ See for example: Jacques Chirac, Biarritz, 14 October 2001, quoted in the Commission’s publication of the Charter, *Charter of Fundamental Rights of the European Union* (Commission: Luxembourg, 2001) at 6; Aalt Willem Heringa ‘Editorial: Towards an EU Charter of Fundamental Rights?’ (2000) 7 *Maastricht Journal of European and Comparative Law* 111 – 116 at 111, 116

⁵¹⁶ Clare McGlynn *Families and the European Union: Law, Politics and Pluralism* (Cambridge, CUP 2006) 18; see also: Joseph Weiler ‘Editorial: Does the European Union Truly Need a Charter of Rights?’ (2000) 6 *European Law Journal* 95 - 97

Article 14⁵¹⁷ being of particular relevance in the context of this thesis since it affirms that “everyone has the right to education” and that this right “includes the possibility to receive free compulsory education.” Article 14 clearly contains the familiar general right of access to education and does suggest at 14(1) that this right of equal access does stretch to the further education/vocational training level.⁵¹⁸ However, it is disappointing that there is no specific reference to primary and secondary level education nor to the quality of education that must be provided. Article 14(2) is similarly disappointing in that it calls only for “the possibility to receive free compulsory education”. While it is vital that the compulsory nature of education is specified, this clearly falls short of the type of requirement regarding free education found in the Convention on the Rights of the Child for example, but is arguably in-keeping with the lack of specific detail found in Protocol 1 Article 2 of the European Convention.⁵¹⁹ It is, however, notable that Article 14(3) recognises that minority groups establishing their own schools is possible provided the establishment of such schools is done in accordance with relevant national legislation. This is however ultimately a weak provision since the “freedom” to do something does not impose any positive obligation to actually do it. Unfortunately, once again, the right to receive education in conformity with religious, philosophical or pedagogical convictions is here framed as a right belonging to parents rather than to the children themselves. As Clare McGlynn notes, “while Article 14 of the Charter proclaims a general right to education, a right which will inhere in children, it effectively qualifies this right by reference to the rights of parents to determine the nature of that education.”⁵²⁰

⁵¹⁷ Article 14

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

⁵¹⁸ See for example: Holly Cullen ‘Children’s Rights’ in Steve Peers and Angela Ward (eds.) *The European Union Charter of Fundamental Rights* (Oxford, Hart Publishing 2004) 323 - 346

⁵¹⁹ The influence of Protocol 1 Article 2 of the European Convention on Article 14 of the Charter is considered in Gisella Gori *Towards an EU Right to Education* (The Hague, Kluwer Law International 2001)

⁵²⁰ Clare McGlynn Op Cit 72

An interesting dichotomy therefore seems to exist between Article 14(3) which sees educational decision making as being a right belonging to parents and Article 23 which recognises that children are capable of being rights holders. Article 23(1)⁵²¹ of the Charter states that “children shall have the right” and so is clearly in-keeping with the spirit of the Convention on the Rights of the Child and with the idea supported by this thesis that children are capable and deserving of being rights holders.⁵²² Indeed, one of the central requirements of the CRC is echoed in Article 23(2) which states “the child’s best interests must be a primary concern.” As discussed earlier, the “best interests of the child” concept is key to the whole conception of children’s rights.⁵²³ It is puzzling therefore that the Charter contains a single provision recognizing children as rights holders but fails to format other child-centric rights, such as education, in similar terms. Therefore, while Article 23 is an important validation of the principles of the CRC and offers a tentative example of the permissibility of children’s rights at an EU level, it still takes a predominantly ‘traditional’ approach to rights protection.

With its provisions designed to guarantee equality and prohibit discrimination, the EU Charter therefore clearly meets the kind of basic level of minority rights protection that is to be seen in all of the rights instruments previously discussed. However, the Charter also goes beyond this basic level of protection. By arguably recognising that children themselves are capable of being rights holders, the Charter is taking the same expansive approach as the Convention on the Rights of the Child. This recognition of the rights-worthiness of children – albeit still seemingly within an individual rights framework – is still fairly radical since, as discussed above, the majority of rights instruments still

⁵²¹ Article 23

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

⁵²² For further discussion of the influence of the CRC on EU law-making see: Helen Stalford and Eleanor Drywood ‘The Use of the CRC in EU Law and Policy-Making’ in Invernizzi and Williams (eds.) *Children’s Rights: Revisiting Visions, Assessing Progress and Rethinking Implementation* (Aldershot, Ashgate 2011)

⁵²³ See for example: Philip Alston ‘The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights’ (1994) 8 *International Journal of Law and the Family* 1 - 25

frame even child-centric rights such as education as rights to be exercised by parents on behalf of children.

The Racial Equality Directive

The Racial Equality Directive obliges EU Member States to “implement a series of measures to maintain a legal and procedural framework for the promotion of equality for racial and ethnic minorities.”⁵²⁴ The Racial Equality Directive prohibits both “direct and indirect discrimination in education. Through this Directive, the European Commission or a Member State can sue a non-implementing state in the European Court of Justice.”⁵²⁵ This, coupled with the lack of an individual complaints mechanism, highlights the importance of political will and of the difficulties that unpopular groups such as the Roma⁵²⁶ face when seeking redress for their grievances: “Given the almost total lack of Roma participation in national politics, member states have, unsurprisingly, not taken such action in cases of discrimination against Roma.”⁵²⁷ This problem is clearly emphasised by the fact that in 2000, as a result of the Racial Equality Directive and as a condition of admission to the European Union, Eastern European nations pledged to eliminate racial discrimination,⁵²⁸ including widespread segregation of Roma school children.⁵²⁹ As the case law from the European Court of Human Rights previously examined demonstrates, the four countries have been slow to meet such

⁵²⁴ European Union Agency for Fundamental Rights *The Racial Equality Directive: Application and Challenges* (Luxembourg, Publications Office of the European Union 2012) p. 9

⁵²⁵ John Greenberg ‘Report on Roma Education Today: From Slavery to Segregation and Beyond’ [2010] 110 (4) *Columbia Law Review* 919, 937 [confirming no direct effect]; see also Monika Ambrus *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection* (Eleven International Publishing 2011)

⁵²⁶ For an example of national measures that racially targeted the Roma in particular, see: Constant Brand and Jim Brunson ‘Reding Slams France on European Expulsions’ (2010) *European Voice* 14 September at <http://www.europeanvoice.com/article/2010/09/reding-slams-france-on-roma-expulsions/68855.aspx>; Lizzy Davies ‘France Defends Roma Expulsions Policy’ (2010) *The Guardian* 15 September at <http://www.guardian.co.uk/world/2012/sep/15/france-defends-roma-crackdown> [last accessed 26/02/13]

⁵²⁷ Lizzy Davies *Ibid*

⁵²⁸ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *Official Journal L 180*, 19/07/2000 P. 0022 - 0026 Full text available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML> [last accessed 26/02/13]

⁵²⁹ Jack Greenberg ‘Report on Roma Education Today: From Slavery to Segregation and Beyond’ [2010] 110 (4) *Columbia Law Review* 919, 921

obligations under the Directive but have faced little or no chastisement from the Commission or other States.

The Racial Equality Directive has, for some EU Member States, meant “the introduction, for the first time, of a detailed non-discrimination provision covering the grounds of racial and ethnic origin.”⁵³⁰

This was the case for each of the four countries: it was the Racial Equality Directive that led to the introduction of the current non-discrimination frameworks and assisted complaints mechanisms concerning racial and ethnic origin in Czech Republic, Hungary, Romania and Slovakia.⁵³¹ This in and of itself is an achievement, but only a notional one if individuals are unable to actually rely on the Directive to provide redress for their grievances.

Turning now to the substance of the Directive, there are a number of provisions which are of particular interest, beginning with Article 1 which establishes the purpose of the Directive:

Article 1

The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.

While Article 1 establishes that the Directive seeks to combat discrimination on the grounds of racial or ethnic origin⁵³² and so achieve equality of treatment within Member States, Article 2 adds detail to what is meant by “discrimination.”⁵³³ Article 2 takes a fairly expansive approach as to what can

⁵³⁰ European Union Agency for Fundamental Rights *The Racial Equality Directive: Application and Challenges* (Luxembourg, Publications Office of the European Union 2012) p. 9

⁵³¹ This will be discussed further below during consideration of Article 13 and in footnote 42

⁵³² For discussion of what constitutes racial discrimination in international law see: Sandra Fredman *Discrimination Law* (2nd edn., Clarendon Law Series 2011) 50 - 69

⁵³³ Article 2

(1) For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

(2) For the purposes of paragraph 1:

constitute discrimination since it expressly prohibits both direct and indirect discrimination. It has been suggested that this prohibition of indirect discrimination “could be approached preventively rather than in relation to specific disputes.”⁵³⁴ This seems to be because tackling indirect discrimination can involve the adoption of positive measures, such as reduced attendance, in order to truly accommodate minority groups.⁵³⁵ Many of the human rights instruments previously discussed did not expressly say as much and so the prohibition of indirect discrimination had to be inferred if possible.

Importantly, while the Directive of course seeks to promote equality, Article 5 does clarify the permissibility of special measures:

Article 5

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

As discussed above, the permissibility of special measures (or affirmative action) is of particular importance to historically disadvantaged groups such as the Roma since, even with rights protection in place, their disadvantaged position may mean they are unable to properly enjoy the full remit of their rights.⁵³⁶ Interestingly, unlike many of the international rights instruments previously discussed,

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

⁵³⁴ European Union Agency for Fundamental Rights *The Racial Equality Directive: Application and Challenges* (Luxembourg, Publications Office of the European Union 2012) 16

⁵³⁵ For further discussion see: Marjolein Busstra *The Implications of the Racial Equality Directive for Minority Protection Within the European Union* (Eleven International Publishing 2011)

⁵³⁶ See for example: European Commission *Equal Rights versus Special Rights? Minority Protection and the Prohibition of Discrimination* (Luxembourg, Office for Official Publications of the European Communities 2007); Colm O’Cinneide *Positive Action* (ERA-Comm 2012); British Commission for Racial Equality

there is no suggestion here that the special measures must be only of limited duration. While this could be said to be obvious, it does at least allow for programmes of special measures to run indefinitely if necessary and thus to only finish when they are no longer necessary to the goal of achieving equality.⁵³⁷

Now that the conceptions of non-discrimination and equality within the Directive have been understood, it is important to consider the fields in which the Directive will operate. While much of the literature concerning the operation and efficacy of the Directive concern its impact in the workplace,⁵³⁸ it is important to note that it also impacts on the field of education:

Article 3

(1) Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(g) education;

According to Article 3 the Directive should serve to prohibit discrimination on the grounds of racial or ethnic origin within the educational sector. Unfortunately, there is no further detail provided as to what specifically is to be expected or prohibited on the part of pupils, teachers, schools and education authorities. Of course, it is important that discrimination of this kind is prohibited in every area of

Combating Discrimination in Goods and Service – Towards the Uniform and Dynamic Implementation of EU Anti-Discrimination Legislation: The Role of Specialised Bodies (Migration Policy Group 2004); Colin McCrudden ‘Rethinking Positive Action’ (1986) 15 *Industrial Law Journal* 219 – 243; C Bell, A Hegarty and S Livingstone ‘The Enduring Controversy: Developments on Affirmative Action Law in North America’ (1996) *International Journal of Discrimination and Law* 233

⁵³⁷ For further discussion on the kind of “equality” envisioned in the Racial Equality Directive and its relationship with children’s rights see: Helen Stalford ‘Constitutionalising equality in the EU: A children’s rights perspective’ (2005) 8 *International Journal of Discrimination and the Law* 1 53 - 74

⁵³⁸ See for example: Colleen Sheppard ‘Mapping anti-discrimination law onto inequality at work: Expanding the meaning of equality in international labour law’ (2012) 151 *International Labour Review* 1, 1 - 19; Mark Bell ‘Beyond European Labour Law? Reflections on the EU Racial Equality Directive’ (2002) 8 *European Law Journal* 3, 384 – 399; Sandra Fredman ‘Equality: A New Generation?’ (2001) 30 *Industrial Law Journal* 2, 145 – 168;

public life, with the prohibition in education being of particular importance, but greater detail as to what is required of states is desirable and would also serve to assist Member States when they are creating/adapting their national frameworks. Conversely, it could be argued that if the Directive contained too much detail as to what is to be expected or prohibited on the part of states, there would be a danger of the Article becoming too prescriptive and states arguing that they had done enough if they simply met the letter of the Article. Some kind of accommodation would therefore perhaps be desirable, where further detail is provided without the establishment of an exhaustive list of requirements.

In order to further assist victims of discrimination, under Article 7 of the Directive Member States are obliged to ensure judicial and/or administrative procedures are available to support the right to equal treatment:

Article 7

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

2. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

All Member States therefore offer remedies “through judicial and/or quasi-judicial mechanisms, with some States also applying penal procedures for certain forms of discrimination prohibited by the

Directive.”⁵³⁹ Article 7(1) allows for Member States to provide enforcement of obligation under the Directive through “conciliation or mediation.” Such methods are not particularly strenuous but they do of course remove the necessity for legal fees and so are potentially a useful practical time and money saving option during periods of economic hardship.

Assessing the impact of the Directive in guaranteeing the right to education of minority groups such as the Roma is therefore somewhat difficult. Since the Directive only allows for complaints by the Commission or other Member States, sub-national groups such as the Roma can have significant difficulty in raising a complaint under the Directive. The absence of an individual complaints mechanism therefore clearly weakens the efficacy of the Directive when it is examined with the context of this thesis. It is arguable though that the recognition of the important reporting role played by NGOs and the formation of the Equality Bodies goes some way to elevating this flaw. Additionally, the Directive does still contain fairly expansive non-discrimination and equality measures and so does notionally guarantee the most basic variety of minority rights protection as identified in this thesis.

3.6 Conclusion

As this chapter has demonstrated, Roma children in contemporary Europe are at a clear disadvantage in the educational process.⁵⁴⁰ Despite the existence of numerous, seemingly comprehensive, human rights instruments that offer specific protection to the right to education, Roma children continue to be marginalised and to be denied the educational opportunities that the majority of children educated in mainstream schools take for granted. Education is held up as being one of the vital human rights and as a right worthy of the highest level of protection, but, until words are matched by deeds, while

⁵³⁹ European Union Agency for Fundamental Rights *The Racial Equality Directive: application and challenges* (Publications Office of the European Union 2012) 12

⁵⁴⁰ Helen O’Nions Op Cit 174

minorities such as the Roma continue to receive less protection and assistance than the majority, the right to education can never be considered to be fully realised.

While many reasons for the disadvantage suffered by the Roma can be offered, the truth of the matter is that they are being failed by the international human rights bodies in the same way that they are being failed by their national governments. The standard formulation of non-discrimination really only provides the most basic form of minority accommodation and has not ended inequality in education and so has failed to get to grips with the problems facing minorities. Unfortunately, this is still the most common means of minority protection to be found in the various international instruments. This is not to say that the rights instruments do not contain other provisions of value to the educational rights of minority children, just that such provisions will be of only limited use while entrenched discrimination is allowed to go unchecked.

Greater recognition of the importance of multicultural education and intercultural dialogue would also be a significant method of strengthening the level of minority protection provided by international human rights law. As well as serving to combat misconceptions and prejudicial attitudes, such multicultural education would serve to foster community cohesion and so benefit the nation as a whole. In addition to increased recognition of the benefits of multiculturalism, this thesis submits that the international instruments should be reformatted so that the child is firmly secured as being a valuable rights holder. At the moment the majority of the human rights instruments conceive of the right to education as a right to be exercised by parents rather than by the individual child in question and this serves to both disempower children and to adversely affect their development into autonomous adults.

The following chapter will analyse the current domestic education law and policies of the four European countries under particular consideration here in order to evaluate how effectively they are implementing the international rights standards.

The Right to Education: Domestic Law and Policy

4.1 Introduction

While the previous chapter considered the various international legal standards concerning the right to education from the standpoint of the protection that they, in theory at least, afford to Roma children, this chapter will take a step further down the hierarchy of educational obligations and consider domestic law and policy. Since each of the four countries in this thesis are signatories to each of the international documents previously discussed, a vital step in assessing to what extent the international standards do actually serve to protect the educational rights of Roma children is to consider the various interpretations of their international obligations that exist in domestic law and policy concerning education. To this end, this chapter will begin by offering an overview of the educational measures of each of the four countries that this thesis is concerned with.⁵⁴¹

The particular difficulties in accessing adequate education provision suffered by Roma children in Europe have been highlighted in Chapter Three of this thesis, with problems such as segregated education,⁵⁴² inadequate preschool and language provision as well as general prejudice having been discussed. However, despite this clearly poor educational situation that Roma children are experiencing, it is important to acknowledge that each of the four countries do have domestic laws and policies guaranteeing the right to education and often specifying what form this education should take, how long it should run for, and what obligations exist on the part of pupils, parents, educators

⁵⁴¹ For a detailed discussion of each of these countries, including facts and figures about their particular Roma populations, see Chapter One of this thesis.

⁵⁴² With Roma children being educated in ghetto schools separate from their national majority counterparts or in schools for children with mental impairments.

and the state. Some of the countries have even gone so far as to provide special, additional educational guarantees targeted specifically at minority students.

If it can be shown, therefore, that these four countries are meeting the letter of their international obligations if not the spirit of them,⁵⁴³ then further analysis is needed to see what additional measures can be taken to better guarantee the right to education of Roma children. For this reason, the following chapter will present two case studies which examine the approach to minority education in two very different countries⁵⁴⁴ - Gypsy/Traveller education within the mainstream in England and Indigenous Education in Canada - to see what lessons can be learned from each and what measures could be applied, perhaps with modification, in the four countries to improve the situation of Roma children.

4.2 An Overview of Current Domestic Education Law and Policy

While the previous chapter established the obligations regarding the right to education that are placed on states⁵⁴⁵ by the various international human rights documents, this chapter will move on to consider how those obligations have been put into effect in the domestic educational policies of the four countries. First, to reiterate the geographical boundaries of this thesis, although there are Roma populations in many countries worldwide, this thesis is particularly concerned with the educational situation of Roma children in the Czech Republic, Hungary, Romania and Slovakia.

Secondly, the previous chapter introduced the idea that there is a sliding scale when it comes to minority accommodation in the field of education. At the lower end of this scale, effectively the most basic level of educational accommodation, is a general guarantee of the right to education which fails

⁵⁴³ Effectively, that they have enacted domestic policy that should in theory satisfy each of their international obligations but that in practice still proves ineffective at including Roma children within mainstream education and ensuring that they receive the same standard of teaching, and so could potentially achieve the same academic outcome, as their national majority counterparts.

⁵⁴⁴ The first case study will analyse traveller education in the United Kingdom while the second will example indigenous education in British Columbia, Canada

⁵⁴⁵ Provided, of course, that they are states parties to the relevant document.

to take into account the particular difficulties experienced by minority groups and so, all too often, fails to actually overcome discrimination and achieve educational equality. Further along the scale from this basic guarantee of the right to education would be the requirement that education is compulsory and that it is available for free.⁵⁴⁶ Further along again would be the provision of specific minority recognition (such as minority history and traditions being included in the syllabus, minority teaching assistants, etc) and mother tongue teaching in the mainstream education system. At the most extreme level of the scale, what this thesis would term the highest possible level of minority accommodation,⁵⁴⁷ is the provision of ‘separate but equal’ schooling. Such schooling would involve minority students being educated in independent, culturally-sensitive schools that reflected their particular educational needs but which still equipped them to compete in mainstream society should they wish to do so. The level of education provided in such schools would be comparable with that of mainstream schools and as such a ‘separate but equal’ education system would be very different from the segregated education discussed earlier.

In Chapter Three, the various international documents concerning the right to education were analysed to determine where exactly they fell on the scale of minority accommodation – effectively, to consider what level of protection minority students could expect to receive when it comes to the guarantee of their right to education. This type of thematic analysis will now be used to determine the level of minority accommodation provided by the domestic education measures of the four countries. The domestic policy of each of the four states will be analysed to determine, first, whether it is compatible with the international educational obligations which the state must meet and, secondly, where exactly each state falls on the scale of minority accommodation. Throughout the analysis, the practical educational difficulties identified in Chapter Three as being currently suffered by Roma children in Europe must be borne in mind so as to determine whether educational laws and policies

⁵⁴⁶ Certainly at a primary level and then, arguably offering an even greater level of minority accommodation, ideally also at a secondary and higher level.

⁵⁴⁷ Not to be automatically confused with the most desirable level of minority accommodation

which might, on the face of it at least, appear to be adequate or even progressive are actually so effective in practice.

Basic Guarantee of Access to Education

As previously discussed, a basic guarantee of access to education is suggested to be the lowest level of minority accommodation possible and, as a study of the relevant international human rights documents has revealed, it is also the education requirement or obligation most often placed on states parties.⁵⁴⁸ It should come as no particular surprise therefore that each of the four countries includes such a basic guarantee of access to schooling in their domestic educational policies. It is also important to remember that such guarantees are blanket guarantees in that they apply to all people and so do not on the face of it provide specific legal protection for minorities.

While all such basic guarantees of access are generally similarly constructed, a useful illustrative example can be found in the domestic educational law of Hungary. In Hungary the right to education is found within Act No. LXXIX of 1993 on Public Education⁵⁴⁹ with Article 2(2) stating that “everyone may receive education and teaching at the institutions of public education.”⁵⁵⁰ The expansive “everyone” is a clear indicator that education is here envisaged as being open to all⁵⁵¹ and this indication is strengthened by the Preamble to the Act which states its purpose as “providing the opportunity to exercise the right for education based on equal opportunities, as stipulated in the Constitution of the Republic of Hungary.”

⁵⁴⁸ For example by Article 13 of the International Covenant on Economic, Social and Cultural Rights (1996) or by Protocol 1 Article 2 of the European Convention on Human Right.

⁵⁴⁹ The full text of Act No. LXXIX of 1993 on Public Education is available in English on the website of the Ministry of National Resources at <<http://www.nefmi.gov.hu/english/acts/act-no-lxxix-of-1993-on>> [last accessed 26/02/13]

⁵⁵⁰ This is a very similar formulation to that found in Article 33 of the Czech Charter of Fundamental Rights and Freedoms which states “everybody has the right to education” while in Romania Article 5(1) of the Education Law 1995 specifies that “all Romanian citizens have the right to equal access to all levels and forms of education, irrespective of social and material conditions, sex, race, nationality and political or religious affiliation.” Similarly, Article 42 of the Constitution of the Slovak Republic states that “everyone shall have the right to education.”

⁵⁵¹ Ministry of Education and Culture (2008) *Education in Hungary: Past, Present, Future – An Overview* (Department for EU Relations) 17 – 30

This reference to the Constitution is important since, as equality of opportunity certainly does not always guarantee equality of outcome, a clear critical flaw would exist in a domestic guarantee of equal educational access that was not supported by an expansive and effective domestic prohibition on discrimination. Minority groups such as the Roma often begin from such an unequal position when compared to their majority counterparts that simply guaranteeing education as being available to all is woefully inadequate at actually addressing educational disadvantage. While schools might be notionally open to all, there could be numerous practical and ideological issues that hamper access for Roma students. It would seem potentially very easy for educational authorities (either centrally or at a more local, individual school level) to state that they have an open admittance policy but then to conveniently fail to take the necessary steps/make allowances that would allow Roma students to actually attend. In this case, any basic guarantee of access would lack practical effect and that is why such a guarantee must be backed up by an effective non-discrimination provision that requires authorities to redress practical difficulties and the kind of indirect discrimination that traps Roma (and other minority) children outside of education. In Hungary such a non-discrimination provision is found in Article 70/A of the Constitution of the Republic of Hungary,⁵⁵² which states “the Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, color [sic.], gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever.” Since Act No. LXXIX of 1993 on Public Education concerns the right to education in Hungary, it must be read in conjunction with the general non-discrimination provision found in Article 70/A of the Constitution and so, notionally at least, the guarantee of educational access for all is strengthened by a prohibition on discrimination.

Ultimately, this thesis contends that a basic guarantee of access to education is an important first step towards minority accommodation. However, such a guarantee can only be effective if it is coupled

⁵⁵² The full text of the Constitution of the Republic of Hungary is available in English at <<http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.HUN.3-Annex2.pdf>> [last accessed 26/02/13]

with an expansive non-discrimination provision and if it is given practical application. Fortunately then, each of the four countries have actually taken a step beyond offering a mere guarantee of access.

Free, Compulsory Education

It is contended that a guarantee of free, compulsory education is a progressive step along the scale of minority accommodation compared to a basic guarantee of access since it impliedly recognises that practical obstacles to educational attainment can exist.⁵⁵³ Minority groups such as the Roma are often economically disadvantaged when compared to the majority of the national population and so schooling which required the payment of fees would be a practical impossibility for them even though access is theoretically available to all citizens. Ensuring that education is available for free to all students therefore serves to facilitate minority access and so ensure true equality of opportunity. Similarly, ensuring that education is compulsory also helps to defeat some of the practical obstacles that might prevent minority students from attending school.⁵⁵⁴ As previously mentioned, minorities tend to be financially disadvantaged and so it is often incumbent on children to earn money to support the family as soon as they are able. Although making education free removes the obstacle of fees, only by making education compulsory can the practice of children avoiding school in order to work be overcome. Additionally, some minority parents may not see the inherent value in their children receiving a formal education and so making school attendance compulsory also helps to ensure that children are required to receive such an education and so are able to develop into autonomous adults capable of living and competing in mainstream society if they so wish.

It must be recognised that all four of the countries under particular consideration here have realised the importance of ensuring that education is available for free and is compulsory for all and have

⁵⁵³ Murray Rothbard (1999) *Education: Free & Compulsory* (Alabama, Ludwig von Mises Institute) 19 – 36

⁵⁵⁴ Stephen Machin, Panu Pelkonen & Kjell Salvanes (2008) 'Education and Mobility' CEE Discussion Paper No. 100 <<http://cee.les.ac.uk/cee%20dps/ceedp100.pdf>> [last accessed 02/03/13]; Thomas Spielhofer, Matt Walker, Kerensa Gagg, Sandie Schagen & Sharon O'Donnell (2007) *Raising the Participation Age in Education and Training to 18: Review of Existing Evidence of the Benefits and Challenges* (National Foundation for Educational Research) Research Report DCSF-RR012

reflected this realisation in their domestic laws. In the Czech Republic, for example, Article 33(1) of the Charter of Fundamental Rights and Freedoms⁵⁵⁵ requires that “school attendance is obligatory for a period specified by law” while Article 33(2) states that “citizens have the right to free education at elementary and secondary levels and, depending on the citizen’s ability and the potential of society, also at university level institutions.” Article 33 is arguably a fairly expansive provision, seeming as it does to guarantee that everybody has the right to free, obligatory education at both an elementary and secondary level.⁵⁵⁶ If education is compulsory for all then minorities such as the Roma should, in theory at least, be completing the same amount and grades of education as majority Czech children do. Further, since both elementary and secondary education is free, the poverty that is endemic in the Roma and other minority populations should not be such a hindrance as it might be to educational attendance. However, yet again there is an issue here as to the positive picture provided by domestic legislation not being matched by the actual practical situation for the Roma living in the Czech Republic.⁵⁵⁷

In fact, this is a dichotomy that can be seen in each of the four countries. Briefly put, each of these countries has similar domestic provisions to that of the Czech Republic concerning the length of compulsory education even if they do fail to provide guidance as to how the compulsion will prove effective in actually achieving educational attainment. According to Article 2 of the Romanian Education Law, education is by law a national priority.⁵⁵⁸ The right to education in Romania is

⁵⁵⁵ The full text of the Czech Charter of Fundamental Rights and Freedoms is available in English on the website of the Czech Constitutional Court at <http://www.concourt.cz/view/czech_charter> [last accessed 26/02/13]

⁵⁵⁶ Interestingly, the analysis of the various international human rights instruments concerned with the right to education conducted in Chapter Three revealed that while they all require that primary education be made free and compulsory (For example in Article 4 of the UNESCO Convention against Discrimination in Education (1960)), only the (Revised) European Social Charter (1996) requires that secondary education be likewise free and compulsory (although Article 28(b) of the Convention on the Rights of the Child and Article 13(2) of the International Covenant on Economic, Social and Cultural Rights (1966) do recognise that the progressive introduction of free, compulsory secondary education may be desirable, neither provision actually requires it). It can be said therefore that domestic Czech education policy actually goes beyond what is strictly required of it by international law.

⁵⁵⁷ David Greger & Eliska Walterova ‘In Pursuit of Educational Change: The Transformation of Education in the Czech Republic’ (2007) 1 *Orbis Scholae* 2, 11 – 43

⁵⁵⁸ UNESCO ‘World Data on Education’ VII Ed. 2010/11 (updated March 2012) IBE/2012/CP/WDE/RM at 2

currently governed by the Education Law 1995,⁵⁵⁹ with Article 5(1) of the Education Law confirming that education is free and compulsory between the ages of 6 and 16 years.⁵⁶⁰ This is comparable to the situation in Hungary where Article 3(3) of Act No. LXXIX of 1993 on Public Education confirms that “the state provides free and compulsory primary education ... secondary grammar school, secondary vocational school, industrial school, vocational school education and teaching, and hall of residence care are free of charge.”⁵⁶¹

Similarly, the Constitution of the Slovak Republic 1992⁵⁶² also makes school attendance compulsory.⁵⁶³ Citizens have “the right to free education at primary and secondary schools and, based on their abilities and society's resources, also at higher educational establishments.”⁵⁶⁴ Unfortunately, one of the accepted varieties of primary school in Slovakia are special remedial schools for mentally handicapped children⁵⁶⁵ which follow a hugely abridged curriculum and do not prepare students to move on to further education or to enter a skilled or even semi-skilled profession. The majority of Roma children are still educated in such remedial schools and this has led to the suggestion that the educational level of the Roma population in Slovakia has actually decreased in recent years.⁵⁶⁶ This

⁵⁵⁹ Law No. 84/1995, an English translation of which is available at: <http://translate.google.com/translate?hl=en&prev=/search%3Fq%3DMonitorul%2BOficial%2Bnr.%2B606%2B1999%26hl%3Den%26prmd%3Divns&rurl=translate.google.co.uk&sl=ro&twu=1&u=http://www.dreptonline.ro/legislatie/legea_invatamantului.php> [last accessed 26/02/13]

⁵⁶⁰ Birza, C., Anghel, F., Balica, M., *et al* (1999) *Romania: Education for All* (Ministry of National Education and Institute for Sciences of Education, Bucharest)

⁵⁶¹ The full text of this article is available in English at <<http://www.nefmi.gov.hu/english/acts/act-no-lxxix-of-1993-on>> [last accessed 26/02/13]

⁵⁶² Full text available at <<http://www.constitution.org/cons/slovakia.txt>> [last accessed 26/02/13]

⁵⁶³ Article 42(1)

⁵⁶⁴ Article 42(2)

⁵⁶⁵ Officially termed “Specialna skola pre mentalne postihnutych.” For further discussion on the education of Roma pupils in these special schools see: James Goldston ‘Roma Rights, Roma Wrongs’ (2002) 81 *Foreign Affs* 146; Benjamin Levin (2002) *Costs and Effects of the Step By Step Roma Special Schools Initiative* (European Roma Rights Centre); Helen O’Nions ‘Different and Unequal: the Educational Segregation of Roma Pupils in Europe (2010) 21 *Intercultural Education* 1, 1 - 13

⁵⁶⁶ European Commission *Structures of Education and Training Systems in Europe: Slovakia 2009/2010 Edition* (Slovak Eurydice Unit 2011); Ministry of Education of the Slovak Republic *The Development of Education: National Report of the Slovak Republic* (Institute of Information and Prognoses Of Education, Bratislava 2004); Silvia Rigova, (Bratislava, November 2000) from Save the Children, *Denied a Future? The Right to Education of Roma/Gypsy & Traveller Children in Europe, Volume 1 South Eastern Europe* (Save the Children 2002) 180; UPI.com ‘Slovak Court: No separate classes for Roma’ 31 October 2012, <http://www.upi.com/Top_News/World-News/2012/10/31/Slovak-court-No-separate-classes-for-Roma/UPI-41991351710118/> [last accessed 26/02/13]; The Slovak Spectator ‘Principle of inclusion is needed’ 29 October

once again highlights the idea that laws which may appear positive on the books can actually have a negative affect when put into practice.

Mandating for free and compulsory education is a clear step beyond a mere guarantee of access and that it is a vital one when it comes to making the right to education a practically achievable one for minority students. While each of the four countries have actually gone beyond that which is required of them in the majority of the international human rights instruments when it comes to the length of the free and compulsory education to be provided, the practical situation of the Roma that has been discussed in previous chapters clearly indicates that this is not sufficient to actually guarantee the right to education for minority pupils. The existing provisions governing the requirement for compulsory education are not robust enough to ensure that minority pupils are actually attending school for the required period and, further, that the education which is being provided is suitable and sufficient for their needs. Similarly, compulsion itself may not be enough – the minority children (and their families) must also want to attend school if they are to actually be able to achieve educational parity.

*Specific Minority Recognition*⁵⁶⁷

The highest level of accommodation to be found in the domestic education laws of the four countries is recognition of specific minority requirements. While none of the countries have domestic laws which mandate for the kind of ‘separate but equal’ education discussed earlier,

2012, <http://spectator.sme.sk/articles/view/48021/2/principle_of_inclusion_is_needed.html> [last accessed 26/02/13]

⁵⁶⁷ This section will consider the recognition of minority requirements in general while the following section will consider special measures designed to assist Roma children in particular.

arguably the extreme of minority accommodation,⁵⁶⁸ each of them does have some educational laws targeted specifically at assisting minority groups. It can be seen that Slovakia and the Czech Republic both offer guarantees of some level of mother-tongue education in their domestic law while Hungary and Romania offer such a guarantee and some additional form of minority accommodation.

As discussed in Chapter Three, a limited understanding of the majority language is one of the major obstacles that Roma (and other minority) pupils face when trying to access education and so the potential to receive education in their mother-tongue would seem to be the ideal means of overcoming that particular obstacle.⁵⁶⁹ It can also be said to bode well for suggestions of additional means of minority accommodation if a state's government has already proved willing to offer accommodation in the area of language.

It should, however, be borne in mind that education should serve to allow minority children to develop into informed, autonomous adults who are secure in their own culture as well as able to live and compete within the majority population if they so wish. To achieve this, a balance must be struck between facilitating mother-tongue education and instilling a thorough knowledge of the majority language. Fortunately, this seems to have been recognised in the domestic laws pertaining to mother-tongue education in each of the four countries. Take, for example, the situation in Slovakia where, in addition to the right to learn the official language, “members of national minorities or ethnic groups

⁵⁶⁸ It is arguably so extreme in fact as to undermine attempts to foster intercommunity understanding and to form cohesive societies. For this reason, ‘separate but equal’ education will be the subject of a case study in the following chapter.

⁵⁶⁹ Carole Benson (2004) *The importance of mother tongue based schooling for educational quality* (United Nations Education, Scientific and Cultural Organization, 2005/ED/EFA/MRT/PI/9); Symposium on Immersion Education for First Nations (October 3 – 6, 2005) *Education through the Medium of the Mother-Tongue: The Single Most Important Means for Saving Indigenous Languages* Summary points available online at <http://www.educatorsforimmersion.org/LI_pdf/rationals.pdf> [last accessed 26/02/13]; David Atkinson ‘The mother tongue in the classroom: a neglected resource?’ (1987) 41 *ELT J.* 4, 241 – 247; Merrill Swain, Sharon Lapkin, Norman Rowen & Doug Hart ‘The role of mother tongue literacy in third language learning’ (1990) 3 *Language, Culture and Curriculum* 1, 65 – 81; Istvan Kecskes and Tunde Papp *Foreign Language and Mother Tongue* (London, Taylor & Francis 2009); Tove Skutnabb-Kangas ‘Multilingualism and the Education of Minority Children’ in Ofelia Garcia & Colin Baker *Policy and Practice in Bilingual Education: Extending the Foundations* (USA, Multilingual Matters Ltd 1995) 40 - 62

are also guaranteed the right to be educated in a minority language, the right to use a minority language in official communications and the right to participate in decision making in matters affecting national minorities and ethnic groups.”⁵⁷⁰

The right to mother-tongue education also exists in the Czech Republic, albeit in a far more limited form. In the Czech Republic, regulations about schools providing special instruction for people belonging to national minorities are set out in Schools Law No. 29/1984 Coll.⁵⁷¹ which states that “Education is conducted in the state language. Citizens of Czech, Hungarian, German, Polish and Ukrainian (Ruthenian) nationality have the right to education in their own language in the extent measured to be in the interest of their national development.”⁵⁷² Although the right to mother-tongue education in the Czech Republic is specifically limited to certain named minority groups (not including the Roma), the domestic provision discussed in this paragraph does still constitute minority accommodation and could be seen as a positive indication of the national attitude towards minorities or, at least, as demonstrating that the capacity for such accommodation within the law already exists. However, all of the named groups who could benefit from these provisions have the support of large national or religious populations and so could be said to have ‘leverage’ that groups such as the Roma do not. So while the Czech Republic has shown certain willingness to accommodate mother-tongue education, it does not seem that such willingness includes specific provision for the Roma at this time.

Moving beyond simply the right to mother-tongue education, additional specific measures of minority accommodation can be seen in the domestic education law of both Hungary and Romania. The

⁵⁷⁰ Article 34(2)

⁵⁷¹ Full text available for download at <<http://www.ciemen.org/mercator/pdf/wp23eng.pdf>> [last accessed 26/02/13]

⁵⁷² See also: Vera Linhartova and Frantisek Uher ‘Teaching Czech as a Mother Tongue in the Czech Republic’ in Resy Delnoy, Wolfgang Herrlitz and Sjaak Krron *European Education in Mother Tongue: A Second Survey of Standard Language Teaching in Eight European Countries* (International Mother Tongue Education Network, Nijmegen 1995) pp 161 – 178; Carolin Zwilling (2004) *Minority Protection and Language Policy in the Czech Republic* available at <<http://www6.gencat.net/llengcat/noves/hm04tardor/docs/zwilling.pdf>> [last accessed 04/11/12]

Hungarian Constitution of 1990⁵⁷³ made some amendments to previous education law, specifically by establishing the right to education in one's mother tongue⁵⁷⁴ and by prohibiting discrimination on the grounds of ethnicity and denial of equality of opportunity.⁵⁷⁵ The legal status and the entitlements of minorities in Hungary were then considerably extended in 1993 by Law LXXVII on the Rights of National and Ethnic Minorities (hereafter the Minorities Law),⁵⁷⁶ which included specific educational provisions. Importantly, the Minorities Law recognises the Roma⁵⁷⁷ as one of thirteen domestic minority populations deserving special protection.⁵⁷⁸ Although, generally speaking, the Minorities Law considers minority education as being special and separate from the mainstream, there is one general clause relating to equality in mainstream education which prohibits "all forms of disadvantageous discrimination against minorities."⁵⁷⁹ There is unfortunately no definition of what might actually constitute disadvantageous discrimination nor is there an identifiable procedure for remedy if discrimination does occur. The Minorities Law enshrines the right of recognised minorities to "knowledge, maintenance, enrichment and passing on of mother tongue, history, culture and traditions of persons belonging to national and ethnic minorities"⁵⁸⁰ and also to participate in education and cultural activities in their mother tongue.⁵⁸¹ Section VI of the Minorities Act deals exclusively with education and elaborates on the previously discussed rights. Members of a recognised minority "have the right to special minority classes in or alongside normal schooling if the

⁵⁷³ Full text available at <<http://www.friends-partners.org/oldfriends/constitution/const-hungary.html>> [last accessed 26/02/13]

⁵⁷⁴ Article 68(2) states "The Republic of Hungary grants protection to national and ethnic minorities, it ensures the possibilities for their collective participation in public life, and enables them to foster their own culture, use the mother tongue, receive school instruction in the mother tongue, and freedom to use their names as spelled and pronounced in their own language"

⁵⁷⁵ Article 70/A states "(1) The Republic of Hungary guarantees for all persons in its territory human and civil rights without discrimination on account of race, colour, sex, language, religion, political or other views, national or social origins, ownership of assets, birth or on any other grounds. And (2) Any discrimination falling within para (1) against persons is strictly punishable by law.

⁵⁷⁶ Full text available: <http://www.minelres.lv/NationalLegislation/Hungary/Hungary_Minorities_English.htm> [last accessed 26/02/13]

⁵⁷⁷ The word "Gypsy" being actually used

⁵⁷⁸ Article 61 (1) states "In accordance with this Act the following ethnic groups qualify as ethnic groups native of Hungary: Bulgarian, Gypsy, Greek, Croatian, Polish, German, Armenian, Romanian, Ruthenian, Serbian, Slovakian, Slovenian and Ukrainian." Additionally, Article 42 recognises the Romani and Beash languages as being official minority languages.

⁵⁷⁹ Article 5

⁵⁸⁰ Article 13(a)

⁵⁸¹ Article 13(b)

parents of at least eight pupils request it.”⁵⁸² Additionally, “mother tongue or mixed language education can be provided in the nursery, primary and secondary sectors”⁵⁸³ and such “classes must teach culture, history and values of the minority and its mother country.”⁵⁸⁴ A means of guaranteeing funding for these special measures is also found in the Minorities Act, which requires the national government to meet the costs of minority education via the relevant local authority.⁵⁸⁵ This is of course particularly important in ensuring that special measures are adequately resourced, followed through with, and that ‘unpopular’ groups do not lose out due to lack of formalised funding structures. A further practicality is recognised by the fact that the state is required to “guarantee the training of teachers of minority education and to support international teacher and pupil exchanges as well as recognising qualifications achieved abroad.”⁵⁸⁶ Practical guarantees such as these are vital since, as earlier discussion has highlighted, it is all too common for educational measures which on the surface seem positive, to fail when it comes to practical application due to a lack of mandated means and method of implementation and achievement.

In Romania, in relation to minority rights, Article 32(3) of the Constitution⁵⁸⁷ states that “people belonging to national minorities have the right to learn and be educated in their mother-tongue.” Article 118 of the Education Law 1995 also declares that “persons belonging to national minorities have the right to study and be trained in their mother-tongue at all levels, in all forms of education, according to this Law.” Article 119(1) gives the “possibility, according to local needs, for national minorities to request and organise on a legal basis groups, classes, sections or schools in the mother-tongue of national minorities.” In terms of curricula, Article 120(3) affirms that “curricula and

⁵⁸² Article 43(4) states “At the request of the parents or legal representatives of eight students belonging to the same minority group, it is compulsory to establish and run a minority class or group”

⁵⁸³ Article 43 (1) – (4)

⁵⁸⁴ Article 45(3) states “In educational institutions established for minorities in accordance with paras (3)-(4) of Article 43. (3)-(4) it will be ensured that students acquire a knowledge of their people, the history of their minority and its motherland, as well as its cultural traditions and values”

⁵⁸⁵ Article 44 states “The extra costs of minority education in the mother tongue or 'bilingually' as provided for in Article 43 - in line with the provisions of the law - are to be met by the state as well as the municipal government”

⁵⁸⁶ Article 46

⁵⁸⁷ The full text of the Constitution of Romania is available in English via the website of the Chamber of Deputies at <http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=2#t2c2s0a32> [last accessed 03/02/13]

manuals of universal and Romanian history will reflect the history and traditions of national minorities in Romania.” This is very important when it comes to providing cultural security for Roma (and other minority) pupils and for breaking down barriers between majority and minority pupils that are based on ignorance. Furthermore, Article 120(4) states that “at the secondary level national minorities can request lessons in history and culture, as appropriate, are taught in their mother-tongue.” The Ministry of Education, though, has “to approve all curricula and manuals used in such lessons.”⁵⁸⁸ Finally, Article 180 states that it is “the parent (or legal tutor) who ultimately bears responsibility for deciding upon the child’s right to learn in the Romanian language or in the language of a national minority.” Clearly then, the domestic educational law in Romania echoes the majority of the international human rights instruments in seeing children as objects of their parents’ wishes when it comes to the education that they receive.

In addition to the general Education Law, the Romanian Minister of National Education adopted a number instructions specifically related to education and national minorities. Instruction No. 3533 of 31 March 1999 concerns the study of their “mother-tongue in schools by pupils belonging to national minorities.”⁵⁸⁹ The Roma are recognised as being one such national minority.⁵⁹⁰ Article I(1) states that “the study of mother-tongue begins in the first grade of primary school.” Article III(1) states that “from the 1st to the 12th grade, lessons in their mother tongue shall be of three or four hours duration per week.”

⁵⁸⁸ Article 120(4)

⁵⁸⁹ Definition given by *Recommendation 1201* of the Parliamentary Assembly of the Council of Europe (1993, Sec. I, Art. 1): “group of persons in a state who reside on the territory of that state and are citizens thereof; maintain longstanding, firm and lasting ties with that state; display distinctive ethnic, cultural, religious or linguistic characteristics; are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state; are motivated by a concern to preserve together that which constitute their common identity, including their culture, their traditions, their religion or their language”.

⁵⁹⁰ Open Society Institute (2007) *Equal Access to Quality Education for Roma: Romania* from *Vol. 1: Bulgaria, Hungary, Romania and Serbia* 377 <www.stop-segregation.ro/System/Download.php?FileID=609> [last accessed 26/02/13] The Minister of National Education has previously adopted some instructions related specifically to the Roma but none of these are recent or current: For example, Order No. 3577 of 15 April 1998 promotes access to education for Roma students by establishing positive discrimination measures for admission into some universities. Order No. 3316 of 24 February 1998 provides measures aimed at the nominal registration of illiterate pupils and their integration into school classrooms. This included an initiative based on the provision of “school caravans” which unfortunately never manifested. Order No. 3363 of 1 March 1999 regulates the nomination of school inspectors in relation to the education of Roma students.

This thesis therefore acknowledges that each of the four countries have implemented domestic policy measures that afford specific recognition of the needs of minority pupils, either through the right to mother-tongue education or through other means such as a modified curriculum. Although this still of course falls short of ‘separate but equal’ education, such provisions can be seen to be highly advanced when it comes to the sliding scale of minority accommodation. Further, in addition to these national measures concerned with the education of minority pupils in general, each of the four countries have enacted education initiatives that are targeted specifically at Roma children.

4.3 Roma-Specific Domestic Education Initiatives

While the preceding section examined the domestic laws pertaining to specific means of minority accommodation in each of the four countries, this section will move on to consider those domestic initiatives that have been designed specifically to improve the educational situation of Roma children. Most of these Roma-specific provisions operate in the realm of policy and good practice rather than law.

a) The Decade of Roma Inclusion

Perhaps the most important, certainly the most expansive, Roma-centric initiative to be implemented in Europe in recent years is the Decade of Roma Inclusion 2005 – 2015 (hereafter the Decade).⁵⁹¹ The Decade is an international initiative bringing together “governments, intergovernmental and

⁵⁹¹ European Roma Policy Coalition (ERPC) *Towards a European Policy on Roma Inclusion* (Brussels: ERPC 2009); Martin Kahanec *The Decade of Roma Inclusion: A Unifying Framework of Progress Measurement and Options for Data Collection* (IZA, Research Report Series 2009)

nongovernmental organisations, as well as Romani civil society, to accelerate progress toward improving the welfare of Roma and to review such progress in a transparent and quantifiable way.”⁵⁹² The Decade focuses on a number of priority social areas including, importantly in the context of this thesis, education.⁵⁹³ In addition, those taking part in the Decade commit themselves to tackling other key issues of poverty, discrimination and the gender divide.

The Decade developed from *Roma in an Expanding Europe: Challenges for the Future*, a regional conference on the Roma that took place in Hungary in 2003.⁵⁹⁴ Following on from this, the Prime Ministers of the first eight governments⁵⁹⁵ participating in the Decade signed the Declaration of the Decade of Roma Inclusion⁵⁹⁶ on 2nd February 2005. This initial commitment grew so that there are now twelve countries participating in the Decade – Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Hungary, Macedonia, Montenegro, Romania, Serbia, Slovakia and Spain – as well as numerous international partner organisations.⁵⁹⁷ All of these countries have significant Roma populations, with the Roma minority suffering both economic and social disadvantage. The Czech Republic, Hungary, Romania and Slovakia are all participants in the Decade.

⁵⁹² From the website of the Decade <http://www.romadecade.org/about> [last accessed 26/02/13]

⁵⁹³ The other key areas of focus being employment, health and housing.

⁵⁹⁴ Open Society Foundations (8 July 2003) ‘Governments Endorse “Decade of Roma Inclusion”’

<http://www.soros.org/press-releases/governments-endorse-decade-roma-inclusion>

⁵⁹⁵ Bulgaria, Croatia, the Czech Republic, Hungary, Macedonia, Romania, Serbia and Montenegro, and Slovakia.

⁵⁹⁶ The Declaration reads: “Building on the momentum of the 2003 conference, “Roma in an Expanding Europe: Challenges for the Future,” we pledge that our governments will work toward eliminating discrimination and closing the unacceptable gaps between Roma and the rest of society, as identified in our Decade Action Plans. We declare the years 2005–2015 to be the Decade of Roma Inclusion and we commit to support the full participation and involvement of national Roma communities in achieving the Decade’s objectives and to demonstrate progress by measuring outcomes and reviewing experiences in the implementation of the Decade’s Action Plans. We invite other states to join our effort.” - Declaration of the Decade of Roma Inclusion 2005 – 2012 (Sofia, Bulgaria, 2 February 2005) <http://www.romadecade.org/decade_declaration> [last accessed 02/03/13]

⁵⁹⁷ There are a number of international partner organisations of the Decade: the Council of Europe, the Council of Europe Development Bank, the World Bank, the Open Society Foundations, the United Nations Development Program, the Contact Point for Roma and Sinti Issues of the Office for Democratic Institutions and Human Rights of the Organisation for Security and Co-operation in Europe, the European Roma Information Office, the European Roma and Traveller Forum, the European Roma Rights Centre, UN-Habitat, UNHCR, the United Nations Children’s Fund (UNICEF), and, since 2011, the World Health Organisation (WHO).

Since one of the core goals of the Decade was to improve the educational situation of Roma children, a Roma Education Fund⁵⁹⁸ (hereafter REF) was established in 2005 to expand the educational opportunities for Roma communities in Central and South-Eastern Europe. The goal of the REF is “to contribute to closing the gap in educational outcomes between Roma and non-Roma, through policies and programs including desegregation of educational systems.”⁵⁹⁹ The REF receives funding from governments, multilateral organisations and private sources, and finances projects designed to meet its educational goals. The creation of the REF is hugely important since, as discussed earlier, a lack of formalised financing commitments would prove to be a critical flaw in the efficacy of any new initiative. The creation of such a fund therefore seems to signify concrete political will (at both a European and national level) that the educational goals formulated under the auspices of the Decade will actually be practically achieved rather than simply being talking points that are ultimately allowed to fade from notice.

Continuing this idea of the practical achievability of the goals established by participants in the Decade, each of the governments involved has had to produce an action plan detailing how the four priority social areas – education, employment, health and housing – will be improved for the Roma population. Since this thesis is particularly concerned with the education of Roma children, only those commitments involved in that priority issue will be discussed here.

Czech Republic

It seems that the drafters of the Czech Republic’s Education Action Plan⁶⁰⁰ perceived early years education as being of particular importance when it comes to facilitating Roma inclusion. The first objective of the Czech Action Plan is therefore to “increase participation of socio-culturally

⁵⁹⁸ <http://www.romaeducationfund.hu/> [last accessed 26/02/13]

⁵⁹⁹ Roma Education Fund <<http://www.romadecade.org/about>> [last accessed 26/02/13]

⁶⁰⁰ It must be born in mind that the Czech Action Plan uses the phrase “socio-culturally disadvantaged” rather than Roma. This is a peculiar feature of a plan that is specific to Roma inclusion but unfortunately has not resulted in discussion of the choice of wording.

disadvantaged children from 3 to 6 years in **pre-school care**.⁶⁰¹⁶⁰² Pre-school care is essential in ensuring that all children begin their formal education on an equal footing and so this first objective clearly has the potential to be enormously valuable. Importantly, the Czech Action Plan also includes the means by which the various objectives should be achieved, progress towards that achievement monitored and the allocated budget⁶⁰³ for such progress. As earlier discussion has demonstrated, when the concrete means of achieving minority specific measures are not formally defined, such measures are often of limited duration and success or else fail completely. In the case of the Czech objective of increasing participation in pre-school care, the objective is to be achieved through the creation of a “comprehensive system of early care for socio-culturally disadvantaged [children]”⁶⁰⁴ and through the “introduction of enabling mechanisms (free attendance of last year of kindergarten) to be built into the Education Act.”⁶⁰⁵ The indicator of the success of this objective will be the enrolment of Roma children in “integrated primary schools rather than in schools for children with special educational needs.”⁶⁰⁶

The second objective of the Czech Plan concerns primary education and sets the goal of achieving “full inclusion of children with socio-cultural disadvantage in the educational mainstream.”⁶⁰⁷ Since one of the major obstacles to Roma children achieving educational parity with their majority counterparts in the Czech Republic is segregated education, this objective is truly vital to achieving real educational inclusion. However, the means set to achieve this integration is “support of the revision of the system of financing of schools.”⁶⁰⁸ While financing for schools is of course important when it comes to practically achieving integration, it is not the only issue that must be tackled.

⁶⁰¹ Decade of Roma Inclusion 2005 – 2015 National Action Plan: Czech Republic p. 1 available at: <http://www.romadecade.org/files/downloads/Decade%20Documents/Czech%20action%20plan_engl..pdf> [last accessed 26/02/13]

⁶⁰² Original emphasis will be preserved through this discussion

⁶⁰³ Free attendance of the last year kindergarten will be financed from the budget of municipalities. Early care system for socio-culturally disadvantaged children will be financed from the state budget. “Zero grades” are already financed from the state budget.

⁶⁰⁴ Decade of Roma Inclusion 2005 – 2015 National Action Plan: Czech Republic Op Cit 1

⁶⁰⁵ Ibid

⁶⁰⁶ Data on this will be compiled and distributed by the Ministry of Education

⁶⁰⁷ Decade of Roma Inclusion 2005 – 2015 National Action Plan: Czech Republic Op Cit 1 - 2

⁶⁰⁸ Ibid

Arguably the main reason behind segregated education in the Czech Republic is prejudice and ignorance of other cultures and so social programmes are necessary to overcome this lack of understanding. Interestingly, the Action Plan specifies that the proportion of pupils being integrated into primary schools must be limited (the example given being up to five Roma pupils per class although this is said to be a subject for discussion).⁶⁰⁹ Schools would not be supported in having a greater number of Roma pupils in case this actually led to further ethnic segregation rather than inclusion. Such an artificial cap on numbers seems arbitrary and potentially unworkable, and also raises the question of what would happen to the excess Roma pupils in school districts where the Roma population is significantly larger than the cap placed on schools.

It has been argued that, although early years education is of vital importance, historically disadvantaged groups such as the Roma may need support throughout the entirety of their school career if they are to be properly included within the education system. Notably the third objective of the Czech Plan is “providing equal access to quality **tertiary education** for Roma students.”⁶¹⁰ The means of achieving this though is simply “to discuss with representatives of colleges and universities creation of a stipend program for Roma university students.”⁶¹¹ While such a stipend program would of course be useful, simply discussing the creation of such a program is an extremely weak attempt at achieving the stated objective. There is no timeframe imposed for the discussion and no alternative/additional steps that must be taken. There seems to be no incentive for colleges and universities to take part in such a program and, indeed, no sanctions if they decide not to do so.

The Czech Action Plan is not wholly without measures designed to tackle the more esoteric obstacles that prevent Roma inclusion in education and that also hamper the educational attainment of Roma children who are educated within the mainstream. The fourth objective of the Plan is to “increase the

⁶⁰⁹ Ibid at footnote 1

⁶¹⁰ Decade of Roma Inclusion 2005 – 2015 National Action Plan: Czech Republic Op Cit 2 available

⁶¹¹ Ibid

capacity of **teachers** to work adequately in a fully multicultural environment.”⁶¹² This is a very valuable objective since, as discussed earlier, Roma children often experience prejudice and ignorance from teachers as well as fellow pupils and parents. Additionally, even those teachers who may not hold any particular prejudice against the Roma are often ill-equipped to assist with the difficulties that Roma pupils face in mainstream education.⁶¹³ Unfortunately, once again, the means of achieving this objective is confined in the Plan to discussion, specifically to discussion with representatives of colleges and universities:

- a) “Possibility of revision of the curricula of pedagogic faculties with clear consideration of the crosscutting theme of multiculturalism (a task for the Accreditation Commission);
- b) Possibility of adaptation of further education programs for those who teach future teachers in pedagogic faculties;
- c) To define problems with training within further learning for established teachers of pedagogical schools (and based on this definition to create concrete training including multicultural education).”⁶¹⁴

While this recognition of the importance of further and revised training for teachers is welcome, it is disappointing that, at this stage at least, the achievement of such changes is limited to discussion. It is, however, particularly welcome to see some recognition at an official level that the Czech Republic is a multicultural country and that such multiculturalism should influence the education system.

The final objective of the Czech Education Action Plan is to “significantly enhance **local implementation of national strategies**”⁶¹⁵ with this being achieved through “support of a creation of

⁶¹² Decade of Roma Inclusion 2005 – 2015 National Action Plan: Czech Republic Op Cit 2 - 3

⁶¹³ Loizos Symeou, Mikael Luciak & Francesca Gobbo ‘Teacher training for Roma inclusion: implementation, outcomes and reflections of the INSETRom project’ (2009) 20 *Intercultural Education* 6, 493 – 496

⁶¹⁴ Decade of Roma Inclusion 2005 – 2015 National Action Plan: Czech Republic Op Cit. 2 - 3

⁶¹⁵ Ibid 3 - 4

an educational agency for local authorities and representatives of schools.”⁶¹⁶ This is an important recognition of the fact that previous initiatives⁶¹⁷ designed to facilitate Roma inclusion in mainstream education have not been given practical implementation at a local level. An agency designed to monitor and ensure such implementation would be a valuable tool for achieving integration provided such an agency was sufficiently funded and provided with enforceable powers of compulsion.

Hungary

The Hungarian Action Plan differs from that of the Czech Republic in that the first five pages discuss the current situation of the Roma population (including statistical data) and the general aims that the government has for inclusion. In keeping with this, the section concerning education begins with a general statement of intent:

In the field of education, the Parliament aims at expanding the scope of integrated education,⁶¹⁸ the effectuation of desegregation (the dissolution of all the segregated classes and schools), as well as the elevation of the qualification level of Roma people.⁶¹⁹

This statement is valuable since, as well as highlighting the importance of ending segregation, it also demonstrates governmental intent to ensure the quality of the education that Roma pupils are receiving and so to increase the qualification level of the Roma population. The Action Plan then goes on to establish in more detail how these central aims should be achieved.⁶²⁰

⁶¹⁶ Ibid

⁶¹⁷ And indeed judgements at a European level

⁶¹⁸ “The concept and substances of integrated education, schooling are defined in the most detailed manner in Article 39/D and 39/E of Decree no. 11/1994 (08/06) by the Ministry of Public Education on the rules of the operations of educational and training institutions.” From 68/2007 (VI.28.) parliamentary resolution on the Decade of Roma Inclusion Programme Strategic Plan 5 footnote 1 available at: http://www.romadecade.org/files/downloads/Decade%20Documents/Hungarian%20NAP_en.pdf [last accessed 26/02/13]

⁶¹⁹ Ibid 5

⁶²⁰ Usefully, it is specified in page 5 of the Action Plan that the actual measures for achieving integration should be re-evaluated every two years to be certain that the most efficient and effective methods are being used.

The first objective of the Hungarian Plan is to ensure “access to an equal level of education for Roma children in public education” and so the “elimination, prevention of segregation, as well as the termination of social, institutional mechanisms that strengthen negative selection.”⁶²¹ Such a measure is of course of central importance if the Roma are to be truly integrated into the mainstream education system. However, it is not a straightforward objective to achieve and so the Hungarian Action Plan includes a list of measures required for achieving this kind of educational equality:

- a) *“Increase of the number of schools requiring preparative activities for integration and the identification of the existing abilities.*
- b) *Reduction of segregation between the individual kindergartens and schools, as well as regions, and the complete elimination thereof in the long run.*
- c) *Dissemination of inclusive, co-educating pedagogic culture, promotion of the elimination of those forms of segregation that have been identified in Hungarian institutions of public education.*
- d) *Making educational materials on minority culture (e.g. Roma folk studies) available to children attending public education.*
- e) *Review of the efficiency of the pedagogic, educational programme conducted in nearly 50 “ghetto schools” (wherein the proportion of Roma children is over 80%) revealing alternatives for the elimination of segregation.*
- f) *Reviewing which governmental supports, normative subsidies can actually and potentially contribute indirectly to the extreme school discrimination of the most disadvantaged pupils, as well as examining the options for the gradual termination or re-regulation of such supports and subsidies.”*⁶²²

In addition to the straightforward call for the elimination of segregation, there are a lot of positives to be found in the above measures. The idea of increasing the amount and efficiency of pre-school

⁶²¹ Hungarian Decade of Roma Inclusion Programme Strategic Plan Op Cit 5

⁶²² Ibid

education so that Roma pupils can begin their schooling on an equal footing with their majority counterparts is vitally important, as is the accurate assessment of Roma pupils capabilities and particular requirements. The importance of including minority cultures in the curriculum as a means of achieving tolerance and understanding has been previously discussed and so the creation of educational materials on minority culture is very welcome. Additionally, it is extremely valuable that the Hungarian Plan recognises that governmental actions can also indirectly contribute to school discrimination and so all existing schemes must be examined to remove this threat. It is however disappointing that the only timeframe referenced is that desegregation should be completely eliminated in “the long run”. While desegregation cannot happen overnight, more detailed and shorter timetable certainly could have been formulated.

The number of measures required for the elimination of segregation highlights how important and also how difficult that particular objective is.⁶²³ However, simply eliminating segregation does not automatically ensure the true integration of minority groups such as the Roma into the Mainstream education system and so the Hungarian Action Plan also contains other objectives, for example the provision of kindergarten services to disadvantaged children in their own villages, an increase in the number of Roma teachers/education sector employees, and a reduction in the number of Roma children being falsely diagnosed as having learning difficulties/mental impairments. Measures of these kinds, which show a clear overlap with the provision of social care, will serve to help minority pupils overcome the poverty gap which necessarily has an adverse impact on their educational attainment. Additionally, this kind of official recognition that many Roma pupils are falsely diagnosed as having educational impairments should serve to dissuade doctors/educators from relying on similar

⁶²³ Jack Greenberg ‘Report on Roma Education Today: From Slavery to Segregation and Beyond’ (2010) 110 *Columbia Law Rev* 4, 919 - 1001; Maja Miskovic *The Roma of Europe: What can be Learned from the United States’ Educational Policies?* (USA, National Louis University 2012) available online at <http://www.mandula.pte.hu/files/tiny_mce/File/2012/Forray/Maja_Miskovic.pdf> [last accessed 26/02/13]; A.T. Erickson ‘The Rhetoric of Choice: Segregation, Desegregation and Charter Schools’ (2011) 58 *Dissent* 4, 41 – 46; Livia Jaroka ‘Roma Education on the Agenda of the European Union’ (2007) 39 *European Education* 1, 81 -87; Valeriu Nicolae ‘Perfectly Equipped Failures: The European Union and Educational Issues Affecting the Roma’ (2007) 39 *European Education* 1, 50 – 63; Carla O’Connor & Sonia DeLuca Fernandez ‘Race, Class and Disproportionality: Re-evaluating the Relationship between Poverty and Special Education Placement’ (2006) 35 *Educational Researcher* 6, 6 - 11

false diagnoses. It would however be helpful if some sort of sanction was able to be placed on schools/professionals that were found to be making discriminatory diagnoses of this kind.

Of particular importance in the context of arguments raised earlier in this thesis are those objectives included in the Action Plan which should serve to increase cultural understanding. The ninth objective of the Hungarian Plan requires “horizontal presentation of equal opportunities, fundamental human rights, Roma folk studies and culture in education.”⁶²⁴ It has previously been suggested that a rights based education system is an efficient and effective way of ensuring that minority pupils have equal rights of access and also that the level and variety of education that they are provided with is equal to that enjoyed by their majority counterparts. Additionally, specific recognition of minority culture and customs in the curriculum will serve to both facilitate inter-community understanding and also to assist minority pupils in feeling secure within the education system. Linked in to this idea of specific minority accommodation is objective ten, which calls for “extension of the scope of the European Council’s European Charter for Regional or Minority Languages to involve Roma (Romani and Beas) languages.”⁶²⁵ As highlighted in the Introduction to this thesis, many Roma children only speak the national language as a secondary language and so the use of mother-tongue teaching can be one of the most effective means of providing quality education. Further, developing teaching and training materials in minority languages serves to demonstrate to all the inherent value of minority cultures. Such a demonstration will help to break down the sense of Otherness that Roma pupils often experience and will also demonstrate to non-minority pupils that different cultures should be respected and valued.

*Slovakia*⁶²⁶

⁶²⁴ Hungarian Decade of Roma Inclusion Programme Strategic Plan Op Cit 7

⁶²⁵ Ibid

⁶²⁶ The Revised National Action Plan of the Decade of Roma Inclusion 2005 – 2015 for the years 2011 – 2015 being discussed due to its being the current working document

In keeping with the Action Plans of the Czech Republic and Hungary, the first goal of the Slovakian Education Action Plan is to ensure “participation of children from socially disadvantaged environment (SDE)/marginalized Roma communities (MRC) in pre-primary education.”⁶²⁷ A number of measures for achieving this participation are then identified, including adjusting legal regulation to stimulation of the participation of disadvantaged children through making kindergartens free of charge from the age of 3 years and/or providing free school meals.⁶²⁸ In addition, measures should be undertaken to improve cooperation between these kindergartens, the teachers and the Roma parents.⁶²⁹ Engaging with Roma parents is very important since studies have demonstrated a reticence on the part of many parents to involve their children in formal education, either through fear of bullying or a lack of understanding of the value of such education.

The second of the Slovakian goals is “to improve motivation, school results and attendance of children in elementary education and to increase the number of children who continue in education after the elementary education.”⁶³⁰ This is very important since, as discussed earlier, mere guarantees/provision of equal access to education is not sufficient to overcome the disadvantage suffered by the Roma – the quality of the education that they are provided with must also be addressed. Additionally, Roma children themselves may not be motivated to excel and remain within the formal education system and so this must also be addressed. One of the measures identified to meet this goal is “to provide the greatest possible accuracy and to thoroughly use the control mechanism during the process of expert pedagogic-psychological diagnostics of children aged 5 – 6 before they start their obligatory schooling and after they finish their annual preparation as well.”⁶³¹ This is another example of recognition of the type of discriminatory educational assessments that have been given to Roma children and that have led to so many being educated in special schools. By checking on progress at the end of each academic year, it is possible to check that children are being

⁶²⁷ Revised National Action Plan of the Decade of Roma Inclusion 2005 – 2015 for the years 2011 – 2015 2

⁶²⁸ Ibid

⁶²⁹ Revised National Action Plan of the Decade of Roma Inclusion 2005 – 2015 for the years 2011 – 2015 Op Cit 3

⁶³⁰ Ibid 4

⁶³¹ Ibid

educated to the best of their abilities and that schools are not excluding Roma pupils from some classes. In addition, this goal should be met by ensuring “the availability of high-quality and variable educational programmes to cover individual pupils’ needs with the focus on the development of cognitive function and on acquiring of key competencies”⁶³² and also by “enhancing the efficiency of the education social support system.”⁶³³ Both of these measures require an understanding on the part of educational authorities of the particular difficulties that face Roma pupils during the course of their schooling. This idea of the desirability of tailored minority accommodation has been discussed in detail earlier and would once again prove valuable here.

An important third goal of the Slovakian Action Plan is “to improve the results of teaching process at secondary schools.”⁶³⁴ An interesting measure for providing this improvement is the possibility of prolonging obligatory schooling until the age of 18.⁶³⁵ Making schooling obligatory, so long as that obligation is enforced, could be a very effective means of overcoming reticence on the part of Roma parents and pupils and also in compelling schools to take the education of Roma pupils seriously since those pupils will be present for their entire school life. Further, if obligatory schooling was prolonged until the age of 18, Slovakia would be going far beyond what is required of them in the various international human rights instruments when it comes to the length of compulsory education. In addition to the possible extension of obligatory schooling, the importance of multicultural education in elementary schools is also recognised as being vital to the accomplishment of this goal.⁶³⁶ The desirability of true multicultural education is one of the key arguments of this thesis and should serve to help ensure community cohesion and also to securely root Roma pupils in their culture.

⁶³² Revised National Action Plan of the Decade of Roma Inclusion 2005 – 2015 for the years 2011 – 2015 Op Cit 5

⁶³³ Ibid, 5 – 6

⁶³⁴ Revised National Action Plan of the Decade of Roma Inclusion 2005 – 2015 for the years 2011 – 2015 Op Cit 9

⁶³⁵ Ibid

⁶³⁶ Revised National Action Plan of the Decade of Roma Inclusion 2005 – 2015 for the years 2011 – 2015 Op Cit 9

The fourth educational goal is “to improve the care for pedagogic and expert employees,”⁶³⁷ which seems to involve both providing additional support for educators who work with pupils from SDE and pupils with health and behavioural disorders, and also to provide additional training for such educators about the particular needs of their charges.⁶³⁸ These two measures are sensibly interlinked since it would be foolish to encourage educators (through financial incentives etc) to work with pupils from disadvantaged backgrounds unless those educators were thoroughly trained in the particular and specific needs of such pupils.

Slovakia’s fifth goal when it comes to educational integration is the “application of the right to education in mother tongue and supporting [development of the child’s identity].”⁶³⁹ Both of these issues were discussed above in the context of Hungary’s Action Plan and both are vital if Roma children are to feel securely rooted within their own culture but are also able to move and compete within the majority population if they wish to do so.

The final educational goal of Slovakia’s Action Plan is “to deal with the problematic issues of education and upbringing at special schools and school facilities including school consultancy and prevention.”⁶⁴⁰ This goal clearly once again involves the abolition of segregated education, in this case by placing Roma pupils, regardless of their actual ability, in schools for mentally impaired children. This is indeed a very serious problem in each of the countries under particular consideration in this thesis. The Slovakian Action Plan sets out a number of measures designed to prevent this type of school segregation. The first such measure involves guaranteeing the accuracy and the careful use of the control mechanism during the process of testing and placing children in special education.⁶⁴¹ This must necessarily involve recognition of the possibility of both direct and indirectly

⁶³⁷ Ibid 11

⁶³⁸ Ibid 11 - 12

⁶³⁹ Revised National Action Plan of the Decade of Roma Inclusion 2005 – 2015 for the years 2011 – 2015 Op Cit 13. Fairly detailed plans of how minority cultural accommodation and understanding are to be achieved can be found in pages 13 to 15 of the Action Plan but will not be discussed further here so as to avoid repartition.

⁶⁴⁰ Ibid 16

⁶⁴¹ Ibid

discriminatory testing systems and also regular re-testing for any pupils still sent to special educational establishments. Further, measures must be taken to improve awareness of special education.⁶⁴² As discussed earlier in this thesis, there has been a persistent problem of Roma parents acquiescing to their children being educated in special schools due to a lack of understanding of the limited nature of such education. It is valuable that the Slovakian government has recognised the existence of such a problem and so would support information programmes which would help to ensure parents give informed consent to any questions about their children's schooling.

Romania

Unlike the Czech Republic, Hungary and Slovakia, Romania has still not formalised and published an Action Plan for the Decade of Roma Inclusion.⁶⁴³ Given that the Decade is running from 2005 to 2015 and that it is already 2013, this shows an immense and disturbing lack of commitment to the process of Roma integration. A lack of commitment that, while in-keeping with the level of treatment that the Roma population receive in Romania, is still perhaps surprising given that participation in the Decade was voluntary.⁶⁴⁴ The documents that are still being publically debated for approval⁶⁴⁵ as an Action Plan are available on the website of the Decade⁶⁴⁶ but are of course of limited use given that they are still informal, are subject to change, may never be finalised and, even if officially declared to be the Action Plan, would only run for an extremely limited time.

⁶⁴² Revised National Action Plan of the Decade of Roma Inclusion 2005 – 2015 for the years 2011 – 2015 Op Cit 17

⁶⁴³ The failure of the Romanian government to finalise a Decade Action Plan is discussed in detail in Decade Watch's (2010) *DecadeWatch Romania Report: Mid Term Evaluation of the Decade of Roma Inclusion* (Romania, DecadeWatch) 16 - 17

⁶⁴⁴ Participation could of course be due to requirements of membership of the EU rather than due to a desire to actually affect change.

⁶⁴⁵ According to government decision HG755/2005

⁶⁴⁶ Since they are still only informal discussion documents, they are only available in the original Romanian. Unofficial translations have therefore had to be produced to enable discussion in this thesis.

However, while there is still no official Decade Action Plan, a National Action Plan on Education was elaborated in 2008 by the National Agency for Roma as part of the Decade of Roma Inclusion.⁶⁴⁷ This National Action Plan established five major educational objectives for Romania:

1. Increasing the pre-school participation of Roma children;
2. Encouraging the participation of Roma youth in mandatory education (1st to 10th grade) and upper secondary education (11th to 12th grade);
3. Encouraging the participation of Roma youth in college education;
4. Developing an inclusive educational environment;
5. Valuing and preserving Roma cultural heritage.⁶⁴⁸

While these five goals are expressed in very general terms, they do broadly correspond to those goals featured in the Action Plans of the three countries discussed above and the discussion document concerning educational integration available through the Decade of Roma Inclusion website indicates that these goals are still the key concerns of the Romanian government.⁶⁴⁹ Take for example the goal of increasing pre-school participation of Roma children; the discussion documents suggest that this should be achieved through priority enrolment in kindergarten for Roma children, the establishment of bilingual kindergartens in communities with at least ten requests in this regard, and that food and medical care should be provided to pupils.⁶⁵⁰ Each of these measures is eminently sensible and involves the kind of practical considerations that can “make or break” strategies of this kind. As such, measures of this kind could be seen as a very positive indication of the intentions of the Romanian Government but the current practical situation must always be borne in mind. While the measures designed to improve Roma integration in the education system that are detailed in the Decade

⁶⁴⁷ The complete plan is seemingly unavailable in English. Email sent to Romanian Ministry of Education, research, Youth and Sport to query this but no response as of 01/03/13

⁶⁴⁸ Decade Watch’s (2010) DecadeWatch Romania Report: Mid Term Evaluation of the Decade of Roma Inclusion (Romania, DecadeWatch) 30

⁶⁴⁹ Romania Action Plan (Draft) available at http://www.romadecade.org/files/downloads/Decade%20Documents/deceeniului_de_incluziune_a_romilor_domeniul_educatiei.pdf [last accessed 26/02/13]

⁶⁵⁰ Ibid at 1.1, and 2

discussion document may seem comprehensive and practicably workable, they are actually nothing more than talking points. A government that is serious about improving the situation of the Roma through participation in the Decade would have formalised an Action Plan long ago. Whatever positive comments can be made about the Romanian ideas, until such ideas are developed into a working Plan and then given practical application, little use will come of them.

b) An EU Framework for National Roma Integration Strategies up to 2020

The EU has recognised that the economic and social marginalisation of the Roma is devastating for the minority group themselves but also disadvantageous for Europe as a whole.⁶⁵¹ Accordingly, “the EU’s Europe 2020 strategy for a new growth path – smart, sustainable and inclusive growth – leaves no room for the persistent economic and social marginalisation of what constitutes Europe’s largest minority.”⁶⁵² It is with this in mind that an EU Framework for National Roma Integration Strategies up to 2020 was drafted to provide guidelines⁶⁵³ for states and to drive determined action, including dialogue with the Roma community, on the part of the EU and national governments.⁶⁵⁴ This idea of dialogue is important, both in terms of achieving the immediate objectives of the Framework and for fostering intercommunity understanding. As this thesis has contended, it is important that members of minority groups feel secure within their own culture but that they are also able to compete on an equal footing with members of majority society. Dialogue and understanding between communities also helps to create the kind of stable, pluralistic multicultural society that has been identified as the optimum kind of society in which to guarantee human rights. With this in mind, it has been commented that “while primary responsibility for action rests with public authorities, it remains a challenge given that the social and economic integration of Roma is a two-way process which requires

⁶⁵¹ See for example: Melanie Ram ‘Interests, Norms and Advocacy: Explaining the Emergence of the Roma onto the EU’s Agenda’ (2010) *Ethnopolitics* 9(2) 197 – 217; Guy, W. & Kovats, M. *EU-Funded Roma Programs: lessons from Hungary, Slovakia and the Czech Republic* (Minority Rights Group International 2006)

⁶⁵² An EU Framework for National Roma Integration Strategies up to 2020 COM(2011) 173 at 1

⁶⁵³ Advisory, non-binding

⁶⁵⁴ Aidan McGarry ‘The dilemma of the European Union’s Roma policy’ (2012) 32 *Critical Social Policy* 126 – 136 at 132

a change of mindsets of the majority of the people as well as of members of the Roma communities.”⁶⁵⁵

The first step towards achieving integration that was identified by the Commission is that Member States must “ensure that the Roma are not discriminated against but are treated like any other EU citizens with equal access to all fundamental rights as enshrined in the EU Charter of Fundamental Rights.”⁶⁵⁶ This is clearly logical and is in-keeping with the various non-discrimination and equality provisions found within the international human rights instruments discussed above.

In addition to simply preventing discrimination, the importance of breaking the vicious cycle of poverty that has trapped generation after generation of Roma has also been highlighted by the Commission. As discussed previously in this thesis, the educational disadvantage that the Roma suffer, both historically and contemporaneously, has an unsurprising knock-on adverse effect on their employment and social outcomes generally. As the Commission has observed, “integrating the Roma people will not only bring social benefits, but will also economically benefit both Roma people as well as the communities they are part of.”⁶⁵⁷ This observation has been supported by World Bank findings that “full Roma integration in the labour market could bring economic benefits of an estimated €0.5 billion annually for some countries.”⁶⁵⁸ This income would stem from the fact that greater employment for the Roma would lead to greater economic production for the nation, an increase in tax revenues and a lowering of social security payments. Economic integration of the kind envisioned here would also assist in achieving social cohesion and in eliminating discrimination in

⁶⁵⁵ European Commission ‘The Social and Economic Integration of the Roma in Europe’ COM(2010) 133 p 5 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0133:FIN:EN:PDF>> [last accessed 02/03/13]

⁶⁵⁶ COM(2011) 173 at 2

⁶⁵⁷ Ibid

⁶⁵⁸ World Bank, Roma Inclusion: An Economic Opportunity for Bulgaria, the Czech Republic, Romania and Serbia, September 2010 from COM(2011) 173 at 3

line with the requirements of the Charter of Fundamental Rights of the European Union⁶⁵⁹ and the various international human rights instruments.

Of course, there are a number of EU measures, in addition to the Charter, in place prior to the Framework which should aid in achieving economic and social cohesion. Perhaps most importantly among these is the obligation on Member States to give the Roma (like all other EU citizens) non-discriminatory access to education, employment, vocational training, healthcare, social protection and housing through Directive 2000/43/EC.⁶⁶⁰ However, as this thesis has previously demonstrated, despite apparently positive actions taken by Member States and the EU, little has improved in the daily lives of the majority of Roma. According to the Commission's Roma Task Force⁶⁶¹ findings, "strong and proportionate measures are still not yet in place to tackle the social and economic problems of a large part of the EU's Roma population."⁶⁶² It was for this reason that the Commission formulated the EU Framework for National Roma Integration Strategies as an additional means to address the specific disadvantage suffered by the Roma. In order to achieve significant progress towards Roma integration, the Framework was designed to guide Member States towards formulating integration strategies with a clear focus on the Roma and which include explicit measures to alleviate the disadvantage that they suffer.

According to the Framework, "Roma integration goals should cover, in proportion to the size of the Roma population, four crucial areas: access to education, employment, healthcare and housing."⁶⁶³ Of course, it is the guidance offered by the Framework in relation to educational integration that is of particular use to this thesis. It is disappointing to note therefore that the Framework makes only one recommendation with regards to education – that "Member States ensure that all Roma children

⁶⁵⁹ Article 21

⁶⁶⁰ The Race Equality Directive, as discussed above.

⁶⁶¹ The Commission Roma Task Force was created on 7 September 2010 to streamline, assess and benchmark the use (including the effectiveness) of EU funds by all Member States for Roma integration and identify underpinning deficiencies in the use of funds.

⁶⁶² COM(2011) 173 at 3

⁶⁶³ COM(2011) 173 at 4

complete at least primary school.”⁶⁶⁴ While primary education is clearly important, on its own it would not equip children to compete and thrive in the wider world. It is disappointing that the Commission did not use the Framework as a means of guiding Member States to integrate Roma children within the entirety of the school system and so require that such children complete both primary and secondary education. The Framework does at least make reference to the importance of “quality” education being provided and that the education system should be free of discrimination and segregation,⁶⁶⁵ but greater stress really should have been placed on Member States committing to improve Roma participation at all stages of schooling.

It is positive to note that the Framework does guide Member States as to how to avoid difficulties in achieving Roma integration. Member States must strive to:

- *“Set achievable national goals for Roma integration to bridge the gap with the general population. These targets should address, as a minimum, the four EU Roma integration goals relating to access to education, employment, healthcare and housing.*
- *Identify where relevant those disadvantaged micro-regions or segregated neighbourhoods where communities are most deprived, using already available socio-economic and territorial indicators.*
- *Allocate a sufficient funding from national budgets, which will be complemented, where appropriate, by international and EU funding.*
- *Include strong monitoring methods to evaluate the impact of Roma integration actions and a review mechanism for adaptation of the strategy.*
- *Be designed, implemented and monitored in close cooperation and continuous dialogue with Roma civil society, regional and local authorities.*

⁶⁶⁴ Ibid at 5

⁶⁶⁵ Ibid

- *Appoint a national contact point for the national Roma integration strategy with the authority to coordinate the development and implementation of the strategy or, where relevant, rely on suitable existing administrative structures.*⁶⁶⁶

Such guidance is valuable for prioritising and focusing on practical measures to achieve goals. Since costs and resource allocation are often troubling issues for states, such practical advice can help to break down hesitation to implement innovative measures. Each of the four countries has used the Framework to craft their own inclusion initiatives.

The Czech Republic

It is important to note from the outset that, following the Commission’s Framework Communication, the Czech Republic did not devise a new National Roma Integration Strategy. This omission was made on the grounds that the Czech Republic already had in place a “Concept of Romany Integration for 2010 – 2013” (hereafter the Concept) which allegedly satisfied the EU’s demands. As Environment Minister Thomas Chalupa commented, “the Czech Republic has a well-developed national coordination mechanism related to the Romany agency. It is neither desirable nor useful to create new tasks for ministries, especially at the time of budget austerity.”⁶⁶⁷ This initial Concept was subsequently updated with the ‘Strategy for the Fight against Social Exclusion for 2011 – 2015’ although this document was not passed to the European Commission for scrutiny.⁶⁶⁸

The Concept can be praised for representing “a relatively comprehensive approach to increasing the integration of socially excluded members of the Roma minority in the Czech Republic. It approaches

⁶⁶⁶ COM(2011) 173 at 8 – 9

⁶⁶⁷ Prague Daily Monitor ‘Senate refuses to comply with call of EC to revise national Roma inclusion strategy’ 05/08/11 <http://praguemonitor.com/2011/08/05/senate-refuses-comply-call-ec-revise-national-roma-inclusionstrategy>

⁶⁶⁸ Open Society Roma Initiatives (2012) *Review of EU Framework National Roma Integration Strategies* (Open Society Foundation) 21

the issue holistically and views integration as a pluralistic and dynamic process.”⁶⁶⁹ However, the Open Society Roma Initiative has criticised the Concept for “the absence of budgets for individual measures and indicators of their impact.”⁶⁷⁰ The criticism here seems to be that the Czech Government envisions only monitoring of the completion of specific individual tasks rather than of the impact of these projects on the lives of Roma citizens. Such failings could well be due to the decision not to draft an action plan following the formulation suggested by the Framework. The fact that such a decision is possible could, of course, also be seen as a failing in the strength of the Framework itself. This is particularly true since the Framework seeks to heavily involve the Roma civil society in all integration measures whereas the Concept seems to envisage only a passive role for the Roma.⁶⁷¹ Without an inter-cultural approach, this thesis would contend that true integration and thus societal cohesion cannot occur.

Turning specifically to the Concept’s effectiveness in guaranteeing Roma integration in the education system, the Concept unfortunately seems to begin from a faulty premise. The Concept “does not set the goal of having all Roma children complete at least primary education,⁶⁷² but instead calls for an increase [in] the number of Roma students in the main education stream.”⁶⁷³ This seems to impliedly assume that all Roma children already successfully complete primary education, an assumption not evidenced by empirical studies,⁶⁷⁴ and so that it is only the practice of segregated education that needs to be tackled. While the Czech practice of segregating Roma children in schools for the mentally handicapped clearly does need to be ended, it is not the only educational disadvantage being suffered by the Roma. No strategy for improving educational integration can be successful until the true current status of Roma integration and attainment in education is understood and accepted.

⁶⁶⁹ Ibid

⁶⁷⁰ Open Society Roma Initiatives Op Cit 21

⁶⁷¹ Ibid. For a discussion on the responsibilities of the Roma themselves with regards to integration under the Framework, see above.

⁶⁷² As called for in the Framework

⁶⁷³ Open Society Roma Initiatives Op Cit 24

⁶⁷⁴ See for example: Open Society Justice Initiative (2012) *Failing Another Generation: The Travesty of Roma Education in the Czech Republic* (New York, Open Society Foundation)

Hungary

The Hungarian Government drafted a new Roma integration strategy (hereafter the Strategy) after the European Commission's communication of the Framework for National Roma Education Strategies. The background study conducted by the Government which formed the basis of the Strategy has been generally praised as offering a "rich and nuanced" description of the situation of the Roma,⁶⁷⁵ specifically:

"Important factors mentioned here include the failure of the state to provide equal access to public services and the need for systematic solutions; the tendency of programs targeting poor people to benefit the relatively less deprived; the failure of EU funds to have substantive impact on social inclusion so far; the territorial concentration of multiple levels of deprivation in the least developed micro-regions; etc."⁶⁷⁶

This is an important recognition of the disadvantaged status of the Roma and of the failure of previous measures to address that disadvantage. As discussed above, only after the true nature of the current state of affairs has been established and reasons for previous failures have been analysed, can new measures to ensure integration be successfully implemented.

The situation is not quite so positive when it comes to looking at the Hungarian Government's strategies for educational integration for the Roma. The Open Society Roma Initiative has noted that the Hungarian statements on integration within the education system are somewhat contentious, most notably when the strategy says "while integrated education is largely wide-spread on an institutional level, drop-out rates and the study results of students with multiple disadvantages have not improved significantly."⁶⁷⁷ This statement from the Open Society highlights the fact that simply desegregating

⁶⁷⁵ Open Society Roma Initiatives Op Cit 42

⁶⁷⁶ Ibid

⁶⁷⁷ Open Society Roma Initiatives Op Cit 41

schools is not in and of itself enough to remedy disadvantage. It is important that national governments do not limit themselves to simply prohibiting segregation rather than investigating the mainstream education system. It is vital that pains are taken to ensure that the academic performance of Roma pupils is able to improve in these newly desegregated schools and, additionally, that the academic performance of students from the majority population does not decrease.⁶⁷⁸ It seems that the Hungarian Government have taken pains with the Strategy to avoid setting ambitious targets when it comes to educational integration and to the substantive practice of actually achieving desegregation.

Romania

The Romanian Government drafted a new Roma integration strategy (hereafter the Strategy) after the European Commission's communication of the Framework for National Roma Education Strategies. Unfortunately, the description of the current situation of the Roma which was used as the basis for the Romanian Strategy⁶⁷⁹ (hereafter the Strategy) can be criticised as relying on old data and outmoded indicators.⁶⁸⁰ An additional criticism can be raised that "the Strategy features no progress indicators and that the budgetary indications are only very general."⁶⁸¹ As noted earlier, many national strategies aimed at improving the situation of minority groups fail because of insufficient budgetary guarantees that, without sufficient checks and balances being put in place, integration schemes can be left to wither away or else only benefit a small percentage of those they were intended to help. Further, there seems to be no reference in the Strategy to participation by the Roma civil society or by interested NGOs and this is another means by which the Romanian Strategy fails to follow the guidance of the Framework.

⁶⁷⁸ See for example: Gabor Kezdi & Eva Suranyi (2009) *A Successful School Integration Program* (Roma Education Fund) <<http://www.romadecade.org/files/ftp/Successful%20School%20Integration%20Program.pdf>>

⁶⁷⁹ Government Strategy for the inclusion of Romanian citizens belonging to Roma minority for the period 2012 – 2020 [last accessed 26/02/13]

⁶⁸⁰ This criticism was raised in Open Society Roma Initiatives (2012) *Review of EU Framework National Roma Integration Strategies* (Open Society Foundation) 55. It is suggested that more accurate, up-to-date data on the situation of the Roma in contemporary Romania could have been found in William Bartlett, Roberta Benini & Claire Gordon (2011) *Measures to promote the situation of Roma EU citizens in the European Union* (European Parliament Report).

⁶⁸¹ Open Society Roma Initiatives Op Cit 55

An equally unsatisfactory approach has been taken by the Strategy when it comes to the specifics of achieving educational integration, with the project's budget for such integration being left incomplete.⁶⁸² So then, while the Strategy may play lip service to the goals of achieving desegregation and of providing Roma children with sustainable access to quality education, the actual means by which this will be achieved is omitted. This is not a hopeful sign for success.

Slovakia

The Slovakian Government has also produced a new national integration Strategy (hereafter the Strategy) after receiving communication of the Commission's Framework. Background information on the current situation of the Roma is given in a good deal of detail, with a general description being provided as the Context to the Strategy and an additional description particular to each of the four key areas of the Framework being provided as the Priority Politics of the Strategy.⁶⁸³ Unfortunately, as discussed earlier, ethnic data is not officially collected in Slovakia and so some of the descriptions provided must be necessarily built on incomplete data, unofficial sources and, potentially, guesswork.

In terms of integration in the field of education, the Slovakian Strategy aims to meet all of the suggestions of the Framework. The United Nations Development Programme has suggested that the Slovakian Government formulated the Strategy so that:

“access to schools with good-quality standard education should be provided for everyone, including pre-school, primary, secondary and higher education. Special emphasis should be placed on the elimination of ethnic segregation. While dropping out of education early needs

⁶⁸² Open Society Roma Initiatives Op Cit 57

⁶⁸³ Ibid 62

to be prevented, attention should also be given to the facilitation of a smooth transfer for students from school to work.”⁶⁸⁴

It is important to note that the Slovakian Strategy therefore recognises the importance of education in allowing children to move on into the world of work. Facilitating this transfer from school to work is of particular importance to minority pupils such as the Roma.

However, the Open Society Roma Institute has criticised the whole of the Strategy’s action plan for including only general proclamations when it comes to the four primary goals of the Framework and thus for confusing goals with methods. For example, in terms of achieving educational integration:

“The second specific goal among others states ‘application of complex integration of gender sensitive and multicultural education in primary schools’ but this sentence is hidden in a 12 line paragraph that starts with the topic of improving motivation, results and attendance of Roma children in primary education and comprises around 10 other topics.”⁶⁸⁵

This lack of clarity and failure to distinguish between means and ends will of course make the practical achievement of the Strategy’s aims all the more difficult.

c) “A Good Start” Project

The “A Good Start” project (hereafter AGS) was launched by the Roma Education Fund⁶⁸⁶ in 2010. The project is supported by the European Commission and is focused on four countries who are parties to the Decade of Roma Inclusion. Those four countries are Hungary, Romania, Slovakia and

⁶⁸⁴ United Nations Development Programme (2012) at <http://europeandcis.undp.org/news/show/FCA3173A-F203-1EE9-B0B1004677CA812C> [last accessed 26/02/13]

⁶⁸⁵ Open Society Roma Initiatives Op Cit 68

⁶⁸⁶ The Roma Education Fund having itself been created as part of the Decade of Roma Inclusion that was discussed earlier in this section. <<http://www.romaeducationfund.hu/>> [last accessed 26/02/13]

Macedonia.⁶⁸⁷ The purpose of AGS stems from the observation on the part of the European Commission that:

“Pre-primary education has the highest returns in terms of the social adaptation of children. Member States should invest more in pre-primary education as an effective means to establish the basis for further learning, preventing school drop-out, increasing equity of outcomes and overall skill levels.”⁶⁸⁸

As discussed earlier, lack of pre-school education and limited early years development care means Roma children begin primary education on an unequal footing with their majority population counterparts and this inequality is rarely overcome. Evidence of the low level of enrolment in preschool of Roma children has been found in a recent World Bank survey:

	Czech Republic	Slovakia	Hungary	Romania
Roma Average (2011) [age 3-6]	28	24	76	37
National Average (2009 – 2010)	79	72	88	77
Roma Average (2011) [3-6]	32	28	76	37
<i>Predominantly Roma neighbourhood (3-6)</i>	33	28	77	36
<i>Rural neighbourhood (3- 6)</i>	17	29	78	43

⁶⁸⁷ Only the Czech Republic is not involved.

⁶⁸⁸ European Commission (2006) ‘Communication Efficiency and Equity in European Education and Training Systems’ from Roma Education Fund (2010) *A Good Start* (Hungary, Roma Education Fund) 2

<i>Roma boys (3-6)</i>	37	29	72	36
<i>Roma girls (3-6)</i>	28	28	80	39
<i>Non-Roma neighbours (3-6)</i>	69	59	94	68

Fig One: Preschool Net Enrolment Rates⁶⁸⁹

It can be clearly seen that in each of the four countries Roma children are less likely to be enrolled in preschool education than their counterparts from the majority population. Indeed,

“Global evidence shows that early childhood education and care is essential to children’s development. The new regional Roma survey data shows that Roma children do not have an equal chance. With the exception of Hungary, the vast majority are not in preschool. It is time to close this gap.”⁶⁹⁰

This lack of early years education therefore is one of the primary causes of the low educational attainment of Roma children. In addition, it has been demonstrated that, even when schools have been properly desegregated, non-Roma children are frequently removed from the schools by their parents, resulting in officially integrated schools effectively becoming segregated again. The major reason behind this seems to be fear of the ‘Other’ and a lack of intercommunity understanding. Bearing all of this in mind, the aim of AGS is to target both Roma and non-Roma children aged 0 – 6 years and their parents and to offer quality, integrated early care and development services.

Under the auspices of the AGS there seem to be a variety of school, community and home-based projects. The breadth of activities includes “supporting children to attend formal kindergarten, training teachers and support staff, providing informal classes for children, parenting classes and

⁶⁸⁹ World Bank *Toward An Equal Start: Closing the Early Learning Gap for Roma Children in Eastern Europe* (World Bank Publication 2012) 12

⁶⁹⁰ Livia Jaroka, Member of the European Parliament, <http://www.romadecade.org/equal_start_june_2012> [last accessed 02/03/13]

enrolment support such as helping children to get identity documents and vaccinations.”⁶⁹¹ These are all highly useful practical steps of the kind previously discussed as being vital to the actual attainment of educational parity. Projects run by the AGS can be invaluable in assisting Member States to meet their inclusion objectives, particularly during times of national financial hardship. The AGS helps “a total of more than 4350 Roma children and families as direct beneficiaries.”⁶⁹² Many more people will have been helped indirectly.

The overall reception to the AGS, both in the four countries involved and at a European level has been largely positive. For example, it has been commented:

“Ensuring Roma children benefit from early stimulation and learning just like all other children is both a moral obligation and good economics in the long run. Experiences like the Good Start and other projects demonstrate that inclusive preschools and home parenting support can bridge the gap between Roma people and the majority population. Countries should leverage structural funds to invest in early learning and care for all poor children.”⁶⁹³

After acknowledging the perceived success of AGS, it is important to consider the work that has actually been undertaken in each of the three countries that are party to the AGS and are also under particular consideration here. First, it is important to recognise the level of implementation of AGS in each of the three countries. In Hungary, for example, the AGS project is being implemented in six locations in Hungary and involves at least “850 Roma and non-Roma children and their families.”⁶⁹⁴ There has been slightly less uptake in Romania where the AGS project is being implemented in two locations and involves 500 Roma and non-Roma children and their families,⁶⁹⁵ while in Slovakia the AGS project is being implemented in four locations and involves over “500 Roma and non-Roma

⁶⁹¹ Roma Education Fund *A Good Start* (Hungary, Roma Education Fund 2010) 4

⁶⁹² *Ibid* 5

⁶⁹³ Laszlo Andor, Member of the European Commission, <http://www.romadecade.org/equal_start_june_2012> [last accessed 26/02/13]

⁶⁹⁴ Roma Education Fund (2010) *A Good Start* (Hungary, Roma Education Fund) 11

⁶⁹⁵ *Ibid* 14

families.”⁶⁹⁶ So, although it can be seen that in all three countries the AGS project operates on a fairly small scale when compared to the total number of Roma children in the populations as a whole, the current instances of AGS are important starting points and serve to demonstrate how the Roma Education Fund can work in tandem with national authorities as well as communities in order to achieve the kind of integration identified in the EU Framework for National Roma Integration Strategies.

While each of the three countries here can therefore be said to have implemented AGS on roughly the same scale, they were not required to do so nor were they required to take any particular steps to actually ensure better take-up and quality of pre-primary education. However, analysis shows significant commonalities in the approaches of these three countries. This commonality becomes clear from the outset when examining each country’s aim in establishing AGS projects. For example, the aims of the AGS in Romania are similar to those of the projects in Hungary and Slovakia in that:

“By increasing the enrolment of Romani children into pre-school education from the age of three, AGS ensures that children in two participating rural localities benefit from pre-school education, both for the educational and social benefits and as a stepping stone to primary education.”⁶⁹⁷

This is clearly similar to the Roma Education Fund’s analysis of AGS in Slovakia:

“With an emphasis on building lasting partnerships among Romani parents, education authorities and institutions, local government, and civil society, the project authorities in Slovakia bring together the experiences of REF and its partners in pre-school education and

⁶⁹⁶ Roma Education Fund Op Cit 9

⁶⁹⁷ Ibid

the transition to primary education. At the same time, the project adds attention to key aspects of preventive healthcare and early childhood development.⁶⁹⁸

So each country clearly sees AGS as a means of both improving the educational attainment of Roma children and of benefiting society and societal cohesion in general.

When it comes to actually implementing their projects, in each of the three countries the mechanics of AGS seem to fall within two main themes: educating teachers and educating parents. Within the theme of educating teachers, the role of AGS in each of the three countries is to help ensure that the educators themselves are equipped to provide suitable preschool education for Roma pupils. The AGS in Hungary has also taken particular steps to work with university/teacher training students so that they can understand the particular problems suffered by Roma pupils.⁶⁹⁹ As well as facilitating children's attainment during primary education, using pre-school education as a means of facilitating integration and intercommunity understanding is hugely valuable in and of itself.

Improving the standards and attitudes of teachers would be only one step in improving preschool education for Roma children, which is why all three of the countries have also taken pains to address the attitudes of Roma parents. In Hungary, for example, the AGS has also taken particular steps to work with Roma parents so that their own skills can be improved and they are thus able to assist with their children's learning.⁷⁰⁰ The parents that have been assisted by the AGS are then encouraged to come into pre-schools and teach the children about aspects of their culture (art, folk lore, etc).⁷⁰¹ This is yet another effective means of breaking down social barriers and so helping to develop a cohesive and inclusive society. Successfully bridging the gap between home life and primary education is vital if Roma children are to be able to start their formal education on an equal footing. The inclusive

⁶⁹⁸ Roma Education Fund Op Cit 9

⁶⁹⁹ Ibid

⁷⁰⁰ Through the Mesed (Your Tale) program

⁷⁰¹ This practice is modelled on the Home School Community Liaison program that was developed in Ireland. See <http://www.education.ie/home/home.jsp?pcategory=17216&ecategory=34291&language=EN> [last accessed 26/02/13]

nature of the pre-school education offered by AGS should also help to lessen the likelihood of discrimination and abuse from non-Roma pupils and parents when Roma children move up through the education system with their non-Roma peers.

It seems, therefore, that, since early years education is so vital when it comes to guaranteeing educational parity, that the AGS project provides an extremely valuable example of good practice and that, if extended to cover a greater number of countries and also a greater number of pupils and their families, could be an invaluable resource for ensuring equal treatment for Roma children.

Roma-specific Education Initiatives – Concluding Remarks

Ultimately, it could be said that this discussion on educational initiatives targeted at specifically assisting Roma children (and their families), as well as the preceding section that considered domestic law and policy aimed at assisting minority groups in general, seems to indicate that each of the four countries here have actually taken, theoretically at least, quite advanced steps when it comes to minority accommodation within the education system. However, despite these theoretical positives, as demonstrated in earlier chapters, Roma pupils continue to suffer discrimination and educational disadvantage and so clearly domestic education policy in each of these four countries (as well as elsewhere) is failing to meet its stated and perceived aims. Those initiatives discussed above that have had potential to alleviate some aspects of the educational disadvantage suffered by Roma children could unfortunately be characterised as having limited reach and thus limited impact. All of the initiatives, whether founded at a local or national level, have resulted in isolated projects of an ad hoc nature which are only viable for small numbers of people for short periods of time. Measures that might have been hugely beneficial for the education of Roma children are failing due to their being inadequately supported and resourced. As such, Roma-specific

projects all too frequently prove unsustainable and yield results that are not adequately monitored, measured and evaluated.

Additional steps are clearly needed in order to truly guarantee educational parity for Roma pupils. In order to help identify exactly what form such additional steps should take, two case studies will be presented in Chapter Five – one of traveller education in the United Kingdom and one of indigenous education in British Columbia, Canada – in order to assess whether the educational models used in different jurisdictions could be cross-applied to help improve the situation of the Roma in Europe.

The Right to Education: Case Studies

As discussed in the previous chapters, Roma pupils are suffering great educational disadvantage in contemporary Europe. This disadvantage occurs despite the right to education being protected in a range of international and European documents and, additionally, despite various measures existing at a national level which are designed to assist Roma (and other minority) pupils. It has become clear that the flaws which can be seen to exist in the education systems of the Czech Republic, Hungary, Romania and Slovakia are able to exist despite fairly extensive human rights provisions and that such flaws cannot be compensated for by piecemeal education projects and isolated initiatives. A far greater change will be necessary if Roma children are to be able to attain educational parity.

In order to identify potential forms for such change to take, two case studies will now be presented that offer differing informative examples of how minority education can be guaranteed. The first case study, that of Gypsy/Traveller education in England, offers insight into how minority pupils can be accommodated within mainstream education while the second case study, that concerning indigenous education in Canada, demonstrates how 'separate but equal' education can exist in a manner that is very far from the type of segregated education that Roma children have been faced with in Europe.

5.1 Case Study One – Gypsy/Traveller Education in England

Introduction

This first case study examines Gypsy/Traveller⁷⁰² education in England and so provides an illustrative example of a mainstreaming approach to minority accommodation within the national education system. Previous chapters have discussed the idea of a sliding scale of minority accommodation within the education system and it is submitted that Gypsy/Traveller education in the United Kingdom is actually, perhaps deceptively, high on the scale. Such accommodation within the mainstream clearly involves the kind of basic guarantee of access and prohibition of discrimination that are to be found at the lower end of the scale but also involves specific minority accommodations and allowances as well as the potential for mother tongue teaching. Although the accommodation of minority pupils within the mainstream is certainly not a radical approach, it can be a valuable one. Since one of the goals of any efficient education system should be to bridge difference and facilitate movement between cultures, the integration of minority pupils into classes with their majority peers can be a valuable means of developing intercommunity understanding. However, it is vital that minority accommodation within the mainstream does result in integration rather than assimilation. While education should serve to develop all children into autonomous adults and so allow minority individuals to function and compete in majority society if they so wish, education should also encourage children to develop an understanding of their own community background so that they might feel secure within their own minority culture. Any attempt to accommodate minorities within the mainstream education system must therefore strike a balance between cultural sensitivity and more straightforward academic rigour. This case study of Gypsy/Traveller education in England is valuable since it can offer insight into a supposedly stable and advanced mainstreaming education

⁷⁰² The phrase Gypsy/Traveller will be used throughout this case study to reflect the terminology most commonly used, both officially and unofficially, when considering English education policy.

system and so can offer examples of good practices and of methods by which the education systems of the European countries under particular consideration here might become more effective.

The Right to Education in England

Although this case study is particularly concerned with the education of Gypsy/Traveller children in England, it is only after the general educational landscape has been thoroughly mapped that a critique of that particular strand of minority accommodation can be made. In presenting the current approach to the right to education in England, the same thematic analysis based on a sliding scale of accommodation used in earlier chapters will be applied.

Although the United Kingdom is a state party to all of the international instruments concerning the right to education that were discussed in Chapter Three, the concept of a ‘right’ to education was only enshrined in English law fairly recently.⁷⁰³ The Human Rights Act 1998 was enacted in order to give national effect to the European Convention on Human Rights, with Article 2⁷⁰⁴ of the First Protocol containing a basic guarantee of access to education: the lowest level of minority educational accommodation. However, Article 2 goes further, requiring the State “to respect the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions.” This kind of specific minority recognition in domestic education policy moves the country in question significantly along the scale of minority accommodation. It is arguable that specific minority recognition within the mainstream is near the pinnacle of minority accommodation and is topped only by ‘separate but equal’ schooling. It is possible though to overstate the scope of Article 2 Protocol 1.⁷⁰⁵ While ‘respect’ is demanded for religious and philosophical convictions there is no requirement for any specific form of accommodation. The provision could also be said to have general

⁷⁰³ Rachel Morris, *The Human Rights Act (HRA) 1998* (Traveller Law Research Unit 2000) 241

⁷⁰⁴ “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.”

⁷⁰⁵ See Chapter Three for detailed discussion of Article 2 Protocol 1

applicability since, while it could be used to justify respect for certain minority practices, it is actually targeted at all parents rather than specifically members of minority groups.

Concern can also be raised about the framing of Article 2 Protocol 1. Despite this recognition of the right to education as a fundamental human right, in practice “it remains the case that education in England is generally viewed in terms of being an adult’s duty rather than a child’s right, whether the adult in question be manifested in the parent, the state, local authorities or other bodies such as religious ones.”⁷⁰⁶ As this thesis has previously contended, the right to education and thus the ability to enjoy the full spectrum of fundamental human rights can only be truly effective if it is framed as being the right of the child. So long as children are seen as being merely the agent of their parents (or other relevant adult), then they are being denied the full scope of their rights.

The Human Rights Act 1998 is of additional importance to this thesis since it also contains in Article 14⁷⁰⁷ a general prohibition of discrimination. As previously discussed, a general guarantee of access to education can only be effective if it is coupled with a strong anti-discrimination provision. Article 14 is expansive, with its reference to ‘race’ and also to ‘association with a national minority’ seeming to include Gypsy/Travellers within its scope. Of course, anti-discrimination provisions such as Article 14 must be judged in light of their practical effect and so its existence must be borne in mind when this case study moves on to consider the practical educational situation of Gypsy/Traveller pupils in England.

No doubt due to the relatively recent adoption of a rights based formulation, debates about education in England tend to focus on “barriers to education”⁷⁰⁸ rather than on “the explicit denial of the right to

⁷⁰⁶ Save the Children, *Denied a Future? The Right to Education of Roma/Gypsy & Traveller Children in Europe Volume 2: Western & Central Europe* (Save the Children 2002) 224

⁷⁰⁷ “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

⁷⁰⁸ See for example: Department for Education <<http://www.education.gov.uk/research/data/uploadfiles/DFE-RR009.pdf>> [last accessed 26/02/13]

education”.⁷⁰⁹ Whilst it is of course important “to recognise that some situations do represent physical or practical barriers, it is equally important to explore ways in which states parties explicitly or implicitly fail to fulfil positive obligations.”⁷¹⁰ This tendency of the English government to focus on so-called “barriers” to education rather than explicitly on education as a right has been commented on at an international level. According to Katarina Tomasevski, then UN Special Rapporteur on the Right to Education, “the right to education entails obligations to make schooling accessible, acceptable and adaptable.”⁷¹¹ In her recent assessment of the United Kingdom⁷¹² Tomasevski makes it clear that advances have been made when it comes to the availability of education at least, but she was still critical of the overall approach to education provision:

‘Rights based strategies ought to adapt education to the circumstances prevailing in the countries, communities and families. This requires resisting the temptation to export models of education suited to industrial or industrialising countries, or to assume that secondary education is accessible to children who complete primary school, or to found education upon a vision of access to employment, in circumstances where the fate of most school leavers is what is alternatively called self-employment or the informal sector.’⁷¹³

Of particular interest to this thesis are Tomasevski’s additional comments that “a rights-based approach was essential with regard to the situation of Gypsies and Travellers in the UK given the multi-layered discrimination which affects Gypsy communities, coupled with the inter-generational transmission of the lack of access to education and thus the demand for it.”⁷¹⁴

⁷⁰⁹ Save the Children Op Cit 224

⁷¹⁰ Ibid

⁷¹¹ Katarina Tomasevski ‘Mission to the United Kingdom of Great Britain and Northern Ireland (England) 18-22 October 1999’ E/CN.4/2000/6 /Add.2 full text available online at: <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/8a492105699f57a3802568770060ddb?Opendocument>> [last accessed 26/02/13]

⁷¹² It is common practice for all of the UN Special Rapporteurs to report on the UK as a whole rather than on each of its constituent countries.

⁷¹³ Katarina Tomasevski Op Cit para 11

⁷¹⁴ Ibid para 62

Moving beyond the current conception of the human right to education, perhaps the most important English statute concerned purely with education is the Education Act 1996.⁷¹⁵ Sections 7 and 8 of the Act are concerned with the compulsory nature of education. Section 7 sets out the duty of parents to secure education of children of compulsory school age:

The parent of every child of compulsory school age shall cause him to receive efficient full-time education suitable –

- a) to his age, ability and aptitude, and*
 - b) to any special educational needs he may have,*
- either by regular attendance at school or otherwise.*

This requirement for education to be compulsory is a step further along the sliding scale of minority accommodation than a basic guarantee of access. While freedom of access to education is of course vital, it is only through making attendance compulsory (and effectively enforcing that compulsion) that previously excluded groups can be truly guaranteed to take part in the education process. Unfortunately, section 7 is another example of an educational provision being formulated with parents as the central figure of interest. Parents are here obliged to ensure that their school age children receive suitable education through regular attendance at school or otherwise. Since the child is once again seen as the object of the parent there is a risk that the means chosen by which the child should receive their education may not actually be the most appropriate. While the vast majority of parents would sincerely act in what they believe to be the best interests of their child, some may use the requirements of section 7 to keep their child firmly entrenched within their particular culture or belief system.

⁷¹⁵ Full text of Act is available at <<http://www.educationengland.org.uk/documents/pdfs/1996-education-act.pdf>> [last accessed 03/03/13]

Section 8 of the Act serves to establish what exactly is meant by ‘school age’ in relation to compulsory education. It establishes that “education is compulsory” for children aged five⁷¹⁶ to sixteen.⁷¹⁷ The length of compulsory education in England is actually set to change soon since, following the Education and Skills Act 2008, the leaving age for compulsory education will be seventeen from 2013 and then 18 from 2015.⁷¹⁸ It can be seen that, even as it currently stands, the length of compulsory education in England lasts beyond that which is required of the state by its international obligations. In keeping with the four countries, England has chosen to make both primary and secondary education compulsory. This is a positive move and is particularly advantageous to children from minority groups who might otherwise choose or feel obliged to leave school at an earlier age. This requirement for compulsory education is reinforced by the fact that every pupil has access to state schooling free of charge.

The Education Act 1996 also makes reference to the idea that pupils are to be “educated in accordance with parents’” wishes.⁷¹⁹ Article 9 states:

In exercising or performing all their respective powers and duties under the Education Acts, the Secretary of State and local education authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.

Perhaps unsurprisingly, there is once again an emphasis on the right of parents. The idea that children should have a right to education is absent from Article 9,⁷²⁰ with the wishes of parents all important. Article 9 does however mandate for certain checks and balances – “so far as that is compatible with

⁷¹⁶ Article 8(2)(a) and (b)

⁷¹⁷ Article 8(3)(a) and (b)

⁷¹⁸ Part I 1(a)

⁷¹⁹ Laura Lundy ‘Family Values in the Classroom? Reconciling Parental Wishes and Children’s Rights in State Schools’ (2005) 19(3) *International Journal of Law Policy and the Family* 346 – 372

⁷²⁰ Neville Harris ‘Education Law: Excluding the Child’ (2000) 12(1) *Education and the Law* 31 - 46

the provision of efficient instruction and learning” – to ensure that the state should oversee parents exercise of their right to determine the most appropriate education for their children. This does provide some level of protection against children being viewed merely as tools of their parents or culture even though it falls short of establishing the child as the principal holder of the right.

This brief overview of general educational provision in England demonstrates the existence of a well-established, if regularly evolving, education system that is designed to operate to the benefit of all children, regardless of their race or other minority status. However, the English education system will remain flawed so long as there is a failure to recognise that it is the child who should be the central rights holder when it comes to education.⁷²¹ This is not to say that the current conception of the right to education is a failure, rather, that any country seeking to follow the English example would be wise to formulate its own national strategy so that the child is firmly entrenched as the rights-holder at the centre of policy.

It is clear from the provisions discussed above that the English education system is designed to be accessible and appropriate for all children. However, there is recognition that this kind of equality is not always easy to achieve. It should be no surprise that in an education system designed to benefit all children equally there exist measures and initiatives designed to target and assist certain particularly disadvantaged minority groups. In England, the Roma are one such group.

Travelling Communities in England

As indicated above, there has been migration of Roma from Central and Eastern Europe to the UK.⁷²²

Although this thesis is concerned with the education of Roma children, it is important to re-emphasise

⁷²¹ Ibid 32

⁷²² Research show that many of these Roma came to the UK in the 1990s in order to escape discrimination in their countries of origin. See: Equality *The Movement of Roma from new EU Member States: A mapping survey of A2 and A8 Roma in England* (Equality 2009) <<http://equality.uk.com/resources.html>> [last accessed

that, within the educational establishment in England, the Roma are rarely treated as a discreet group. This is not to say that there exists no special provision for the education of Roma children in England but, rather, that those special measures which are in place are said, more generally, to cater for ‘travelling communities.’⁷²³ The phrase ‘travelling communities’ is used as an umbrella term to cover “those identifiable groups, some of which have minority ethnic status,⁷²⁴ who either are, or have been, associated with a nomadic lifestyle, and include Gypsy Travellers,⁷²⁵ Fairground and Circus families,⁷²⁶ New Travellers,⁷²⁷ Bargees⁷²⁸ and other families living on boats.”⁷²⁹ Importantly, the definition of Gypsies and Travellers “does not exclude those who are settled or those who are presently living in houses. Ethnicity or ethnic identity is not somehow ‘lost’ when a family settles: it continues and adapts to the new circumstances.”⁷³⁰ Throughout this case study then, the term ‘Gypsy Travellers’ shall be used in place of ‘Roma’ so that the discussion undertaken will be clear and consistent with all primary material quoted.

03/03/13] NB: the A8 countries are Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia, while the A2 countries are Bulgaria and Romania.

⁷²³ See for example: Anne Wilkin, Chris Derrington, Brian Foster, Richard White and Kerry Martin (2009) ‘Improving Educational Outcomes for Gypsy, Roma and Traveller Pupils: What Works?’ Department for Children, Schools and Families Research Report DCSF-RR170; OFSTED, *The Education of Travelling Children: A Survey of the Educational Provision for Travelling Children* (HM Stationary Office 1996) 3 full text available online at <<http://www.ofsted.gov.uk/Ofsted-home/Publications-and-research/Browse-all-by/Education/Inclusion/Traveller-children/The-education-of-Travelling-children>> [last accessed 26/02/13]; Erika Cudworth and David Cudworth ‘Educating the Outcast? Policy and Practice in the Teaching of Gypsy/Traveller Children’ 27 – 48 in Lynn Ang, John Trushell & Tricia Valker *Learning and Teaching in a Metropolis* (Editions Rodopi B.V. Amsterdam 2010); David Gillborn ‘Ethnicity and Educational Performance in the United Kingdom: Racism, Ethnicity and Variability in Achievement (1997) *Anthropology & Education Quarterly* 28(3) 375 – 393

⁷²⁴ Gypsy Travellers [the general term being accepted as including Roma people] constitute a recognised minority ethnic group for the purposes of the 1976 Race Relations Act.

⁷²⁵ Although not ideal, it is acknowledged that, in this context, the word ‘gypsy’ is not intended to have any negative connotations and is used for ease and as an umbrella term to include Roma, Sinti, Irish Travellers etc. For further discussion of ‘gypsies’ and the ethnic groups commonly perceived to be represented by this term, see the introductory chapter to this thesis.

⁷²⁶ A self-explanatory category. Although of course not a recognised minority ethnic group these families have also found that a nomadic lifestyle can significantly hamper access to, and attainment in, education.

⁷²⁷ A term taken to include hippies and New Age Travellers – groups that adopted a nomadic lifestyle in the 1960s.

⁷²⁸ Families living on the network of inland waterways in England. The British Waterways Board reported in 1987 that there are only eleven families, with a total of seventeen school aged children, who maintain a traditional Bargee lifestyle.

⁷²⁹ OFSTED, *The Education of Travelling Children: A Survey of the Educational Provision for Travelling Children* (HM Stationary Office 1996) 3 <<http://www.ofsted.gov.uk/Ofsted-home/Publications-and-research/Browse-all-by/Education/Inclusion/Traveller-children/The-education-of-Travelling-children>> [last accessed 26/02/13]

⁷³⁰ Save the Children Op Cit 214

Gypsy Travellers are by far the largest group among the travelling communities⁷³¹ and constitute a recognised minority ethnic group for the purposes of the 1976 Race Relations Act. Most Gypsy Travellers have retained the use of their inherited language as well as being proficient in English.⁷³² There have been various figures offered as representing the number of Roma currently living in the UK.⁷³³ This variation in statistics seems to indicate some considerable difficulty in conducting an accurate population count of the Gypsy/Traveller.⁷³⁴ The reason behind this difficulty could perhaps best be framed in light of comments by Paul Gordon on the issues surrounding the collection of what he terms “racialised” statistics:

“The collection of racial or ethnic statistics is not a neutral exercise involving the simple collection of objective facts. Rather, from the start, it involves decisions of a political nature about what to record, in what terms and in what way, stemming from a particular ideological position.”⁷³⁵

Seemingly then, the process of estimating the number of Gypsy Travellers in England is difficult due to the limited and often controversial statistics and sources available. Differing opinions as to what constitutes a Gypsy/Traveller identity coupled with an increased likelihood of being ‘missing’ from official statistics and reticence about self-declaring ethnic identity⁷³⁶ has resulted in only a few, often fairly inaccurate, studies being carried out.

⁷³¹ A figure of 300,000 has been offered for the total number of Gypsy Travellers in the UK based on local government caravan courts. For further statistical data see the Commission for Racial Equality (2006) *Common Ground: Equality, Good Race Relations and Sites for Gypsies and Travellers* report available online at <http://www.equineteurope.org/2384_gypsy_travs_summary.pdf> [last accessed 26/02/13]; See also: Equality and Human Rights Commission *Gypsies and Travellers: simple solutions for living together* (EHRC Publications 2011)

⁷³² This is a particularly significant difference when considering the education of Roma children in Eastern Europe as fluency in the national language is far less common there.

⁷³³ An analysis of the whole of the UK is unfortunately far more common than an analysis of each of the constituent countries.

⁷³⁴ Jeremy Druker, “Present but Unaccounted For”, (1997) 4(4) *Transitions* 22–23

⁷³⁵ Paul Gordon, “The Racialisation of Statistics” in Richard Skellington, (1996) *‘Race’ in Britain Today* (2nd edn, Sage Publications 1996) 28

⁷³⁶ Out of fear of discrimination and hostility etc.

However, some parties have made thorough and convincing attempts at reaching credible estimates as to the Gypsy/Traveller population based on a combination of official statistics and unofficial sources. Friends Families and Travellers⁷³⁷ estimates the overall number of Gypsy Travellers in the UK to be 300,000,⁷³⁸ while Equality has recently suggested the figure to be far higher with around 500,000 Roma alone living in the UK.⁷³⁹ Both of these estimates include Gypsies and Travellers currently living in houses. One of the major problems with securing official figures is that the UK national census does not include an option for identifying as a Gypsy Traveller.⁷⁴⁰ Formal statistics on Gypsy Travellers in the four constituent countries therefore “mainly derive from a confusing mix of caravan, household and pitch counts.”⁷⁴¹ In England such counts occur twice yearly on council and private sites as well as unauthorised sites. As of January 2013 the most recent published statistics available are from the July 2012 caravan count and reveal a total of 19,400 caravans spread across all varieties of sites, a fairly substantial increase of 700 caravans on the July 2011 figures.⁷⁴² Unfortunately, such statistics are hugely unsatisfactory when trying to determine the total number of Gypsy Travellers living in England as they, first, only count caravans rather than the individuals living in them and, secondly, ignore completely those Gypsy Travellers who choose to live in houses. Importantly, however, despite the somewhat vague figures available as to total population, it does seem that there are comparable numbers of Gypsy Travellers in England with the Roma populations elsewhere in Europe that were highlighted in Chapter One of this thesis.

Given the difficulty in arriving at a single, accurate number for the general Gypsy Traveller population of England, it should come as no surprise that estimates as to the number of school age

⁷³⁷ Friends, Families and Travellers <<http://www.gypsy-traveller.org/>> [last accessed 28/02/13]

⁷³⁸ Friends, Families and Travellers *Annual Report 2010 – 2011* 9 < <http://www.gypsy-traveller.org/wp-content/uploads/2010/08/Annual-Report-2010-2011.pdf>> [last accessed 28/02/13]

⁷³⁹ Equality *The Movement of Roma from new EU Member States: A mapping survey of A2 and A8 Roma in England* (Equality 2009) <<http://equality.uk.com/resources.html>> [last accessed 03/03/13]

⁷⁴⁰ As of the 2011 Census

⁷⁴¹ Save the Children Op Cit 218

⁷⁴² Department for Communities and Local Government, *Count of Gypsy and Traveller Caravans – July 2012* (Housing, Statistical Release, 6 November 2012) 1 available online at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/11710/caravan.pdf> [last accessed 15/01/13]

Gypsy and Traveller children are also considered to be questionable. However, the Department for Education does carry out an annual School Census in which all schools must report pupil numbers and supply some additional material (such as ethnicity of pupils, numbers who receive free school meals, numbers with Special Educational Needs, etc) from which national statistics can be drawn. The most recent published results are from the January 2012 School Census,⁷⁴³ with the data revealing that there were 9,525 (or 0.3%) Gypsy/Roma primary school pupils, 4,910 (or 0.2%) Gypsy/Roma secondary school pupils and 220 (or 0.2%) Gypsy/Roma pupils attending special schools.⁷⁴⁴ This data is troubling for two main reasons: First, the number of Gypsy/Roma pupils registered with schools seems far lower than the general population statistics discussed earlier would seem to indicate. Secondly, the difference in numbers of Gypsy/Roma attending primary school versus the number attending secondary school seems to indicate a huge dropout rate when it comes to advancing through the education system. The School Census data does however reveal that there is no greater ‘critical mass’ of Gypsy/Roma pupils in England when compared to those in the rest of Europe and so there should be no suggestion that any Roma-specific education measures in England are only viable due to the existence of a greater number of pupils.

Before moving on to look at the practicalities of Gypsy/Traveller education in England, it is valuable to establish the general attitude of English Gypsy/Travellers to education. As previous chapters have indicated, Roma elsewhere in Europe frequently exhibit negative attitudes to education based on historical experiences and current hostility within the education system, but such attitudes seem far less prevalent in England. A recent study by the Roma Education Fund, for example, has revealed that “parents interviewed during [the] study valued the overall atmosphere at school.”⁷⁴⁵ Importantly in the context of this thesis, the study also found parents happy with:

⁷⁴³ Department for Education, *Schools, Pupils and their Characteristics – January 2012* available online at < <http://media.education.gov.uk/assets/files/pdf/m/sfr10-2012.pdf> > [last accessed 15/01/2013]

⁷⁴⁴ Ibid at 18 Table 4(a): *Maintained Primary, State-Funded Secondary and Special Schools Number and Percentage of Pupils by Ethnic Group* NB: for purposes of the School Census, Irish Traveller and Gypsy/Roma pupils are treated as separate categories.

⁷⁴⁵ Roma Education Fund *From Segregation to Inclusion: Roma Pupils in the United Kingdom A Pilot Research Project* (REF/Equality 2011) 10

“children’s feeling of being welcomed [at school] and their experience of equal treatment, equal opportunities and the absence of anti-Roma sentiments and racism expressed by their children’s non-Roma peers and teachers, which they all said their children had experienced in various forms in the Czech Republic and Slovakia.”⁷⁴⁶

It seems clear that there is a generally positive attitude among those parents interviewed about their children attending school. This positivity stems from the absence of racism among other pupils and teachers and so the experiences of Roma pupils in England are positively contrasted against their experiences in the Czech Republic and Slovakia. These two countries (as well as Hungary and Romania) should therefore move swiftly to educate citizens and stamp out the kind of prejudiced treatment that Roma pupils have been receiving if they are to fulfil their international obligations and truly provide education access and inclusion for all. It seems that reticence towards education on the part of the Roma community can be tackled by proving an absence of hostility in the classroom.

The Evolution of Gypsy/Traveller Education in England

It must first be acknowledged that the English approach to the education of Gypsy Traveller children has not been straightforward. Tracing the history of Gypsy and Traveller “education in [England] is a lengthy and problematic affair and it is difficult to explore and analyse this history fully.”⁷⁴⁷ Although so-called ‘Gypsy schools’ existed throughout England for many years, it was only in the early 1900s that some, albeit limited, local councils began to specifically tackle the issue of Gypsy/Traveller education.⁷⁴⁸ The 1908 Childrens Act had made education compulsory for Gypsy Traveller children, admittedly only for half the regular school year, but this requirement was only laxly enforced.⁷⁴⁹ Save the Children have argued that it was, in fact, “not until the 1960s, when government circulars and

⁷⁴⁶ Ibid; also 40 - 43

⁷⁴⁷ Save the Children, Op Cit 225

⁷⁴⁸ For example, the Hurtwood School in Surrey

⁷⁴⁹ Save the Children, Op Cit 225

reports started to discuss frequently the ‘Gypsy problem’, did the issue of Traveller education get any serious attention.”⁷⁵⁰ It is highly unfortunate that it was negative public perceptions of Gypsy/Traveller life that caused a spotlight to be shined on their children’s education.

However, as a result of this increase in interest⁷⁵¹ in the Gypsy/Traveller community, as well as a general interest in the country about the state of the education system, Sir Edward Boyle, then Education Minister, commissioned a report by the Central Advisory Council for Education (England) into “primary education in all its aspects and the transition to secondary education.”⁷⁵² The Plowden Report⁷⁵³ as it was popularly known was published in 1967 and, amongst other issues, drew attention to the educational plight of Gypsy and Travelling children. The Report commented that “... the children’s educational needs are nevertheless extreme and largely unmet ... They will require special attention and carefully planned action.”⁷⁵⁴ This is a particularly useful comment in that it highlights that Gypsy Traveller children have particular educational needs and that the education system is failing to meet these needs. As well as being framed in generally positive terms, Appendix 12 is also of particular importance since it recognises that Gypsy Traveller children may well need special, targeted educational measures that the majority of children do not require. Appendix 12 went on to consider the specific reasons why Gypsy Traveller children were experiencing problems in accessing effective education, with nomadism identified as a particular problem.⁷⁵⁵

⁷⁵⁰ Ibid 226

⁷⁵¹ And arguably also due to the lobbying efforts of MPs like Norman Dodds and Eric Lubbock

⁷⁵² From a letter written to the Secretary of State by Baroness Plowden as quoted in the Foreword to the Plowden Report – the full text being as follows: (28th October, 1966) Dear Secretary of State, In August 1963 the then Minister of Education, Sir Edward Boyle, asked the Central Advisory Council for Education (England) ‘to consider primary education in all its aspects, and the transition to secondary education.’ I now have much pleasure in submitting the Report of the Council. The Central Advisory Council for Education (Wales) were given identical terms of reference and we understand that they, too, will report soon. We have been able to keep in touch with their work through the members appointed jointly to both Councils. Yours sincerely, ...

⁷⁵³ ‘Children and their Primary Schools’ A Report of the Central Advisory Council for Education (England), ‘The Plowden Report’ <<http://www.educationengland.org.uk/documents/plowden/plowden2-12.html>> [last accessed 26/02/13]

⁷⁵⁴ Appendix 12

⁷⁵⁵ Ibid ‘for as long as education has been provided, Gypsy Traveller children have had restricted access to schools for a variety of reasons - nomadism has been, and still is in many cases, an important influence in this regard.’

After the Plowden Report raised the issue of minority pupils experiencing particular difficulty when it came to education, there was unfortunately little immediate practical progress although the government did proceed to investigate the issue further. The Swann Report⁷⁵⁶ was commissioned in 1985 following such highlighted incidents of underachievement in education on the part of minority pupils and was designed to investigate why the education system in England was apparently failing to keep pace with and reflect the kind of multicultural society that England had become. While concerned with the educational situation of all minority groups in England, the Swann Report did highlight the particular situation of Gypsy/Traveller students:

‘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.’⁷⁵⁷

It was clear the Gypsy/Traveller pupils were facing a whole host of difficulties, almost every difficulty that could possibly be faced by minorities in fact, when attempting to access education. Both the Plowden Report and the Swann Report were influential and persuasive documents and highlight the importance of officially sanctioned and supported investigations into matters of national concern such as education. While the four countries have perhaps historically relied on reports by EU bodies and NGOs when it comes to education issues involving minority groups, they would be wise to take ownership of the problem, undertaking some official national survey of the type undertaken in England. Data that has been collected by governmentally sanctioned agents is likely to have a far greater persuasive effect on both that government and on the popular citizenry.

⁷⁵⁶ ‘Education for All’ Committee of Inquiry into the Education of Children from Ethnic Minority Groups, The Swann Report, HMSO 1985. Full text available at: <<http://www.educationengland.org.uk/documents/swann/>> [last accessed 26/02/13]

⁷⁵⁷ Ibid 72

National Innovations Concerning Gypsy/Traveller Education

Despite the rather piecemeal approach taken towards Gypsy/Traveller education discussed above, there have actually been a number of national innovations aimed at Gypsy/Traveller pupils in England:

a) Bridging Schools

Following the Swann Report, many local authorities did begin appointing advisors to develop a multicultural education policy.⁷⁵⁸ Interestingly, amongst the concerns exhibited in the Swann Report was the highlighted preference among Travellers for on-site education.⁷⁵⁹ Acting on this apparent preference on the part of Gypsy Travellers to step outside of the mainstream education system, some of those councils who wished to better accommodate their minority residents instituted bridging schools of the type that had been suggested in the Swann Report. These bridging schools were designed to ease Gypsy/Traveller students from no formal education into the formal school system. These schools were clearly not an attempt to introduce ‘separate but equal’ schooling since they were designed to facilitate the transition of Gypsy Traveller children into mainstream education, but they were an innovative means of achieving minority accommodation. Although the preference for on-site education that was expressed in the Swann Report was not met by the bridging schools, they did represent an important attempt at cultural sensitivity. Ultimately, such bridging schools were unfortunately rarely successful⁷⁶⁰ and prompted some commentators to suggest that Gypsy Travellers were the “only ethnic minority presenting a prima facie case for segregation in education.”⁷⁶¹ The use of ‘segregation’ here is unfortunate, but it is true that bridging schools were clearly insufficient on

⁷⁵⁸ William H Taylor, ‘Ethnic Relations in All-White Schools’ in Sally Tomlinson & Maurice Craft, *Ethnic Relations and Schooling: Policy and Practice in the 1990s* (Athlone Press 1995) 106 from Helen O’Nions, *Minority Rights Protection in International Law: The Roma of Europe* (Ashgate Publishing 2007) 144

⁷⁵⁹ para 97

⁷⁶⁰ Derek Hawes and Barbara Peres, *The Gypsy and the State: The Ethnic Cleansing of British Society* (School of Advanced Urban Studies, University of Bristol 1996) 70

⁷⁶¹ Robert Jeffcoate, *Ethnic Minorities and Education* (Harper and Rowe 1984) 115 from Helen O’Nions, *Op Cit* 144

their own to tackle the difficulties in accessing education that Gypsy Traveller children were experiencing. It is submitted though that this was because of a failure to tackle issues of hostility and discrimination that existed in the mainstream schools. Although the Gypsy Traveller pupils were made aware through attendance of bridging schools of what would be expected of them in mainstream education, there was seemingly no corresponding attempt to modify the mainstream attitudes towards Gypsy Travellers.

b) Green Card Scheme

The experiment with bridging schools did serve to ‘kick start’ the introduction of other innovations designed to better provide for Gypsy Traveller pupils. In 1992, for example, the DfEE⁷⁶² introduced the Record Reference “Green Card” scheme for Travelling pupils.⁷⁶³ It provides a parent-held card that is stamped with the school’s details each time a Traveller child is registered and “enables the next school to obtain the child’s educational records more speedily than would otherwise be possible.”⁷⁶⁴ The scheme was therefore designed to minimise the interruption to the child’s education that would arise due to regular transfer between schools. As of January 2013 no further progress had been made on the issue of whether to expand the Green Card scheme to include parent-held educational records. While it is a national initiative, use of the Green Card scheme is voluntary and so it will not benefit all children nor will it be equally effective in all Local Education Authorities (hereafter LEAs). However, it is yet another attempt at a culturally sensitive means of accommodating minority children within the mainstream education system. It attempts to strike a balance between respecting cultural practices such as nomadism and ensuring that Gypsy Traveller children’s education is able to continue as smoothly as possible.

⁷⁶² Now the DfES

⁷⁶³ Information on the legalities of the scheme as well as how it has been implemented in Devon can be found at <http://www.devon.gov.uk/index/learning/supporting-children/travellers_education/services-2/booklets_and_leaflets/traveller_children.htm#green_card> [last accessed 26/02/13]

⁷⁶⁴ Devon Consortium Traveller Education Service *Traveller Children in School: A Booklet for the Use of School Administrators and Headteachers* (DCTES 2002) 4

c) School Attendance

Any educational model which seeks to integrate minority pupils, particularly if the minority in question practices some variety of nomadic lifestyle, will likely have to address the need for a certain level of flexibility when it comes to school attendance. There is strong evidence that regular, consistent attendance at school is synonymous with good educational attainment. In the UK for example, statistics have shown that only 6% of pupils who missed more than half of their schooling achieved 5 or more good GCSEs⁷⁶⁵ in 2010/11.⁷⁶⁶ With this in mind, under section 444(1) of the Education Act 1996 a parent commits an offence if they fail to ensure their child's regular attendance at the school where the child is registered. Additionally, under section 444(1)(A) a parent commits a further offence if the circumstances in section 444(1) apply and the parents know that their child fails to attend school regularly and fails to cause the child to attend. Effectively, parents are penalised if their children do not attend school regularly and a further offence is committed if the parent in question actually knows that their child is failing to attend and they do not compel the child to do so. Sections 444(1) and 444(1)(A) are clearly not without practical difficulties when it comes to the steps that parents must actually take to "cause" their child[ren] to attend school and could potentially have a disproportionate impact on travelling families.

However, the Education Act 1996 does allow for defences against the requirements of sections 444(1) and 444(1)(A). Notably, section 444(6) gives parents a defence in which they "cannot be found guilty of a school attendance offence, provided that the child is of no fixed abode and:

- a) Parents are engaged in a trade or business of such a nature as to require them to travel from place to place, and*

⁷⁶⁵ "Good" being here defined as grades A* to C

⁷⁶⁶ Internal Department for Education analysis of the National Pupil Database from the Department for Education's 'Improving educational outcomes for children of travelling families' Consultation 30 November 2012 at 1.2

- b) *The child has attended at a school as a registered pupil as regularly as the nature of that trade or business permits, and*
- c) *If the child has attained the age of six, that he or she has made at least 200 attendances during the period of 12 months ending with the date on which the proceedings were instituted.”*

This is clearly an accommodation which takes into account the particular circumstances of all of the minority groups in the UK who would be termed Gypsy/Travellers. Further, it is important to recognise that parents who dual register their child[ren] at several schools whilst travelling⁷⁶⁷ will not be affected as their child[ren] will not be recorded as absent from school. This is thus another useful accommodation that takes into account the specific requirements of travelling families and allows for them to be accommodated within the mainstream education system.

While such examples of minority accommodation could certainly be welcomed from the point of view of cultural sensitivity, relaxed attendance requirements could be blamed for contributing to the lower educational attainment of Gypsy/Traveller pupils when compared to their majority counterparts. In fact, this very issue has been recently commented on by Charlie Taylor, the Government’s Expert Advisor on Behaviour, in his 2012 report on school attendance for the Secretary of State.⁷⁶⁸ Taylor comments that schools are often too lenient when it comes to pupils’ absences and that school authorities are too willing to give retrospective authorisation to such absences.⁷⁶⁹ Additionally, Taylor notes that the parental sanctions created by sections 444(1) and 444(1)(A) of the Education Act 1996 are inadequate at combating pupil absence due to reticence on the part of councils and education

⁷⁶⁷ For example if their work/trade takes them on a regular route so that they might register their children at several schools along the way and know, generally at least, when the children will be in attendance at a particular school.

⁷⁶⁸ Charlie Taylor ‘Improving attendance at school’ 16 April 2012 available online at <<http://media.education.gov.uk/assets/files/pdf/t/improving%20attendance%20at%20school.pdf>> [last accessed 26/02/13]

⁷⁶⁹ Ibid

authorities when it comes to prosecuting parents and also due to the relative ease with which parents can avoid significant punishment.⁷⁷⁰

Due in part to the Taylor report, the Department for Education has launched a Consultation on “Improving educational outcomes for children of travelling families”.⁷⁷¹ The Consultation was launched on 30 November 2012 and will run until 22 February 2013. The consultation document stresses that “all parents have a legal duty to educate their children of compulsory school age either by registering them at a school or otherwise. Where a parent chooses to educate their child at a school they have a legal duty to ensure their child attends school regularly regardless of their background or ethnicity.”⁷⁷² The tone of this passage indicates a shift in government education policy away from culturally sensitive accommodations when it comes to attendance and towards a more universal policy. This is confirmed by the crux of the consultation document which is the Government’s consideration of the wisdom of repealing section 444(6) of the Education Act 1996.⁷⁷³

While such a move might initially dismay advocates of greater cultural accommodation within the mainstream education system, the consultation document does contain some disturbing figures which highlight the flaws in the current regulation of attendance. For example, Gypsy/Roma pupils who missed less than 10% of sessions (38 sessions) over the Key Stage 2 years were **1.7 times** more likely to achieve Level 4 in Key Stage 2 English and Maths than those who missed more than 10% of sessions and **2.8 times** more likely than those who missed more than 20% of sessions.⁷⁷⁴ Similarly, Gypsy/Roma pupils who missed less than 10% of sessions (again, 38 sessions) over the Key Stage 4 years were **2.6 times** more likely to achieve 5 A*-C GCSEs or equivalent including English and Maths than those who missed more than 10% of sessions and **9.4 times** more likely than those who

⁷⁷⁰ Charlie Taylor Op Cit 19 – 24

⁷⁷¹ The Consultation document is available online at <<https://media.education.gov.uk/assets/files/pdf/i/improving%20educational%20outcomes%20for%20the%20children%20of%20travelling%20families%20consultation%20document.pdf>> [last accessed 26/02/13]

⁷⁷² Ibid at 2.1

⁷⁷³ At 2.2

⁷⁷⁴ At 4.2

missed more than 20% of sessions.⁷⁷⁵ Clearly persistent absence is a serious problem for pupils (and one that escalates in proportion to the amount of sessions missed) and one that is demonstratively affecting Gypsy/Traveller pupils in the UK.

The question becomes then, what can be done to ensure the attendance at school of Gypsy/Traveller pupils without alienating the community by seeming to penalise them due to their nomadic lifestyle? According to the consultation document, the Government “wants to ensure that all children who are school registered are attending schools whilst not encroaching on their parents’ right to travel for employment.”⁷⁷⁶ Some level of cultural accommodation is still being anticipated. The purpose of the Government’s consultation is to request views on section 444(6) of the Education Act 1996 it is encouraging to note that the consultation is seeking input from Gypsy/Traveller parents as well as school authorities. This is just the kind of inter-community dialogue necessary in ensuring that travelling families feel a sense of inclusion within the mechanics of the education system and so become invested in education and feel that the mainstream system is reflective of and sensitive to their particular culture.

Although, the Roma community have historically been wary of this type of engagement with Government authorities, this consultation into “Improving educational outcomes for children of travelling families” seems to have been engaged with by many of the Gypsy/Traveller organisations in the UK. For example, the Advisory Council for the Education of Romany and other Travellers (ACERT) has published an article on its website encouraging parents/interested parties to submit their views for inclusion in the official ACERT response to the consultation request.⁷⁷⁷ While ACERT

⁷⁷⁵ Ibid

⁷⁷⁶ At 5.1

⁷⁷⁷ Advisory Council for the Education of Romany and other Travellers ‘Education of nomadic children under threat’ 11 December 2012 <<http://www.acert.org.uk/2012/12/education-of-nomadic-children-under-threat/>> [last accessed 26/02/13]

acknowledges that section 444(6) “might benefit from redrafting,” the worry remains that “its repeal would seem to further criminalise people who are economically nomadic.”⁷⁷⁸

d) The TARGET model: Traveller And Roma Gypsy Education Tool

The Traveller and Roma Gypsy Education Tool (TARGET) was developed by Wilkin et al in “Improving Educational Outcomes for Gypsy, Roma and Traveller Pupils: What Works?”⁷⁷⁹ and is the result of significant case study analysis. The study was sponsored by the then Government and was designed to produce guidance for LEAs and schools seeking to improve the educational attainment of Gypsy/Traveller pupils. As such, the findings of the study are in no way binding on any authority but do have persuasive power and offer examples of good practice. The TARGET model is intended to assist schools in the way they approach traveller children and its recommendations can be expressed diagrammatically:

⁷⁷⁸ Ibid

⁷⁷⁹ Anne Wilkin, Chris Derrington, Brian Foster, Richard White and Kerry Martin (2009) ‘Improving Educational Outcomes for Gypsy, Roma and Traveller Pupils: What Works?’ Department for Children, Schools and Families Research Report DCSF-RR170

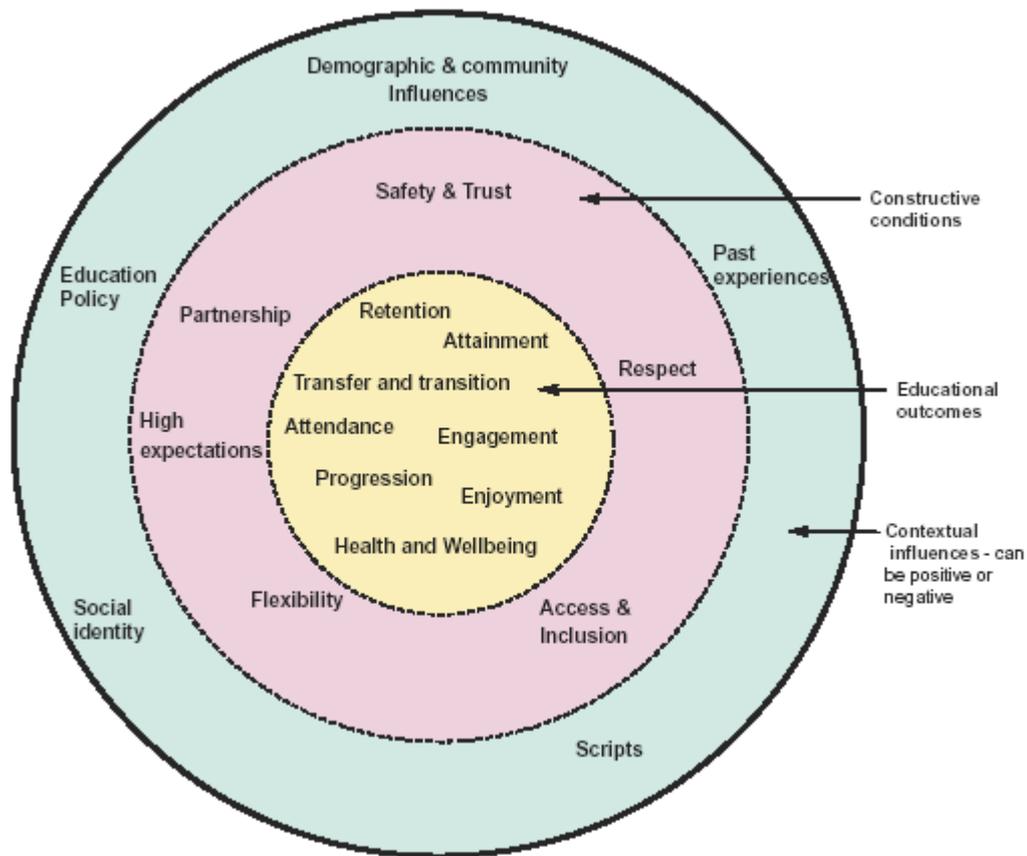


Figure 1: The TARGET model⁷⁸⁰

The TARGET model diagram is an excellent means of demonstrating the complexity of issues associated with measuring educational outcomes for Gypsy/Traveller pupils. According to its creators, the TARGET model is “an evidence-based tool that can be used to help schools and policy makers analyse their current position and identify where effort should be placed to further improve all educational outcomes for Gypsy, Roma and Traveller pupils.”⁷⁸¹ At the core of the diagram are the potential educational outcomes, which include the type of positive “soft” outcomes discussed earlier in this thesis as well as the more formal modes of educational achievement. It seems accurate to suggest that these outcomes are interdependent to at least some degree. In terms of using the model, it

⁷⁸⁰ Anne Wilkin, Chris Derrington, Richard White, Kerry Martin, Brian Foster, Kay Kinder and Simon Rutt (2012) ‘Improving the outcomes for Gypsy, Roma and Traveller pupils: final report’ Department for Education Research Report DFE-RR043 at 81

⁷⁸¹ Ibid 82

is suggested that, “as a first step, schools may find it useful to evaluate strengths and areas for development across the eight outcomes and review and develop success criteria for each.”⁷⁸² By considering all eight of these potential outcomes, schools would be taking the kind of holistic approach to education that has been discussed earlier in this thesis and so would be helping minority pupils to be secure both within their own culture and within the education system.

The next ring of the TARGET model contains six “constructive conditions” (namely: safety and trust; respect; access and inclusion; flexibility; high expectations; and partnership) that can be said to impact positively on each of the eight educational outcomes housed in the core of the model.⁷⁸³ While each of these conditions is clearly important for educational attainment, it is suggested that their cumulative effect is particularly vital for historically marginalised groups such as the Roma and other Gypsy/Travellers. Only when pupils feel secure within their school environment will they be able to thrive and this of course requires the presence of “safety and trust” as well as “respect”. The need for engagement with minority communities can be found within the “partnership” condition while the existence of “access and inclusion” and “flexibility” conditions highlights the need for understanding and special minority accommodation within the education system. Finally, “high expectations” both of the pupils themselves and of the education that they will receive is vital if such minority pupils are to attain educational parity with their peers from the majority population.

Finally, the outer ring of the model “acknowledges the context within which individual schools are working to improve outcomes for Gypsy, Roma and Traveller pupils.”⁷⁸⁴ This ring is particularly interesting since it seems to take into account the extreme variables that each individual school must have to take into account when seeking to improve the educational attainment of both particular pupils

⁷⁸² Ibid

⁷⁸³ The detailed research data that led to these particular constructive conditions being selected can be found in Anne Wilkin, Chris Derrington, Brian Foster, Richard White and Kerry Martin (2009) ‘Improving Educational Outcomes for Gypsy, Roma and Traveller Pupils: What Works?’ Department for Children, Schools and Families Research Report DCSF-RR170

⁷⁸⁴ Anne Wilkin, Chris Derrington, Richard White, Kerry Martin, Brian Foster, Kay Kinder and Simon Rutt (2012) Op Cit 88

and pupils in general. Once schools recognise the existence of these external influences – “demographics and communities; education policy; social identity; scripts; and past experiences” – and the impact that they all have on pupils, then they will be better able to overcome such social obstacles and also capitalise on positive influences. This should go some way to redressing the kind of deep-rooted and possibly even unconscious prejudices that exist both in the Gypsy/Traveller community and in the education establishment. This should lead to the kind of positive outcome identified by Myers and Bhopal whereby close cooperation and understanding can lead to Gypsy/Traveller communities exhibiting “strong and loyal attachments to their local school and its staff.”⁷⁸⁵ Where such attachments occur, Gypsy/Traveller pupils are far more likely to be fully integrated members of the school community and their education is likely to be supported by both their family and community and by the school and wider community. This should in turn lead to the kind of cohesive, multicultural society in which both majority and minority cultures can flourish.

e) Virtual Learning/Home Education

No doubt following on from the Coalition Government’s stated election goal of improving social mobility, in November 2010 the Secretary of State for Communities and Local Government set up a ministerial working party to investigate the inequalities experienced by Gypsy/Travellers. A progress report was published in April 2012 which includes “28 commitments from across government that will help mainstream services work more effectively with the Gypsy/Traveller communities.”⁷⁸⁶ The second of these commitments has the potential to have an extremely positive impact on the education of Gypsy/Traveller children and states that the “Department for Education will establish a Virtual Head Teachers pilot for Gypsy, Roma and Traveller pupils.”⁷⁸⁷ This pilot began in April 2012 with

⁷⁸⁵ Martin Myers and Kalwant Bhopal ‘Gypsy, Roma and Traveller children in schools: Understandings of community and safety’ (2009) 57 *British Journal of Educational Studies* 4, 417 – 434

⁷⁸⁶ Department for Communities and Local Government ‘Progress report by the ministerial working group on tackling inequalities experienced by Gypsies and travellers’ April 2012 available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6287/2124046.pdf> [last accessed 26/02/13]

⁷⁸⁷ *Ibid* 8

each involved Local Authority appointing a senior figure to “champion the interests of Gypsy, Roma and Traveller pupils within the authority and to monitor and respond to issues of low attainment and attendance.”⁷⁸⁸ This Virtual Head Teacher is intended to “provide training and support to schools; work to identify and return to school those Gypsy, Roma and Traveller children who are missing from education; and raise awareness among schools and others about the barriers to success which these children face and how best to overcome them.”⁷⁸⁹ Although still in the early stages, if implemented successfully, this type of advocate/supervisor role could be a very effective means of bridging the gaps in understanding between schools and local authorities and Gypsy/Traveller communities.⁷⁹⁰

f) Pupil Premium

According to the Department for Education, the Government believes that “the Pupil Premium, which is additional to main school funding, is the best way to address the current underlying inequalities between children eligible for free school meals and their wealthier peers by ensuring that funding to tackle disadvantage reaches the pupils who need it most.”⁷⁹¹ So, in theory at least, schools should receive extra funding for every disadvantaged pupil enrolled and this extra funding should provide the additional services and help needed to assist these children in achieving educational parity. However, the efficacy of this system has been questioned with commentators suggesting that “the group most likely to suffer are children from Gypsy, Roma and Traveller communities, who already underperform in all educational measures.”⁷⁹² Effectively, the feeling is that Gypsy/Traveller pupils are, despite their obvious need, more likely than pupils from other needy groups to be precluded from taking advantage of the pupil premium. The reason for this is that in order to qualify for extra funding for their

⁷⁸⁸ Ibid

⁷⁸⁹ Ibid

⁷⁹⁰ For more on the use of ICT to assist Gypsy/Traveller learners see: Ken Marks *Using ICT to Enhance Learning for Mobile Traveller Children* (E-LAMP Project 2010); Ken Marks *Mobile Traveller Children: Steps in Bridging the Digital Divide* (NATT 2006)

⁷⁹¹ Department for Education ‘Pupil Premium – what you need to know’ 26 October 2012 available at <<http://www.education.gov.uk/schools/pupilsupport/premium/b0076063/pp>> [last accessed 26/02/13]

⁷⁹² TES ‘Travellers fall foul of pupil premium rules’ 29 April 2011 available at <<http://www.tes.co.uk/article.aspx?storycode=6079627>> [last accessed 26/02/13]

children's schools, parents must be in receipt of benefits but, according to the TES article, many travelling families are not entitled to or else unlikely to claim such benefits.⁷⁹³ Where schools are not able to claim the extra money provided by the Pupil Premium, they may in effect face real terms funding cuts and so be unable to fund additional support for Gypsy/Traveller pupils. This has led Linda Lewins, vice-president of the National Association of Teachers of Travellers, to call for Gypsy/Travellers to be treated as a separate group who automatically qualify for the Pupil Premium.⁷⁹⁴ However, as of January 2013, this issue has not yet been addressed by the government.

Local Innovations Concerning Gypsy/Traveller Education

It is important to recognise that as well as the national measures discussed above,⁷⁹⁵ there have also been several localised attempts at improving minority accommodation in education. In the same way that the UK is made up of four constituent countries who are each responsible for their own education provision, England is made up of LEAs⁷⁹⁶ who, provided they fulfil the requirements of the national curriculum, are able to introduce their own education initiatives. Some, although certainly not all, of these LEAs have introduced special educational measures targeted specifically at Gypsy and Traveller children. As well as providing actual policy initiatives, LEAs with a large population of Gypsy/Travellers are often at the forefront of studies and data gathering on the subject.⁷⁹⁷

In England, individual LEAs, supported by central government, began setting up Traveller Education Services (hereafter TESs) in the 1970s in response to the findings of the Plowden Report.⁷⁹⁸ As only limited funding was centrally available for this project, not all local authorities in England established

⁷⁹³ Ibid

⁷⁹⁴ Ibid

⁷⁹⁵ That is measures that are centrally sanctioned and so have national applicability even if ultimate uptake is left to the discretion local agencies

⁷⁹⁶ There are currently 150 LEAs in England as per <http://www.dcsf.gov.uk/everychildmatters/?action=authority> [last accessed 26/02/13]

⁷⁹⁷ For example, see: Clare Bingham *Child poverty relating to Gypsy and Traveller children and young people in Sussex* (Friends Families and Travellers 2010)

⁷⁹⁸ See earlier in the chapter for details on the Report itself

TEs, highlighting the importance of both secure funding and a compulsion to institute any measures of accommodation that have been identified as desirable. However, where TEs were established, the system is still in use today and, as of 2013, “there are specialist teams of teachers for Gypsies and Travellers in over 100 LEAs in England.”⁷⁹⁹ Typically “a Traveller Education Team consists of various specialist support staff, such as peripatetic and school-based staff who can work on-site or in school.”⁸⁰⁰ Although TEs do work directly with individual Gypsy/Traveller pupils when needed, their principal role is to advise and assist schools with meeting their responsibilities to such pupils. TEs also support schools by “providing a degree of continuity of education by liaising with other TEs in areas where the children have been previously.”⁸⁰¹ Particularly when coupled with the use of the Green Card system discussed above, TEs provide a valuable means by which to avoid unnecessary interruption in Gypsy Traveller children’s study due to an absence of records and progress reports. Although they are clearly separate entities to both LEAs and particular schools, these TEs highlight a means by which an external agency can be used to facilitate minority accommodation within the mainstream. While special services are provided for Gypsy Traveller pupils, they serve to allow such pupils to access education in the same way and to the same level as their peers from the majority population. Unfortunately, like many special services, TEs are vulnerable to budget cuts. Investigation by Michael Doherty has found that out of 127 local authorities, 24 are planning to abolish their TEs completely while another 34 were planning on cutting staff.⁸⁰² These cuts will clearly have a negative or indeed devastating impact on service provision.

As well as measures targeted particularly at Gypsy Traveller children, interested LEAs have also been able to mould more general education measures so that they might have a specific advantageous impact for Gypsy Travellers and other minorities. The Sure Start scheme, for example, was launched

⁷⁹⁹ Hackney Learning Trust
 <http://www.learningtrust.co.uk/schools/travellers/travellers_education_service.aspx> [last accessed 26/02/13]

⁸⁰⁰ Ibid.

⁸⁰¹ Brian Foster, Cross-Boroughs Co-ordinator for Traveller Education, Camden Language and Support Service
 <<http://www.babcockwf.co.uk/waltham-forest/traveller-education-service>> [last accessed 26/02/13]

⁸⁰² ACERT *Annual Report 2010 – 2011* (June 2012) 14 – 18

in 1998 and aimed at “improving the health and education status of 0-3 year olds by activities targeted at the children and families.”⁸⁰³ Although not targeted specifically at Gypsy and Traveller children, the Sure Start scheme certainly does not exclude them and, indeed, there are a few local programmes that have at least Gypsy/Traveller elements to them. In the West Midlands, for example, all Sure Start projects purposely include Gypsy Travellers,⁸⁰⁴ while there are a number of Sure Start projects in Darlington specifically aimed at Gypsy/Traveller families.⁸⁰⁵

This use of Sure Start helps to highlight the fact that certain LEAs have really embraced the idea of offering particular accommodation for Gypsy Traveller children and have actually gone above and beyond that level of provision more commonly found across the country. For instance, also in the West Midlands, the West Midlands Consortium Education Service for Travelling Children⁸⁰⁶ has suggested that when families return from a period of travel⁸⁰⁷ it would be “useful to have a certificate or other reward system to acknowledge the independent study done through ‘school-based distance learning’.”⁸⁰⁸ This would act as an incentive to encourage children and their families to make continued use of distance learning tools during future times of travel. This recognises the idea that minority cultural practices – such as nomadism – are inherently valuable and that protecting them can serve to benefit the wellbeing and development of individual minority children.

⁸⁰³ See the Sure Start webpage for further details: <<http://www.surestart.gov.uk/home.cfm>> [last accessed 26/02/13] Its Mission Statement reads as follows: ‘The aim of Sure Start is to work with parents and children to promote the physical, intellectual and social development of preschool children – particularly those who are disadvantaged – to ensure that they are ready to flourish when they get to school.’

⁸⁰⁴ Unfortunately, as local news has reported, all of these Sure Start projects have had their funding frozen for four years and so it is likely that they will be unable to continue working as they have done previously: <<http://www.regen.net/news/ByLocation/Scotland/West-Midlands/1036251/Sure-Start-funding-frozen-four-years/>> [last accessed 26/02/13]

⁸⁰⁵ Darlington Borough Council lists its Sure Start projects at: <<http://www.darlington.gov.uk/Environment/Gypsies/Gypsies+and+Travellers.htm>> [last accessed 03/03/13]

⁸⁰⁶ West Midlands Consortium Education Service for Travelling Children <<https://gateway01.lppplus.net/sites/wmc/Pages/Home.aspx>> [last accessed 26/02/13]

⁸⁰⁷ They use the example of having settled quarters during the Winter months

⁸⁰⁸ West Midlands Consortium Education Service for Travelling Children, *Education Arrangements for Gypsy, Roma and Travelling Children* (2008) 1 available online at: <<https://gateway01.lppplus.net/sites/wmc/Documents/Education%20Arrangements%20for%20Gypsy,%20Roma%20Traveller.pdf>> [last accessed 26/02/13]

In addition to the above approach pioneered by West Midlands Consortium Education Services for Travelling Children, although admittedly not specifically targeted towards Gypsies and Travellers, is that suggested by Education Otherwise.⁸⁰⁹ Formed in 1977, Education Otherwise is “an independent organisation offering advice, guidance and support primarily to people who have decided to educate their children at home.”⁸¹⁰ This once again highlights the importance of different agencies, both governmentally sanctioned and otherwise, working together in order to provide the best means of accommodation possible. The name Education Otherwise comes from Section 36 of the 1944 Education Act which states that:

“Parents are obliged to ensure that their child receives efficient full-time education suitable to the child’s age, aptitude, or any special education needs he or she may have, while of compulsory school age ... either by regular attendance at school or otherwise.”⁸¹¹

Education Otherwise can be provided at the discretion of LEAs to parents who choose not to send their children to mainstream school. Although not targeted specifically at Gypsy Travellers, it is applicable to them if both parents and the LEA are amenable. Some local authorities offer Education Otherwise as “an alternative if parents choose not to send their children to secondary school.”⁸¹² Alternatively, authorities such as the Wrexham Traveller Education Service have used Education Otherwise as “a type of bridging option to keep lines of communication open until the children reach the age of fourteen when they can opt for a college course.”⁸¹³ Although not specifically targeted at Gypsy and Traveller children, it is worth noting that the same general approach could have implications for Gypsy/Traveller education. For example, “Friends Families and Travellers in its

⁸⁰⁹ Education Otherwise <<http://www.education-otherwise.org/>> [last accessed 26/02/13]

⁸¹⁰ Save the Children, *Denied a Future? The Right to Education of Roma/Gypsy & Traveller Children in Europe, Volume 2 Western & Central Europe* (Save the Children 2002) 267

⁸¹¹ As quoted in Donald Kenrick and Colin Clark, *Moving On: The Gypsies and Travellers of Britain* (University of Hertfordshire Press 1999) 127

⁸¹² Kent County Council for example, offer such Education Otherwise: <http://www.kent.gov.uk/education_and_learning/school_attendance__behaviour/absence_from_school/gypsy,_roma__travellers.aspx> [last accessed 03/03/13]

⁸¹³ Wrexham Traveller Education Service *Gateway to Success: Secondary School Attendance by Traveller Children* (1998) 21

submission to the National Union of Teachers recommended that, given the problems which beset the educational establishment in meeting Gypsy/Traveller children's needs, extra resources need to be given to help parents 'educate otherwise'.⁸¹⁴

There are clearly many LEAs and other local organisations which take particular interest in the wellbeing of those Gypsies and Travellers who live or stay within the local area. The initiatives described above are just a few of the numerous projects and schemes that were used or are still in existence and all serve to highlight the important role that the local authorities and community play in integrating all minority groups. Additionally, it seems that the British government is supportive of innovation on the part of LEAs while still instituting policies and measures with national effect. The innovations highlighted above can all be seen as means by which to involve Gypsy Traveller pupils in mainstream education – either by easing them into the system, adapting principles of monitoring attendance and achievement, or providing additional support for the pupils once they are in full-time mainstream education – and so provide models of good practice that the four European countries under particular consideration in this thesis may look to implement. However, as the above discussion intimated, the provision of education to Gypsy Traveller pupils in England is certainly not perfect. Fortunately, the flaws in a particular system can prove just as insightful as examples of good practice for outside observers seeking to determine whether that particular system could be of benefit to them.

Flaws in the English Approach

The clearest flaw that can be seen in the English approach to the accommodation of Gypsy Traveller pupils is that, despite central backing in some cases, the majority of the special provisions and measures are of an ad hoc nature. Take for example the development of targeted initiatives following

⁸¹⁴ Text available online at: <<http://www.gypsy-traveller.org/your-family/young-people/educational-reports-and-resources/>> [last accessed 26/02/13]

the publication of the Plowden Report.⁸¹⁵ It is clear that countries wishing to implement a mainstreaming approach like that used in England must take steps to both formalise the existence of targeted initiatives so that they have national application and place funding on a statutory (or equivalent) level so it cannot be easily avoided during times of relative financial hardship.

The other major flaw in the English model has arguably been a failure to be consistent when it comes to the general treatment of Gypsy Travellers. For this reason, the government desire to better accommodate Gypsy Traveller pupils within the education system has actually been undermined by other government policies which have a negative impact, whether direct or indirect, on Gypsy Travellers. The most obvious example of this can be seen in the effects of the Criminal Justice and Public Order Act 1994 (hereafter CJPOA).⁸¹⁶ The CJPOA signified a major shift in policy towards site provision for Gypsy and Travellers and introduced new powers to remove and criminalise unauthorised sites.⁸¹⁷ The duty previously placed on local authorities to provide suitable accommodation of Gypsy Travellers was also removed.⁸¹⁸ The CJPOA therefore resulted in many Gypsy Traveller families having great difficulty in securing legal accommodation and this of course had an adverse knock-on effect on the children's ability to access education. In the 1996 OFSTED Report, it was noted that "for many Gypsy and New Travellers, the situation [of education] has been exacerbated by involuntary movement in consequence of evictions from unauthorised land."⁸¹⁹ It is not just the lack of official sites which is a problem for Gypsy Travellers, they also have to contend with the likelihood of forced eviction when they camp in an unofficial location. The trauma of forced eviction is likely to have a particularly damaging impact on particularly vulnerable groups such as children. Attempts have in fact been made to highlight the negative impacts of eviction. For example,

⁸¹⁵ Helen O'Nions, *Minority Rights Protection in International Law: The Roma of Europe* (Ashgate Publishing 2007) 143

⁸¹⁶ Derek Hawes and Barbara Peres, *The Gypsy and the State: The Ethnic Cleansing of British Society* (School of Advanced Urban Studies, University of Bristol 1996) 83 - 85

⁸¹⁷ Part V s(77) – (80)

⁸¹⁸ It is important to note that 'local authorities retained their discretionary powers to provide sites if they wished to do so'. This resulted, however, in inconsistent provision of sites across England and Wales. DETR, *Managing Unauthorised Camping – A Good Practice Guide* (London 1998)

⁸¹⁹ OFSTED, *The Education of Travelling Children: A Survey of the Educational Provision for Travelling Children* (HM Stationary Office 1996) 20

Justice Sedley made it clear that “local authorities must consider welfare issues when deciding whether to proceed with eviction whatever the powers being used.”⁸²⁰ This dichotomy still exists, as a report ACERT report has noted the likelihood, following the events at Dale Farm,⁸²¹ “whose eviction is being subsidised by £18 million of public money, other local authorities will be acting tough against the 3,100 unauthorised caravans [and] will also decline to renew the 900 temporary permissions whenever they expire.”⁸²²

It is therefore submitted that any country wishing to accommodate minority pupils within the mainstream education system in the same way as that attempted in England must be certain that national policies relating to such groups are consistent. It is counterproductive to introduce measures designed to better accommodate Gypsy Traveller children in mainstream schools while at the same time enacting laws such as the CJPOA which serve to disrupt the lives of Gypsy Travellers and hamper their access to social services such as schools.

Ultimately then, there seem to be two major flaws within the English model of Gypsy Traveller accommodation in education which must be remedied or avoided by states wishing to use the English model as a basis for improving their own level of minority accommodation. Fortunately, neither of the above mentioned flaws are critical to the ideal of achieving minority accommodation within the mainstream education system and so, once sufficiently adapted, the English model could be a valuable means by which to better guarantee the right to education of Roma children. However, as mentioned above, the education system in England can be seen to be a constantly evolving system and so it is

⁸²⁰ R v Lincolnshire County Council ex p Atkinson; R v Wealdon District Council ex p Wales and Stratford [1995] 8 Admin LR 529

⁸²¹ European Roma Rights Centre ‘Dale Farm Evictions’ 01/02/06 <<http://www.errc.org/article/dale-farm-evictions/2508>> [last accessed 03/03/13]; Amnesty ‘Dale Farm Evictions’ 20/10/11 <<http://action.amnesty.org.uk/ea-action/action?ea.client.id=1194&ea.campaign.id=11724>> [last accessed 03/03/13]; Alexandra Topping ‘Dale Farm Travellers face eviction again’ *The Guardian* 19/12/12 <<http://www.guardian.co.uk/uk/2012/dec/19/dale-farm-travellers-face-eviction-again>> [last accessed 03/03/13]; Traveller Solidarity Network ‘Fight for Sites’ 24/10/12 <<http://travellersolidarity.org/>> [last accessed 03/03/13].

⁸²² ACERT *Annual Report 2010-2011* (June 2012) 4

important to acknowledge new/current innovations concerning the education of Gypsy/Traveller children.

Conclusion

It is important for the four countries to note that a recent Roma Education Fund study in England has demonstrated that “the average attainment of Roma pupils (ages 9 – 15) in numeracy, literacy and science reported ... was just below average.”⁸²³ When it is considered that 85% of respondents to the study has previously been placed in special/segregated schools in the Czech Republic or Slovakia⁸²⁴ it becomes clear that the children’s capabilities had been woefully underestimated in their countries of origin. All of these children were attending mainstream schools in England and the fact that their overall results were only slightly below average clearly indicates that they did not need to attend special schools for those with learning difficulties.⁸²⁵ Further, the Roma Education Fund also found that 90% of recently arrived Roma pupils received English language support in addition to their mainstream schooling.⁸²⁶ This is a useful demonstration of minority accommodation within the mainstream and the academic results mentioned above seem to indicate that such accommodation has been very useful in helping Roma pupils settle into school and work towards reaching their academic potential.

However, even in a country with as advanced an education system as that found in England, Gypsy and Traveller children are still being disadvantaged and, effectively, left behind. In the course of discussing the general policy context of education in the United Kingdom, this case study has

⁸²³ Roma Education Fund *From Segregation to Inclusion: Roma Pupils in the United Kingdom A Pilot Research Project* (REF/Equality 2011) 8

⁸²⁴ *Ibid* 9

⁸²⁵ Given that these children had in fact moved to the UK from Czech Republic or Slovakia, the change in environment may have actually played a part in their results being slightly lower than average as well as a need to ‘catch up’ with their age group due to having previously received only limited schooling.

⁸²⁶ Roma Education Fund *From Segregation to Inclusion: Roma Pupils in the United Kingdom A Pilot Research Project* (REF/Equality 2011) 10 NB: so did their recently arrived peers from other countries where English was not the first language.

demonstrated that the manner in which the right to education is conceptualised in the UK is a weakness that needs to be addressed by any country seeking to learn from its example. It has been noted that the education system in England, as in other European countries, is highly politicised and that the curriculum is subject to a huge amount of lobbying and change due to the ‘swinging pendulum’⁸²⁷ of political and, indeed, public support and interest. This variation in interest has, of course, had an effect on the nature, direction and, importantly, funding of Gypsy/Traveller education schemes and projects. It has also been noted that in England there is an obvious and troubling correlation between site provision and access to, and achievement in, education.

Many of the schemes and projects discussed show high levels of commitment and dedication on the part of a number of governmental and voluntary organisations to improve educational provision for Gypsy and Traveller children. It is clear that “examples of good practice can be found in terms of educational practice that is inclusive, responsive, relevant, developmentally appropriate and participatory.”⁸²⁸ While the European countries under particular consideration here could therefore adopt the English example of good practice if they wish to implement a mainstreaming approach to minority accommodation, it must also be noted that such countries would have the additional benefit of being able to observe the current flaws in the English model and so see how best to avoid them. The type of mainstreaming approach that has developed in England could, provided certain limitations to the current model are tackled, prove a hugely valuable means with which to combat the educational disadvantage being experienced by Roma children in contemporary Europe.

4.5 Case Study Two – Indigenous Education in Canada

Introduction

⁸²⁷ Save the Children, *Denied a Future? The Right to Education of Roma/Gypsy & Traveller Children in Europe Volume 2: Western & Central Europe* (Save the Children 2002) 277

⁸²⁸ Ibid

The previous case study concerned accommodation within the mainstream education system but that is just one means by which minorities can be accommodated. As previous chapters have discussed, there is in fact a sliding scale of minority accommodation, at the extreme end of which is ‘separate but equal’ education. Such education involves minorities moving outside of the mainstream stream through choice rather than coercion and their receiving education of the same level and standard as their mainstream peers. The major difference would be that education could be provided in a culturally sensitive environment through a means better suited (whether mother tongue teaching or altered course materials etc) to minority learning. As such, it should in theory be very different from the kind of segregated education that Roma children have previously been subject to. However, any kind of separation is controversial since it could arguably serve to entrench isolation and perpetuate differences between communities, and so it needs to be thoroughly examined before its viability for Roma education can be assessed.

‘Separate but equal’ education is not without precedent in the Roma community. The Gandhi School⁸²⁹ in Pecs, Hungary was opened in 1994 with the central goal of “qualitative learning and educating [a] Roma elite who can complete and are qualified to enter the labour market and university.”⁸³⁰ The Gandhi School seeks to educate pupils to the same academic standards as those in mainstream schools but also teaches Roma language and culture as well as various social issues. According to Renata Dezso, by 2009⁸³¹ the Gandhi School had graduated 446 pupils.⁸³² While the interviews with graduating students conducted by Janus Munk et al seem to reflect satisfaction with the schooling they received,⁸³³ there has been concern from commentators about the isolating affect

⁸²⁹ Official website: < <http://gandhi.dravanet.hu/index.php> > [last accessed 02/03/13]

⁸³⁰ Janus Munk, Line Bahner, Lisa Calleseb & Rebekah Prole *Roma Identity Under Construction: At Gandhi Minority School in Hungary* (Roskilde University 2006) 19 available at <<http://rudar.ruc.dk/bitstream/1800/1959/2/project%20-%20Roma%20minority%20school%20-%20project%20body.pdf>> [last accessed 02/03/13]

⁸³¹ So fifteen years after it started accepting pupils

⁸³² That being the number of pupils who were awarded leaving certificates. The number of pupils who left the school without sufficient qualification to graduate is unknown. Renata Anna Dezso ‘Minority Nationality Education: A True Marker of Democracy’ (2009) DRC Summer School Proceedings 103 – 126, 108

⁸³³ Janus Munk, Line Bahner, Lisa Calleseb & Rebekah Prole Op Cit 23 - 64

that attending the Gandhi School has had.⁸³⁴ While clearly a hugely worthwhile initiative, the results of which will certainly be interesting in the coming years, the Gandhi School is an isolated project that only involves a small number of Roma students. In order to make an accurate and thorough examination of ‘separate but equal’ education provision, it was therefore decided that the Gandhi School would be an inappropriate topic for a case study.

This second case study then is substantively different from the previous one in that it does not directly concern either the Roma or Europe. However, as this thesis has suggested and the available statistical data seems to attest, Roma children in Europe are continuing to suffer dramatic educational disadvantage and those initiatives which have been introduced have had limited success. If an answer to the problem cannot be found within Europe itself, then logically one must search further afield and consider more radical approaches. In the same way that the Roma have suffered historical and continuing disadvantage and discrimination in Europe, the First Nations in Canada have suffered similarly. Importantly though, since the latter part of the 20th century there has been a marked change in attitude among both the government and people of Canada towards the treatment⁸³⁵ that the First Nations should be entitled to receive and recent policy has reflected this change. The First Nations have taken concrete steps to work together as a people and to push for achieving the right to self-government⁸³⁶ in order for them to be able to secure cultural integrity in the provision of education for First Nations students. The First Nations have also been the subject of targeted measures and educational devolution of a similar nature to the type of measures that could potentially improve the situation of Roma children in Europe. This case study of Canada therefore provides vital insight into the successes and failures of such measures and into possible ways in which the Canadian model could potentially be followed within Europe. However, a substantial part of this case study will be

⁸³⁴ Barry van Driel ‘The Gandhi Secondary School: An experiment in Roma education’ (1999) 10(2) *European Journal of Intercultural Studies* 173 – 182; Susan Katz ‘Emerging from the cocoon of Romani Pride: The first graduates of the Gandhi Secondary School in Hungary’ (2005) 16(3) *Intercultural Education* 247 – 261; Tracy Smith ‘Recognising Difference: The Romani “Gypsy” Child Socialisation and Education Process’ (1997) 18(2) *British Journal of Sociology of Education* 243 – 257

⁸³⁵ Both educational and otherwise.

⁸³⁶ And have achieved the interim measure of self-administration

dedicated to a more radical approach: a ‘separate but equal’ on-reserve education system, currently being explored in British Columbia. This practice of ‘separate but equal’⁸³⁷ education is very different from the segregated education system seen in many European countries and could well provide the kind of advanced cultural sensitivity which would assist Roma students while at the same time ensuring that they have access to the same quality of education as their mainstream counterparts.

First, a note on terminology: First Nations is the term of ethnicity that refers to “the Aboriginal peoples in Canada who are neither Métis nor Inuit.”⁸³⁸ Although they are grouped together under the title First Nations, there is no single First Nations entity.⁸³⁹ There are currently “over 630⁸⁴⁰ recognised First Nations governments or bands spread out across Canada, roughly half of which are in the provinces of Ontario and British Columbia.”⁸⁴¹ In this way the First Nations are similar to the Roma in that there are, in reality, numerous subgroups of people who are grouped together under one banner by the majority populations. The total First Nations population is said to be nearly 700,000 people⁸⁴² which, although less than the number of Roma living in Europe, is still significant.⁸⁴³ Interestingly, although the First Nations are classed as being a group who require special measures of legal protection, they are not technically termed a ‘visible minority’. Under the Employment Equality Act⁸⁴⁴ First Nations are “a ‘designated group’ along with women, visible minorities and people with

⁸³⁷ Whereby First Nations children are educated on-reserve in non-mainstream schools that are considered more culturally sensitive whilst still being required to adhere to national educational standards.

⁸³⁸ The Canadian Constitution recognises that three distinct indigenous groups live within Canada and all three are constitutionally protected. The Metis are aboriginal people who can trace their decent to mixed European and First Nations heritage. The Inuit are a culturally similar group of indigenous peoples inhabiting the Arctic regions of Canada. Canada’s System of Justice: Rights and Freedoms in Canada available at: <<http://www.justice.gc.ca/eng/dept-min/pub/just/06.html>> [last accessed 26/02/13]

⁸³⁹ Although it must be acknowledged that the First Nations are politically organized in a way that the Roma are not and so do join together under the auspices of the Assembly of First Nations.

⁸⁴⁰ Per the Assembly of the First Nations <<http://www.afn.ca/index.php/en/about-afn/description-of-the-afn>> [last accessed 26/02/13]

⁸⁴¹ Ibid.

⁸⁴² According to Census data the actual First Nations population is 698,025 people. Statistics available from the Human Resources and Skills Development Canada website at <<http://www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=36>> [last accessed 26/02/13]

⁸⁴³ See Chapter One of this thesis for a discussion about Roma population figures and about the various communities who collectively constitute the ‘Roma’

⁸⁴⁴ 1995 C-44

physical or mental disabilities.”⁸⁴⁵ This could well be due to the fact that in several areas of Canada the First Nations are actually numerically the majority group as well as a reflection of the fact that they were the original inhabitants of Canada and so politically should not be classed as a minority in their own land. In both of those ways, the First Nations, as well as being in a legally different position,⁸⁴⁶ are in a factually different position to the Roma of Europe despite sharing similar disadvantage. Therefore, although measures concerned with indigenous education can be usefully illustrative of measures that may be used to alleviate the educational disadvantage suffered by Roma children in Europe, it must always be borne in mind that there are these significant political and practical differences between the two peoples which would necessarily impact on decisions as to the transferability of such educational measures.

Turning now to consider First Nations children in particular, according to the 2006 Canadian Census, 40% of the First Nations population was 18-years-old or younger, compared with 24% for the population as a whole,⁸⁴⁷ with about one-third of all First Nations people living on-reserve.⁸⁴⁸ While they may live on-reserve, First Nations people do not, and indeed cannot, live completely separate from mainstream Canadian society. As the “Canadian population ages and the baby-boomer generation retires, [First Nations] people will be needed to fill emerging labour market shortages – particularly in occupations requiring post-secondary education because this is where employment growth is anticipated to be the most significant.”⁸⁴⁹ Unfortunately, however, First Nations children have suffered educational disadvantage that makes it unlikely that they will be able to fill such a void,

⁸⁴⁵ S3

⁸⁴⁶ As they are constitutionally protected under s35 of the Canadian Constitution.

⁸⁴⁷ Statistics Canada, *2006 Census of Population*, available at <www.statcan.ca/start.html> [last accessed 24/02/13]. Although the 2011 Census has now taken place, only limited statistical data (overall population growth, population centres, etc) has currently been released and so the figures from 2006 still offer the most up-to-date statistics on the First Nations population. As such, the 2006 figures have been retained throughout this case study.

⁸⁴⁸ Statistics Canada, *Projections of the Aboriginal populations, Canada, provinces and territories 2001 to 2017* (Ottawa: Industry Canada, Catalogue no. 91-547-XIE, 2005) from Maytree, ‘Poor Educational Outcomes for Aboriginal Students Threaten Canada’s Prosperity’ *Policy in Focus*, Issue 5 Sept 2008 at <http://maytree.com/PDF_Files/MaytreePolicyInFocusIssue5.pdf> [last accessed 26/02/13]

⁸⁴⁹ Mario Lapointe and others, *Looking-Ahead: A 10-Year Outlook for the Canadian Labour Market (2006-2015)* (Ottawa: Human Resources and Social Development Canada, October 2006) from Maytree, ‘Poor Educational Outcomes for Aboriginal Students Threaten Canada’s Prosperity’ *Policy in Focus*, Issue 5 Sept 2008 at <http://maytree.com/PDF_Files/MaytreePolicyInFocusIssue5.pdf> [last accessed 26/02/13]

not in the short term at least.⁸⁵⁰ Similarly, such disadvantage makes it unlikely that the children will be easily able to improve their general position within society. While education is not an instant remedy for issues of poverty and inequality, First Nations people with postsecondary education can expect to experience similar economic outcomes to those of European Canadians. For example, in Western Canada, “postsecondary educated Aboriginal people living off-reserve had an unemployment rate of 6.9% compared with 3.9% for non-Aboriginal people.”⁸⁵¹ In comparison, the “overall unemployment rate was 4.4% for non-Aboriginal people aged 25 to 64 and 11.5% for Aboriginal people.”⁸⁵²

Historical Background

Before moving on to evaluate the current educational situation of First Nations children in Canada and to see what lessons, if any, can be taken from the Canadian education model and applied to the situation of the Roma in Europe, the historical background of First Nations education must be established in order to determine what has influenced and shaped the current approach.⁸⁵³

Mainstream European Canadian society had, from the late 18th century, adopted an assimilationist stance towards the First Nations and education was one of the main tools used to coerce them into abandoning their culture and language.⁸⁵⁴ Founded in the 19th century, the Canadian Indian residential

⁸⁵⁰ Unable in the sense that they are likely to lack the formal examinations that are considered vital in mainstream Canadian society but, as will be discussed later in this case study, are not considered to be so important by the First Nations people themselves. For more on the cost to Canadian society of allowing First Nations children to slip through the education gap see: W. Craig Riddell “The Social Benefits of Education: New Evidence on an Old Question” in Frank Iacobucci & Carolyn Tuohy (eds) *Taking Public Universities Seriously* (University of Toronto Press 2005); Barbara Wolfe & Robert Haveman “Accounting for the Social and Non-Market Benefits of Education” in J.F. Helliwell (ed) *The Contribution of Human and Social Capital to Sustained Economic Growth and Well-Being: International Symposium Report* (Ottawa: OECD 2001)

⁸⁵¹ Maytree Op Cit 6

⁸⁵² Statistics Canada, “Labour Force Survey: Western Canada’s off-reserve Aboriginal population.” *The Daily*, June 13, 2005 <<http://www.statcan.gc.ca/daily-quotidien/050613/dq050613a-eng.htm>> [last accessed 26/02/13]

⁸⁵³ For a more detailed examination of the history of First Nations education in Canada see: Senate Canada *Reforming First Nations Education: From Crisis to Hope* (Report of the Standing Senate Committee on Aboriginal Peoples 2011) 4 – 9

⁸⁵⁴ For a useful and informative overview of the history of Canada and of the interactions between ‘new’ Canadians and the First Nations, see: Robert Bothwell, *A Penguin History of Canada* (Penguin 2008)

school system carried the assimilationist approach to disturbing lengths by deliberately separating First Nations children from their families with the purpose of “killing the Indian in the child.”⁸⁵⁵ Funded under the Indian Act 1876⁸⁵⁶ by Indian and Northern Affairs Canada, a branch of the Federal government, the schools were run by religious organisations.⁸⁵⁷ This institutional attempt to force assimilation involved punishing children for speaking their own languages or practicing their own faiths, leading to allegations against the Federal government in the 20th century of cultural genocide and ethnocide. There was also widespread abuse at the residential schools. Overcrowding, poor sanitation and a lack of medical care led to high rates of tuberculosis and death rates among the children of up to 69%.⁸⁵⁸

Details of the mistreatment suffered by First Nations children at the hands of their supposed educators have been published numerous times throughout the 20th century⁸⁵⁹ but, “following the closure of the residential schools in the 1960s, the work of indigenous activists and historians led to a change in public perception of the residential school system, as well as official government apologies and a controversial legal settlement.”⁸⁶⁰ Ultimately, up to this point in history, the attempts at assimilating First Nations students into mainstream North American culture only succeeded in severely damaging the indigenous children’s sense of cultural identity and security.⁸⁶¹ According to Patrick Brady, “people who left the reservations fared no better.”⁸⁶²

⁸⁵⁵ Canada apologizes for ‘killing the Indian in the child’, *Americas News*, June 11 2008.

⁸⁵⁶ Indian Act I-5. The full text of the Act is available at: <<http://laws.justice.gc.ca/eng/I-5/FullText.html>> [last accessed 26/02/13]

⁸⁵⁷ About 60% by Roman Catholics and 30% by the Anglican Church of Canada and the United Church of Canada, along with its pre-1925 predecessors, Presbyterian, Congregationalist and Methodist churches.

⁸⁵⁸ For an overview as well as facts and figures about the Residential Schools system see: <<http://www.cbc.ca/news/canada/story/2008/05/16/f-faqs-residential-schools.html>> [last accessed 26/02/13]

⁸⁵⁹ See for example *A Lost History: Canada’s Residential Schools* and the accompanying video clips available at <<http://archives.cbc.ca/society/education/topics/692/>> [last accessed 26/02/13]

⁸⁶⁰ <<http://www.cbc.ca/news/canada/story/2008/05/16/f-faqs-residential-schools.html>> [last accessed 26/02/13]

⁸⁶¹ Jean Barman, Yvonne Hebert and Don McCaskell, *Indian education in Canada. Vol. 1: The legacy* (University of British Columbia Press 1986) in Glen S Aikenhead, ‘Towards a First Nations Cross-Cultural Science and Technology Curriculum’ (1996) *Journal of Culture and Comparative Studies* 218

⁸⁶² Patrick Brady, ‘Two policy approaches to Native education: Can reform be legislated?’ (1995) 20 *Canadian Journal of Education* 349, 361

The closing of the residential schools did however mark the beginning of a change in attitude by the Canadian government and a recognition that the First Nations themselves should play a role in determining the education that their children should receive. As early as 1972 the First Nations and the Federal Government put forward a statement of values about indigenous learning in the Indian Control of Education agreement.⁸⁶³ However, this agreement was not followed through in a thorough or substantial way and so there was a lengthy period during which little practical progress was achieved. Due to this and despite the fact that “during the past 30 years there have been concerted though isolated efforts to renew First Nations culture and to gain control and equity in educational opportunities,”⁸⁶⁴ there is a widely held belief amongst First Nations people that their educational plight was being generally overlooked by mainstream Canadian society. Indeed, it has been remarked that:

“Repeated attempts have been made to inform Canada, through numerous studies, audits and evolutions, that the status quo of First Nations learning systems is inadequate. Despite this evidence, success in achieving the identified objectives of First Nations education [has] consistently been stymied by Canada’s unilateral failure to adequately fund and support First Nations education in a sustainable and meaningful manner.”⁸⁶⁵

Even though attitudes towards First Nations education both amongst the First Nations themselves and mainstream Canadians have changed, actual practical progress has clearly lagged behind. This lack of progress could perhaps be explained in part by the jurisdictional difficulties which exist in relation to First Nations education. While the Federal Government has responsibility for First Nations issues,⁸⁶⁶ the various Provincial Governments have responsibility for providing education for their residents.

⁸⁶³ <<http://www.ainc-inac.gc.ca/ai/mr/nr/m-a2006/02773bk-eng.asp>> [last accessed 26/02/13]

⁸⁶⁴ Marie Battiste and Jean Barman (eds), *First Nations Education in Canada: The Circle Unfolds* (University of British Columbia Press 1995) in Glen S Aikenhead, ‘Towards a First Nations Cross-Cultural Science and Technology Curriculum’ (1996) *Journal of Culture and Comparative Studies* 218

⁸⁶⁵ National Chief Atleo, Assembly of First Nations, Press Release 13 July 2010, quoted from: <<http://www.vancouverobserver.com/blogs/schoolview/2010/07/31/report-calls-first-nations-control-first-nations-education>> [last accessed 26/02/13]

⁸⁶⁶ Including, importantly, funding.

This dichotomy results in an understandable controversy over who should pay for special educational measures targeted at First Nations people. It is thus no wonder that the First Nations continue to be greatly dissatisfied with the education made available to them.

The historical educational disadvantage and discrimination suffered by First Nations children is very similar to the historical experiences of Roma children. In a clear difference from the current, disorganised stance of the Roma, however, this historical disadvantage and dissatisfaction with education has spurred on the First Nations to seek jurisdiction over education and the creation of a ‘separate but equal’ education system of the type that this thesis contends to be the most radical of minority accommodation in education.

The Desire for Educational Separation

In July of 2010 the Assembly of First Nations⁸⁶⁷ published a report entitled *First Nations Control of First Nations Education 2010* which was designed to be a blueprint for educational change. National Chief Atleo described the report as “an important confirmation of the clear priority every First Nation places on education. We are all agreed on the way forward and the imperative of supporting all First Nations learners and improving education for our children.”⁸⁶⁸ The central motivation behind the report comes from an acknowledgement that, in the past at least, education had been used as a weapon against the First Nations but that the community as a whole is now in a position where it can unlock the potential of education and use it as a tool to aid First Nations people and communities.⁸⁶⁹ In his statement about the report, National Chief Atleo continues that “rather than relying on external reports, it’s time that our people lead the way. We compel and encourage Canada to work with us, as they committed, hand-in-hand to strengthen and reform First Nations education.”⁸⁷⁰ This is a very clear statement of the First Nations desire to take back control over education and work, admittedly

⁸⁶⁷ <www.afn.ca> [last accessed 26/02/13]

⁸⁶⁸ National Chief Atleo Op Cit

⁸⁶⁹ Ibid

⁸⁷⁰ Ibid

with the assistance of the majority Canadian population, towards reforming the education system in a way which will better protect the interests of First Nations learners.

As previously discussed, there is a clear historical basis to the belief that First Nations has been dealt a hugely unequal educational hand. It is not only the First Nations themselves who have seen the need for First Nations control over education. Interestingly, the American Association for the Advancement of Science has claimed that “the prime obstacle to First Nations peoples’ participation in science was science’s lack of relevance to their everyday lives and to their cultural survival.”⁸⁷¹ It is clearly beneficial to the First Nations campaign for jurisdiction over education that such an organisation has recognised the importance of culturally relevant education. This belief is echoed by Albert Medvitz’s observation that “science learned in school is learned as science in school, not as science on the farm or in the health clinic or garage”⁸⁷² and suggests a recognition of the fact that certain cultures⁸⁷³ value subjects such as science for their practical implications rather than from a belief in the inherent worth of academic investigation. All of these observations serve to highlight the point that an education system which exists in isolation from a student’s community and culture will never be able to adequately meet their needs. The desire for First Nations jurisdiction over education can therefore be seen as a desire to provide the best and most appropriate education for First Nations students, effectively education that has relevance to their lives and to their communities.

This desire for First Nations control over First Nations education can be seen as a desire for a ‘separate but equal and different’ education system since it is clear that the Assembly of First Nations were envisaging an education system that was adaptable and culturally sensitive but that also

⁸⁷¹ AAAS, *Native Americans in science* (American Association for the Advancement of Science 1977) from Glen S Aikenhead, ‘Towards a First Nations Cross-Cultural Science and Technology’ (1996) *Curriculum Journal of Culture and Comparative Studies* 227

⁸⁷² Albert G Medvitz, *Problems in the application of science education to national development* (1985) Paper presented at the Institute of Development Studies, University of Nairobi, Kenya 15 in Glen S Aikenhead, *Ibid* 227

⁸⁷³ While Medvitz was specifically considering the approach of African tribes, the same belief is held by First Nations peoples and, indeed, also the Roma.

equipped First Nations students to stand on an equal footing with their counterparts educated in the mainstream. As National Chief Atleo remarked:

“First Nations have taken steps to improve the education outcomes of their children, but clearly much more needs to be done. Our students suffer unfair inequities in funding and lack access to critical support services which creates barriers to success. We must address these head on in order that our children can be supported to achieve comparable outcomes to other students in Canada.”⁸⁷⁴

This is a very important point and one that is directly relevant to decisions about applying the Canadian model to the education of Roma children in Europe. Designing a culturally sensitive education system that recognises the particular difficulties faced by minority children and supports them in an appropriate way is an important step towards educational equality, but it is not the end of the story. If minority children are to be able to succeed both for themselves and for their communities then they must also be educated to a standard that is comparable to that of the majority population.

Towards this end of ensuring educational parity with the majority population, it has been acknowledged that the First Nations will still make use of certain Western teaching methods and subject content. It has been suggested that the First Nations should use the Western education system as “a repository to be raided for what it can contribute to the achievement of practical ends.”⁸⁷⁵ It is important to always remember that this idea of “practical ends” should be taken to mean things which are deemed to be practical by the First Nations themselves, so: finding useful employment and/or pursuing a career, making informed life decisions, economic development of the community as a whole, environmental responsibility, cultural survival etc. Madeleine MacIvor’s approach to this issue

⁸⁷⁴ Assembly of First Nations, Press Release 13 July 2010, quoted from: <<http://www.vancouverobserver.com/blogs/schoolview/2010/07/31/report-calls-first-nations-control-first-nations-education>> [last accessed 26/02/13]

⁸⁷⁵ David Layton, Edgar Jenkins, Sally Macgill and Angela Davey *Inarticulate Science?* (Studies in Education 1993) 135

integrates “selected science and technology content into an Aboriginal worldview and requires coordination with economic, social, and resource developments to ensure that students can apply their new skills within their local communities.”⁸⁷⁶ The best method of achieving such a goal would be a hybrid syllabus which incorporates both First Nations and Western ideas but that is taught by teachers familiar with First Nations customs and attitudes. Teachers will “help [First Nations] students feel that the school program is a natural part of their lives and help them move more smoothly back and forth between one culture and the other.”⁸⁷⁷

At the beginning of his investigation into how indigenous knowledge can be incorporated into the Western canon, Richard Simonelli relates an intriguing Aboriginal⁸⁷⁸ prophecy about how the four peoples of the earth were each tasked with learning different bodies of knowledge: “the red people will be keepers of the earth; the black people will know water wisdom; the yellow people will be keepers of air knowledge; and the white people will know the ways of fire. The prophecy states that on the initiative of the white people, the four peoples of the earth will one day combine their knowledge into an integrated whole.”⁸⁷⁹ This prophecy illustrates an additional important consequence of educational change: It is not just the First Nations themselves who will benefit from First Nation control over their own education system. The majority population can learn from First Nations experience in the same way that the First Nations can learn from subjects taught on a Western style syllabus. It would therefore be detrimental to all if First Nations culture was subsumed within that of the Canadian majority. Aikenhead also highlights the idea that the majority “can learn something about our own knowledge system by comparing it with alternative systems. Western students could develop insights into the nature of Western science by comparing and contrasting it

⁸⁷⁶ Madeleine MacIvor, ‘Redefining science education for Aboriginal students’ (1995) in Marie Battiste and Jean Barman (eds), *First Nations education in Canada: The circle unfolds* (University of British Columbia Press 1995) 73, 77

⁸⁷⁷ Robert Leavitt, ‘Language and cultural content in Native education’ (1995) in Marie Battiste and Jean Barman (eds), *Ibid* 134

⁸⁷⁸ Original authors term

⁸⁷⁹ Richard Simonelli, ‘Sustainable science: A look at science through historic eyes and through the eyes of indigenous peoples’ (1994) 14 *Bulletin of Science, Technology and Society* 1–12 available at: <http://www.eric.ed.gov/ERICWebPortal/search/detailmini.jsp?_nfpb=true&_ERICExtSearch_SearchValue_0=EJ510730&ERICExtSearch_SearchType_0=no&accno=EJ510730> [last accessed 26/02/13]

with Aboriginal knowledge of nature.”⁸⁸⁰ It is important therefore to recognise that the desire for First Nations jurisdiction over education does not stem just from consideration of what is beneficial for the First Nations themselves but also from wider societal considerations.

It can be seen, therefore, that the desire for First Nations jurisdiction over First Nations education stems from the historical educational experiences of First Nations people and from a desire to protect their children⁸⁸¹ and afford them an education which is both culturally suitable and academically rigorous in the same way as mainstream education. This unified desire for educational change on the part of the First Nations is heartening and seems to offer the promise of coherent measures being taken to ensure education parity. For example, Arlene Stairs holds an optimistic view of the future for First Nations education in the “ongoing shift in First Nations education from the token inclusion of Aboriginal content to an Aboriginal perspective that serves as a base for the integration of non-Aboriginal content.”⁸⁸²

Limited Autonomy: On-Reserve Schooling

The inherent failures of the historical approach to First Nations education have been recognised in Canada itself and potential solutions have been offered. It can be said that, while it takes more than money to ensure good quality education, it also takes more than just schools themselves. If schools are to be able to function well and educate to the best possible standard, then they must be supported by an excellent infrastructure that can support a high quality education system.⁸⁸³ On-reserve education is most often managed by individual First Nations who usually only have authority for one

⁸⁸⁰ Glen S Aikenhead, (1996) Towards a First Nations Cross-Cultural Science and Technology Curriculum *Journal of Culture and Comparative Studies* 233

⁸⁸¹ Assembly of First Nations *A Portrait of First Nations and Education* (AFN 2012) 3

⁸⁸² Arlene Stairs, ‘Learning processes and teaching roles in Native education: Cultural base and cultural brokerage’ (1995) in Marie Battiste and Jean Barman (eds), *First Nations education in Canada: The circle unfolds*. (University of British Columbia Press 1995) 139–153

⁸⁸³ Michael Mendelson, *Improving Education on Reserves: A First Nations Education Authority Act* (Caledon Institute of Social Policy 2008) 6

or two schools and so is an example of limited educational autonomy.⁸⁸⁴ There is no First Nations school system as such. The opposite is true of the majority of Canadian schools which operate under the control of the school board of the relevant province.⁸⁸⁵ The difficulties that this lack of central organisation poses for First Nations have been expressed by Harvey McCue, the Executive Director of the informal Mi'kmaq Education Authority:

“How can any serious observer or bureaucrat reasonably expect all 680 or so bands, the majority of them with fewer than 1,000 residents and situated in rural and remote locations, to manage effectively an education program with limited and inexperienced internal resources in the absence of anything even remotely resembling a system of education? Elsewhere in Canada, there are whole Departments or Ministries of Education plus school boards, faculties of education and a variety of commissions and committees to plan, evaluate and oversee the status and future of Canadian education ...”⁸⁸⁶

This lack of educational structure clearly overlaps with the problem of the ‘policy vacuum’ which will be discussed below as it is another factor in education that was given insufficient consideration when the Canadian government changed its approach to First Nations education in 1973. A comprehensive school system is vital to the provision of high quality education in schools as the education system as a whole should fulfil a number of vital functions. For example, Ministries of Education work mainly through school boards to provide services relevant to “broader education issues such as regulations, standards, certification, codes of conduct and the setting (and altering) of the provincial

⁸⁸⁴ For discussion of the current status of funding for these band schools see: Assembly of First Nations *A Portrait of First Nations and Education* (AFN 2012) 4

⁸⁸⁵ In the same way that, in England, education policy is initiated by the government, controls the schools themselves but is overseen by the relevant local authority.

⁸⁸⁶ Harvey McCue, *Fixing Indian Education* (2003) available at <<http://www.turtleisland.org/discussion/viewtopic.php?t=847>> [last accessed 26/02/13]

curriculum.”⁸⁸⁷ Without levels of support such as this, schools will struggle to provide high quality education.

Of course, simply organising First Nations schools under a school board will not immediately cure all the ills of on-reserve education, but it is a necessary condition for the improvement of First Nations schools. For this reason, one of the recommendations of Bell et al. in their study *Sharing Our Success: Ten Case Studies in Aboriginal Schooling*⁸⁸⁸ was to establish a system of education:

“[It is recommended] that the Indian Act be revised to: a) recognise and empower Aboriginal school boards similar to those in provincial/territorial systems; b) provide sufficient funding to develop and support a level of educational infrastructure and services equivalent to those provided by provinces and territories; and c) articulate an accountability framework that defines the relationships and responsibilities of educational stakeholders for the provision of educational equity and excellence for all Aboriginal students.”⁸⁸⁹

Interestingly, it is not only academic commentators who have identified this need for a functioning education system. In a speech before the House of Commons Standing Committee on Aboriginal Affairs, the Honourable Jim Prentice, then Minister for Indian and Northern Affairs, also commented on the issue:

“The biggest challenge with the education system, I would submit, is not the dollars per se; it is rather the absence of an overall system that individual schools are part of. Previous governments have created a system in this country where individual First Nations schools are

⁸⁸⁷ Harvey McCue, *First Nations 2nd & 3rd Level Education Services: A Discussion Paper for the Joint Working Group INAC – AFN* (2006) available at <www.turtleisland.org/education> [last accessed 26/02/13]

⁸⁸⁸ David Bell et al, *Sharing Our Success: Ten Case Studies in Aboriginal Schooling* (Society for the Advancement of Excellence in Education (SAEE 2004) <www.sae.ca> [last accessed 26/02/13]

⁸⁸⁹ Ibid 323

one-off schools operating outside any school system. It's fair to say that it's not working very well."⁸⁹⁰

While it is certainly a positive step that the necessity for a school board with authority over First Nations schools has been recognised at the highest Federal level as well as by the First Nations themselves, the question then becomes: how best to constitute such an Education Authority? Although not a perfect example, guidance can be found from within Canada itself by considering the example of the province of British Columbia.

The Perceived Failure of Education for On-Reserve Students

Evaluating the success of an education system will always prove difficult since education has an inherently different meaning to different people. To one person a successful education must result in the awarding of numerous qualification and certificates, while to another it is the process of learning that is important rather than the outcome. As Clifford Stoll commented "data is not information, information is not knowledge, knowledge is not understanding, understanding is not wisdom."⁸⁹¹ This idea that education is far more than the desire for formal qualifications was expressed particularly effectively by John Dewey: "Education is a social process. Education is growth. Education is, not a preparation for life; education is life itself."⁸⁹² As discussed earlier, the main motivating factors behind the drive for First Nations educational separation were the desire to protect their culture and traditions and also to ensure the safety and wellbeing of their young people.⁸⁹³ All of these goals could clearly be achieved without the attainment of nationally recognised educational qualifications and this must be

⁸⁹⁰ Jim Prentice (2007) Standing Committee on Aboriginal Affairs and Northern Development; No. 054, 1st Session, 39th Parliament, evidence, May 29. <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2976265&Language=E&Mode=1&Parl=39&Ses=1>> [last accessed 26/02/13]

⁸⁹¹ Clifford Stoll (1989) *The Cuckoo's Egg* (Doubleday, USA)

⁸⁹² John Dewey (2010) *My Pedagogic Creed* (8th edition, Penguin USA)

⁸⁹³ For example, speaking in particular regard of teaching science, First Nations educator Madeline MacIvor spoke of the importance of supporting [First Nations] students who wish to learn Western science but, at the same time, not be assimilated into Western culture at the expense of their own Aboriginal culture and identity – Discussion from Glen S Aikenhead, Towards a First Nations Cross-Cultural Science and Technology Curriculum (1996) *Journal of Culture and Comparative Studies* 218

kept in mind when evaluating the successes and failures of the separate on-reserve education system. It would be illogical to on one hand profess a desire to support the First Nations and respect their desire for educational autonomy while, on the other hand, evaluating their education system only in terms of how it compares to the practice and desired results of the majority, national education system. While the ideal outcome of educational devolution to the First Nations may well have been a system which exhibits the dual successes of security and cultural sensitivity and school-leavers with qualifications directly comparable to those of mainstream school-leavers, in practice this is not the only measure of success.⁸⁹⁴

Unfortunately, this view is not commonly held outside of the First Nations themselves and so, based on admittedly disappointing government statistics as to educational attainment, there is a widely held view that the devolution of on-reserve education has not been a success. In his report on Improving Education on Reserves,⁸⁹⁵ Mendelson contends that the historic failure of the Canadian education system to adequately meet the needs of First Nations children has, despite policy changes and numerous educational initiatives, been continued in one form or another right up until the present day, particularly so in respect of the education of on-reserve students.⁸⁹⁶ A look back through recent Census⁸⁹⁷ reports seems, disappointingly, to support this contention. The 1996 Census disclosed that “approximately 60% of First Nations on-reserve residents aged 20 to 24 had not completed high school or obtained an alternative diploma or certificate.”⁸⁹⁸ In the 2001 Census, once again “approximately 60% of First Nations on-reserve residents aged 20 to 24 reported not completing high

⁸⁹⁴ Canadian Council on Learning *The State of Aboriginal Learning in Canada: A Holistic Approach to Measuring Success* (CCL Ottawa 2009)

⁸⁹⁵ Michael Mendelson Op Cit

⁸⁹⁶ Ibid 1

⁸⁹⁷ The Census in Canada is conducted by Statistics Canada and takes place every five years. The Census provides demographic and statistical data that is used to plan public services including health care, education, and transportation and to determine Federal transfer payments and determine the number of Members of Parliament for each province and territory. The data collected is available to view online at <www.statcan.ca/start.html> [last accessed 26/02/13]. The next Census took place on 2nd May 2011 although only limited data has been released as of 03/03/13.

⁸⁹⁸ All data from Statistics Canada website <www.statcan.ca/start.html> [last accessed 26/02/13] (various Census tables are available under the Education and also the Aboriginal Peoples tabs)

school.”⁸⁹⁹ The results of the 2006 Census were again practically unchanged and showed that approximately 60% of First Nations 20 to 24-year-olds who lived on-reserve had failed to complete high school nor had they obtained an alternative diploma or certificate.⁹⁰⁰ Clearly, if educational outcomes on-reserve had been improving over recent years then the 2006 Census statistics should have highlighted far better results, at least for those within the 20 to 24-year-old group.⁹⁰¹ Instead they have stayed approximately the same. However, this alarming trend towards stagnation in educational attainment actually appears even worse when viewed from the point of view of the percentage of First Nations students who have, in recent years, actually graduated from high school:

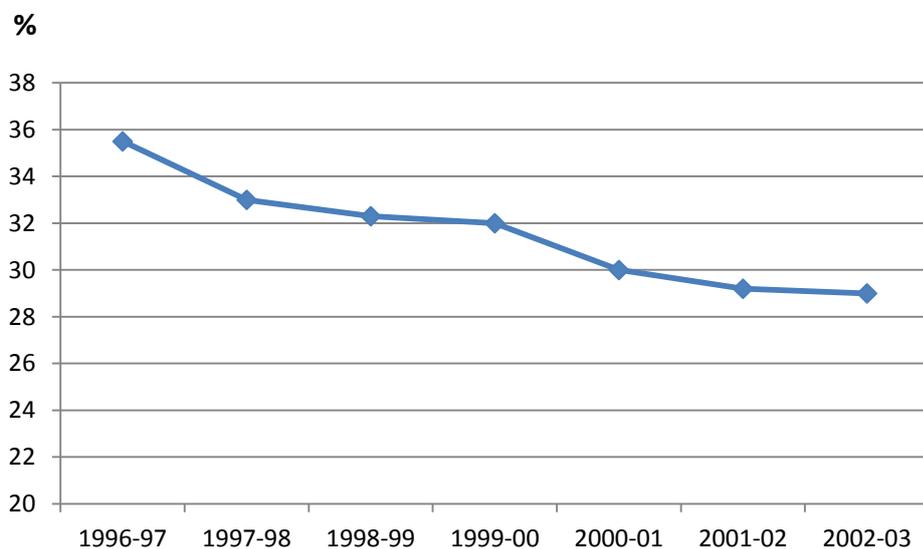


Fig. 1 Percentage of On-Reserve Pupils Who Graduate Grade 12⁹⁰²

When the data is presented in this way it becomes depressingly clear that the actual number of First Nations young people who live on-reserve and who have graduated from high school has actually

⁸⁹⁹ Ibid.

⁹⁰⁰ <<http://www.statcan.gc.ca/pub/89-645-x/2010001/c-g/c-g009-eng.htm>> [last accessed 26/02/13]

⁹⁰¹ Michael Mendelson Op Cit 1

⁹⁰² Indian Affairs and Northern Development (2005a) Basic Departmental Data 2004. This chart has been compiled using the model from Maytree, Policy in Focus, Issue 5 Sept 2008 [the PDF document cannot be directly referenced in a Word document] at <http://maytree.com/PDF_Files/MaytreePolicyInFocusIssue5.pdf> [last accessed 24/02/13]

been falling year-on-year. In keeping with the data supplied in this table, in Mendelson's own report he states that:

“... the static educational attainment data imply that educational outcomes for residents on reserve are actually getting worse in relative terms. During the 1996 to 2006 period, the number of 20 to 24-year-olds in Canada as a whole with less than high school graduation decreased from 19% to 14%. The high school completion gap among the 20 to 24-year-old age cohort on reserve has therefore *increased* in the last decade by five percentage points.”⁹⁰³

While Mendelson acknowledges that there might be “data weaknesses in the Census in respect of First Nations, especially under-enumeration of the total reserve population,” he states that “there is no reason to suspect that the Census understates educational attainment on-reserve.”⁹⁰⁴ Such statistics are hugely alarming, particularly in a country as advanced as Canada. Fortunately, the situation might be slowly improving as data collected by Indian and Native Affairs Canada states the percentage of on-reserve pupils who graduated high school for 2005 –06 as 30%, for 2006 - 07 as 32%, for 2007-08 as 34% and for 2008-09 as 36%.⁹⁰⁵ Although the percentage increase is small, at least the number of on-reserve pupils graduating is now increasing year on year.

However, it is important to remember that, as explained earlier in this case study, children are classed as on-reserve learners so long as they are normally resident on-reserve – this includes children who actually attend a regular mainstream secondary level school. It has already been established that the majority of on-reserve schools are actually primary level schools and so a large number of children have to either travel daily or reside away from home when they move up to secondary level education. This necessity to attend a mainstream educational establishment after previously receiving education

⁹⁰³ Michael Mendelson, *Improving Education on Reserves: A First Nations Education Authority Act* (Caledon Institute of Social Policy 2008) 1

⁹⁰⁴ Ibid.

⁹⁰⁵ Assembly of First Nations *First Nation Elementary and Secondary Education – A Discussion Guide* (AFN 2011) 5

on-reserve could no doubt prove both traumatic and disruptive. Acknowledged problems associated with First Nations learners attending mainstream schools are one of the central reasons behind the desire for the provision of separate schooling and so it should not really prove too surprising if the decline in the number of First Nations learners graduating from secondary level education corresponds with the number who actually receive their secondary education in a mainstream establishment. It would be interesting to contrast the number of First Nations learners who successfully complete their primary education on-reserve with the number who are able to maintain this success when forced to travel off-reserve for secondary education. Unfortunately, there are no statistics available for primary level graduation with which to conduct such an analysis. Nevertheless, this idea of the importance of continuous culturally sensitive education is something that must be borne in mind when considering whether the Canadian model of 'separate but equal' education could be adapted for use in Europe.

In the same way that education would help the Roma in Europe improve their social and economic situation, so it could help the First Nations in Canada. The First Nations children must obtain an acceptable level of education if they are to be able to succeed in the modern Canadian economy and be able to compete on a level playing field with their Canadian peers. While in the modern world an acceptable education could be said to be more than simply high school graduation,⁹⁰⁶ the high school diploma is vital if a student is to be able to move on to any higher level programme. With on-reserve education standing as it currently does, the ability to move up through the further education levels is closed off to the majority of First Nations young people.

One major difference between the current educational situation of the Roma and that of the First Nations is that, "from a public policy perspective, the continuing failure of education for residents of First Nations reserves is in some ways confounding."⁹⁰⁷ First Nations issues are politically important in Canada and they are thus the subject of targeted measures in a way that the Roma certainly are not.

⁹⁰⁶ In reality, a post-secondary diploma or a degree or trade certificate is needed for most careers

⁹⁰⁷ Michael Mendelson Op Cit 2

It could be said that there is strong agreement in Canada about the desperate need for on-reserve education to be improved. In a 2004 study on public opinion regarding Aboriginal⁹⁰⁸ issues, Canadians rated “education as the number one issue on which the government should concentrate its efforts on behalf of Aboriginal young people.”⁹⁰⁹ In addition, the study highlighted a widely held belief among all sections of the community that present First Nations education policy is failing.⁹¹⁰ It seems that both First Nations youth and “the general public felt that the quality of on-reserve education is poor compared with the education received by the general population.”⁹¹¹

While an understanding of the historic disadvantage experienced by the First Nations gives an insight into the low starting point from which their educational improvement must be measured, it does not explain why there has been an obvious failure to improve high school completion rates in recent years. It was this very difficulty in explanation that prompted the Royal Commission on Aboriginal Peoples to ask: “Why, with so many sincere efforts to change the quality of Aboriginal education, have the overall results been so disappointing?”⁹¹² This thesis suggests that a lack of uniformity in education provision and policy is the most likely reason, coupled with reticence about significant structural change both on the part of the Federal Government and the First Nations.

Of course, there would be little value in transposing an education system into Europe that had failed in Canada. The goal of this case study is to see what, if anything, can be learned from the approach of Canada towards the education of First Nations children that could be used to improve the educational situation of Roma children in Europe. It is, therefore, not enough to simply conclude that the First Nations are being educationally failed. It is necessary to now move on to see exactly where this

⁹⁰⁸ The term Aboriginal is used here as the Inuit and Metis people were also under consideration.

⁹⁰⁹ Indian and Northern Affairs Canada 2004 from the 2004 November Report of the Auditor General of Canada <http://www.oag-bvg.gc.ca/internet/English/parl_oag_200411_05_e_14909.html#ch5hd4b> [last accessed 26/02/13]

⁹¹⁰ <<http://www.ainc-inac.gc.ca/edu/index-eng.asp>> [last accessed 26/02/13]

⁹¹¹ Michael Mendelson Op Cit 2

⁹¹² Royal Commission on Aboriginal People, 1996. The full text of the Report is available on the Indian and Northern Affairs website at <<http://www.ainc-inac.gc.ca/ap/pubs/rpt/rpt-eng.asp>> [last accessed 26/02/13]

failure stems from and so whether, with any necessary changes having been made, there are still lessons to be learned from Canada which could be applied in Europe.

The Absence of a Unified Education Policy

The statistics discussed above clearly demonstrate that on-reserve education is still substandard when viewed from the traditional standpoint and, as the situation has actually been in decline in recent years and has only shown limited recovery, it seems equally clear that there is no quick, easy solution that will improve educational standards. However, this does not mean that there are no alternatives to, or at least improvements that could be made to, the current system. The first step towards identifying such alternatives is establishing how the current system is organised and pinpointing each problematic element.

First, it must be re-emphasised⁹¹³ that the education system in Canada was predominantly used as a tool to oppress the First Nations until fairly recently. Until the release of *Indian Control of Indian Education*⁹¹⁴ by the National Indian Brotherhood⁹¹⁵ in 1972, “First Nations education remained firmly under the control of successive governments and of religious institutions.”⁹¹⁶ In this way, education was effectively wielded as a weapon to forcibly combat First Nations’ use and appreciation of their language and culture. A disturbing illustration of this practice can be found in the *Indian Act 1876*⁹¹⁷ itself, which remains the statute governing education on most reserves today. The Indian Act’s education sections⁹¹⁸ categorically state the obligation of First Nations children to attend the schools

⁹¹³ For the initial discussion, see section 2 of this chapter.

⁹¹⁴ A Policy Paper on education, submitted to the Minister of Indian Affairs and Northern Development in 1972, which emphasizes the belief: “Unless a child learns about the forces which shape him: the history of his people, their values and customs, their language, he will never really know himself or his potential as a human being.” The full text of the Paper can be found online at : <<http://64.26.129.156/calltoaction/Documents/ICOIE.pdf>> [last accessed 26/02/13]

⁹¹⁵ Now the Assembly of First Nations

⁹¹⁶ Michael Mendelson Op Cit 3

⁹¹⁷ Indian Act I-5. The full text of the Act is available at: <<http://laws.justice.gc.ca/eng/I-5/FullText.html>> [last accessed 26/02/13]

⁹¹⁸ Ss 114 - 122

established for them, whether or not they or their parents actually wish them to do so.^{919,920} The Indian Act further permits the Education Minister “to enter into agreements with provinces or religious organisations to run First Nations schools, but does not permit the Minister to enter into an agreement with a First Nations organisation to run its own schools.”⁹²¹ A close reading of the education provisions of the Indian Act indicates that its major purpose was to provide a legal basis for the government to institute educational policies aimed at forcibly assimilating First Nations children into mainstream culture.⁹²² Further, it is remarkable that, even within the ‘Schools’ section, the Act “does not make reference to any substantive issues about the quality of education or about the rights of parents to obtain an adequate education for their children.”⁹²³

In reality, although the Indian Act remains legally in force today, these particular educational provisions are effectively obsolete.⁹²⁴ In practice then, does this mean that most First Nations education has no applicable statutory basis? The answer seems to be: not exactly. The inherent right to self-government⁹²⁵ does of course provide a basis for First Nations control over education, and various Treaties⁹²⁶ govern requirements for the Federal financing of education. However, there is still no single Federal statute governing any general right to education on the part of all First Nations. This

⁹¹⁹ 116 (1) Subject to section 117, every Indian child who has attained the age of seven years shall attend school.

⁹²⁰ 118 Every Indian child who is required to attend school shall attend such school as the Minister may designate, but no child whose parent is a Protestant shall be assigned to a school conducted under Roman Catholic auspices and no child whose parent is a Roman Catholic shall be assigned to a school conducted under Protestant auspices, except by written direction of the parent.

⁹²¹ 114 (1) The Governor in Council may authorize the Minister, in accordance with this Act, to enter into agreements on behalf of Her Majesty for the education in accordance with this Act of Indian children, with

(a) the government of a province;

(b) the Commissioner of Yukon;

(c) the Commissioner of the Northwest Territories;

(c.1) the Commissioner of Nunavut;

(d) a public or separate school board; and

(e) a religious or charitable organization.

⁹²² Such a belief is further backed up by the fact that, until 1950, the *Indian Act* provided that any First Nations person who obtained a university degree or college diploma would automatically lose their Indian status.

⁹²³ Michael Mendelson, *Improving Education on Reserves: A First Nations Education Authority Act* (Caledon Institute of Social Policy 2008) 3

⁹²⁴ Due to dissatisfaction on the part of both the First Nations themselves and the majority Canadian population, as well as due to the education scandals discussed earlier in this case study.

⁹²⁵ The inherent right to self-government stems from treaty rights recognized under section 35 of the Constitution Act 1982. Under this Act self-government is recognized as an inherent right of Aboriginal people in Canada.

⁹²⁶ For a general discussion, see: James Henderson, (1995) "Treaties and Indian Education." in Marie Barman and Jean Battiste (eds), *First Nations Education in Canada: The Circle Unfolds* (UBC Press 1995) 246-60

absence of a legal framework for on-reserve education is the result of what Michael Mendelson terms a ‘policy vacuum’ at the federal level.⁹²⁷ This ‘policy vacuum’ compounds the historical weaknesses that plague First Nations education and thus is something which must be tackled is the education system as a whole is to be effectively reformed. As Fullan and Levin have suggested, the revitalisation of a school system frequently requires “whole system reform.”⁹²⁸

Clearly, in the absence of formal, legal regulation, it can be hard to see what can be achieved at both a Federal and Provincial level to assure quality education for on-reserve students while at the same time maintaining the desired devolution of authority for education to the First Nations. Indeed, in 2004 the Auditor General⁹²⁹ commented:

‘The [Public Accounts] Committee expressed serious concern about the unacceptable state of First Nations elementary and secondary education and criticized the Department’s hands-off management approach. While agreeing with the principle of devolution, the Committee insisted that this principle must be accompanied by clearly defined roles and responsibilities agreed to by all parties.’⁹³⁰

The conflict between expectations that the Federal government will ensure the provision of quality education to First Nations students on one hand, while on the other continuing with its policy of educational devolution, is not an easy one to solve. Nor is the question of where funding⁹³¹ for special educational measures and allowances such as those which the First Nations strive for should come

⁹²⁷ Michael Mendelson Op Cit 3

⁹²⁸ Michael Fullan & Ben Levin “The Fundamentals of Whole-System Reform: A Case Study from Canada” (2009) 28(35) *Education Week* 30 - 31

⁹²⁹ She was tasked with examining the funding of on-reserve education but did venture further afield into issues as to quality.

⁹³⁰ Auditor General’s Report, 2004, at 5.23

⁹³¹ There being controversy over whether such funding should come from the Federal or the Provincial level. A question complicated by the fact that First Nations people who live on-reserve are exempt from paying the provincial taxes which are used to fund mainstream education. As ever, the need for, and cost of, special educational measures targeted at the First Nations must be weighed up against the respective educational needs of mainstream Canadians.

from. The current ad-hoc system is clearly insufficient⁹³² and it seems likely that only a significant, formal policy change could address the problem. One obvious lesson that those wishing to improve the educational situation of Roma children in Europe can learn from this is that an informal, piecemeal approach to minority education is highly unlikely to be successful. Some form of formal, all-encompassing legislation that will bind the government, local authorities and the minority group themselves seems to be vital for achieving educational parity.

With regard to the situation in Canada, in order to tackle this deficiency it is desirable that the Federal government, in co-operation with the First Nations, draft a universal Act more in-line with the universal organisation envisioned in *Indian Control of Indian Education*.⁹³³ Such an Act would have to have “sufficiently flexible terms to permit the particular needs of each alliance of First Nations to be met, but at the same time clarify core requirements and responsibilities.”⁹³⁴ The Act could still permit rather than compel First Nations to establish an Education Authority if they so wished. The Authorities would necessarily “combine many First Nations schools under a single administrative structure and provide the support functions of a school board.”⁹³⁵ Further, according to Maytree, the Act would have “to commit the federal government to fund Authorities at a level sufficient to achieve results equivalent to that of provincial schools. This would be an enforceable obligation on the federal government, and the Act would include a dispute resolution mechanism should a disagreement arise.”⁹³⁶

⁹³² Reflecting the difficulties of ad hoc provision that were identified during the England case study

⁹³³ As discussed above.

⁹³⁴ Michael Mendelson *Why We Need a First Nations Education Act* (Caledon Institute of Social Policy 2009) 26 – 30; John Richards *Closing the Aboriginal/non-Aboriginal Education Gaps* (C.D. Howe Institute 2008) 3 – 6 [last accessed 26/02/13]

⁹³⁵ Maytree, *Policy in Focus*, Issue 5 Sept (2008) 4 available at: <http://maytree.com/PDF_Files/MaytreePolicyInFocusIssue5.pdf> [last accessed 26/02/13]

⁹³⁶ Ibid.

There are no plans in place to introduce such a universal *First Nations Education Authority Act* in Canada at the moment.⁹³⁷ However, from a theoretical point of view, the advantages of such an Act would seem to be applicable to both the First Nations and the Roma, the latter perhaps developed in a pan-European context.

First Nations Jurisdiction over Education: An Example from British Columbia

In response to the perceived failures and insufficiencies of the kind of federally controlled on-reserve education discussed above, First Nations have been keen to take greater control over education. A policy of returning First Nations education back into the control of the First Nations themselves began with the publication of *Indian Control of Indian Education*⁹³⁸ in 1972. The Paper was favourably received by the Canadian government who proceeded to make an almost total change to their approach to First Nations education. From 1974, the Federal government “started to fund Band-operated schools and the number of federally directly-operated schools began to decline.”⁹³⁹ The Federal government still supports a large number of these Band-operated schools.⁹⁴⁰ Currently, Indian and Northern Affairs Canada⁹⁴¹ funds⁹⁴² Band councils or other First Nations education authorities to provide education from kindergarten through to adult learner level for people resident on-reserve., with “Federal funding paying for students normally⁹⁴³ resident on- reserve to attend school;⁹⁴⁴ student

⁹³⁷ A consultation on improving First Nations educational outcomes is, however, on-going. Details of which can be found in: Aboriginal Affairs and Northern Development Canada *First Nation Elementary and Secondary Education: Discussion Guide* (Minister of Aboriginal Affairs and Northern Development 2011)

⁹³⁸ As discussed above.

⁹³⁹ <<http://www.edu.gov.on.ca/eng/>> [last accessed 26/02/13]

⁹⁴⁰ A full list of all current band-operated schools is available at: <[http://www.aboriginalcanada.gc.ca/acp/site.nsf/vDownload/schools/\\$file/ACP_BAND_OPERATED_SCHOOLS_2009_EN.pdf](http://www.aboriginalcanada.gc.ca/acp/site.nsf/vDownload/schools/$file/ACP_BAND_OPERATED_SCHOOLS_2009_EN.pdf)> [last accessed 26/02/13]

⁹⁴¹ <<http://www.ainc-inac.gc.ca/index-eng.asp>> [last accessed 26/02/13]

⁹⁴² Indian and Northern Affairs Canada spends roughly \$1.2 billion for operations and \$200 million for building capital and maintenance to support about 120, 000 who are normally resident on-reserve.

⁹⁴³ Many students who are normally resident on-reserve must take up temporary residence off-reserve to go to high school. They are still classed as students resident on-reserve.

⁹⁴⁴ Whether the school is on-reserve or off-reserve

support services such as transportation, counselling, accommodation and financial assistance; and school administration and evaluation.”⁹⁴⁵

Tentative steps have already been made by some of the First Nations towards the establishment of First Nation Education Authorities and so these various approaches need to be analysed when trying to establish best practice. Each of these education initiatives have required a legislative base outside of the *Indian Act* and the Federal government has so far proved accommodating, albeit through one-off legislation rather than through a general statute. In some of the new Treaties, such as the Nisga’a Treaty,⁹⁴⁶ the provisions of the *Indian Act* “have been replaced by the Treaty’s provision for First Nations control over education.”⁹⁴⁷ However, the Treaty contains little about the quality or nature of education itself. There is really only one detailed example of First Nations attempting to take complete jurisdiction over on-reserve education provision and to institute a formal organisation system, and that comes from British Columbia.⁹⁴⁸

Simply put, “jurisdiction over education is the formal recognition by the Federal and Provincial Governments of Canada of a First Nation’s right to determine the type and standard of education that their children will receive.”⁹⁴⁹ First Nations across Canada had sought recognition of their jurisdiction over education for decades, viewing this recognition as a critical component of their First Nations rights, as well as a meaningful part of their efforts to improve education for First Nations learners.⁹⁵⁰

First Nations in British Columbia, in association with the First Nations Education Steering

⁹⁴⁵ Michael Mendelson, *Improving Education on Reserves: A First Nations Education Authority Act* (Caledon Institute of Social Policy 2008) 4

⁹⁴⁶ <<http://www.ainc-inac.gc.ca/ai/mr/is/nit-eng.asp>> [last accessed 26/02/13]

⁹⁴⁷ Michael Mendelson Op Cit 12

⁹⁴⁸ Of course not all First Nations students (and their families) do wish for educational separation and so, even where band schools do exist, a number of First Nations young people will continue to attend public schools. The most recent data on the educational outcomes of First Nations students in public schooling can be found in: Ministry of Education (British Columbia) *How Are We Doing? Aboriginal Report 2006/07 – 2010/11* (BD Ministry of Education 2012)

⁹⁴⁹ First Nations Education Steering Committee, *First Nations Education Jurisdiction* (2008) 5 available at <http://www.fnesc.ca/Attachments/miscel-docs/Information%20Officer%20Employment%20Posting%202011_Final.pdf> [accessed 20 October 2011]

⁹⁵⁰ Ibid

Committee,⁹⁵¹ have made significant inroads towards establishing their jurisdiction over education in recent years.

The first significant milestone was reached on 24th July 2003 when First Nations, Federal and Provincial government representatives signed “a Memorandum of Understanding outlining the key elements of First Nations education jurisdiction.”⁹⁵² Negotiations on this issue continued and in November 2005 the negotiators signed formal agreements based upon the framework established in the Memorandum.⁹⁵³ On 23rd November 2006 *Bill C-34: First Nations Jurisdiction over Education Act* was introduced in the House of Commons by the Minister of Indian Affairs and Northern Development.⁹⁵⁴ It passed through both the House of Commons and the Senate and was given Royal Assent on 12th December 2006. This Federal enabling legislation “created a new legal entity, the First Nations Education Authority, and established the legal foundation for the creation of Community Education Authorities through First Nations’ laws.”⁹⁵⁵ The final step in the process was the passage of *Bill 46: The First Nations Education Act*, Provincial enabling legislation for jurisdiction which received Royal Assent in the British Columbia Legislature on 29th November 2009.

While the First Nations peoples believe that the jurisdiction agreements will serve as an important foundation for increasing the educational success of First Nations students,⁹⁵⁶ it has been agreed that a staged approach to jurisdictional transfer must be taken in British Columbia and so the current

⁹⁵¹ For more information on this independent, non-profit society directed by First Nations communities see <<http://www.fnesc.ca/>> [last accessed 26/02/13]

⁹⁵² The Memorandum can be viewed at: <<http://www.turtleisland.org/discussion/viewtopic.php?p=8759>> [last accessed 26/02/13]

⁹⁵³ The agreements were signed in full by all three parties on July 5th 2006

⁹⁵⁴ Then the Honourable Jim Prentice

⁹⁵⁵ First Nations Education Steering Committee, *First Nations Education Jurisdiction* (2008) 5 <http://www.fnesc.ca/Attachments/miscel-docs/Information%20Officer%20Employment%20Posting%202011_Final.pdf> [last accessed 26/02/13]

⁹⁵⁶ First Nations Education Steering Committee, *First Nations Education Jurisdiction* (2008) 5 <http://www.fnesc.ca/Attachments/miscel-docs/Information%20Officer%20Employment%20Posting%202011_Final.pdf> [last accessed 26/02/13]

⁹⁵⁶ For more information on this independent, non-profit society directed by First Nations communities see <<http://www.fnesc.ca/>> [last accessed 26/02/13]

legislation deals only with the K-12 system.⁹⁵⁷ As a result of this change in infrastructure, First Nations should have a strong foundation that will enable them to both operate and run their own on-reserve schools as well as work with Provincial authorities to regulate the education received by those who attend school off-reserve.

The focus of this initial phase is on-reserve, Kindergarten to Grade 12 level First Nations schools.⁹⁵⁸ The Framework established by the First Nations Education Act (hereafter the Act) has been designed in such a way that each First Nation that chooses to participate must formally indicate that it wishes to enter into the agreement.⁹⁵⁹ It also recognizes that, as they are concluded, treaties and self-governance agreements will take precedence over the jurisdiction agreements. As of January 2011, sixty-three of the First Nations of British Columbia “have formally indicated their interest in negotiating the Canada-First Nation Education Jurisdiction and thirteen First Nations were pursuing formal negotiations.”⁹⁶⁰

The British Columbia agreements and the Act set an important precedent. The interests of the First Nations have been well represented and the Federal and Provincial governments have responded positively. However, Michael Mendelson has questioned whether the “arrangements in themselves could provide an adequate base upon which to build a First Nations education system.”⁹⁶¹ It is true that there are issues as to resources which have yet to be adequately addressed. The sixty-three First Nations who have so far expressed an interest in participating have relatively small populations⁹⁶² and

⁹⁵⁷ This term refers to Kindergarten through Year 12 schooling or, as it would be in the UK, primary school through to sixth form. Provided the transfer of jurisdiction for these school years proves successful, it is envisioned that eventually jurisdiction for early-school development and post-secondary programming will also be transferred.

⁹⁵⁸ s2

⁹⁵⁹ Preamble

⁹⁶⁰ First Nations Education Steering Committee, *First Nations Education Jurisdiction* (2008) 6 <http://www.fnesc.ca/Attachments/miscel-docs/Information%20Officer%20Employment%20Posting%202011_Final.pdf> [last accessed 26/02/13]

⁹⁶⁰ For more information on this independent, non-profit society directed by First Nations communities see <<http://www.fnesc.ca/>> [last accessed 26/02/13]

⁹⁶¹ Michael Mendelson, *Improving Education on Reserves: A First Nations Education Authority Act* (Caledon Institute of Social Policy 2008) 14

⁹⁶² Ibid Mendelson suggests that there are approximately 20,000 to 25,000 people in total.

so have limited resources both in terms of finance and ‘people power’. For this reason, initially at least, the First Nations will have to rely heavily on support from the Provincial Ministry of Education. If the ultimate goal is devolution of authority for education then this situation cannot continue for too long. Further, “the Act provides for accountability mechanisms for the First Nations, but not for the Federal government.”⁹⁶³ The agreement as to ongoing Federal funding is also vague and so there is nothing per se to stop the Federal government from arbitrarily ceasing funding at any time they choose. This may seem an unlikely outcome but that does not mean that there is no need for a legislative provision to guard against it.

Ultimately then, while there are drawbacks to the example found in British Columbia, there are also positives which can be taken from it and potentially applied in Europe. So long as the legislation enacted does not leave the same gaps as those identified in the Act then it would place the Roma in a far more secure position. It is also worth considering that the British Columbia model could perhaps be expanded and developed within Canada itself in an attempt to overcome the educational disadvantage suffered by First Nations nationally.

Conclusion

Seemingly, despite overwhelming good intentions on the part of both the Federal and Provincial governments and the First Nations themselves, the present piecemeal system of education for First Nations children living on-reserve is failing, and the overall school attainment figures for Canada show no significant improvement in recent years. It seems that the process of devolution of education has remained incomplete due to a lack of foresight which resulted in no mechanism for a First Nations Education Authority being established. There are, however, positives to be found from the Canadian experience which may be applied to the situation of the Roma in Europe. A similar sort of ‘separate but equal’ education as that being implemented in British Columbia could potentially serve to

⁹⁶³ s14

preserve Roma culture in each of the four countries under consideration here and also aid in Roma pupils feeling more secure within the learning environment. However, if any of the four countries did wish to provide ‘separate but equal’ education they would need to learn from the significant flaws of the Canadian model and so ensure institutional support for Roma schools in the form of funding, expertise and governance. Further, it must be recognised that such educational separation as seen in Canada, while it could potentially be instituted without leading to segregation, would fail to foster intercommunity understanding and would likely lead to Roma children remaining distanced from mainstream society. Such distance would significantly hamper any Roma child who wished to work within mainstream institutions. For these reasons and also no doubt due to the vastly different historical backgrounds of the Roma and the First Nations, the Roma themselves do not generally wish to take control of their children’s education through complete separation. Europe could still learn from this idea though and perhaps offer in-community, culturally sensitive education that still covers the relevant national curriculum to the Roma. By learning from the mistakes identified within the Canadian model, it is possible that a modified approach to this idea of ‘separate but equal’ may prove far more successful for the Roma in Europe.

5.3 Conclusion

The first case study involved an examination of the education of Gypsy/Traveller pupils in England. Although England does not completely adhere to the rights based approach to education that this thesis suggests to be the optimum approach, the English education system does make special accommodation for Gypsy/Travellers. Accommodation is offered within the mainstream – with additional support and teaching available as well as special rules as to attendance – so that Gypsy/Traveller pupils are educated alongside their peers from the majority population. The idea behind this type of provision seems to be giving additional targeted support for minority pupils but firmly ensuring that they are included within the mainstream education system and so are able to compete equally in mainstream English society. This type of mainstreaming approach to minority

accommodation is very near to the top of the scale of minority accommodation but falls short of being 'separate but equal' education.

The second case study, on the other hand, considered indigenous education in Canada and so offered an example of 'separate but equal' education in the form of on-reserve education for indigenous pupils. The political situation in Canada is of course vastly different to that in Europe and there is a deliberate government practice of placing governance (and thus control over such social functions as education, health, etc) back into the hands of indigenous communities. A desire for autonomy on the part of the indigenous peoples coupled with a desire to improve the educational situation of their young people as well as to protect pupils from the social difficulties discussed earlier in this chapter, led to calls for educational autonomy and an example of how this has been achieved can be seen in British Columbia. On-reserve schools have proven popular within the indigenous community and seem to provide a culturally sensitive and nurturing environment for indigenous pupils. However, the quality of the formal education provided in such schools has been called into question due to perceived poor examination results when compared to those of the majority population.

While this thesis classifies the type of 'separate but equal' education seen in British Columbia as being the most radical measure for accommodating cultural difference in education, it is ultimately submitted that this type of accommodation would not be suitable for the Roma in Europe. The political situation in each of the four countries is very different from that in Canada and so it is difficult to see how a completely separate education system could be practically implemented and overseen. Additionally, there does not seem to be the demand for such a system from the Roma that there has been from indigenous peoples. The Roma are not so politically organised and unified as the indigenous peoples of Canada and so it seems that no single system would suit them either. While many Roma have demonstrated the desire for an education system that reflects and supports their culture, there seems little desire to completely move away from the mainstream national education system. Further, since this thesis contends that the goal of a multicultural education system should be

to securely root a child within their own culture while also equipping them to compete in mainstream society if they so wish, it is suggested that 'separate but equal' education would ultimately be detrimental to including the Roma within a cohesive society. It is therefore submitted that the English model of accommodation within the mainstream would be more suited to the needs of the Roma.

This is not to suggest that the English model is perfect or that it could be easily transposed across Europe. A number of critical flaws which exist within the English system of minority accommodation were identified earlier in this chapter and so this thesis suggests that a number of alterations must be made and guarantees put in place if efficient minority accommodation within the mainstream education system is to be implemented elsewhere in Europe. Among the key recommendations of this thesis therefore are:

- There should be an immediate end to segregated education with strict legal measures being put in place to ensure that Roma children are not being abandoned to schools for the mentally disabled. Strict controls should be put in place on the system by which children are sent to such schools.
- Attempts must be made to tackle the various social issues (poverty, poor housing, lack of health care, etc) that have a knock-on negative effect on Roma educational attainment.
- Similarly, measures must be put in place to tackle racism, prejudice and discrimination at the national level and a prohibition on negative stereotyping must be enforced.
- Education policy measures targeted specifically at minority groups need to be enshrined in law, with the relevant obligations on the part of both the state and the local educators being clearly set out. Adequate enforcement mechanisms must also be put in place to help guarantee that these obligations are met. Although it is clear that each of the four countries do have domestic policies that are, by and large, working for the majority population, it has become clear that education is not a 'one size fits all' issue and so it is time that targeted measures are introduced.

- Attempts must be made to involve Roma parents in their children's education at both the planning and provision stages. The provision of free of charge adult literacy classes would be extremely valuable in achieving this.
- Reliable monitoring data should be collected as to the efficacy of desegregation measures and also as to the effectiveness of policy measures targeted at assisting the Roma. Accurate data as to attendance, participation and graduation is necessary to determining the success of an education system.
- There must be a legal recognition of the right to be educated in one's mother-tongue as well as to learn the majority language. To this end, curricula must include the possibility for some lessons at least to be conducted in Romanes.⁹⁶⁴ There will of course have to be consideration as to the number of students being present that would justify such lessons as well as guarantees as to funding language schemes.
- Free preschool education should be extended so that Roma and other minority children can become accustomed to the formal education environment and also become more fluent in the national language if necessary. Currently, Roma children are starting school already in a position of disadvantage compared to their majority peers and so are immediately struggling to catch up.
- There should be an increased, formalised use of Romani teaching assistants and also a drive to recruit more Romani teachers.⁹⁶⁵ This will have dual advantageous effects of assisting the Roma children with their learning and also assuaging fears on the part of Roma parents about how their children will be treated.
- Similarly, to some extent at least, curricula should be altered so that there are lessons discussing minority cultural and historical issues. This will result in the dual effects of making

⁹⁶⁴ For example, as this is the most widely spoken Romani dialect

⁹⁶⁵ Perhaps making use of a similar training scheme to that suggested by the Council of Europe Training Programme for Roma Mediators: <http://www.coe.int/t/dg3/romatravellers/default_en.asp> [last accessed 03/03/13]; See also: Marianna Battaglia & Lara Lebedinski 'Equal Access to Education: An Evaluation of a Roma Teaching Assistant Programme' (Working Paper 2011) < http://www.edge-page.net/papers2011/Paper_BATTAGLIALEBEDINSKI.pdf> [last accessed 03/03/13]

education more appropriate for the minority children themselves and also helping to break down barriers between minority and national majority students.

- As well as making the curriculum more culturally sensitive, special targeted measures should be introduced to assist Roma children with their access to education. This could be modelled on the example of good practice – Green Card scheme, reduced attendance rates, distance learning provisions etc – as identified in the England case study. Such measures, once modified to combat any identified flaws, are important practical steps to bring Roma children more effectively within the mainstream education system.
- Outside the scope of mainstream education, consultation could be undertaken into providing some level of educational autonomy for the Roma. Practically, such autonomy would probably have to fall short of the kind of ‘separate but equal’ schooling seen in Canada, but could involve the kind of limited separation seen in religious schools in England. However, current data seems to suggest that there is no mass desire for such separation on the part of the Roma and, indeed, that achieving such separation practically would be extremely difficult, and so any consultation must take place alongside changes being made to the mainstream education system.
- There should be a greater involvement for minority groups and for NGOs in the formation of future education policies.

Once these practical recommendations have been implemented, the English model of minority accommodation within the mainstream education system would be rendered far more effective and so could, as a whole, be better transposed across Europe as a means of alleviating the education disadvantage suffered by Roma pupils. While such a transition will not be quick nor is it likely to be cheap, it does currently seem to be the best and most practical means of ensuring educational parity.

CONCLUSION

This thesis developed from an observation of the educational disadvantage suffered by Roma children in Europe and from a desire to investigate the best means by which to rectify the situation. Chapter One served to provide background information on the history of the Roma as a people and to detail the current situation of the Roma in Europe. This chapter also clarified the target population, established the geographical boundaries of the study and detailed the thematic approach with which this thesis would be conducted. The importance placed on the right to education stems from a contention that education can be the best tool to help the Roma lift themselves out of societal disadvantage while at the same time helping to unite the communities in which they live. As Mark Halstead has suggested, education is crucial for both an integrated society and for facilitating social mobility.⁹⁶⁶ It is contended that a rights based approach is the best means by which to guarantee the right to education. For this reason, Chapter Two moved on to examine the most efficient human rights approach for guaranteeing the rights of minority groups such as the Roma.

6.1 GUARANTEEING RIGHTS IN A MULTICULTURAL SOCIETY

The first issue to address was that of identifying the type of society best able to support the accommodation of minority rights. While there are four distinct countries under particular consideration in this thesis, each of them can be said to exhibit a fractured society where the needs of at least some minority groups are either ignored or else subsumed within majority

⁹⁶⁶ J. Mark Halstead, 'British Muslims and Education' 104 in Tufyal Choudhury (ed), *Muslims in the UK: Policies for Engaged Citizens* (Open Society Institute 2005)

society. It is contended that a fractured society ultimately exists to the detriment of all citizens and that only in a unified, cohesive society can all individuals, whether belonging to a minority group or to the majority population, truly be able to flourish and enjoy the full range of their human rights.

The type of cohesive community advocated here does not currently exist in any of the four European countries under particular consideration here.⁹⁶⁷ The argument at this first stage is therefore that, in order to better accommodate the Roma and other minority groups as well as to ensure national stability and unification of citizens, a means by which each of these four countries can achieve a truly cohesive society must be identified.

To this end, it is contended that the traditional liberal democratic model of governance as widely featured in Europe is insufficient to adequately address the needs of minority groups and also fails to guarantee the kind of cohesive community which would be beneficial to both minorities and mainstream society. It is submitted that the most effective means by which to address the difficulties posed by the traditional liberal democratic model would be to recognise a version of multiculturalism (or, indeed, interculturalism⁹⁶⁸) that is compatible with liberal theory and also serves to promote integration rather than assimilation. Key to this version of multiculturalism would be the presence of critical (or value) pluralism where differences in society are recognised and evaluated in order to generate universal norms for the benefit of society as a whole.⁹⁶⁹ Such pluralism considers how cultural practices are necessary for the development of individual autonomy, but also provides checks and balances to avoid illiberal minority practices and also safeguard majority goods. Additionally, this

⁹⁶⁷ For further discussion of what constitutes a cohesive community see: Maleiha Malik, 'Discrimination, Equality and Community Cohesion' 55 in Tufyal Choudhury (ed), *Muslims in the UK: Policies for Engaged Citizens* (Open Society Institute 2005)

⁹⁶⁸ Charles Taylor 'Interculturalism or Multiculturalism?' (2012) 38 *Philosophy & Social Criticism* 413 – 423

⁹⁶⁹ Adeno Addis, 'Individualism, Communitarianism, and the Rights of Ethnic Minorities' (1992) 67 *Notre Dame L Rev* 615, 620

critical pluralism is valuable since it endorses the view that where any separation occurs, equal treatment must still exist.⁹⁷⁰ Effectively, this is recognition that true pluralism must allow for the fact that, sometimes, minority groups desire some level of separation from the mainstream but that, in the course of this separation, they are not to be in any way disadvantaged in terms of facilities or opportunities.⁹⁷¹

After establishing that a society based on this concept of multiculturalism would be the best environment in which to guarantee the human rights of minorities, this thesis moved on to consider the extent to which multiculturalism is already mandated for in international law. Of course, “if the aim of international human rights law is to ensure that domestic policies satisfy common standards of individual protection, any debate on state policies relevant to cultural membership and diversity cannot be complete without taking into account the states’ obligations, if any, according to international law.”⁹⁷² This consideration necessarily involved an examination of three key concepts in international law: equality, non-discrimination and culture.

Equality

The principle of equality is a fundamental component of any truly democratic society and it is well recognised that “a corollary exists between equality and non-discrimination.”⁹⁷³ It is contended that two varieties of equality currently exist in international law. Formal equality is basically the notion of equal treatment and does not take into account the fact that equal

⁹⁷⁰ David A. Reidy ‘Pluralism, liberal Democracy and Compulsory Education: Accommodation and Assimilation’ (2001) 32(4) *Journal of Social Philosophy* 585 – 609

⁹⁷¹ So, for example, if a minority wish to conduct the education of their children in a separate school then the children who attend such a school should not be disadvantaged when it comes to teaching methods, subject content and ultimate educational attainment. This will necessarily entail cooperation between the minority group and the national government and is a concept which was discussed in the previous chapter.

⁹⁷² Alexandra Xanthaki, ‘Multiculturalism and International Law: Discussing Universal Standards’ (2010) 32 *Human Rights Quarterly* 21, 22

⁹⁷³ See for example: Christopher McCrudden, ‘Equality and Non-Discrimination’ in David Feldman (ed), *English Public Law* (OUP 2007) 581 - 668

application of the rules to unequal groups or individuals can have unequal results. Consequently, formal equality is about treating everybody the same and so can actually lead to inequalities for those suffering severe and entrenched disadvantage. The alternative interpretation is substantive equality: “This goes beyond the notion of equal treatment and takes into account the differences in the needs that exist between groups and individuals. Consequently, substantive equality is concerned with achieving equitable outcomes.”⁹⁷⁴ It is clear that only a substantive approach to equality can help elevate minority groups such as the Roma from the disadvantageous position in which they currently stand in society.

Non-Discrimination

Discrimination has been described as “any act or conduct which denies to individuals equality of treatment with other individuals because they belong to particular groups in society.”⁹⁷⁵ Roma children of course fall within this definition and so, in theory at least, are provided with some level of protection by international law. It is important, however, to always bear in mind that not all forms of discrimination are prohibited by international law.⁹⁷⁶ It is only through robust and expansive non-discrimination provisions that all minorities can be protected and have their rights respected.

Culture

It seems clear that multiculturalism in all its forms involves the recognition and protection of culture in the public sphere. Although multiculturalism as a phrase is noticeably absent from international human rights instruments, international law has recognised the importance of

⁹⁷⁴ Hugh Collins ‘Discrimination, Equality and Social Inclusion’ (2003) 66(1) *Modern Law Review* 16 – 43, 17

⁹⁷⁵ Warwick McKean, *Equality and Discrimination under International Law* (OUP 2003) 10 - 11

⁹⁷⁶ The crucial grounds being factors over which the individual has no control so factors such as a nomadic lifestyle may fall outside the protected grounds – Study of Discrimination in Political, Economic, Social and Cultural Spheres, UN Doc E/CN.4/Sub.2/288 para 46 – 48 from Helen O’Nions, *Minority Rights Protection in International Law: The Roma of Europe* (Ashgate Publishing 2007) 69

culture for the individual. Several examples of cultural protection already enshrined in international law were identified⁹⁷⁷ and then critiqued as to the strength of the protection and the ultimate effect that it has on minority groups.

Once it was established that there is at least some recognition of the concept of culture in international law, it was important to consider whether the recognition of culture and a drive for a liberal multicultural society necessitate the recognition of group rights.⁹⁷⁸ Since the central focus of international law has always been the individual, any move towards a group rights approach would necessarily prove controversial and so it was vital to quickly determine whether such a move would be necessary in order to establish a truly multicultural society. While it was determined that there could, theoretically, be a number of justifications for a groups rights approach (and, as a corollary of this, that the Roma could be classed as a “group” in international law⁹⁷⁹), it was ultimately determined that group rights are not currently recognised in international law and neither is such a recognition necessary. This could be seen as a positive discovery since, when attempting to convince the states in question to alter their interpretation of law, success is far more likely when the change requested is non-controversial.

However, while it was ultimately determined that a group rights approach was unnecessary, the importance of the group to the individual was recognised. It is contended that no individual exists in a vacuum since everyone must be influenced to some extent at least by the society in which they live.⁹⁸⁰ Additionally, since disadvantage often occurs as a result of group membership, it is contended that a remedy can best be found to such disadvantage

⁹⁷⁷ For example Article 27 of the International Covenant on Civil and Political Rights

⁹⁷⁸ Philip Vuciri Ramaga ‘The Group Concept in Minority Protection’ (1993) 15(3) *Human Rights Quarterly* 575 – 588

⁹⁷⁹ Gulara Guliyeva ‘Defining the Indefinable: A Definition of “Minority” in EU Law’ (2012) 9 *European Yearbook of Minority Issues* 179 – 210; Helen O’Nions, *Minority Rights Protection in International Law: The Roma of Europe* (Ashgate 2007) 180 – 184

⁹⁸⁰ Charles Taylor *Hegel and Modern Society* (Cambridge University Press 1979) 157

through measures targeted at specific groups. This recognition of the importance of the group to the individual can, it is submitted, be handled through a modified approach to individual rights. Since this thesis is concerned particularly with the right to education, it is submitted that the best means by which to vary the individual rights approach is through an increased recognition of children's rights.

Since it is contended that the individual is the ideal primary focus of human rights law, it follows that the child should be the primary focus of the right to education. It should be the child who is the central focus and the rights holder, rather than the parent or the educator. In order to achieve this position in a practical sense, it is submitted that a greater international recognition of children's rights is required. It was established that there is already an important international recognition of children's rights in the form of the Convention on the Rights of the Child and that the Convention contains a number of provisions which are of particular importance in the context of the right to education.⁹⁸¹ Of course analysis has shown that the Convention is not a perfect instrument for guaranteeing the protection of children's rights. It is suggested that "the Convention is a very mixed bag in terms of the variety and range of rights which are being claimed, the problems inherent in enforcing those claims, the financial and material resources necessary to meet them and the social, political and economic consequences of granting them."⁹⁸² For this reason, as well as the numerous positives found in the Convention, it is contended that a greater recognition of children's rights is necessary in order to produce a truly multicultural society and so protect all of the human rights of Roma children in Europe and, indeed, of minority children everywhere. While community support is important to every individual, the uniquely vulnerable position

⁹⁸¹ Articles 29, 30 and 3; Laura Lundy 'Children's rights and educational policy in Europe: the implementation of the United Nations Convention on the Rights of the Child' (2012) 38 *Oxford Review of Education* 4 393 – 411

⁹⁸² Bob Franklin, 'Children's Rights: An Introduction' Bob Franklin (ed), *The New Handbook of Children's Rights* (Routledge 2005) 20

of children means that such support, as well as the sense of stability and acceptance associated with it, is particularly important. However, it is vital that, while the importance of culture is recognised, a balance is struck so that the child does not become subject to his or her culture but is instead able to rely on cultural support to back-up and potentially inform individual choices.

6.2 THE RIGHT TO EDUCATION: INTERNATIONAL LEGAL STANDARDS

After establishing the ideal rights environment in which to guarantee minority rights, this thesis moved on in Chapter Three to examine in detail the right to education. This examination began by first considering the purpose of the right to education. It is contended that education should enable opportunity and the realisation of potential, but it is also important to the development of self-esteem and identity.⁹⁸³ Furthermore, if delivered sensitively and appropriately, education can serve to break down barriers and prejudice between communities.⁹⁸⁴ 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.⁹⁸⁵ While respect for culture is arguably inherently valuable, it is also of instrumental value since protecting culture helps to protect the fundamental rights of the child. In keeping with the earlier assertion that the child as an individual should be the principal rights holder when it comes to education, it is also contended that a key purpose of any education system should be to facilitate the growth of each child into an autonomous individual who is secure in their own culture whilst also able to compete fully within mainstream society.

⁹⁸³ Kristin Henrard, 'Education and Multiculturalism: the Contribution of Minority Rights?' (2000) 7 *Int. Journal on Minority and Group Rights* 393, 394

⁹⁸⁴ Jean-Pierre Liegeois, *The Education of Gypsy and Traveller Children* (University of Hertfordshire Press 1993) 208

⁹⁸⁵ Helen O'Nions, *Minority Rights Protection in International Law: The Roma of Europe* (Ashgate Publishing 2007) 133

The question thus became, what can be done to allow the minority students access to education on an equal footing with the majority population and to ensure that the education they are then provided with is culturally sensitive while still being as academically rigorous as that provided in the mainstream?

It is now generally accepted that the cultures of religious and ethnic minorities contribute to the richness of a pluralistic society and, equally, that one of the most important rights that such minority groups hold is their right to preserve their separate identity.⁹⁸⁶ Jane Fortin contends that such a right cannot be fully exercised unless minority groups are able to maintain cultural continuity “by educating their children to understand and respect their own customs, religion and culture.”⁹⁸⁷ Culturally sensitive education of this sort serves to ensure that traditions are not lost and that group identity is passed down from one generation to the next. Difficulty lies in identifying and implementing an educational system which provides this level of cultural sensitivity whilst also ensuring that minority children are educated in a way, and to a level, which allows them to coexist peacefully and equally with the majority population of their home state.

The rights based approach to education must therefore be formulated so that a democratic pluralistic society⁹⁸⁸ can be ensured wherein minority culture and identity is respected whilst the minorities themselves join with the majority population in accepting a set of shared values for the society as a whole. Where separation is to occur, it must never become segregation and, equally, measures must be taken⁹⁸⁹ to guarantee social cohesion but never total assimilation. Striking this balance is particularly difficult in the field of education. Fortin discusses how it could be suggested that society would most benefit from all children being

⁹⁸⁶ Jane Fortin, *Children's Rights and the Developing Law* (3rd ed, Cambridge University Press 2009) 406

⁹⁸⁷ Ibid

⁹⁸⁸ As described by Jane Fortin Op Cit

⁹⁸⁹ For example, ensuring the learning of the majority language

educated in multicultural schools where ideas and beliefs could be shared and cultural barriers broken down, but that, conversely, it could also be said that a refusal to establish separate schools could disadvantage minority groups, eroding their cultural identities, and so hurting the richness of society in general.⁹⁹⁰ It is important to consider the educational interests of minority children from both perspectives: consideration must be given to the legal rights of minority children and parents to request a separate education and to the role that the state government is required to play in such a situation, as well as steps that could be taken for minority children⁹⁹¹ who wish to pursue a wholly mainstream education.

Once the purposes behind the right to education had been evaluated, this thesis moved on to critique the current international formulation of the right. In Chapter Three the various international instruments governing the right to education were considered in turn to determine the level of protection that they provide for the educational needs of children and their parents, what obligations they place on the states parties concerned, and any areas that exist for improvement which may help to redress the disadvantage currently suffered by Roma children in Europe. In undertaking this analysis of the various international instruments, it was suggested that there is a sliding scale of levels of accommodation in education that may be offered to minority students. At one end of this scale, the lowest level of accommodation, would be legal provisions that guarantee basic access to education but which go no further. This could take the form of a straightforward non-discrimination provision stating that no one shall be denied the right to education. The reason that this is a low level of minority accommodation is that it fails to recognise that equality of opportunity does not always result in equality of outcome and, also, that minority groups often need extra help or additional means of assistance due to the fact that their ‘starting position’ in education

⁹⁹⁰ Jane Fortin Op Cit 407

⁹⁹¹ And their parents

(and other areas of national life) is lower than that of mainstream citizens.⁹⁹² Further along the scale of minority accommodation would be the fairly uncontroversial step of making education free and compulsory, while further along still would be measures aimed specifically at assisting minority groups (such as relaxed attendance requirements, mother tongue teaching, etc). It is suggested that at the most extreme end of the accommodation scale is a legal mandate for ‘separate but equal’ education. Such a form of education would involve minority students being educated in separate, culturally-sensitive schools that reflected their particular educational needs but also equipped them to compete in mainstream society should they wish to do so. The level of education provided in such schools would be comparable with that of mainstream schools and as such a ‘separate but equal’ education system would be very different from the segregated education discussed in previous chapters. After applying this method of thematic analysis to all of the international instruments concerning the right to education, it was concluded that international law does not place an onerous burden on states parties in this area. The level of accommodation demanded for minority pupils is very much of the lower level. All of the international instruments of course require a basic guarantee of access and a standard non-discrimination provision but, even when they demand more (whether it be in terms of free and compulsory education or something else), they do not progress to anywhere near ‘separate but equal’ education. There is, however, some limited recognition that special targeted measures of a temporary duration may sometimes be needed to help place minorities on an equal footing with their majority population counterparts.

The analysis conducted in Chapter Three ultimately demonstrated that Roma children in contemporary Europe are at a clear disadvantage in the educational process.⁹⁹³ Despite the existence of numerous, seemingly comprehensive, human rights instruments that offer

⁹⁹² Gudmundur Alfredson and Alfred de Zayas ‘Minority Rights: Protection by the United Nations’ (1993) 14 *Human Rights Law Journal* 2

⁹⁹³ Helen O’Nions Op Cit 174

specific protection to the right to education, Roma children continue to be marginalised and to be denied the educational opportunities that the majority of children educated in mainstream schools take for granted. Education is held up as being one of the vital human rights and as a right worthy of the highest level of protection, but, until words are matched by deeds, while minorities such as the Roma continue to receive less protection and assistance than majority citizens, the right to education can never be considered to be fully realised.

While many reasons for the disadvantage suffered by the Roma can be offered, the truth of the matter is that they are being failed by the international human rights bodies in the same way that they are being failed by their national governments. The traditional focus on non-discrimination is really only the most basic form of minority accommodation and this has not ended inequality in education and has failed to address the problems facing minorities. The focus on plain individualism and neutrality is, however, fortunately now being questioned.⁹⁹⁴ One possible solution to the issue could therefore be an increased recognition of the need for intercultural education:

“Intercultural education aims to deepen students’ knowledge and appreciation of different cultures, to reduce prejudices, to pinpoint the interdependence of the world community, and – if it encompasses an anti-racist approach – to facilitate a critical awareness of institutional discrimination and the origins of societal inequalities.”⁹⁹⁵

It is suggested that intercultural education will help to foster understanding and break down prejudice and social barriers but it will not be able to remedy the situation of the Roma on its own. An additional change needs to be made from the present focus of human rights so that the importance of the group to the individual is better recognised and the child is firmly

⁹⁹⁴ Ibid

⁹⁹⁵ Mikael Luciak, ‘Minority Schooling and Intercultural Education: A Comparison of Recent Developments in the Old and New EU Member States’ (2006) 17(1) *Intercultural Education* 73, 75

positioned as the focus of his/her own human rights. It is submitted that, by reflecting the importance of group membership and culture in the education system, minority pupils can be better facilitated in their learning experience. Although minority education for the Roma should be culturally sensitive and should allow for teaching in the minority dialect, general standards would still be guaranteed by the state, including time spent learning the majority language. Such an approach would serve ensure the Roma children benefit from the same quality of education as their mainstream counterparts, while also ensuring that their own culture is preserved and respected.

6.3 THE RIGHT TO EDUCATION: DOMESTIC LAW AND POLICY

After considering the various international instruments governing the right to education, this thesis moved on to consider the domestic education law and policies of each of the four countries. The same type of thematic analysis as discussed above was used to determine the level of minority accommodation provided by the relevant domestic education policies. The domestic policy of each of the four countries was analysed to determine, first, whether it is compatible with the international educational obligations which the state must meet and, secondly, where exactly each state falls on the scale of minority accommodation. Throughout the analysis, consideration was given to whether educational policies which might, on the face of it at least, appear to be adequate or even progressive are actually so effective in practice.

It was soon established that each of the four European countries featured a basic guarantee of access in their domestic education law. It is contended though that a basic guarantee of access to education is only an important first step towards minority accommodation. Additionally, such a guarantee can only be effective if it is coupled with an expansive non-discrimination

provision and if it is given practical application. Notably, each of the four countries have actually taken steps beyond offering a mere guarantee of access.

It is suggested that mandating for free and compulsory education is a clear step beyond a mere guarantee of access⁹⁹⁶ and that it is a vital one when it comes to making the right to education a practically achievable one for minority students. While each of the four countries have actually gone beyond that which is required of them in the majority of the international human rights instruments when it comes to the length of the free and compulsory education to be provided, the practical situation of the Roma that has been discussed in previous chapters clearly indicates that this is not sufficient to actually guarantee the right to education for minority pupils. This clearly indicates that the existing provisions governing the requirement for compulsory education are not robust enough to ensure that minority pupils are actually attending school for the required period and, further, that the education which is being provided is suitable and sufficient for their needs. Such provisions will need to be substantially overhauled and strengthened if they are to achieve their desired effect.

It is acknowledged that each of the four countries have implemented domestic policy measures that afford specific recognition of the needs of minority pupils, either through the right to mother-tongue education or through other means such as a modified curriculum. Although this still of course falls short of ‘separate but equal’ education, such provisions can be seen to be quite advanced when it comes to the sliding scale of minority accommodation. However, despite these theoretical positives, as demonstrated in the earlier chapters of this thesis, Roma pupils continue to suffer discrimination and educational disadvantage and so clearly domestic education policy in each of the four countries is failing to meet its stated and perceived aims. Additional steps are clearly needed in order to truly guarantee educational

⁹⁹⁶ Murray Rothbard (1999) *Education: Free & Compulsory* (Alabama, Ludwig von Mises Institute) 19 – 36

parity for Roma pupils. In order to help identify exactly what form such additional steps should take, two case studies were offered – one of traveller education in England and one of indigenous education in British Columbia, Canada – in order to assess whether the educational model used in different jurisdictions could be cross-applied to help improve the situation of the Roma in Europe.

Case Study One – Gypsy/Traveller Education in England

It was unfortunately demonstrated that, even in a country with as advanced an education system as that found in England, Gypsy and Traveller children are still being disadvantaged. This first case study attempted to set out the argument for the “right” to education in the English context and illustrated the general policy context of Gypsy and Traveller education. It has been noted that the education system in England, as in other European countries, is highly politicised and that the curriculum is subject to a huge amount of lobbying and change due to the ‘swinging pendulum’⁹⁹⁷ of political and, indeed, public support and interest. This variation in interest has, of course, had an effect on the nature, direction and, importantly, funding of Gypsy/Traveller education schemes and projects. It has also been noted that in England “there is a clear and problematic correlation between site provision and accommodation and access to, and achievement in, education.”⁹⁹⁸ The first observation made was that England might benefit from taking a more rights based approach to education rather than concentrating solely on practicalities. By framing education at a national level as being a fundamental right of all children, the level of obligation placed on the state to ensure the sufficiency and adaptability of education would be arguably far stronger.

⁹⁹⁷ Save the Children, *Denied a Future? The Right to Education of Roma/Gypsy & Traveller Children in Europe Volume 2: Western & Central Europe* (Save the Children 2002) 277

⁹⁹⁸ ACERT *Annual Report 2010-2011* (June 2012) 4

The second important observation was that minority accommodation in England is conducted within the mainstream education system. Although it quickly became apparent that Gypsy/Traveller provision in England was mainly of a piecemeal nature (and that this is something which must be avoided if any English examples were to be implemented elsewhere in Europe), there were some valuable examples of good practice available, perhaps most noticeably the reported absence of anti-Roma racism and discrimination.⁹⁹⁹ The goal of the English mainstreaming approach seemed to be the integration of Gypsy/Traveller pupils into the standard education system but there were a number of positive, targeted initiatives (including bridging schools, Green Cards, relaxed attendance targets, virtual learning and curriculum modifications) at both a national and local level which demonstrated that tailored minority accommodation can still be developed within a mainstream setting. By identifying such examples of good practice across the country, it is submitted that some ideas for a positive way forward can be highlighted and refined.¹⁰⁰⁰ Many of the schemes and projects discussed show high levels of commitment and dedication on the part of a number of statutory and voluntary organisations to improve the education outcomes for Gypsy and Traveller children. It is clear that examples of good practice can “be found in terms of educational practice that is inclusive, responsive, relevant, developmentally appropriate and participatory.”¹⁰⁰¹ The lack of national uniformity and formality in these targeted measures was identified as being a critical flaw and one that must be avoided if the four countries decide to implement similar measures. There is also a worrying issue as to budget cuts which, while not an absolute certainty, do seem to indicate that some if not all of the special schemes targeted at minorities might be cut in the near future. This in itself contains a valuable warning for countries seeking to implement similar schemes – it is important that funding is

⁹⁹⁹ Roma Education Fund *From Segregation to Inclusion: Roma Pupils in the United Kingdom A Pilot Research Project* (REF/Equality 2011) 10

¹⁰⁰⁰ Both for use in England and further afield in Europe.

¹⁰⁰¹ Save the Children Op Cit 277

uniform and that it is placed on a secure, statutory platform. So then, while clearly not perfect, this English model of minority accommodation within the mainstream offered several positive examples and guidance for changes that could be implemented elsewhere in Europe.

Case Study Two – Indigenous Education in British Columbia, Canada

It was acknowledged from the outset that the situation of indigenous peoples in Canada is very different from that of the Roma in Europe but, it is submitted, this case study offers a valuable example of ‘separate but equal’ education in practice. While the desire for this educational separation was clear from the information presented in the case study, the ultimate success of the project is unfortunately dubious.¹⁰⁰² Seemingly, despite the good intentions on the part of both the Federal and Provincial governments, the present non-unified system of education for First Nations children living on-reserve is failing from the standpoint of formal educational achievement with the overall school attainment figures for indigenous pupils in Canada showing no improvement in recent years. It seems that the process of devolution of education has remained incomplete due to a lack of foresight which resulted in no mechanism for a First Nations Education Authority being established.¹⁰⁰³ There are, however, positives to be found from the Canadian experience which may be applied to the situation of the Roma in Europe. There certainly seems to be both political and public will that the First Nations be provided with educational parity and such a change in attitude, happening as it did fairly quickly within a period of less than fifty years, is encouraging. The basic idea that First Nations could be educated separately on-reserve but with the education provided being held to the same standard as that provided to ‘mainstream’ society is sound in

¹⁰⁰² Michael Mendelson, *Improving Education on Reserves: A First Nations Education Authority Act* (Caledon Institute of Social Policy 2008) 6

¹⁰⁰³ Michael Mendelson *Why We Need a First Nations Education Act* (Caledon Institute of Social Policy 2009) 26 – 30

that it seems to offer both equality and cultural understanding.¹⁰⁰⁴ Unfortunately, statistics demonstrate that the idea has not yet been brought into reality as on-reserve education still seems to be substandard (at least when it comes to the number of pupils formally graduating from school). However, it is suggested that educational success should not be solely judged based on the awarding of certificates and qualifications. It is equally important that children are secure and happy in their learning environment and that they can couple formal educational goals with culturally relevant instruction. With regard to these additional purposes of education, on-reserve schools have been far more successful. Europe can therefore learn from this Canadian model and perhaps offer in-community, culturally sensitive education that still covers the relevant national curriculum to the Roma.

6.4 CONCLUDING OBSERVATIONS

Since it is clear that the current education policies in each of the four European countries under consideration in this thesis are failing to remedy the educational disadvantage suffered by Roma children, even when these policies move beyond what is required of states parties by international law, changes must be made if these countries are sincere about improving minority accommodation. While the first of such changes are necessarily conceptual, such as the move towards a truly multicultural society and the recognition of the child as the primary rights holder, there are some practical changes that must be made to the education system as well. These changes can be observed within the case studies discussed above.

Although England does not completely adhere to the rights based approach to education that this thesis suggests to be the optimum approach, the English education system does make special accommodation for Gypsy/Travellers. Accommodation is offered within the mainstream – with additional support and teaching available as well as special rules as to attendance – so that

¹⁰⁰⁴ Glen S Aikenhead, (1996) Towards a First Nations Cross-Cultural Science and Technology Curriculum *Journal of Culture and Comparative Studies* 233

Gypsy/Traveller pupils are educated alongside their majority peers. The idea behind this type of provision is that of giving additional targeted support for minority pupils but firmly ensuring that they are included within the mainstream education system and so are able to compete equally in mainstream English society. Such accommodation has the potential to be a very effective and practical means of minority accommodation.

While this thesis classifies the type of ‘separate but equal’ education seen in British Columbia as the extreme of minority accommodation in education, it is ultimately submitted that this type of accommodation would not actually be suitable for the Roma in Europe. The political situation in each of the four countries under consideration here is very different from that in Canada and so it is difficult to see how a completely separate education system could be practically implemented. Additionally, there does not seem to be the same demand for such a system from the Roma as there was from the indigenous peoples. The Roma are not so politically organised and unified as the indigenous peoples of Canada and so it seems that no single system would suit them either. Further, since it is contended that the goal of a multicultural education system should be to securely root a child within their own culture while also equipping them to compete in mainstream society if they so wish, it is submitted that the English model of accommodation within the mainstream would be more suited to the needs of the Roma.

This is not to suggest that the English model is perfect or that it could be straightforwardly transposed elsewhere in Europe. A number of critical flaws within the English system of minority accommodation were identified in Chapter Five and so this thesis suggests that a number of alterations must be made and guarantees put in place if efficient minority accommodation within the mainstream education system is to be implemented elsewhere. It is vital that the concept of education being a fundamental right is firmly entrenched in national legislation and, also, that critical issues such as funding are likewise formalised. Ultimately though, while alleviating the educational disadvantage suffered by Roma children in Europe will not be an easy or wholly uncontroversial

process, it is certainly possible that the situation can be improved in a way that should prove satisfactory to the Roma as well as to the majority populations.

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