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The European Convention on Human Rights and the Protection of the Roma as a Controversial Case of Cultural Diversity

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Abstract

The Roma are often the victims of systemic discrimination which is closely related to the prejudices against them and their particular way of life, their own minority identity. When studying to what extent the Roma and their own way of life are protected on the basis of individual human rights in the European Convention on Human Rights, it becomes clear that slowly but surely the European Court of Human Rights acknowledges the vulnerable position of the Roma and their concomitant need of special protection. While significant developments have taken place concerning the preliminary issues of non-discrimination and the protection of physical integrity, the actual protection concerning language rights or educational rights is still rather meagre. Nevertheless, the gradual emergence of a right to an own way of life for Roma and the ensuing positive state obligations might very well enhance the latter incipient protection. The overall tendency of the latest judgements of the Court is to increasingly restrict the margin of appreciation of states, also in the sensitive domain of minority protection.

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Key words

Roma – Minority – Equality – Identity - Language – Education – Lifestyle – State Obligation.

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1. Introduction

The particular predicament of the Roma all over the world, but also in most European countries, is well documented. Problems of pervasive discrimination in several areas of life, especially regarding access to employment, education, health care and housing, go hand in hand with numerous instances of racial violence, and mistreatment by the police. All these negative factors for the overall living conditions of the Roma can mainly be attributed to negative perceptions about the Roma identity, their own way of life, values and traditions.

Notwithstanding the fact that the Roma are generally acknowledged to constitute a minority, which would invite an investigation of possible avenues of protection for the Roma on the basis of minority rights, this chapter will be focused on the extent to which individual human rights provide protection for Roma.

A brief 'preliminary' section concerning the meaning of the concepts 'cultural diversity' and 'cultural rights', justifying the exact scope of this article, and a succinct factual description of the situation of the Roma, is followed by an analysis of the way in which individual human rights contribute to the protection of the Roma and their own way of life. In view of the excellent reputation of human rights protection under the European Convention on Human Rights (ECHR), this second part will be constructed around the latter treaty and the jurisprudence of the European Court of Human Rights (ECtHR).

Two preliminary issues that are elaborated upon are the equality principle, more specifically the prohibition of discrimination, as well as the protection of the right to life and physical integrity. When studying the degree to which

[1] An earlier, shorter version of this paper has been published in Francesco Palermo and Gabriel N. Toggenburg (eds.), *European Constitutional Values and Cultural Diversity* (EURAC Research, Bolzano/Bozen, 2003, out of print).

Roma's cultural rights are protected, the focus will be on the right to one's own way of life, the use of one's own language in the public sphere and the right to education, including access to education and the right to mother tongue education. In several regards, important developments can be gleaned from the jurisprudence of the European Court of Human Rights, even though not always in cases concerning Roma. Nevertheless, this case law is of obvious relevance for Roma in view of the principles they contain. In any event, it is equally obvious that there is still ample scope for improvement.

2. Cultural Diversity (Cultural Rights) and Factual Background on the Situation of the Roma

2.1. Cultural Diversity (Cultural Rights)

When speaking in terms of cultural diversity, it is always advisable to give an indication about the meaning of the concepts of culture and cultural rights. A narrow and a broad, anthropological meaning of the concept of culture can be distinguished. Whereas the first mainly concerns the highest intellectual achievements of humans, like philosophy, literature etc., the second is much wider and includes aspects of one's own, separate way of life such as food, clothing, housing, the learning of family values and the like.[2] Arguably, language is a component of culture, and this can also be put forward regarding religion. An enumeration of cultural rights confirms the broad scope of culture and its intrinsic relation to the identity of minorities. Cultural rights definitely tend to include the right to education,[3] which is crucial for minorities in view of its socialization function, while access to and adequate coverage in the media can also be added to the list of important issues concerning the reproduction of a certain culture.[4]

As already indicated in the introduction, this article will mainly address the protection of the own way of life of the Roma, rights pertaining to language use and education more generally. When mentioning the own way of life of the Roma, one thinks immediately of living in caravans and often, but not necessarily any more, an itinerary life style. Regarding the right to education,

2 Linda V. Prott, "Cultural Rights as Peoples' Rights" in Jack Crawford (ed.), *The Rights of Peoples in International Law* (Clarendon Press, Oxford, 1988), 93-106, 94. See also Jack Donnelly, "Human Rights, Individual Rights and Collective Rights" in Jan Berting et al. (eds.), *Human Rights in a Pluralist World: Individuals and Collectivities* (Meckler, Westport, 1990), 39-62, at 55.

3 Yoram Dinstein, "Cultural Rights", *Israel Yearbook on Human Rights* (Martinus Nijhoff Publishers, The Hague, 1979), 58; Prott, "Cultural Rights …", 96-97; Vernon van Dyke, "The Cultural Rights of Peoples", 2 *Universal Human Rights* (1980), 13; Collin H. Williams, "The Cultural Rights of Minorities: Recognition and Implementation", in Jana Plichtova (ed.), *Minorities in Politics*: *Cultural and Language Rights* (Czechoslovac Committee of the European Cultural Foundation, Bratislava, 1992), 112.

4 Williams, "The Cultural Rights of Minorities: …", 111-113.

severe problems exist as regards *de facto* access to education, especially the higher echelons of education, while education in the/a Roma language is also an issue. The problems regarding the use of the/a Roma language in the public domain might come less to the forefront but they definitely belong to the realm of cultural rights and are an issue that should not be overlooked.

Notwithstanding the focus on cultural diversity and the protection of cultural rights**,** it seems appropriate and even necessary to first consider some so-called 'preliminary' issues. Indeed, certain rights do not qualify as cultural rights but are nevertheless rights that can play a central role regarding the enumerated cultural rights or that can be considered as pre-eminent rights that need to be guaranteed to be able to enjoy these cultural rights. In general when one discusses the position of Roma, the focus is on their overall disadvantaged, vulnerable position, and the related systemic prejudice against them, which translates into multiple manifestations of racial violence and systemic discrimination. This obviously colours their lives and influences the way they exercise their cultural rights and can live their own way of life.

The most important of the so-called 'preliminary rights' are the right to life and the prohibition of torture and inhuman or degrading treatment or punishment. The right to life is undoubtedly the natural first right that should be guaranteed to individuals as it is a necessary condition for the enjoyment of the other fundamental rights and freedoms. Members of minorities have by definition a vulnerable position in society, in view of their numerical minority position and non-dominant position. They tend to be almost natural victims of these offences so arguably, their vulnerability amplifies the need for an effective protection of the (overall) physical integrity of the persons involved.[5]

Because of the special importance of the effective protection of the rights at issue, it is crucial that they are considered absolute or quasi absolute rights in view of the very limited scope of legitimate limitations, derogations and exceptions.

As will be elaborated infra, it is well known that the Roma are often victims of police mistreatment, which even results in deaths in custody. Furthermore, Roma tend to be the target of more pervasive problems of racial violence, also at the hand of private individuals. In the latter respect, the question arises to what extent the state has positive state obligations to prevent infringements of the right to life at the hand of private parties or in other words how wide the indirect horizontal applicability of human rights reaches.

[5] See also Rudolf Stavenhagen, "Human Rights and Peoples' Rights – the Question of Minorities", *Nordic Journal on Human Rights* (1987), 16-26, at 21.

Secondly, another kind of preliminary right of crucial relevance for Roma concerns the prohibition of discrimination. Indeed, the Roma are often subject to pervasive, systematic discrimination in many countries in Europe, both east and west. Equality or equal treatment are justifiably said to be key issues in relation to the protection of Roma. Furthermore, the absence of discrimination is arguably a prerequisite to the full enjoyment of cultural rights as it determines the actual scope of the accommodation of the Roma.

Also here protection against private acts of discrimination, including violent manifestations of prejudice by private persons, and the required state activities in this respect are very important. Furthermore, as will be developed infra, issues of indirect discrimination are crucial, especially regarding the separate, own way of life of the Roma, in relation to, for example, general town planning regulations. An awareness of indirect discrimination already implies a certain openness towards substantive equality, which would be further enhanced by the grant of 'special' measures, at least special protection, for Roma, in view of their particularly disadvantaged position.

2.2. Factual Background on the Roma

An extensive coverage of the Roma, information on their own language, culture, religion and way of life (including a nomadic life style), their early roots, their arrival in Europe in the 14th Century, the development of the policy of the authorities in their regard and the ensuing situation for the Roma as regards their social-economic situation, education, discrimination and ethnic violence, has been done elsewhere[6] and does not need to be repeated here. It suffices to indicate here the generally miserable living conditions of the Roma, due to their weak economic position and difficult access to employment. Furthermore, several obstacles to schooling of Roma children can be pointed out, which are all related to a hostile school environment to pupils with a different social and cultural background.[7]

As ECRI points out in the preamble to its General Policy Recommendation no 3, entitled Combating racism and intolerance against Roma/Gypsies: "Roma/Gypsies suffer throughout Europe from persisting prejudices, are victims of racism which is deeply rooted in society, and target of sometimes violent demonstrations of racism and intolerance and that their fundamental

6 Marcia Rooker, *The International Supervision of Protection of Romany People in Europe* (University Press, Nijmegen, 2002), 9-17 and 53-66. See also Peter Bakker and Marcia Rooker, "The Political Status of the Romani Language in Europe", Working Papers of the Office of the High Commissioner on National Minorities, 3-7, at http://www.osce.org/hcnm.

7 See also Report of the OSCE High Commissioner on National Minorities to the Human Dimension Section of the OSCE Review Conference, Vienna, 22 September 1999, RC.GAL/2/99; "Report on the Situation of Roma and Sinti in the OSCE Area", (2000).

rights are regularly violated or threatened" and "the persisting prejudices against Roma/Gypsies lead to discrimination against them in many fields of social and economic life, and that such discrimination is a major factor in the process of social exclusion affecting many Roma/Gypsies".[8] Indeed, although general xenophobia may exist, the Roma still suffer special vilification. It should furthermore be noted that although there are serious concerns that Roma tend to suffer persecution in several European states, special measures are apparently taken to preclude Roma in particular to have access to a substantive refugee determination.[9]

3. The Protection for the Roma and their Separate Identity at the Level of Individual Human Rights

As will be demonstrated in the following paragraphs, several developments have taken place in the general human rights framework, and more specifically in terms of the European Convention on Human Rights, that have potential to improve the protection of Roma and their separate identity at the level of individual human rights. Nevertheless, it has to be acknowledged that so far the progress has been mainly one of theoretical principle, as the actual application to the facts has remained rather restrictive. Moreover, certain critical remarks can be made concerning the admissibility hurdles present in many cases brought before the ECtHR by Roma. The most problematic of these hurdles is obviously the finding by the European Court of Human Rights that a case is manifestly ill founded[10] because there would be no reason to depart from the conclusions reached by the national authorities as they are better situated to evaluate the applicant's complaints or because the minimum level of severity for Article 3 would not be reached (concerning cases of alleged excessive police violence). The reasoning of the Court in these instances furthermore arguably departs from its own jurisprudence as regards the need for the Strasbourg organs to re-examine the facts when there are disagreements in domestic courts about them or as regards injuries sustained when in police custody (e.g. *Ribitsch*[11] and *Tomasi*[12]).[13]

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8 See also John Whooley, "Inequality and the Struggle for Roma Rights" (1999), at http://www.errc.org

9 See the advocacy piece, "Migration, Asylum and Roma Rights Policy: a 3-part Basis for Good Governance", 2 *Roma Rights* (2002), at http://www.errc.org .

10 See in this respect the difference between the same case before the Committee against the Elimination of all Forms of Racial Discrimination and before the ECtHR: the former considered it admissible (para. 6.5) but then concluded to the non violation because of the condemnation of the alleged perpetrator (para. 10) with the decision of non admissibility by the ECtHR to the same facts because the claim would be manifestly ill founded (*Lacko v. Slovakia*, CERD/C/59/D/11/1998 and *Lacko v. Slovakia*, Application No. 47237/99.See for this and any further reference to a judgment of the ECtHR the Court's website at http://www.echr.coe.int.

11 ECtHR, *Ribitsch v. Austria*, judgment of 4 December 1995.

3.1. The Protection of Physical Integrity

Concerning the preliminary issues identified above, namely the protection of physical integrity and the equality principle, one can point to significant developments or at least developments with a great deal of potential.[14] Although most of these developments have been extensively covered elsewhere,[15] it seems appropriate to take up the broad lines here, while adding important recent developments where necessary. The complaints before the ECtHR mostly concern torture, inhuman and degrading treatment, also during detention, and discrimination. Because the related acts tend to stem from prejudice against Roma because of their own, separate way of life, culture etc, it is relevant to treat them briefly here.

Whereas until now most Roma cases against Hungary have not been successful, several cases of police violence against Roma have led to condemnations of Bulgaria. Recently the ECtHR has confirmed its case law of *Assenov*[16] and *Velikova*[17] in *Anguelova*[18]. In the latter case, the Court concluded to multiple violations, which concerned the death of Anguelova's son after ill-treatment in police custody. The Court did not only establish a violation of Article 2 because a person died in police custody while being healthy before and the state being unable to provide a plausible explanation,[19] but also of Article 2 because the investigation into the death of that person was not sufficiently objective and thorough.[20] A violation of Article 3 was found because the injuries to the person's body "were indicative of inhuman treatment beyond the threshold of severity under Article 3",[21] while the "unacknowledged detention of an individual is a complete negation of the fundamentally important guarantees contained in Article 5".[22] This line of jurisprudence seems to indicate a growing acknowledgement of the

12 ECtHR, *Tomasi v. France*, judgment of 27 August 1992.

13 See also Lilla Farkas, "Knocking at the Gate: the ECHR and Hungarian Roma" (2000), at http://www.errc.org.

14 No cases of racially inspired violence have come before the Human Rights Committee (HRC) or the CERD.

15 *Inter alia* Florence Benoit-Rohmer, "Observations: A propos de l'autorité d'un 'précédent' en matière de protection des droits des minorités", *Revue Trimestrielle de Droits de l'Homme* (2001), 905-915; Rooker, *The International Supervision …*, 140-142, and 172-178.

16 ECtHR, *Assenov. v. Bulgaria*, judgment of 28 October 1998..

17 ECtHR, *Velikova v. Bulgaria*, judgment of 18 May 2000.

18 ECtHR, *Anguelova v. Bulgaria*, judgment of 13 June 2002.

19 ECtHR, *ibid.*, paras. 110-121.

20 ECtHR, *ibid.,* para. 145.

21 ECtHR, *ibid.,* para. 149.

22 ECtHR, *ibi*d., para. 154.

vulnerable position of Roma and the related stricter stance of the ECtHR towards action (or inaction) by the state authorities.[23]

Notwithstanding the fact that *Nachova v. Bulgaria*[24] does not concern Article 5 but Article 2, it also concerns excessive police violence against Roma and hence can be considered here (in addition to its seminal importance as regards Article 14, see infra). The case concerns a complaint of close relatives of two Roma men who were shot by police officers who tried to arrest them, while being unarmed and not suspected of having committed a violent crime. The Court confirms its strict stance as regards violations of Article 2, and actually adds an additional requirement to Article 2(2)(b) when it argues that the legitimate aim of effecting a lawful arrest cannot justify putting human life at risk where the fugitive has committed a non violent crime and does not pose a threat to anyone.[25] In the process the Court also reveals its 'heightened scrutiny' of police violence against Roma in view of their disadvantaged position in many societies.

3.2. The Equality Principle

A second important development concerning the protection of Roma on the basis of individual human rights pertains to recent jurisprudence of the ECtHR as regards the equality principle. There have in any event been important developments in ECHR's Article 14 jurisprudence, which reveal an openness towards substantive equality, as contrasted with mere formal equality.[26] First of all, it should be highlighted that the Court recently accepted in theory allegations of indirect discrimination. As the latter are focused on norms and practices with disparate impact on certain groups, and as indirect discrimination often occurs on the basis of race/ethnic origin, the principled

23 Note that in *Cyprus v. Turkey*, the original complaint before the European Commission on Human Rights comprised complaints about the discriminatory treatment of Romany people which would amount to a violation of Art. 3. However, the Commission held the complaint inadmissible in this respect as being manifestly ill founded and hence it did not feature in the merit stage before the Court.
On the other hand, reference should definitely be made to *Conka v. Belgium* (judgment of 5 February 2002) in which the ECtHR found for the first time a violation of Art. 4 of Protocol 7 as related to the collective expulsion of a group of Roma. The Court here seemed to give enhanced protection to the Roma in view of their extra vulnerable position in society. See also Lilla Farkas, "Knocking at the Gate: …", 3; Judy Garland, "Case note: *Conka v. Belgium* – Inroads into Fortress Europe?", at http://www.errc.org; Elspeth Guild, "The Borders of Legal Orders: Challenging Exclusion of Foreigners", 2 *Roma Rights* (2002), at http://www.errc.org.

24 ECtHR, *Nachova v. Bulgaria*, judgment of 26 February 2004.

25 ECtHR, *ibid.*, para. 103.

26 The Human Rights Committee has from the beginning manifested a focus on substantive equality in its views on the prohibition of discrimination, as is also reflected in its General Comment 18 on non-discrimination, at http://heiwww.unige.ch/humanats/gencomm/hrcom22.htm. See also the Articles 1(4) and 2(2) of the Convention on the Elimination of All Forms of Racial Discrimination and the concomitant views of the CERD.

stances in *Kelly v. UK*[27] and *Mc Shane v. UK*[28] are important. An even more important development has manifested itself in *Thlimmenos v. Greece*[29] as the Court indicates here for the first time that states are obliged to adopt differential measures concerning persons who find themselves in significantly different situations: "the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different".[30] This opening towards substantive equality,[31] arguably extends the changing approach concerning indirect discrimination, and tends to augur well for the determination of state obligations to take special measures for their minority populations generally and the Roma more specifically, that take their specific characteristics and needs into account.

Even though the ECtHR used to be rather conservative in ruling on racial discrimination, one can point to certain older case law exposing at least a special attention and concern for manifestations of racially inspired actions and violence (e.g. *Jersild v. Denmark*[32]). For many decades the Commission's decision in the *Asian Africans cases* in the late 60s was not followed by explicit statements by the Court that identified race as a suspect class in its non-discrimination jurisprudence. Nevertheless, the growing concern in member states, as reflected in the EU's Race Directive (directive 2000/43 EC) and as in states worldwide, to eradicate racial discrimination has exerted pressure on the ECtHR also to take a more explicit stance in this respect, which has arguably materialised (to some extent) in *Nachova v. Bulgaria* (see infra). The adoption on 4 November 2000 of the 12th Additional Protocol to the ECHR, which introduces a general, autonomous prohibition of discrimination, should also be highlighted. Notwithstanding the slow ratification process (by end of October 2004 only 6) which will delay its coming into force, the positive expectations about its impact on the overall equality jurisprudence of the ECtHR are rather high. The developments regarding the Court's heightened awareness of and concern for the treatment of minorities and of Roma more specifically, discussed *infra*, will hopefully lead the Court to further reorient its jurisprudence towards uncovering and recognizing also less obvious forms of racial and ethnic discrimination with which Roma are

27 ECtHR, *Kelly v. UK*, judgment of 4 May 2001.
28 ECtHR, *Mc Shane v. UK*, judgment of 28 May 2002.
29 ECtHR, *Thlimmenos v. Greece*, judgment of 6 March 2000 .
30 ECtHR, *ibid.*, para. 44.
31 See also Janneke H. Gerards, "Noot bij het Thlimmenos arrest van het EHRM", *European Human Rights Cases* (2000), 45-46.
32 ECtHR, *Jersild v. Denmark*, judgment of 23 September 1994.

confronted.[33] In this respect, the Court could for example in the future accept more easily complaints of discrimination in relation to complaints of violations of Article 3 because of mistreatment by police officers (in contrast to its position so far, e.g. *Anguelova v. Bulgaria*).[34]

Nachova v. Bulgaria is undoubtedly very important for the European Court's jurisprudence pertaining to Article 14 in several respects. It is not only the first case in which the Court concludes to a violation of Article 2 in combination with Article 14 but it also seems to announce some kind of heightened scrutiny for differentiations on the basis of race. Considering the broad interpretation given to the concept 'race' as encompassing ethnic origin this heightened scrutiny works in favour of ethnic minorities, including the Roma. As already emphasized supra, the fact that these developments take place in a case concerning police violence against Roma further demonstrates that the Court acknowledges the special protection needs of Roma in view of the severe prejudices against them and their own way of life.

In its evaluation of the complaint of violation of Article 14 in combination with Article 2 ECHR, the Court points out, in line with its steady jurisprudence, that the prohibition of discrimination of Article 14 also applies to the procedural dimension of Article 2, concerning the duty of public authorities to conduct effective investigations in case of suspect deaths. In an earlier case pertaining to a racist murder by private individuals (*Menson v. UK*, recevability decision 6 May 2003), the Court already underlined that "where [an] attack is racially motivated, it is particularly important that the investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence" (p. 13-14). Arguably this holding already signals a special status for racial discrimination which is acknowledged to be of particular relevance for minorities and minority protection. *In casu* the Court adds that in case it concerns a killing by state officials "State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events".[35] In this respect it should be highlighted that the Court actually draws on the *Thlimmenos* rational to underline that special attention should be given to investigations of possible racial violence: "a failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified

[33] See also Endre Sebok, "The Hunt for Race Discrimination in the European Court", 1-2, at http://www.errc.org.
[34] See also Rooker, *The International Supervision …,* 140-142.
[35] ECtHR, *Nachova v. Bulgaria*, para. 158.

treatment irreconcilable with Article 14 of the Convention".[36] Furthermore, the Court decides to reverse the burden of proof in view of its own broader vision of the prohibition of discrimination as indicated in *Thlimmenos* and the broader European trend[37] to do so regarding discrimination complaints. Even though the Court does not explicitly take up its 'very weighty reasons' terminology which it normally uses to indicate a 'suspect class' of differentiations, this reversal of the burden of proof (in combination with its other statements on racism and racial discrimination) arguably amounts to a similar instance of stricter scrutiny, entailing a drastic reduction of the states' margin of appreciation.

According to the Court, the public authorities had not made adequate efforts to unveil whether or not racial motives had played a role in the killing of the Roma, despite numerous indications to that effect. Consequently the Court decides to reverse the burden of proof, requiring Bulgaria to proof that the police officers were not influenced by discriminatory attitudes during the shooting incident.[38] It should be underlined that in its evaluation and conclusion to a violation of Articles 14 and 2[39] the Court also takes the broader context into account, more specifically the numerous instances of police violence against Roma, which had already entailed multiple convictions of Bulgaria by the Court. This consideration of the broader picture, the broader reality in a country was not one of the Court's strongest points in the past and is particularly important for minority protection purposes, inter alia because it allows to unveil instances of indirect discrimination (see also infra the discussion of *Buckley v. UK*).

3.3. The Right to Education

A first human right with clear connotations to cultural diversity is the right to education.[40] Notwithstanding the fact that education has been identified as a specific problem area for Roma, there is hardly any international case law to be found on this topic, none at all actually at the websites of the Human Rights Committee and the Committee on the Elimination of All Forms of Racial Discrimination. Nevertheless, on 18 April 2000 a complaint was filed with the ECtHR against the Czech Republic because of the systematic racial discrimination in Czech schools where Romany children tend to get relayed to special schools for retarded children, while the majority of them are not

36 *Ibid*.
37 The Court refers explicitly to the EU's Race Directive (paras. 167-168), which can be understood as a case of synergy between the respective organizations' stance regarding racial discrimination.
38 ECtHR, *Nachova v. Bulgaria*, paras. 169-171.
39 ECtHR, *Nachova v. Bulgaria*, para. 175.
40 See Rooker, *The International Supervision …,* 241-243.

mentally deficient.[41] This would amount to degrading treatment under Article 3, the denial of the right to education as well as discrimination in the enjoyment of the right to education (in terms of Article 2 of the second additional protocol and Article 14). The case is still pending in October 2004 but its outcome will reveal the degree of protection individual human rights offer against these widespread anti-Roma practices in several Eastern European countries.

The remaining claims concerning Roma and their right to education were directed against the United Kingdom. In all these cases, the complaint pertaining to education was related to the fundamental problem of the inability for Romany travellers to find a caravan site or plot of land to settle down on. The question of language in education, which is also relevant for Roma, will be discussed infra.

3.4. Language Rights

Secondly, one could have regard to the extent to which individual human rights guarantee language rights that contribute to the accommodation of linguistic diversity, and hence also protect and promote the use of the Roma language, to some extent. In view of the fact that there is no Roma specific case law in this respect, it seems appropriate to merely give a quick summary here of a more extensive study.[42] The degree to which the ECHR accommodates the wishes and needs of (members of) linguistic minorities is minimal. Not only does the Convention contain hardly any explicit language rights, but these are also interpreted restrictively while the Court has been in general reluctant to deduce meaningful language rights from other provisions like the Articles 8-10. The protection is indeed explicitly limited to the implications of the non-discrimination principle, which is only one of the pillars of a full-blown system of minority protection – the second being special measures aimed at protecting and promoting the separate identity of minorities. However, the recent developments in the jurisprudence revealing a greater awareness of and concern for minority needs might influence also

41 This practice of segregating Roma pupils from other pupils is a wide spread problem in many Eastern European countries. See *inter alia* papers at the ERRC website (http://www.errc.org): European Roma Rights Centre, "Barriers to the Education of Roma in Europe: A Position Paper by the European Roma Rights Center, (5 May 2002); Margareta Illieva and Daniela Mihaylova, "Court Action against Segregated Education in Bulgaria: A Legal Effort to Win Roma Access to Equality", (2003). A positive development in this regard is the February 2004 Action Plan on the Educational Needs of Roma and Other National Minorities in Bosnia Herzegovnia which also sets out to incorporate aspets of their culture and language in the existing curricula. For an in depth discussion of the factual background and the legal and strategical approaches to counter this practice, see Edwin Rekosh and Maxine Sleeper (eds.), *Separate and Unequal: Combating Discrimination against Roma in Education: A Source Book* (Budapest Law Center, Budapest, 2004).

42 See Kristin Henrard, "Devising an Adequate System of Minority Protection in the Area of Language Rights", in Gabrielle Hogan–Brun and Stefan Wolff (eds.), *Minority Languages in Europe* (Palgrave, Houndmills, 2004), 37-55, at 53-54.

this jurisprudence, as was already to some extent visible in the paragraphs on the right to education in the *Cyprus v. Turkey case* of 10 May 2001.[43]

The Court seems indeed to be moving away from its rigid stance with respect to the protection of mother tongue education visible in the *Belgian Linguistics case*[44] of 1968 in its *Cyprus v. Turkey* judgment.[45] In the latter case the Court notes that "children of Greek-Cypriot parents in northern Cyprus wishing to pursue a secondary education through the medium of the Greek language are obliged to transfer to schools in the south, this facility being unavailable in the TRNC ever since the decision of the Turkish-Cypriot authorities to abolish it".[46] Although the Court at first seems to repeat its stance that the provision on the right to education "does not specify the language in which education must be conducted in order that the right to education be respected",[47] it does conclude that "the failure of the TRNC authorities to make continuing provision for [Greek-language schooling] at the secondary-school level must be considered in effect to be a denial of the substance of the right at issue".[48] Because the children had already received their primary schooling through the Greek medium of instruction, "[t]he authorities must no doubt be aware that it is the wish of Greek-Cypriot parents that the schooling of their children be completed through the medium of the Greek language".[49] Consequently, it seems that because the authorities assumed responsibility for the provision of Greek-language primary schooling, they have the obligation to do the same for the secondary school level in view of the wishes and expectations of the parents to that effect.

Even though this reasoning does not rely explicitly on the importance of mother tongue education for the cognitive development of the students and related substantive equality considerations, and although it does not read into the article on the right to education a right to mother tongue education, it clearly attaches more weight to the parents' convictions about the benefits of a certain medium of instruction and should thus be welcomed. It is to be hoped that in subsequent jurisprudence the European Court on Human Rights will further elaborate and enhance the protection of mother tongue education for minorities.

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43 ECtHR, *Cyprus v. Turkey*, paras. 277-278.

44 For a critical analysis of the Belgian linguistics case see *inter alia* Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (Martinus Nijhoff Publishers The Hague, 2000), 119-121; Christian Hillgruber and Mark Jestaedt, *The European Convention on Human Rights and the Protection of National Minorities* (Verlag Wissenschaft und Politik, Köln, 1994), 25-31.

45 ECtHR, *Cyprus v. Turkey*, judgment of 10 May 2001.

46 *Ibid.*, para. 277.

47 *Ibid.*

48 *Ibid.*, para. 278.

49 *Ibid.*

3.5. The Right to an Own Way of Life

Finally, there has been a significant shift in the jurisprudence in terms of Article 8 ECHR, in the sense that the Court finally acknowledged the right to an own way of life in *Chapman v. UK,*[50] a case concerning Roma's difficulties to station their caravans. The Court explicitly departed from its previous case law in *Buckley v. UK*[51] and in the process made some potentially far reaching statements concerning minority protection more generally, denoting a more favourable stance to the special needs of minorities.[52]

The (now extinct) European Commission on Human Rights had already held in 1983, in a case concerning the Lap minority in Norway, that although the ECHR does not guarantee any specific rights for members of minorities, they can rely on Article 8 ECHR since that would imply a right to a traditional way of life as part of private life, family life or home.[53] However, the Commission underlined immediately that this right would not be absolute and is subordinate to more important public interests. *In casu* the interference would be proportional to the legitimate aim and hence the Commission decided that the application was manifestly ill founded and thus inadmissible.[54] Consequently, the Court did not have a chance to pronounce itself on the matter in this case. However, this was different in at least one of the several cases concerning Roma it was confronted with (prior to Chapman).

Buckley v. UK dealt also with Roma's difficulties to station their caravan as a result of a combination of national regulations, and hence with interferences with their traditional lifestyle. The Commission declared this complaint admissible under Article 8 in respect of and the right to respect for privacy, and the right to respect for family life and the right to respect for home. However, the Court limited its assessment to the latter right as it would be unnecessary to assess whether this case would also deal with the right to respect for one's private and family life.[55] The Court thus chose not to pronounce itself on the possibility suggested by the Commission in the case regarding the Lap minority, that Article 8 would imply a right to a traditional way of life. In view of the fact that the Commission had declared the case admissible as regards the three rights explicitly mentioned in Article 8, the Court could have combined these three rights to deduce the right to respect

50 ECtHR, Grand Chamber, *Chapman v. UK*, judgment of 18 January 2001.
51 ECtHR, *Buckley v. UK*, judgment of 25 September 1996.
52 Farkas, "Knocking at the Gate… ", 3; Sebok, "The Hunt for Race Discrimination…", 2. For an extensive discussion of the implications of Chapman, see Benoit-Rohmer, "Observations: A Propos de ….", 905-915.
53 ECommHR, Appl. No. 9278/81, *G. and E. v. Norway*, decision of 3 October 1983, *D.R*. 35, 35-36.
54 *Ibid*., 36.
55 ECtHR, *Buckley v. UK*, para. 55.

for one's own, distinct way of life.[56] It was furthermore striking that the Court limited its evaluation completely to the individual right of Ms. Buckley to respect for her home on the one hand and the interests of society that the planning regulations would be respected on the other hand.[57] This attitude arguably reflects a positive predisposition towards the state and its interests by ignoring the issue that transcends the individual case of Ms Buckley, which concerns the Roma minority as a group and implies indirect discrimination. In the end, the Court concluded that Article 8 was not violated *in casu*. However, two judges expressed in their dissent the wish that the Court would be more focused on achieving full equality of rights via special measures for the Roma minority.[58]

In *Chapman v. UK*, the Grand Chamber of the European Court of Human Rights, sets the stage for a significant development concerning minority protection in two respects, while still leaving crucial problems as to the actual restrictive assessment of the facts. The first positive development is that the Court for the first time recognizes that Article 8 ECHR indeed enshrines a protection for the traditional life of a minority group.[59] Secondly, the Court remarks, while emphasizing the particularly vulnerable position of Roma, that Article 8 also entails positive obligations for the state in this respect:

> *… although the fact of being a member of a minority with a traditional lifestyle different from that of the majority of a society does not confer an immunity from general laws intended to safeguard assets common to the whole society such as the environment, it may have an incidence on the manner in which such laws are to be implemented. … [T]he vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in arriving at decisions in particular cases. To this extent there is thus a positive obligation imposed on the Contracting states by virtue of Article 8 to facilitate the gypsy way of life*.[60]

It should furthermore be highlighted that the Court, in its assessment whether the interference was in line with the conditions of paragraph 2 and hence proportional to the legitimate aim, explicitly took into account the "emerging

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56 Henrard, *Devising an Adequate System …*, 103; Olivier de Schutter, "Observations: Le droit au mode de vie tsigane devant la Cour europeenne des droits de l`homme: droits culturels, droits des minorites, discrimination positive", 29 *Revue Trimestrielle des droits de l'homme* (1997), 76-77.

57 ECtHR, *Buckley v. UK*, paras. 64-85.

58 The dissent of Judges Lohmus and Pettiti is given immediately after the majority judgment at http://www.echr.coe.int.

59 ECtHR*, Buckley v. UK*, para. 73.

60 ECtHR, *Chapman v. UK*, para. 96.

international consensus amongst the Contracting states of the Council of Europe recognizing the special needs of minorities and an obligation to protect their security, identity and lifestyle (see … in particular the Framework Convention for the Protection of Minorities), not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community".[61] The establishment of some kind of European common standard tends to limit the margin of appreciation left to the states and thus leads to stricter scrutiny by the Court, which *in casu* would be favourable towards a more pronounced minority protection. The explicit reference to the Framework Convention is furthermore in itself important as this might announce that the Court will take the provisions of that Convention more generally into account when interpreting the rights enshrined in the ECHR, which would surely strengthen the minority protection regime in terms of the latter.

Nevertheless, the Court immediately adds that it is not persuaded that the consensus is sufficiently concrete to derive specific rules on the kind of action which is expected from the states in any particular situation.[62] More specifically, it would be impossible to interpret Article 8 to involve a far reaching positive obligation of general social policy, such as providing sufficient number of adequate housing and camping facilities for the Roma.[63] This analysis obviously entails a balancing act which seems to reduce the actual, immediate contribution towards an enhanced minority protection flowing from the reference to minority rights provisions and emerging common European standard.

Even though the actual outcome of the case was not that Roma friendly due to the minimal supervision exercised by the Court,[64] the fact that there was a significant dissent (seven of the seventeen judges of the Grand Chamber), concluding to a violation of Article 8 in the circumstances, criticizing the majority to be too careful and reserved, indicates a clear potential for further, more positive developments pro minority protection generally.[65]

The related complaint in terms of Article 14 *cum* Article 8 should also be mentioned as it puts a gloss on the *Thlimmenos* case discussed above. The claim was also formulated in terms of a failure to make a distinction between qualitatively different situations because the general laws and policies did not

61 *Ibid.*, para. 93.
62 *Ibid.*, para. 94.
63 *Ibid.*, para. 98.
64 For a critical assessment of the problems as regards the kind of supervision exercised by the Court, see Benoit-Rohmer, "Observations: A propos de ...", 911-913.
65 Joint Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Staznicka, Lorenzen, Fischbach and Casadevall. See also Sebok, "The Hunt for Race Discrimination"…, 2-3.

take into account the special needs of the Roma flowing from their tradition to lead a non sedentary life, travelling in caravans. The majority of the Court referred explicitly to the *Thlimmenos* reasoning but found that there was an objective and reasonable justification for the absence of this differential treatment. To establish that the proportionality principle was fulfilled the reasoning in terms of legitimate limitations to Article 8 was referred to.[66] Consequently the application to the facts of the *Thlimmenos* rational remains limited, in line with the overall still predominantly favourable attitude towards states and their justifications.[67] The dissenting judges disagreed as they underlined that the authorities had failed to take the specific circumstances and needs of Roma into account in the application of the planning regulations, which also logically follows their analysis in terms of Article 8. Also here, the considerable dissent does carry potential for alterations in the jurisprudence in the not too distant future.

It can be argued that *Connors v. UK*[68] appears to provide building blocks for a further shift in the jurisprudence of the European Court in this respect, even though the facts of the case diverge in important respects from *Chapman*. *Connors* concerns a particularly harsh eviction of a Roma family from a municipal gypsy site, and the main issue was the absence of procedural guarantees that were available for tenants of other municipal forms of housing or private gypsy sites. The traditional gypsy case in terms of Article 8 against the UK concerns Roma who station their caravan on own plots in violation of national planning regulations. Nevertheless, the Court's evaluation of the complaint that Article 8 is violated and more particularly the argumentations to grant the UK only a narrow margin of appreciation are arguably of wider relevance in cases concerning Roma. The Court appears to acknowledge the continuation of an already existing line of jurisprudence itself when it refers in its reasoning explicitly to the statements in *Chapman* and *Buckley* that "the vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the regulatory framework and in reaching decisions in particular cases", which would entail that "there is thus a positive obligation imposed on the Contracting States by virtue of article 8 to facilitate the gypsy way of life".[69]

This positive state obligation obviously has in impact on the assessment of the proportionality of the interference and the related determination of the margin of appreciation. However, the important 'innovation' of *Connors*,

66 ECtHR, *Chapman v. UK*, para. 129.
67 See also Henrard, *Devising an Adequate System …,* 144.
68 ECtHR, *Connors v. UK*, judgment of 27 May 2004.
69 *Ibid.*, para. 84.

which was somehow announced in *Nachova*, is the fact that the Court now seriously considers the broader context, more specifically the general situation of Roma in the UK flowing from the overall regulatory framework. This is indeed a significant departure from the Court's reasoning in the previous Roma cases.[70]

When considering the Court's jurisprudence concerning the margin of appreciation of states, it can be pointed out that over the years the Court has identified various factors that are relevant for the determination of the scope of this margin. Even though these factors do not always pull in the same direction, the Court tends not to provide much explanation about the relative weight of the various factors. In *Connors* the Court actually elaborates quite extensively on the determination of the exact scope of the margin of appreciation in the concrete case. The Court does not only clarify that a case concerning general economic policy considerations does not necessarily result in a broad margin of appreciation for states[71] but also that a severe intrusion into the personal sphere of the applicant requires particularly weighty reasons of public interest, correspondingly narrowing the states' margin of appreciation. It should furthermore be emphasized that the Court attaches particular importance to the fact that the Roma did not benefit in any way from the special regime for municipal gypsy sites, because the municipal authorities did not have any obligation to ensure that there are sufficient plots for Roma on these sites.[72] Finally, the Court denounces the various hurdles for Roma to lead their traditional nomadic style of life, while the more sedentary Roma are excluded from procedural protection as regards their housing. Even though *Connors* turns around adequate procedural safeguards against eviction, the Court does seem to refer to the state obligation 'to facilitate the gypsy way of life' it recognized in Chapman when it criticizes the lack of adequate plots for Roma etc.

The Connors judgement in any event appears to confirm the ever increasing attention of the European Court for the vulnerable position of Roma as minority and their ensuing protection needs. Furthermore, *Connors* and the ensuing first finding that the UK has violated Article 8 in a case concerning Roma housing, might announce similar findings also in the more typical Roma cases in terms of Article 8. Indeed, even though *Connors* does not concern the own lifestyle of Roma, the argumentation of the Court reveals that the Court does pay attention to the difficulties for Roma to conduct their own way of life as resulting from the general regulatory framework.[73] In *Connors* the Court

70 See de Schutter, "Observations: Le Droit de Mode de Vie Tsigane …", 83-87.
71 ECtHR, *Connors v. UK*, para. 82.
72 *Ibid.*, para. 92.
73 *Ibid.*, para. 94.

seems to build on the principles it had set out in *Chapman*. Arguably the emergence of a more explicit policy concerning the protection of minorities (and Roma in particular) in the framework of the ECHR comes a little closer.

4. Conclusion

It is generally known that the Roma encounter severe problems, most of which are related to the perceptions about their separate identity and way of life. Their exclusion and discrimination as regards access to employment, education and health care often lead to deplorable living conditions. Furthermore, severe prejudice against the Roma identity in the wider society is reflected in and worsened by the media, which only aggravates the situation and compounds the multiple instances of racially inspired violence against Roma. This article assesses to what extent individual human rights contribute to the protection and promotion of this highly controversial case of cultural diversity.

It should be acknowledged that as it stands individual human rights provide an important but often still minimal and hence insufficient protection for the Roma and their own identity. Notwithstanding several developments with considerable potential as regards theoretical principles, only very recently these have been translated in actual findings of violations. Not only does the jurisprudence of the ECtHR reveal an increasing concern about acts of discrimination and outright violence against Roma, but there is also an explicit recognition of the right to a traditional way of life in terms of Article 8 ECHR. *Thlimmenos* demonstrates furthermore an important openness towards substantive equality, of special relevance for minorities; while *Nachova v. Bulgaria* announces some kind of heightened scrutiny of racial differentiations (or, following *Thlimmenos*, lack of those). It is to be hoped that the slowly emerging practice of more rigorous scrutiny of the facts in concrete cases, will continue to enhance the actual protection for the Roma.

For the time being, the Roma remain a most controversial case of cultural diversity in Europe, as elsewhere.

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