



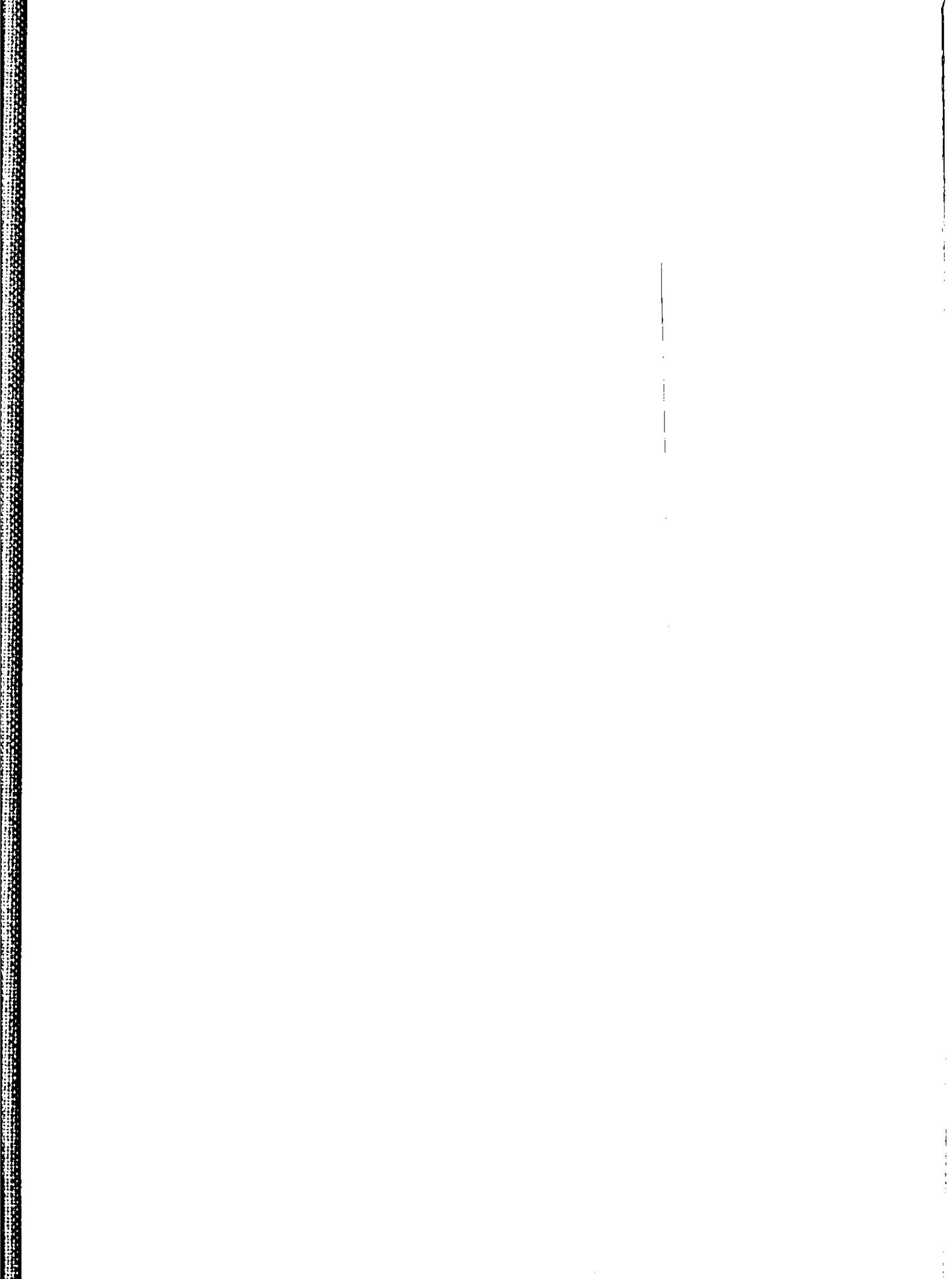
**European University Institute**  
Department of Law

**The Romani claim to non-territorial nationhood: taking  
legitimacy-based claims seriously in international law**

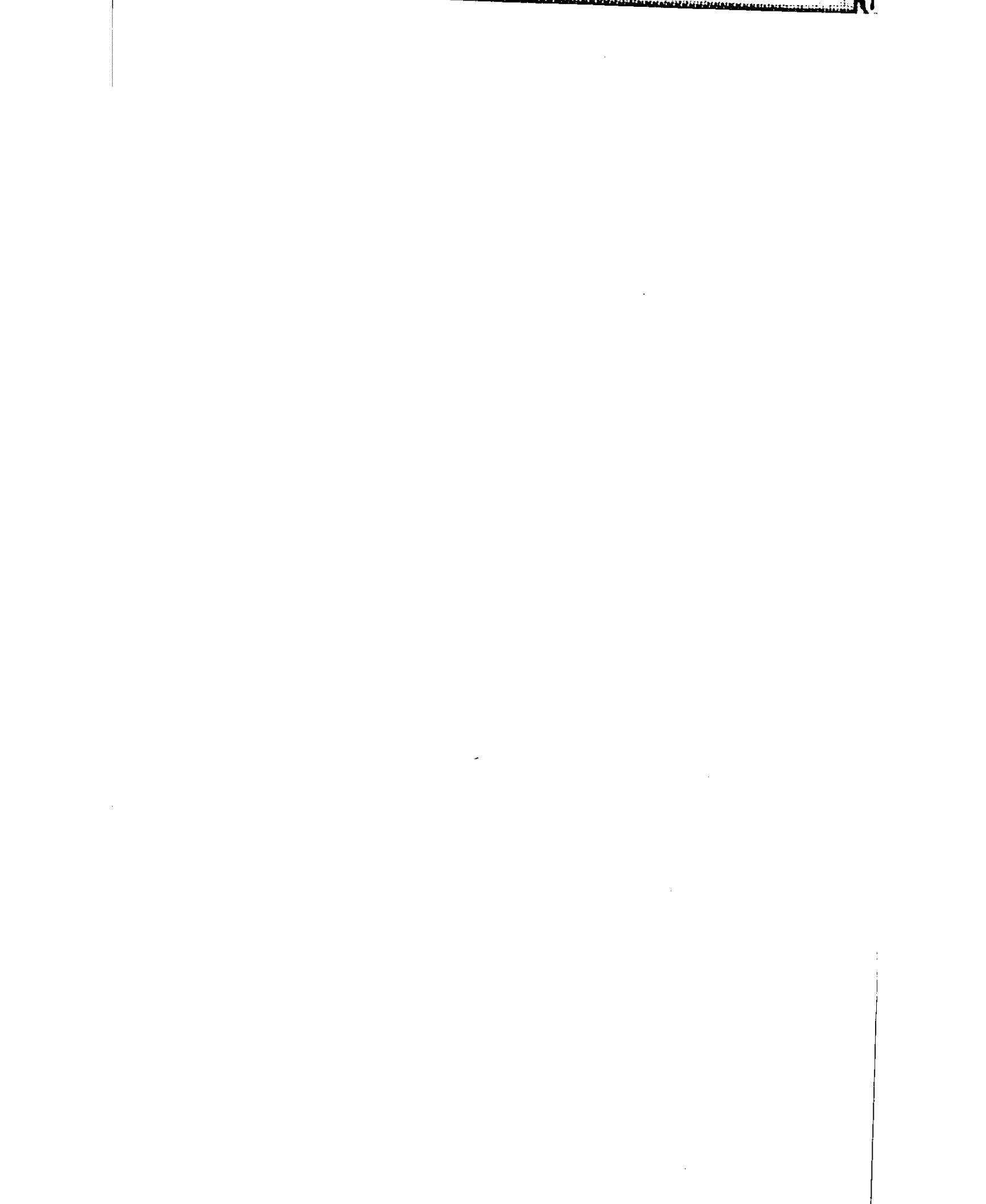
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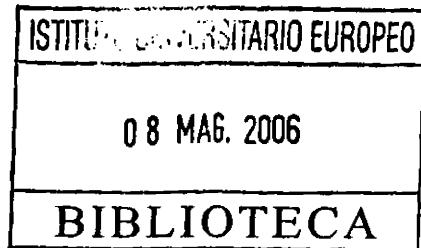
**Supervisor:**  
**Prof Neil Walker**

Thesis submitted with a view to obtaining the degree of  
Doctor of Laws of the European University Institute









European University Institute  
Department of Law

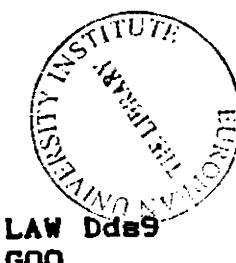
## The Romani claim to non-territorial nationhood: taking legitimacy-based claims seriously in international law

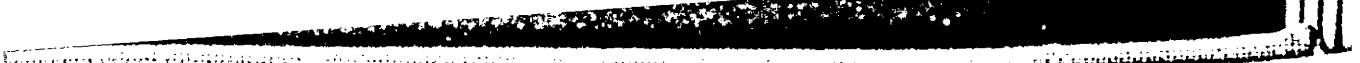
Morag Goodwin

### Examining Board Members:

Prof. Neil Walker (Supervisor, European University Institute)  
Prof. Michael Keating (European University Institute)  
Prof. James Tully (University of Victoria)  
Mr. Stephen Tierney (University of Edinburgh)

Florence, April 2006





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## Introduction

*Homo fibula*: we are story-telling beings.<sup>1</sup>

A few years ago I was reading the Sunday newspaper, *The Observer*, on a Monday evening in Florence and made the disorientating discovery that I was excluded from certain conceptions of what it means to be English. Raised and educated as a Catholic, I have always felt a little disconcerted by the unfamiliarity of Anglican churches; yet I have never felt discriminated against or that I have suffered any adverse affects from being an English Catholic (the one clear legal act of discrimination – the inability to marry the future King – never being of particular relevance). However, on that evening in Florence in December 2002, I read a piece by a columnist and author I admire, Will Hutton. Hutton was using the funeral of a friend and colleague to make wider comments about the importance of the role of the Archbishop of Canterbury. He wrote that, despite a growing secularism in our society, “Our collective relationship with the Church of England runs very deep.” He continued, the Church of England “represents, for all its weaknesses, the best of England”. What Will Hutton was saying, whether he intended to or not, was that his conception of England does not include me (or, of course, any other religious minority, from Baptists to Sikhs). One could imagine that ordinarily this would not matter. Perhaps if I was not living abroad and was not so aware of my Englishness; or had it not been Will Hutton making such remarks, but the Archbishop himself, or someone else with whom I do not identify as being quintessentially part of the England to which I understand myself as belonging, then it is also possible that it would not have mattered. But it did matter. Reading and reflecting upon that column was disorientating and a little painful – surely they couldn’t exclude *me*? I am embarrassed to admit that my shock led me to the crass insensitivity of bringing up the experience with a compatriot and colleague in Florence who happens to be of Asian descent. His reaction to my tale of woe was instant and angry: you’ve only felt that once? I’ve felt that way every day of my life, he told me.

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<sup>1</sup> Ben Okri, ‘The Joys of Story-Telling’ in *Birds of Heaven*. London: Phoenix, 1997.

The point of relating this episode is not to suggest that I have the personal experience to embark upon the research presented here; not only would that be absurdly self-aggrandising, it would also be wholly untrue as I started this project a full year before reading Hutton's column. Furthermore, as the reaction of my compatriot suggested, there are many people out there with a lot more such experience. The point is rather to suggest that identity matters, that acceptance in that identity really matters, and that those of us who are (relatively) secure in our many identities should not underestimate the debilitating impact of ontological vulnerability.

## ***1. Subject and delimitation of this thesis***

This thesis does not, however, take Catholics or English Asians as its focus, but the most disadvantaged and marginalised group in Europe: the Roma. The daily discrimination and violence Roma face in Europe and beyond is well-documented. It is not, however, the subject of consideration here. Rather, it is the claim of the Romani movement that the globally scattered groups of Roma constitute a non-territorial nation that is the subject of this thesis. I first encountered the claim to non-territorial nationhood in a document submitted as part of the Romani delegation to the 2001 World Conference Against Racism. The incongruence of this claim with the centrality of territory to political organisation and, consequently, to international law was striking. Yet, enquires made with my colleagues and with a wider circle of Romani leaders about the nature of this claim elicited confusing answers. This thesis project began, therefore, with the simple aim of understanding the claim itself: what was being asked for? How was a non-territorial nation to be understood? What was the claim intended to gain for those in whose name it was being made? In addition to questions internal to the nature of this particular claim, the second aim of this research was to take an external perspective. I wanted to understand how such a claim would be received: to whom was the claim being made? What consequences flowed, or could flow, from the status of being a non-territorial nation?

The two main research questions of this thesis are, therefore:

- How should the Romani claim to non-territorial nationhood be understood?
- How can such a claim be situated at the international level?

While I have drawn the understanding of the nature of the claim from documents and statements published by leading members of the Romani movement where they were available, and although I have discussed my thoughts on the nature of the claim with members of the Romani movement, as well as with a number of the handful of scholars working in this area, the result is not the work of an insider in the Romani movement. I am not a Romani ‘expert’; nor am I privy to the intimate political thoughts of any of the main factions of the Romani movement. This thesis is not an attempt to shine light on the Romani movement itself and the outcome is not the ‘correct’ interpretation of the nature of the claim. It does not seek to make a case for recognising the Roma as a nation, nor does it attempt to argue a line about which strategy the Roma themselves should pursue.

Instead, I take the claim of the Declaration of Nation issued at the Fifth Romani World Congress to be offering a visionary conception of political organisation on its own terms and I attempt to understand it from within contemporary debates and developments in the academic world. The assertion that this claim can shed light on present-day challenges to political organisation is taken seriously. The Romani claim is viewed here as a means by which to examine the claim to recognition and to nationhood, and to understand how recognition claims might play out on the international stage. This thesis attempts to outline the disempowerment of the Roma and other legitimacy-based claims in the international legal order and to suggest how such a claim, and its effects, can be understood at the international level.

Further, there are a number of assumptions made in the course of this thesis. They should be mentioned here. The first sees this thesis situated in a world in which ‘spaces of flows’<sup>2</sup> – of people, capital, goods and services, information – are replacing the ‘spaces of place’, in which the dominance of states is being challenged both vertically and horizontally. That the nature of governance is changing and that new entities and new claims are emerging in this state of flux is not seen as controversial and it forms the backdrop to the understanding of the Romani claim and to attempts to situate it at the international level. Secondly, the ‘fact’ of human

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<sup>2</sup> Manuel Castells, *The Rise of the Network Society*. Oxford: Blackwells, 1996.

plurality is taken as being self-evident, or, in the language of Arendt, it is assumed that we are living beings, that we inhabit a world of our own creation, and that we share the world with others.<sup>3</sup> This thesis accepts that a culture is only capable of being understood from within its own terms, but does not support a cultural relativist position. Instead, I accept that I can only argue from within the position of my own culture; where examples are called for, I try as far as possible to draw them from my own experience and identity. Yet, whilst accepting that there are no universals to which I can appeal, at the root of the arguments put forward is the belief that all human beings are born free and equal in both dignity and rights.

## **2. Structure of this thesis**

This thesis is composed of seven chapters and is divided into three sections. A short introduction and brief conclusion begin and end it. The first section presents the claim to non-territorial nationhood in the context of who or what the Roma are. It is divided into three chapters.

Chapter 1 presents a history of the Roma. It provides an account of the widely accepted Romani migration from India 1000 years ago and their journey up and into Europe, laying out some of the controversy surrounding the Indian origin thesis. The chapter charts the nature of the persecution endured throughout the centuries and suggests the means by which Roma came to be scattered throughout the world. The aim of the chapter is to provide an historical context into which the claim can be situated.

Chapter 2 traces a history of Romani transnational political organisation from the beginning of the twentieth century to the most recent international Congress in 2004. This brief survey reveals that the Romani Movement has traditionally and self-consciously framed its claims as national demands. The Movement's most recent claims, including the claim to non-territorial nationhood, are interrogated in an effort to understand both the framing and content of these claims. At root of the diversity of

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<sup>3</sup> Hannah Arendt, *The Human Condition*. New York: Doubleday Anchor, 1959, (1:7).

claims being advanced is the belief that Roma constitute a nation; and what is being sought is recognition and representation at the international level as such.

Chapter 3 considers the nature and depth of Romani identity. It presents three alternative visions of Romani identity and lays out the controversy surrounding the Indian origins thesis in more detail. It gives some indication of the diverse archipelago of Romani groups before suggesting that the post-colonial reclaiming of identity as epitomised by Frantz Fanon and the constant re-positioning of diasporic identity as identified by Stuart Hall provide a means of understanding a claim to an over-arching Romani identity. The chapter suggests that while a claim to Romani trans-national identity may not resonate deeply among large sections of the Romani population at present, it is growing, and the Romani Movement is in a process of nation-building.

The second section presents the theoretical framework within which the claim to nationhood is understood. The Romani claim is firstly placed within the broad framework of recognition demands and contemporary understandings of the politics of recognition. Chapter 4 presents an understanding of the recognition dialectic from the Hegelian perspective of recognition as the path to freedom, and attempts to establish that recognition is vital both for individual personal development as well as the ability to function in society. It is argued that where identity is best understood in Arendtian terms as a constant re-telling and re-forming of the story of ourselves, recognition itself must necessarily be conceived of as interactive, mutual and reflexive, capable of taking account of the ever shifting nature of identity. The second part of Chapter 4 considers a number of attempts within political philosophy to accommodate recognition demands and highlights the problems of both the liberal and communitarian approaches. Where recognition necessitates active participation on a basis of equality, the chapter concludes that the cultural agonism of James Tully and his understanding of politics as a critical activity is best able to offer groups the opportunity to contest the recognition they require whilst retaining the centrality of the individual to the purpose of recognition. The final part of the chapter highlights the danger of promiscuity that flows from taking recognition seriously – that recognition becomes cheap and easy – and suggests that viewing political freedom as the act of contestation can chart a path through the dilemma of promiscuity v.

hegemony. This nature this contestation might take on the international level is picked up again in the final chapter.

Secondly in this section, the Romani claim is situated in contemporary considerations of nations and nationalism and placed in the space of wider challenges to the monopoly of the state. Chapter 5 considers what it means to make a national claim and whether it is possible to imagine a non-territorial nation. Two elements of any claim – legitimacy and capacity – are highlighted and the nature of their relationship considered. It is argued that where nations are understood as intrinsically valuable communities, the determining factor of the claim to nationhood must be its legitimacy and not the capacity it possesses. Where nations are viewed as the primary vehicle for the claim to the freedom to be collectively self-governing, the capacity element of a national claim – commonly viewed as the ability to run (elements of) a modern state – can only be subsidiary to the legitimacy of that claim. It is thus argued that capacity is important only in so far as it enables the legitimacy of a claim to be established. As among the variety of roles territory is understood to play in establishing a national claim the instrumental part it plays in facilitating capacity is its most important, it is, further, argued that where only minimal amounts of capacity are required to establish a national claim, territory is not an essential element of nationhood. The only factor, therefore, that should be determinate in establishing a Romani claim to nationhood is whether or not the claim has legitimacy in the eyes of those over whom the claim is being made.

The Romani claim is thus understood as a claim to recognition at the political level as a group that aspires to collective self-governance, where recognition is vital to both the individual and societal development of a human being, and in which recognition at the political level is viewed as necessitating active participation. As recognition claims are necessarily an attempt to counter the domination of a particular discourse, the Romani claim should be seen not as the claim to the paraphernalia of a nation-state but viewed as demanding the freedom to contest the hegemonic discourse which excludes them from participation at the international level.

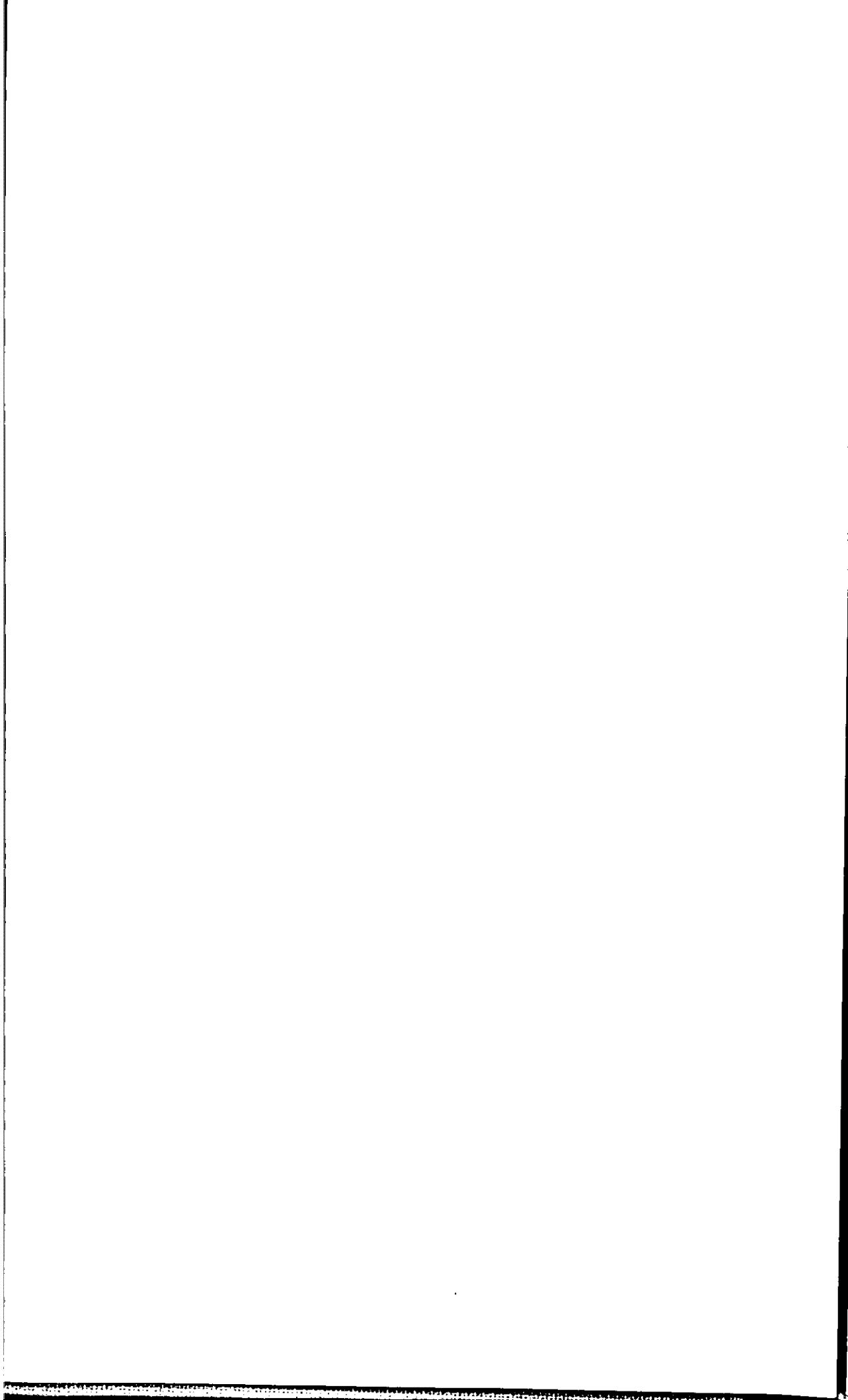
The third and final section moves the setting of the Romani claim from the realm of theory to the international arena. Chapter 6 examines the international legal response

to, and the existing avenues for recognition for, non-state legitimacy-based claims. It notes, first, that nations have no separate place in international law and thus examines a national claim to recognition from the perspective of minority rights. Secondly, as the claim to nationhood is necessarily the claim to collective self-governance, and as the Romani Movement has explicitly articulated their claim in the language of self-determination, the chapter considers the development and status of the legal principle of self-determination. It concludes that it is territory rather than people that continues to underpin the scope and nature of self-determination and, as a consequence, that access to participation in international law-making is closed off to a legitimacy-based claim such as that of the Roma.

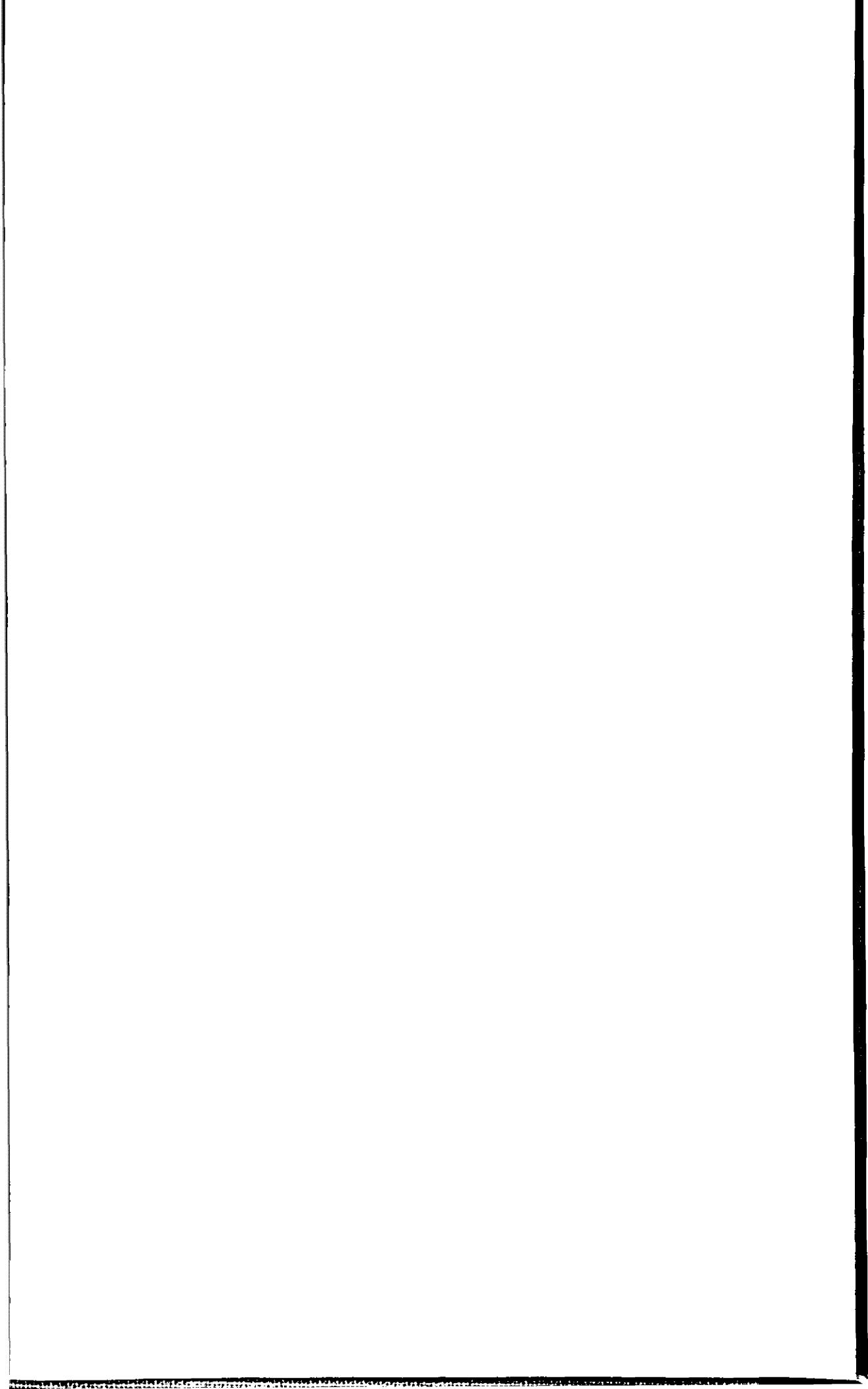
Chapter 7 considers the construction of international personality, as well as of existing theories of recognition in international law. It highlights the acceptance that access to the international arena is determined by territory as denoting capacity, and argues that both the declarative and the constitutive theory, in focusing on capacity over legitimacy, deny the importance of legitimacy for the constitution of international personality. The chapter attempts to formulate an alternative conception of personality capable of incorporating the wide variety of claims both to legitimacy and to capacity, in which all entities have more or less degrees of each, but where legitimacy that stems from the claim to original authority is understood to be qualitatively different from that which is generated by efficient fulfilment of function. The impact of this upon our understanding of sovereignty is examined. The suggestion is made that claims to legitimacy should be viewed as claims to self-determination, where self-determination is the right to participate, and where the nature of that participation is determined by the degree of capacity that an entity possesses. It is suggested, ultimately, that the need to take legitimacy seriously entails that at the very least a right to self-determination *qua* participation must entail the right to participate in discussions over the nature of one's own claim. Finally, two possibilities of discursive forums at the international level which would enable a legitimacy-based claim such as that of a Romani nation to contest both the 'who' and the 'how' of participation, but as well as the substantive 'what', are examined.

On a final note, Ben Okri's simple yet powerful statements concerning the 'Joys of Story-Telling' introduce each chapter, giving lie to the childhood comfort that sticks

and stones may break your bones but words will never hurt you. In reminding us of the unique power words have to shape our lives, his work underscores the responsibility that comes with their use. Okri also highlights that, despite their power, stories are not immutable and are changed and made their own by each generation. His words draw attention to the intimate relationship between human beings and stories; in this post-foundational epoch, the need to tell stories about ourselves is one of the few links we have to each other across the cultural divide.



# **Section 1**



# Chapter 1: A History of the Roma

The greatest stories are those that resonate our beginnings and intuit our endings ..., and dissolve them both into one<sup>4</sup>

The currently predominating understanding of the term Roma (Rroma) is as a collective of transnational ethnic groups, mainly concentrated in Europe and central and eastern Europe in particular, although scattered throughout the world. It is a word used in the singular, yet is an overarching term to describe a variety of groups that allegedly all share some common essence, or *řomanipé* ('Romani-ness'). This section is an examination of past and contemporary understandings of Romani origins, of Romani mobilisation and of political claims made to date. It is not intended to be an exhaustive account; rather, it seeks to serve as an introduction to the complexities and controversies that dog the continuing discussion about who or what the Roma are. This first chapter provides an historical introduction to the Roma; the second chapter an account of past and present political organisation; and the third chapter, which completes this section, examines the nature of Romani identity and attempts to assess the extent to which any such identity transcends the local.

## 1.1. Indian Origins

The origins of this people or groups of people have been shrouded in mystery for much of their known existence and the confusion is evident in the terms of description used both by others and as self-ascription – it was thought, for example, until relatively recently that the dark-skinned exotic strangers came from Egypt, the likely source of the term 'Gypsy'.<sup>5</sup> That Roma originated in India and migrated westward at the beginning of the second millennium – a theory that burst to light in the latter half of the nineteenth-century – is fast becoming established fact; according to Ian

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<sup>4</sup> Ben Okri, 'The Joys of Story-Telling' in *Birds of Heaven*. London: Phoenix, 1997.

<sup>5</sup> Whilst the term comes from a probable misunderstanding about origins, it has been by and large absorbed as an ascriptive term by large numbers of those whom it purports to describe. It is a frequent charge that 'Roma' is a term only used by the educated elite and not by 'ordinary' Roma. The extent to which this is true across countries is difficult to assess but there is certainly a degree of truth to it, although it is largely country-dependent. As 'Gypsy' is a term of offence to many, Roma is mainly used throughout.

Hancock, one of the main proponents of the thesis, it is “beyond dispute”.<sup>6</sup> However, there is still considerable uncertainty about the Indian thesis, much of which stems from the fact that the main evidence is linguistic. It is the formation of the origins of the Romani language that is linked to India and its subsequent development that is related to other languages encountered along an hypothesised migration route. While linguistic analysis can tell us that the various dialects of Romanes are structured and populated so as to make likely an Indo- Aryan birth and a subsequent migration through Persia and Armenia, through the Byzantium Empire and upwards through the Balkans into western Europe, it cannot of course provide information as to reasons for such an exodus, the numbers, the social and ethnic backgrounds of the speakers or any detailed timing. All of these factors remain contested, as is indeed the suggestion of Indian origins for a bounded ethnic group at all.

Yaron Matras, a Professor of Linguistics at Manchester, has provided a very detailed and seemingly indisputable account of the early relationship of the Romani language to other diasporic Indian languages, such as Domari.<sup>7</sup> Matras has traced the beginning of what he terms ‘Proto-Romani’ by comparison with related Indo- Aryan markers to what are known as New Indo- Aryan languages. Early Romani, however, is characterised by structural innovations and loanwords from Greek – a development that he suggests may be traced to the Byzantium Empire and thus as occurring from the tenth and eleventh centuries onwards. In addition to the presence of Greek influence, the Romani lexicon reveals Persian and Armenian influences. The absence of an Arabic influence has generally been understood as evidence either of a migration preceding the Islamic Conquests (prior to 700 AD) or of a northern migration route through the Pamir, south of the Caspian Sea, through the Caucasus mountains, along the Black Sea coast and into Constantinople, a route that receives support from the absorption of loanwords of Georgian and Ossetian origin. While it was traditionally assumed that these layers were acquired successively in both time and therefore geography, Matras argues that it is also possible that the Persian, Kurdish, Armenian and even Greek components could have been acquired in close spatial proximity in eastern and central Anatolia, with the significant non-Muslim

<sup>6</sup> Ian Hancock, ‘The Struggle for the Control of Identity’, (1997) September *Transitions* 36, 42. The Chambers Dictionary (1998) identifies ‘Gypsy’ as ‘a member of a wandering people of Indian origin’.

<sup>7</sup> Yaron Matras, *Romani. A Linguistic Introduction*. Cambridge: Cambridge University Press, 2002, 18. Most of the details from this section are taken from Matras, Chapter 3, 14-48.

population there also preventing Arabic or Turkish from leaving a mark on the new linguistic arrival. From this common background, according to Matras, Romani split into its various dialects and was dispersed throughout Europe; traditional historical records suggest that this dispersal took place from the thirteenth and fourteenth centuries onwards. Matras notes, however, that the fact that current Romani dialects shared common structural features at various stages of their early developments need not be evidence that Romani was uniform at any stage – that is, the movement of speakers was not necessarily co-temporal or co-ordinated.

The linguistic details are supported by sociological findings. Of central importance is the existence outside India throughout the medieval period of various groups of Indian origin, notably in the Near East and Central Asia. Such groups specialised in service-providing, peripatetic trades such as entertainment and metalwork, and were marginalised by the mainstream, settled populations, with interactions between them being usually limited to economic transactions. The suggestion of a linguistic link to these populations in the mid-nineteenth century was responsible for a direct connection being made between the Romani populations of Europe and the castes of commercial nomads in India proper. This early interest in Romanes suggested an association with a low caste of travelling musicians and dancers, and the term *dom* continues to indicate a caste affiliation in India, referring to a group of people who specialise in service-providing occupations such as basket-weaving, smiths, cleaners, musicians and dancers. The assertion of a connection is strengthened by the sharing by many of the groups classifiable as commercial nomads of Indian origin of a term for the designation of outsiders: in Romani, *gadžo*, in Domari, *kažža*, for example. Moreover, the term for outsiders also often carries the additional meaning of ‘settled’ or ‘farmer’, which has been understood as reinforcing the impression of a group or groups historically self-identifying as non-sedentary.<sup>8</sup> Further, the likelihood of Indian service-providing populations migrating eastwards is suggested by the Persian poet Firdursi in his work of the eleventh century, *Šāhnāme*, in which 10,000 Indian musicians known as *luri* are invited to entertain the Persian king Bahrām Gūr around the time 420 AD. The story is supported by Arabic and Persian chronicles of the period and is accepted by a number of those writing on the issue as evidence of the

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<sup>8</sup> Matras, *Romani*, 15.

nomadic migration of such groups, if not of Romani ancestors themselves (the timing being about 500 years too early).<sup>9</sup> Accepting a connection between these various groups – known as the Dom hypothesis – explains shared socio-ethnic profiles<sup>10</sup> while nonetheless accommodating linguistic differences by allowing for western migration by individual groups seeking employment opportunities at different times.

The necessary oversimplification of the linguistic evidence for the non-specialist risks, as Fraser points out, appearing to suggest that hordes of Roma filed out of India, stopping at intermissions on the way through the Middle East, before arriving in Europe, thereafter splitting off into different groups as some pursued their way ever north and westwards. This is unlikely to have been the case if social organisation followed an Indian model and the specific characterisations of similar peripatetic groups. It seems therefore reasonable to speculate that the linguistic ancestors of today's Romani- speakers did not leave India as a coherent group, but were various sub-caste groups, providing specialised goods and services, working in relatively small numbers and permanently on the move as specialisation required a wide range of potential customers. Such a peripatetic way of life would not have seemed unusual to others; in the East, nomadism was widespread, although largely for agricultural or pastoral reasons. The continual search for custom and the desire to avoid the period's conflicts, it is to be assumed, led to the arrival of such groups in the Byzantium Empire and, from there, to Europe.

However, while the idea of Roma as descendants of commercial nomads has gained acceptance, other, more controversial, explanations for the linguistic connections exist. The Dutch Arabic and Oriental scholar, Michael Jan de Goeje, suggested a variation on the caste-origin thesis in a contribution to the Koninklijke Akademie van Wetenschappen of Amsterdam in 1875, casting Roma as descendants of a group of nomadic entertainers rather than commercial itinerants.<sup>11</sup> According to de Goeje,

<sup>9</sup> E.g., Hancock accepts the veracity of Firdursi's writings, but holds that it does not refer to the beginnings of the Roma. Hancock, *We are the Romani people*. Great Britain: University of Hertfordshire Press, 2002.

<sup>10</sup> Fraser suggests in support of this that ethnic sub-castes relationships, based on work specialisation, have more relevance in everyday society than the main castes, and the Dom thesis offers an explanation for the distinct boundaries between similar groups, a customary feature of such sub-castes being marriage within the group. Fraser, *The Gypsies*. Oxford: Blackstone Press, 1992, 42-44.

<sup>11</sup> M. J. de Goeje, *Accounts of the Gypsies in India*. Delhi: New Society, 1976.

these entertainers were part of the camp-followers of a group of warriors, the Jat or Zutt, who originated in Sindh (a province of south-eastern Pakistan) and were eventually re-settled in the seventh century; de Goeje points to a twelfth-century text by the Arab historian Tabari that describes the settlement of 30,000 of Zutt prisoners on the border of the Byzantium empire in the year 855 – a thesis which apparently could fit the linguistic evidence as well as accounting for the range of physical characteristics present in modern Romani populations.<sup>12</sup>

In recent years, the idea of migration occurring because of political unrest has been put forward by Romani scholars themselves and has led to the elevation of Roma from travelling musicians or trading people to descendants of warrior castes. In a 1979 article Jan Kochanowski claimed ancestry for Roma with the *kshatriyas*, the second of the four castes of Hindi society.<sup>13</sup> Similarly, Ian Hancock, a Romani Professor of Linguistics, holds that Roma are descended from the Rajputs, a warrior caste. In support of this, Hancock has put forward the suggestion of *gadžo* as traceable to the Sanskrit *gajha*, meaning civilian; of *goro* meaning “slave, enemy, captive” and *gomi* as “one who has surrendered”.<sup>14</sup> The defining of the Romani: non-Romani relationship by military terms is, according to Hancock, complemented by the fact that Romani military vocabulary is of Indian origin (words such as “soldier”, “spear”, “sword”, “battlecry”), whereas that relating to metalwork or agriculture, for example, has a later ancestry. In an attempt to reconcile the warrior thesis with the social and economic features of peripatetic Indian populations, Hancock has proposed that the Rajput and their camp-followers of low and untouchable caste moved into Persia during the military campaigns against Islam, continuing perhaps as a mercenary force, and that as they became further removed from their homeland, caste distinctions were overcome in the trauma of separation from India.<sup>15</sup> In building this hypothesis, Hancock has comprehensively rejected comparison with the Domari -- the Dom thesis – arguing instead that the Dom were low caste camp-followers (entertainers, porters, cooks etc), in contrast to the high caste Rajput ancestors of the Roma, although if they

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<sup>12</sup> Fraser, *The Gypsies*, 28.

<sup>13</sup> Jan Kochanowski, ‘Roma: History of their Indian Origin’ (1979) 4 *Roma* 16.

<sup>14</sup> Ian Hancock, *The Origins and Westward Migration of the Romani people*. Occasional Paper of the International Romani Archives, 1999 (on file with the author); for a synopsis of similar arguments: Hancock, ‘The Emergence of Romani as a Koïné outside of India’, in T. Acton (ed.), *Scholarship and the Gypsy Struggle*. Great Britain: University of Hertfordshire Press, 2000, 7.

<sup>15</sup> Hancock, ‘The Emergence of Romani as a Koïné outside of India’, 8-9.

eventually intermingled in the course of migration the eventual distinction seems non-existent.<sup>16</sup>

The Belgium-based authors of the ‘Frame Statute of the Rromani People in the European Union’ present a variation on both the craftsman and warrior theme. According to the Statute, Roma herald from a specific town, Kannauj, the former capital of Northern India, which is identified as “the cradle of the Rromani nation”.<sup>17</sup> The migration is explained not as commercial nomadism or as the result of military campaigning, but as abduction and captivity. The Statute states that the Kitab al-Yamini manuscript identifies 20 December 1018 as the date on which the inhabitants of Kannauj were transported by the ruling Sultan to Khorasan, where they were held in captivity for several decades for their skills as artists and craftsmen.

The warrior hypothesis and the abduction thesis however present chronological difficulties. According to Fraser, the strong presence of Greek in all Romani dialects as well as the historical records suggest the presence of Romani speakers in Byzantium by the eleventh century at the latest, in order to account for this commonality prior to a split in the thirteenth or fourteenth centuries. While Hancock maintains that descent from the Rajput is consistent with a migration that departed in the first quarter of the 11<sup>th</sup> century<sup>18</sup>, the lack of Arabic influence and the necessarily prolonged presence in the Near East for the absorption of the Persian and Armenian influences suggest that migration from India needed to have taken place in the eight or ninth centuries. Attempts have been made, according to Fraser, to overcome these inconsistencies by suggesting multiple waves of migration connecting an exodus of Jats in the eighth century with a second wave of Rajputs in the twelfth century, either following their defeat in the battle of Tarāīn in 1192 or earlier, as Hancock argues; these separate groups then congregated in Byzantium and there formed a single

<sup>16</sup> Hancock, ‘The Eastern European Roots of Romani Nationalism’, Paper presented at the Gypsy Panel American Association for the Advancement of Slavic Studies Twentieth National Convention, Honolulu, November 1988; reprinted in *Nationalities Papers*, Vol. XIX, No. 3, Fall 1991. Hancock’s rejection of the Dom thesis appears to have mellowed slightly with his acceptance of Kenrick’s claim that whereas the Dom today are a population of menials, the term 1000 years ago simply meant ‘person’. Hancock, ‘The Struggle for the Control of Identity’, (1997) Sept. *Transitions* 36, 40.

<sup>17</sup> Frame-Statute (Moral Charter) of the Rromani People in the European Union; available at <http://rinchibarno.free.fr/cm.en.doc>. §4 The “Rromani Nation” As It Defines Itself, a)

<sup>18</sup> Hancock, ‘The Eastern European Roots of Romani Nationalism’; Hancock, ‘The Emergence of Romani as a *Koiné* outside of India’.

population where common linguistic features took shape. While this thesis can not be ruled out, the suggestion that Roma are descendants of commercial nomads appears to make better use of the available evidence.

## 1.2. A people of Europe

While theories of ultimate origins are forced to rely solely upon linguistic comparison, supported by sociological and serological theories<sup>19</sup>, documenting the history of Roma in Europe benefits greatly from the addition of written accounts; interpretation of sources is not always straightforward, however, and much remains supposition.

### 1.2.1. From pilgrims to persecution

The earliest surviving reference to people likely to be Roma as far west as Constantinople is contained in the *Life of St. George the Athonite*, written on Mount Athos in 1068; in the account, the Emperor Constantine Monomachus, plagued by wild animals devouring game in the imperial park, appealed to the help of “a Samaritan people, ... who were called Adsincani, and [were] notorious for soothsaying and sorcery.”<sup>20</sup> According to Fraser, the name Adsincani is the Georgian form of the Greek *Atsinganoi*, the term by which the Byzantines commonly referred to Roma. *Zigeuner* in German, *Tsiganes* in French, the Italian *Zingari* and Hungarian *Cigányok* are all derived from this Byzantium term. The origin of the name has been much debated and the commonest view is that it is a corruption of *Athinganoi*, an heretical sect persecuted into near extinction in the ninth century and likely to have been applied to the Roma as both groups had a reputation for sorcery and fortune-telling. Similarly, the legend of Egyptian origin and thus the term ‘Gypsy’ probably owed much to the popular medieval belief in Egypt’s association with the occult.<sup>21</sup> Superstition and appeal to the supernatural was widespread at all levels of Byzantium society – a credulity easily exploited by groups of entertainers, bear-keepers, snake-charmers, acrobats and jugglers – and the vilifying references in folk literature of the

<sup>19</sup> Evidence of an Indian connection based upon on genetic (blood) ties will be considered in the second chapter of this section.

<sup>20</sup> Fraser, *The Gypsies*, 46. In comparison, Hancock has the migration not arriving in Europe until c. 1250 ('The Eastern European Roots of Romani Nationalism').

<sup>21</sup> According to Fraser, the date of this association is difficult to place but was certainly popular in the Byzantium Empire by the fifteenth century.

period suggest that despite the popularity of their services, they themselves did not enjoy a good reputation, although they were likely to have been only one of the sub-castes arriving to sell their skills.<sup>22</sup>

Roma became well-established in the Peloponnese and on a number of Greek islands in the course of the fourteenth century. According to Fraser's interpretation of the limited source material, they demonstrated a decided preference for settling in Venetian territories, such as Corfu and the Greek mainland, presumably because of the relative peace and stability, free as they were at that time from the threat of Turkish invasion.<sup>23</sup> By the end of the fourteenth century, Roma had become established throughout the Balkans. Systematic enslavement in the provinces of Wallachia and Moldavia meant that for many, migration must have ended here.<sup>24</sup> Traditional Romani skills, such as black-smithing, gave them an economic value that was not comparable to any other group and although the Gypsies of the Crown were obliged only to pay an annual tribute and could move freely, those belonging to the monasteries and estate-owners (*boyars*) were chattels of their masters. More fortunate Romani groups were recorded in the Hungarian lands during the fourteenth century and from there fanned out across central and western Europe over the following centuries, leaving a surviving written trace as far north as Scotland, for example, by 1505.<sup>25</sup> By the beginning of the sixteenth-century it seems that these groups had largely departed the Greek territories in advance of the Turkish onslaught. The time-lag between arrival in Europe and such records further suggest that these groups were migrating independently of one another. The long stay in the Greek lands had a lasting and substantial impact, however, upon the Romani language and probably marks the end of anything approaching a single language. As Romani was carried onwards in Europe, linguistic diversification began in earnest.

Specialisation in the trade of performance, in gullibility and spectacle, continued to serve a number of different groups that made their way west and it became known in

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<sup>22</sup> Fraser, *The Gypsies*, 48.

<sup>23</sup> Fraser, *The Gypsies*, 49-50.

<sup>24</sup> Hancock has suggested that approximately half of the Romani population was taken into slavery, although provides no evidence to support this statement. Hancock, *We are the Romani people*, 29. There is no doubt, however, that large numbers were enslaved. Fraser, *The Gypsies*, 57-59.

<sup>25</sup> Fraser, *The Gypsies*, 111

the Spanish Romani dialect as *o xonxanó baró* – ‘the great trick’.<sup>26</sup> By the early fifteenth century, groups of Romani speakers were no longer unobtrusive but appeared to be moving purposefully from town to town and across borders under leaders with increasingly impressive titles. Furnished perhaps with the knowledge their ancestors had gained of Christianity during their time in the Greek territories of the respect and sustenance traditionally (and in some cases legally) due pilgrims since the pious times of Charlemagne, these groups began claiming this virtuous status. A record in Heidelberg in 1550, for example, describes a wandering band presenting letters of safe conduct from Emperor Sigismund detailing how in Egypt their ancestors had forsaken the Christian faith, and that as penance they were condemned to wander the world in exile for a period of seven years.<sup>27</sup> An earlier chronicle of 1417 noted the passage of “a certain strange wandering horde of people” through the northern German territories of Holstein, Mecklenburg and Pomerania, observing that they “travelled in bands and camped at night in the fields outside the towns, for they were excessively given to thievery... especially their women.”<sup>28</sup> Yet, the same account relates that they had letters of safe conduct from Sigismund and recounts the same story of apostasy and penance. Similar accounts of foreigners led by various leaders, styled in the European fashion often as Dukes, arriving with letters of safe conduct appear in town chronicles all over western Europe around this time. One from Tournai dated May 1421 notes that the Egyptians had privileges so that “none could punish them save themselves”; this fact and the sheer strangeness of their fashion and lifestyle apparently saw the stunned burghers bestow beer and coal upon them.<sup>29</sup> Yet this is not to suggest that such deceptions met with success everywhere. As the letters of Sigismund expired (they were also without currency outside the Holy Roman Empire), new ones by the Pope came into circulation, but there were nonetheless incidents of the strangers being driven from towns for their alleged sorcery, with local clerics often acting as the prime instigators of such rejection.

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<sup>26</sup> Fraser, *The Gypsies*, 60-83.

<sup>27</sup> D.M.M. Bartlett, ‘Münster’s *Cosmographia universalis*’, (1952) 31 *Journal of the Gypsy Lore Society* 83, cited by Fraser, *The Gypsies*, 65. Although Münster completed his work in 1550, it is likely that the encounter with the Gypsy pilgrims took place many years previous. Sigismund, King of Hungary, was elected Holy Roman Emperor in 1411.

<sup>28</sup> The chronicle is that of Hermann Cornerus, cited by Fraser, *The Gypsies*, 66-67.

<sup>29</sup> Fraser, *The Gypsies*, 70-71.

The tide began to turn against these wandering pilgrims about the mid-fifteenth century. However clever the original tale of a seven-year pilgrimage had been, it could only be renewed so many times before the protective sheen wore off and there were only so many towns that could be visited before welcome was no longer forthcoming. The German chronicler Aventius, writing in 1522, recounts a tale from the Bavarian Chronicle of 1439:

“At this time, that thievish race of men, the dregs and bilge-water of various peoples ... began to wander through our provinces under their king Zindelo, and by dint of theft, robbery and fortune-telling they seek their sustenance with impunity. They relate falsely that they are from Egypt and are constrained by the gods to exile, and they shamelessly feign to be expiating, by a seven year banishment, the sins of their forefathers... I have learned ... that they ... are traitors and spies.”<sup>30</sup>

There are numerous such accounts of the declining reception such groups were receiving right across the German lands by this time. The Imperial Diet issued edicts against them in 1497, accusing them of espionage, in 1498, demanding their expulsion as spies, and in 1500, allowing them a brief period to remove themselves from all imperial lands after which there would be no punishment for violent action taken against them; they were thus outlawed. These groups fared better for longer in France, although their presence was by no means frictionless; in the Low Countries they were increasingly unwelcome and alms forthcoming rather as bribes to secure their departure. Much the same story occurs right across Europe, although Scotland proved a safe-haven under the protection of James V until a year before his death in 1541, when an Order was issued banishing all Gypsies from the Kingdom within thirty days. Such groups do not appear to have arrived in Scandinavia until the first decade of the sixteenth century at the earliest, entering from Scotland and England, but there too their welcome quickly expired and within thirty years of their arrival royal orders were being issued to the effect that all Gypsies were to leave within a specified period of time. It was in this period that anti-Gypsmism took on an official form.

By the mid- to late-sixteenth century, the Reformation ensured that attitudes towards pilgrimage and the Franciscan idealisation of begging and related alms-giving were

<sup>30</sup> From the Latin of Johann Thurmaier (Aventius), *Annalium Boiorum libri septem*. Cited by Fraser, *The Gypsies*, 84-5.

not what they had been in medieval times. Moreover, papal letters of protection were not only losing their protective sheen but had become totally worthless in many places as the Reformation took hold, and could even be a source of harm themselves. The deep distrust felt by majority settled populations towards nomadic groups was increasingly reflected in the harsh arrangements made for poor relief and the pitiless penalties enacted against vagrants.<sup>31</sup> The belief that the poor were to be supported by their own parish while ‘foreign’ beggars were to be sent away without mercy left no space for those who lacked a native parish. The huge uncertainties of the long sixteenth century – the wars, famine and disease – that raged across Europe was combined for ordinary people with the loss of comfort previously to be found in ‘Popish’ customs and traditions. This hardship, coupled with the sweeping away of the belief in salvation through good works in place of faith alone that saw the prospect of hope of a better life in the next amidst the drudgery of the present diminish accordingly, make the unwillingness of the majority to accommodate the exoticism of ‘strangers’ and to persecute those who were different unsurprising.<sup>32</sup> This is not to excuse the treatment such groups suffered but to place it in context.

The characterisation of Roma as foreigners and the hostility towards them for their alleged criminality became entrenched. As repressive measures took hold, they produced huge changes in the lives of Roma in Europe.<sup>33</sup> In order to survive under a system which explicitly sought to deny such groups food, shelter and employment, they were forced to adapt. Some found refuge in wastelands and woods, others took advantage of the relative lawlessness of border regions to make their home there.<sup>34</sup> The nature of the groups also changed as they fractured into smaller family-sized groupings in order to avoid attention, or else banded together in large groups for self-protection. The denial of means to make an honest living did indeed see a turn to

<sup>31</sup> For example, the accession of Edward VI in 1547 in England saw the enactment of a statute that provided for vagrants to be branded on the chest with a ‘V’ and to be enslaved for two years by any willing master by any means that he saw fit. C.S.L. Davies, ‘Slavery and Protector Somerset: the Vagrancy Act of 1547’ (1966) 19 *Economic History Review* 533, 533–49. The difficulty of enforcement, however, saw the act repealed in 1549 in favour of earlier statutory provisions.

<sup>32</sup> The drama of replacing the leading of a good life as qualification for salvation with faith alone, and thus a personally negotiated relationship with God, or in some cases with the belief that one’s cards were marked for salvation or damnation already at the beginning of time, should not be underestimated.

<sup>33</sup> Fraser, *The Gypsies*, 176–177.

<sup>34</sup> Concentrations of Roma are found about this time (16<sup>th</sup> century) at the frontiers between France and Spain, between the German states, between the Kingdom of Lorraine and the Empire, in the northern Marches between Scotland and England and in the easternmost areas of the Dutch Republic.

criminality for certain of the larger bands and by the eighteenth-century, a number of Gypsy brigand gangs had become notorious in the German lands for violent robberies and murder. Belief in their inherent asocialibility combined in the course of the subsequent four hundred years of European history with religious intolerance for their alleged heathen practices and sorcery<sup>35</sup> and, later, with racial prejudices. Enlightenment thinking failed to make any real impact upon the authorities' practices of repression towards Roma; the role of the 'noble savage' in Enlightenment literature was, however, a part almost tailor-made for the Roma.<sup>36</sup> The Romanticism of the nineteenth- century was responsible for a growing interest in the wild, mysterious and the exotic. While this led to an increased interest in studying Romani culture, in particular in traditional Romani music<sup>37</sup> and in their language<sup>38</sup>, it also had a darker side that saw a return to the role of the Gypsy as linked to the supernatural and criminal as an explanation for any mysterious occurrence.<sup>39</sup>

The European nineteenth-century also bore witness to the huge social and economic upheavals of industrialisation. However, Roma, despite now high levels of sedentarisation, by and large avoided regular wage-labour in favour of retaining their traditional economic lifestyle; yet adaptation was necessary and new seasonal rhythms and crafts were adopted to take account of the advance of services into rural areas and the steady production of cheap factory goods that meant that repair-work and tinkering services were no longer in such demand. Nonetheless, in general, Roma maintained their independence from the prevailing economic trends and held fast to the traditional community ideals that developed in accompaniment to peripatetic self-employment. However, the failure to engage in the industrial age and the offence caused to Protestant ethical sensibilities by the Romani lifestyle were largely

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<sup>35</sup> Whether Catholic, Protestant or Orthodox, the ecclesiastical authorities approached the Gypsies with undisguised hostility, although they did not fare badly in the Inquisition, perhaps because they were considered not as heretics or witches but as exploiters of superstition. Fraser, *The Gypsies*, 184-186.

<sup>36</sup> For example, Goethe's Gypsy chief in his *Götz von Berlichingen* (1773).

<sup>37</sup> In the course of the nineteenth-century, Romani musicians rose to prominence and considerable acclaim in the Habsburg Empire, Russia and Spain, where 'Gypsy music' became the height of fashion – the Hungarian Romani violinist, János Bihari, for example entertained the statesman at the 1814 Congress of Vienna and was the primary inspiration for Liszt's *Hungarian Rhapsodies*.

<sup>38</sup> "The Gypsies' speech became something of an orchid in the philological garden... seen to have the antique beauty of a crumbling ruin"; studies of Romani peaked in the 1860s and 1870s and the attraction was strongest in Germany. Fraser, *The Gypsies*, 197-198.

<sup>39</sup> The enduring tale of Gypsies as child-stealers developed in this period, for example; see Cervantes' *La Gitanilla* and Defoe's *Moll Flanders*.

responsible for the strength of anti-Gypsyism sentiment and the extent of the persecution that followed.

### 1.2.2. The Romani Holocaust (O (Baro) Porrajmos<sup>40</sup>)

The brutality of the nascent European states in the thousand years since their appearance in Europe to those characterised as Gypsies is not disputed<sup>41</sup> and they suffered a similar fate to other outcasts and scapegoats: the Jews, the Anabaptists, witches, and vagrants. In a number of lands, moreover, simply to be a Gypsy was a felony punishable by death.<sup>42</sup> They suffered expulsion, enslavement, persecution, which later, in common with the Jews, found its zenith in their attempted extermination.<sup>43</sup>

The numbers of those murdered in Nazi-controlled Europe differ considerably, ranging from a quarter to half a million, and are ultimately unknowable as accurate censuses of ‘Gypsies’ existed neither before nor after the war. The Nazi characterisation of race and designation of ‘mixed blood’ would likely have meant that in any case many of those selected for persecution would not have recognised themselves as Romani. A Gypsy camp was established at Auschwitz-Birkenau in 1942 and it seems certain that more than 20,000 perished there.<sup>44</sup> Outside the Reich, survival rates varied considerably across the realm of German influence. The greatest losses in relative terms were in the lands of Bohemia and Moravia, where of an

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<sup>40</sup> The term, controversial but increasingly common, translates as ‘The (Great) Devouring’, and refers to the Romani genocide. For details, Hancock, *We are the Romani People*, 34-52.

<sup>41</sup> On the other hand, it should not be overstated either. Hancock’s account, perhaps understandably, appears to suggest that those categorised as Gypsies were the recipients of not a single act of kindness or benevolence from the moment of their arrival on the European scene (Hancock, *Nationalities Papers*). The alms granted such groups as pilgrims gives lie to such extremism.

<sup>42</sup> For details on the Habsburg policy of transforming Roma into ‘new Hungarians’, see Fraser. It was also the case in Scotland from 1554 onwards, according to Judith Okely (*The Traveller-Gypsies*. Cambridge: Cambridge University Press, 3).

<sup>43</sup> The Romani place in the Holocaust – the so-called ‘forgotten holocaust’ – has been largely ignored both by the scholarly community and by popular imagination for much of the last 60 years. The stark treatment accorded Roma is brought into harsh focus in the obvious comparison with the Jews. Lack of acknowledgement of the place of Roma alongside the Jews and others in being singled out for annihilation has meant that compensation for survivors has been meagre and barely forthcoming. A number of accounts have since gone some way to addressing the balance, however. See Kenrick and Puxon, *The Destiny of Europe’s Gypsies*. London: Heinemann, 1972; Crowe and Kolsti (eds.), *The Gypsies of Eastern Europe*. London, 1991; as well as the comprehensive Kenrick (ed.), *The Gypsies During the Second World War. 2: In the Shadow of the Swastika*. Great Britain: University of Hertfordshire Press, 1999.

<sup>44</sup> Fraser, *The Gypsies*, 264-5.

estimated 8000 Roma only 600 survived, and in Yugoslavia; Serbia was the first country where the ‘Gypsy question’ was deemed to have been solved.<sup>45</sup> Roma suffered deportation to the camps from across Europe, with only those states that retained a degree of independence, such as Bulgaria and Italy, providing any real protection to their Romani populations. At the far end of the scale, it has been suggested that between 70% and 80% of European Roma died in the Holocaust, either directly or indirectly – a figure of 500,000 to 1 million dead<sup>46</sup>; whether this figure is accurate or not, the racial selection of Roma, alongside the Jews, for annihilation is arguably more important than any tally of deaths.

### **1.2.3. Post-war responses to the ‘Gypsy problem’**

The fact of genocidal persecution afforded Roma no protection after the war. Acknowledgement of the existence of a specific collective identity was slow in coming on both sides of the Cold War divide.<sup>47</sup> While in some cases Roma benefited from the individual rights that emerged from the horrors of the Second World War, they continued to suffer exclusion and harassment on the basis of their group identity.

In the post-war world, the majority of those Roma that had survived the genocidal policies of the Third Reich and its allies now found themselves under the power of the in-coming Communist regimes in eastern Europe. Fraser’s comment on Czechoslovakian policy towards Roma, as “typified by a blend of condescension and impatience, of paternalism and despotism, of benevolent inactivity and strenuous attempts at radical solutions”, serves as a useful guide to the prevailing attitudes of Communist authorities across the region.<sup>48</sup> Policies were complex, guided by Marxist thinking on progress and implemented with the zeal for which Communist planners were renowned. Michael Stewart’s work on Hungary, for example, details how the response of the police and security forces towards Roma continued along pre-Communist lines, with all Gypsies marked out as ‘untrustworthy’ citizens by the

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<sup>45</sup> Details from Fraser, *The Gypsies*, 267.

<sup>46</sup> See, for example, Ian Hancock, ‘Gypsy History in Germany and Neighbouring Lands: A Chronology to the Holocaust and Beyond’ (2001) 19 *Nationalities Papers* 395.

<sup>47</sup> For example, Fraser cites a case before the Hamm Court of Appeal in Germany, which pronounced in 1959 that a Rom arrested in Poland in 1940, held in custody for five years and whose parents were murdered had been arrested on the basis of inherent asocial tendencies, rather than on racial grounds. It was not until 1968 that the Federal Court of Justice overturned this decision. (Fraser, 269).

<sup>48</sup> Fraser, *The Gypsies*, 276-277.

colour of their identity cards. This contrasted with attempts by other departments of the regime to develop a new social policy for Roma, including providing support for the establishment of the first, albeit short-lived, national organisation for Hungarian Roma.<sup>49</sup> The benevolent half of government policy was, however, generally undermined, particularly at the local level, by continuing hostility to Roma as a group.

The general antipathy towards expressions of nationalism was a consequence of the ideological commitment to modernise society – progress that required the common effort of the whole population.<sup>50</sup> Society needed to be unified, homogenous, directed by centrally-co-ordinating authorities, in order to progress in the historical struggle against the backwardness and under-development that had plagued central and eastern Europe for centuries. For any group to be allowed to form an organisation for the promotion and protection of their specific interests they had therefore to overcome this hurdle, and Roma, failing to meet the qualifications set by the Marxist-Leninist doctrine on nationality status, were more at risk of homogenisation than those formally designated ‘national minorities’.<sup>51</sup> The consequence of this was that Romani culture officially became a social problem. Moreover, the Romani economic way of life, built around the selling of unique skills, was considered redundant under the new system – entrepreneurial activities did not fit the world of centrally-planned Communist economics – and the continuation of Romani culture was thus perceived as no more than the hangover of this defunct way of life.

In Czechoslovakia, for example, the authorities concluded by 1958 that Gypsy group identity needed to be destroyed if they were to progress in step with the rest of society; nomadism was outlawed, children were enrolled in school, encampments were raided and broken up, horses were slaughtered, caravans burnt, savings

<sup>49</sup> Stewart, ‘Communist Roma policy 1945-89 as seen in the Hungarian case’ in Will Guy (ed.), *Between Past and Future. The Roma of Central and Eastern Europe*. Great Britain: University of Hertfordshire Press, 2001, 75-6.

<sup>50</sup> Walker Connor, *The National Question in Marxist-Leninist Theory and Strategy*. Princeton: Princeton University Press, 1984.

<sup>51</sup> Roma had not always been thus treated. The Soviet Union had recognised Gypsies as a national minority in 1925, a Pan-Gypsy Union was formed a year later and a Gypsy State Theatre was founded in 1931; Romani was used as a language of instruction in a number of schools and books and periodicals were printed. The 1930s however saw a reversal of such policies, none of which were revived in the post-war period. The theatre survived, but in 1956 nomadism was outlawed and it was from this new climate that the countries of eastern Europe took their examples. Alaina Lemon, ‘Russia: politics of performance’ in Guy (ed.), *Between Past and Future*.

confiscated, and the adults were registered in one place and refused employment elsewhere. Although the enthusiasm with which authorities forced integration meant ‘victories’ were achieved, notably in the rate of school attendance and in certain types of employment, it was more likely, according to Guy, that the local authorities supposed to be registering and finding work and accommodation for those Roma settled in their area simply ignored them.<sup>52</sup> The failure of such schemes to make a lasting impression and end the ‘Gypsy way of life’ saw a new scheme of ‘dispersal and transferral’ inaugurated in the late 60s, with the idea of spreading the Gypsy population as thinly as possible across the whole of the country. The lack of proper financing, bureaucratic restrictions, the hostility of local authorities and populations and the unwillingness of those transferred to play by the rules forced upon them, saw the scheme fail, but not without generating a huge upsurge in racial prejudice. Assimilationist policies such as forced sterilization were then introduced whilst, paradoxically, segregation in schooling became entrenched.<sup>53</sup>

Similarly Bulgaria conducted a campaign of assimilation which lasted thirty years, with the use of the language prohibited, the designation ‘Gypsy’ abolished and those with Muslim names being obliged to take Slavic ones.<sup>54</sup> The situation in Romania was similar; attempts to prevent the traditional nomadic lifestyle saw the secret police of the incoming Communist regime in Romania in 1946, for example, confiscate horses and carts of the Romani population.<sup>55</sup> Despite some successes, such as enabling more Romani children than ever before to complete secondary schooling and go onto higher education, assimilationist policies in the Communist east arguably failed to take into account the barrier popular anti-Romani prejudice played in the integration of Roma into society, and the haphazard schemes that characterised Communist policies towards them succeeded rather in fanning the flames of this prejudice.

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<sup>52</sup> Will Guy, ‘Romani identity and post-Communist policy’ in Guy (ed.), *Between Past and Future*.

<sup>53</sup> For details of segregation of Romani children into schools for the mentally handicapped on the basis of their ethnicity, ERRC, *A Special Remedy. Roma and Schools for the Mentally Handicapped in the Czech Republic*. Budapest, 1999. Available at <http://www.errc.org/publications/reports/>. Racial segregation in education continues across the region; for details on the current situation, <http://www.errc.org>

<sup>54</sup> For one Rom’s personal account of being forced to change his name, Ivan Ivanov, ‘Discrimination and the Romani complex’ (1999) 2 *Roma Rights*; [http://errc.org/rr\\_nr2\\_99/meet.shtml](http://errc.org/rr_nr2_99/meet.shtml), accessed 19<sup>th</sup> January 2004.

<sup>55</sup> See Franz Remmel, *Die Roma Rumäniens: Volk ohne Hinterland*. Wien: Picus Verlag, 1993.

Not all Communist regimes, however, reacted according to this pattern. The Yugoslav authorities were considerably more tolerant towards cultural differences, in keeping with the ethos of a multicultural federation. In 1981, Gypsies were granted nationality status, placing them on an equal constitutional footing to other minorities, such as the Hungarians, Albanians and Turks, and conferring cultural and linguistic rights. The pejorative *cigan* was dropped in the media and replaced with *Rom*; radio and television channels began regular programming in Romani. Social and cultural associations sprung up in the larger communities and began to participate in local politics. Roma continued, though, to occupy the lowest socio-economic rung and although Yugoslavia was the one Communist state that did not force nomadic Roma to settle, the change in economic climate producing cheap industrialised goods frequently meant that their economic way of life ceased to be viable.<sup>56</sup>

The Romani population of western Europe traditionally differs from the more sedentary populations of eastern Europe, but the peripatetic way of life fared little better in the West. Although not actively prohibited<sup>57</sup>, governance systems designed for sedentary societies and built on the welfare state model have not been able or willing to support a travelling lifestyle. Travellers faced regular eviction and were forced to camp in places unfit for human habitation, without running water or sanitary facilities. Where the right to follow their traditional way of life was recognised, the resources were rarely made systematically available and Roma were subject to swings in political climates, often the first to feel the slap of right-wing policies.<sup>58</sup> Education

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<sup>56</sup> Guy, 'Romani identity and post-Communist policy'.

<sup>57</sup> Although that is not to say that laws prohibiting stopping did not specifically target the Roma. According to Klímová, it was not uncommon for municipalities in France, for example, to pass legislation prohibiting Roma from stopping with their caravans in the surrounding area for more than a few hours at a time. Ilona Klímová, 'The Romani Voice in World Politics', unpublished Ph.D. dissertation, University of Cambridge, 2003, 51.

<sup>58</sup> Using Great Britain as an example, the findings of the UK Ministry of Housing and Local Government in 1962 to the effect that "the true gypsies [sic.], or romanies, have the right to follow their traditional mode of life, and they have a legitimate need for camping sites" led to the 1968 Caravan Sites Act which made it a statutory obligation for local authorities in England and Wales to provide sufficient sites for Travellers. However, cash-strapped local authorities and pressure from local rate-payers meant that, while the situation certainly improved, a 1990 Department of the Environment survey found that 39% of the travelling community (as recorded by government figures) had no legal stopping-place, while of the remainder an estimated third had access only to private sites. Details taken from Fraser, 283-4. The 1992 Criminal Justice and Public Order Act granted police and local authorities sweeping new powers to deal with unauthorised camping at the same time that the 1968 Caravans Act and the obligations it contained for the provision of sites was repealed and the funding for such sites abolished. The travelling population were victims of the popular right-wing climate that prevailed at that time, although the 1992 Act was the cause of huge protests and a House of Lords

systems struggled to provide for the needs of Romani children, whether it was because of the difficulties of schooling around a travelling lifestyle, or because of language difficulties or cultural difference requiring different approaches. In Spain, most Roma have traditionally been sedentary and the problem was less one of toleration of a separate way of life than of living conditions in the shanty-towns they largely occupied. Fear of efforts towards political mobilisation saw Romani organisations banned and closed down in France, as they were across eastern Europe, with their leaders frequently questioned by police on suspicion of anti-state activities.<sup>59</sup> The continuing inability of western European societies to support in practice an alternative way of life – to recognise that equality can often only be achieved by difference in treatment – is illustrated by reference to the United Kingdom and the series of cases concerning planning laws, so far unsuccessful, brought by English Gypsies before the European Court of Human Rights.<sup>60</sup> Underpinning this unwillingness of the majority of society to provide the necessary resources remains the belief in the fundamental asocialibility of travelling groups or of Gypsies in general, combined in societies facing large-scale immigration, with high levels of xenophobia.

#### **1.2.4. A global people**

In much the same way that the Indian origins of Roma has become an established part of the perception, certainly from without but also partly from within, of Romani identity, so too has the notion of the Roma as a population dispersed throughout the world begun to fix itself in the common or accepted understanding of who or what the Roma are. This understanding has its roots in the practices of persecution of the European states. It was initially the policy of deportation by the emergent colonial powers that saw Romani speakers become spread throughout the world. In medieval times, expulsion had been more or less a local matter, seeing travellers moved onto to other towns, later expelled from whole domains or realms, as suggested by the

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revolt, both of which however failed to stop the progress of the Bill to law. The UK example is arguably not atypical of the attitude of northern European governments to travelling groups. Luke Clements and Sue Campbell, ‘The Criminal Justice Bill & Public Order Act and its implications for Travellers’, in Acton (ed.), *Gypsy Politics and Traveller Identity*. University of Hertfordshire Press, 1997.

<sup>59</sup> Klímová, ‘The Romani Voice in World Politics’, 51.

<sup>60</sup> For example, *Buckley v. UK* (1996) and *Chapman et al. v. UK* (2001). All cases available at <http://hudoc.echr.coe.int/>.

Imperial edicts. Certain countries also used concentration as a means of dealing with the ‘Gypsy problem’; in the course of 1749, for example, the Spanish authorities executed a carefully orchestrated round-up of all the Gypsies in Spain – men, women and children – and sent them to forced labour in places of the government’s choosing, all their possessions being confiscated and sold.<sup>61</sup>

During the course of the sixteenth century, however, Portugal developed a policy of deportation and was the first country to adopt transportation overseas as a solution to the problem of those Roma who had been born in the country and could not simply be expelled to a neighbouring state. In 1574, a Romani man and his family were forcibly transported to Brazil, and from that date a Portuguese practice of sending Romani women to Africa and men to service in the galleys established itself; large-scale group expulsions switched from Africa to Brazil a century later.<sup>62</sup> By the beginning of the eighteenth century, groups of Roma were being forcefully rounded up by the Portuguese authorities and transported to both India and Africa. This practice was picked up and copied by other countries. The Spanish sent Roma and others into the army, for example, or to holdings in North Africa, but not, interestingly, to the American colonies; in 1570, Phillip II forbade Gypsies from entering these areas and ordered his officials to arrange them to be shipped back to Spain should they appear there. England, however, had no such qualms about the use of the Americas as a dumping ground for undesirables and the 1597 Vagrancy Act saw considerable numbers of Roma and other itinerants shipped to hard labour in the American colonies. There appear to be, unsurprising in connection with the Roma, no figures for the numbers of those transported overseas nor any details as to their reception by the locals.

While enforced overseas relocation by the colonial powers petered out in the course of the eighteenth- and nineteenth- centuries, migration continued.<sup>63</sup> The second half of

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<sup>61</sup> Angus Fraser, ‘The present and future of the Gypsy past’ (2000) 13 *Cambridge Review of International Affairs* 17, 29.

<sup>62</sup> Details in this paragraph are taken from Fraser, *The Gypsies*, 168-171.

<sup>63</sup> Matras has suggested that migration forms a repetitive pattern in Romani history and imagination and thus places the movements of the modern era within this context. Yaron Matras, ‘Romani Migrations in the Post-Communist Era: Their Historical and Political Significance’ (2000) 13 *Cambridge Review of International Affairs* 32, 34. While there may be some truth to this assertion, there is a danger that it may be used to justify the continuing equation of Roma with nomadism or as an excuse for the policies

the nineteenth century that saw the abolition of slavery in the lands of Wallachia and Moldavia (present-day Romania and Moldova) consequently witnessed a further subsequent scattering of Roma across the world as emancipation also effectively meant eviction from land and dwellings, a migration known as the 'great Kelderara invasion' – the group of Roma involved being primarily the Kalderash.<sup>64</sup> In a number of European countries, the Kalderash constituted a new stratum of Roma in addition to the existing Romani population.<sup>65</sup> Those Roma that crossed the Atlantic at that time had arguably a greater impact as the overseas expulsees of colonial times had left few traces of their presence; the new arrivals established themselves primarily in Ohio, Pennsylvania and Virginia and Romani migration kept pace with general immigration to the United States.<sup>66</sup> A further mass migration occurred during the 1960s and 1970s with the opening of the borders of the former Yugoslavia which led to waves of Roma exiting those lands, mainly to West Germany. Since 1989, migration has continued from east to west, and out of Europe to the New World. The fighting in the former Yugoslavia, particularly in Kosovo, and continuing harassment, violence and social exclusion saw large numbers of Roma depart the Balkans and central and eastern Europe for western countries, such as the UK, Germany, and Italy. Canada has also received large numbers of Roma from central and eastern Europe in the last ten years.<sup>67</sup> Thus whether as a consequence of forced transportation and continuing persecution either necessitating migration or at the very least making it highly attractive, and perhaps, although with some scepticism, because of the hold migration has on Romani cultural imagination, there are groups claiming Romani identity effectively living scattered across the entire globe.

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and persecution that force Roma to seek refuge abroad by reference to their inherent desire to travel, and is thus perhaps best avoided.

<sup>64</sup> Elena Marushakova and Vesselin Popov, 'Historical and ethnographic background: Gypsies, Roma, Sinti' in Guy (ed.), *Between Past and Future*, 35. Fraser suggests, however, that migration patterns do not support the widely-held view of a major outflow from Rumania in the 1850s. (*The Gypsies*, 236).

<sup>65</sup> This is arguably the origin of the term 'Sinti', which was taken up by those Roma that were already present in central European countries, primarily Germany and Austria, to distinguish themselves from the newcomers.

<sup>66</sup> Fraser, *The Gypsies*, 234. From the time the migration began in 1815 to the 1880s, the majority of Romani migrants came from the British Isles; but from that time until the outbreak of World War I, there was a marked shift in general immigration, with the new migrants coming primarily from southern and eastern Europe, a pattern mirrored by Romani migrants.

<sup>67</sup> Ronald Lee, 'Post-Communism Romani Migration to Canada' (2000) 13 *Cambridge Review of International Affairs* 68. For a brief historical sketch of Roma in Canada, see RCAC Fact Sheet 8, available at <http://www.romani.org/toronto/FS8canada.html> For up-to-date information on current patterns of migration and asylum-seeking, <http://errc.org/publications/indices/asylum.shtml>

## Chapter 2: Romani Transnational Political Organisation

A people are as healthy and confident as the stories they tell themselves.<sup>68</sup>

The collapse of Communism and the emergence of attendant civil and political freedoms in eastern Europe marked a new chapter in Romani history. While socio-economic conditions for Roma have worsened considerably in the countries of the former eastern bloc<sup>69</sup>, the new freedoms (and funding), as well as the intervention of the EU, have, by most accounts, re-energised political mobilisation.<sup>70</sup> As the title to Hancock's controversial article suggests, the roots of Romani nationalism are, as he puts it, in eastern Europe.<sup>71</sup> However, while the historical, linguistic and anthropological dimensions of the Roma have attracted a not inconsiderable amount of attention, there has been, until very recently, little attempt at documenting and analysing Romani political organisation.<sup>72</sup>

In terms of defining Romani mobilisation, Klimová, in her empirical study of the Romani movement's interaction with the United Nations, has classified the Movement as a loose transnational social movement, "an action system of mobilised networks of

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<sup>68</sup> Ben Okri, 'The Joys of Story-Telling' in *Birds of Heaven*. London: Phoenix, 1997.

<sup>69</sup> This trend has been well-reported. E.g., Ina Zoon's country reports under the title *On the Margins* (available at <http://www.soros.org>) and the UNDP's 2003 *Avoiding the Dependency Trap: The Roma in Central and Eastern Europe* (available at <http://roma.undp.sk>). One of the more striking assertions by the UNDP is that "by such measures as literacy, infant mortality and basic nutrition, most of those country's [Bulgaria, Czech Republic, Hungary, Romania and Slovakia] four to five million Roma endure conditions closer to those of sub-Saharan Africa than Europe".

<sup>70</sup> Martin Kovats has suggested, however, that despite the fact that Romani politics has achieved real significance only in the post-Communist era, such mobilisation must be seen in terms of the development of Romani populations within their respective countries in the socialist era, rather than as the gift of an enlightened democratic era. He points out, for example, that access to health care, housing, education and employment under socialist regimes enabled Roma to better express their needs. Martin Kovats, 'The Politics of Romani identity: between nationalism and destitution'. *Open Democracy*: 30 July 2003; available at [www.opendemocracy.net](http://www.opendemocracy.net); accessed 9 January 2004.

<sup>71</sup> Hancock, 'The Eastern European Roots of Romani Nationalism', *Nationalities Papers*, Vol. XIX, No. 3, Fall 1991.

<sup>72</sup> The work of Thomas Acton is a notable exception. There have been moves to remedy this lacuna by a handful of scholars, notably Ilona Klímová, *The Romani Voice in World Politics* (unpublished PhD thesis, University of Cambridge, 2003) (a much shortened version is published with Ashgate, 2005; as a consequence, citations refer to the PhD thesis unless otherwise indicated) and Peter Vermeersch, 'Roma and the politics of ethnicity in Central Europe: a comparative study of ethnic minority mobilisation in the Czech Republic, Hungary and Slovakia in the 1990s' (unpublished PhD thesis, University of Leuven, 2002). The present author notes with gratitude the willingness of both to allow access to their work prior to publication and acknowledges the debt this section owes to their research.

individuals, groups, Romani and Pro-Romani organisations from several continents functioning at all levels up to the global.” This system is based on “a shared belief in Romani identity and attempts to improve social and political status and treatment of the Romani people all over the world, predominantly by means of organised actions targeting the transnational level.”<sup>73</sup> Few of the groups at the local, or occasionally even the national, level come under the umbrella of one of the transnational organisations but most interact or co-operate with one another or with the wider Movement on a more or less regular basis. According to Klimová, this is true also of a number of prominent Romani individuals, who are unattached to an organisation as such. The extent and nature of interactions between the various actors of the Movement have not yet been studied in their own right and hence are largely unknown. However, as the above definition suggests, ‘Movement’ should be understood as referring to a loose network of organisations linked by a common aim but lacking detailed and sustained co-ordination, and with a frequent failure to recognise other members of the network. This chapter intends to provide only the briefest of sketches as an introduction to the transnational Romani Movement as background to the claim to non-territorial nation status.

## **2.1. The past of Romani political mobilisation**

A number of scholars have suggested that Romani political mobilisation began at the end of the nineteenth century. Hancock, for example, has claimed that large gatherings of various groups of Roma, from the alleged meeting in Switzerland of Roma from all over Europe at the end of the fifteenth century to a grand assembly in Romania in 1913, mark the beginning of the movement. He is supported in principle by the anthropologists Marushiakova and Popov, who locate the roots of the movement in the Balkans in a 1905 ‘congress’ held in Sofia. Similarly, Acton cites reports in *The Times* of large conferences held in Germany in 1872 and in Hungary in 1879.<sup>74</sup> Romani language newspapers appeared around this time in Bulgaria, Greece,

<sup>73</sup> Klimová, 22-28. ‘Pro-Romani’ organisations is a term used to denote those organisations established or run by non-Roma, although they may employ Roma, whose work is predominantly or exclusively concerned with the improvement of the situation of Roma; the Budapest-based European Roma Rights Center is the most prominent example of a pro-Romani organisation.

<sup>74</sup> *The Times*, 27 January 1872 and 29 September 1879. Thomas Acton, *Gypsy Politics and Social Change*. London: Routledge & Kegan Paul, 1974, 101. Klimová has however dismissed claims of early international congresses as nation-building myths, suggesting instead that it was only in the 1920s and

Romania and Yugoslavia and, in 1925, the Soviet authorities allowed the formation of a Romani organisation. The first proposal for institutionalising an international meeting came from the General Union of Roma in Romania, in which it was intended that affiliated groups of Roma in every country would attend. Hancock, calling the organisation the General Association of Roma of Romania, has suggested that the first international conference took place in Bucharest in 1933 under the title 'United Gypsies of Europe'. He further alleges that among other things, the conference sought to establish 23 December as an annual Romani holiday to commemorate emancipation from slavery. A flag to symbolise Romani identity was also apparently adopted and proposals were made for the creation of a Romani library, hospital and university and, for Hancock most importantly, suggestion was made "to institute an international program of communication and co-operation among representative Romani groups everywhere".<sup>75</sup> According to Klimová, however, no such conferences took place in the interwar period – the Bucharest congress is, she alleges, rather a mythical forebear of later congresses.

There is general acceptance, however, that in Poland in the 1920s a Romani family persuaded the local authorities to recognise their claim to royal authority over all the Roma of Poland, reviving the concept of a King of the Gypsies.<sup>76</sup> They were fairly successful in their claims, moreover. The enthronement of Janusz Kwiek as Janos I in 1937 before an audience of thousands had Church approval from the Archbishop of Warsaw and various European heads of state were invited.<sup>77</sup> The Second World War effectively brought the dynasty to an end. Janos was executed by the Nazi occupying forces in Poland for refusing to cooperate and, as a symptom of Romani mobilisation across the continent in that period, public political organisation went into serious decline as Roma were reluctant to draw attention to themselves. Although a new King proclaimed himself in the ashes of post-war Poland, he found few followers. In

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1930s that Romani organisations began to take on existence in any regular manner (although this presumably does not rule out the occasional large meeting).

<sup>75</sup> Hancock, 'The Eastern European Roots of Romani Nationalism', 10.

<sup>76</sup> 'King of Gypsies' was apparently an office established in the Polish territories in the 17<sup>th</sup> century to prevent lawlessness among Roma and to collect their taxes. Although the position's first two incumbents were rumoured to be Romani, from 1668 it was an office for the Polish gentry. The office ended with the partition of the Polish Commonwealth at the end of the 18<sup>th</sup> century and was revived by the Kwiaks in the 1920s. Klímová, 34.

<sup>77</sup> According to Acton, the Polish President attended, although no-one comments on whether any other of the invited dignitaries was actually present. T. Acton, *Gypsy Politics and Social Change*. London: Routledge & Kegan Paul, 1974, 100.

contrast, however, to the current claim to non-territorial nation status, the Kwiek family took their inspiration from Zionism and developed initiatives for the founding of a Romani homeland. Michael Kwiek II had announced in 1934 a plan for creating a state for Roma in their ‘original’ homeland on the banks of the Ganges; Joseph Kwiek, a cousin and competitor for the throne, declared a plan for a homeland in South Africa. Janos I pledged in his coronation address to petition Mussolini for a part of the newly conquered Abyssinia as a place where Roma could settle.<sup>78</sup> These plans came to nothing but were not however forgotten, and according to Klímová, the efforts of the Polish ‘Kings’ are seen as the roots of the Movement, at least as embodied today by the International Romani Union (IRU).<sup>79</sup>

The ambitions of the nascent Movement had been crushed by the spread of fascism, and the Holocaust left it floundering; those that survived were reluctant to publicise their identity as Roma. Cultural, religious and political organisations at both the local and national level however slowly began to form anew.

The 1960s saw various attempts at establishing an international Romani organisation. Many were banned by the incoming Communist regimes of the east and the focus of initiatives shifted to France, where a Romanian Rom, Ionel Rotaru, had declared himself ‘the Supreme Chief of the Romani People’ at a public ceremony in 1959. Rotaru attracted enough supporters from within the immigrant Romani population of France to form the World Gypsy Community. Following on from the ambitions of the Kwieks, Rotaru drew up elaborate plans for an autonomous stretch of territory for Roma within France<sup>80</sup>, as well as for the establishment of *Romanestan* in Somalia.<sup>81</sup> The formation of a governmental-type organisation in order to campaign for the establishment of a Romani state was thus the WCG’s prime objective and Romani passports were in fact printed.<sup>82</sup> Its plans failed to meet with the approval of the

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<sup>78</sup> Hancock, ‘The Eastern European Roots of Romani Nationalism’, 12.

<sup>79</sup> Klímová, 34.

<sup>80</sup> According to Klímová, Rotaru petitioned the people of Lyon for land so that Romani tradesmen could settle and establish the city as the Romani world capital. Klímová, 43.

<sup>81</sup> Rotaru’s choice of Somalia was based upon his belief that the Roma had settled in Mesopotamia following the biblical flood, and from there had settled in Somalia. He further claimed that at that moment 35% of Somalis were of Romani descent. There is however no evidence to support any connection between the Roma and Somalia. Klímová, 43-44.

<sup>82</sup> The ‘passports’ were printed in Belgium and had, in place of details of national identity, the Declaration of the Rights of Man. Rotaru was not the only international Romani figure to attempt to

French authorities, however, and in 1965 the French Government banned the WGC, on the stated grounds of security concerns.<sup>83</sup> Following its prohibition in France, and the failure to establish a homeland as protection from persecution that Rotaru had so desperately sought, the headquarters moved to Vienna and the organisation slowly ceased to play an active role in Romani politics.

A number of other transnational associations appeared about the same time, demanding various forms of recognition. The International Gypsy Rights Mission established itself in Paris in 1968, under the stewardship of a member of the Kwiek family, Rudolf Kwiek (Karway). The founding of GIPSAR (the Assembly of Roma-Gypsies) followed in 1969, with its headquarters also in the French capital. Although neither of these organisations managed anything more than symbolic actions, the statements of intent by Kwiek's organisation in particular are worthy of note in terms of contextualising more recent national-political claims of the Movement.

According to its statutes, the International Gypsy Rights Mission represented the interests of the global Romani population and had a number of specific aims.<sup>84</sup> The organisation was to, *inter alia*, ensure that the appellation 'Roma' was to replace 'Gypsies' in official and public discourse<sup>85</sup>, attempt a statistical survey of Romani populations worldwide, broker agreements with individual states concerning Romani immigration and cross-border movement and assume responsibility for all Romani groups or 'clans'. To this end, it reserved the right to demand a percentage of the income of all employed Roma, as well as the right to represent Roma in any negotiations with the officials of individual governments and to approve any compensation deal on their behalf. All disputes between Roma anywhere in the world were to be referred to a Romani court in Hamburg. Other Mission documents suggest that Karway intended to establish Romani embassies in every country in which Roma reside, although a trip to London in an apparent attempt to begin this process of accreditation was unsuccessful. While some documents suggest a strategy of pursuing citizenship in countries of residence and accepting sedentarisation, another demands

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produce Romani passports; Rudolf Kwiek (Karway), President of the International Gypsy Rights Mission, also issued such documents. Klímová, 45, 50.

<sup>83</sup> Acton, *Gypsy Politics and Social Change*, 236.

<sup>84</sup> All details in this paragraph are taken from Klímová, 46-51.

<sup>85</sup> Klímová has noted however that the organisation itself oddly continued to use the term 'Gypsy' not only in its name but also throughout its documents and statutes. *Ibid.*

that until all Roma achieve traditional citizenship papers (ie from existing nation-states), they should be entitled to identity papers bearing Romani nationality. Karway later also issued passports to this end. The trappings of nationhood and structures of governance which Karway sought to establish arguably finds echo in the recently articulated demands of today's international Romani organisations.

Of more interest in terms of concrete achievements, a breakaway faction of Rotaru's WGC formed the International Romani Committee (IRC) (also commonly referred to as the Comité International Rom (CIR)) in 1967. At its founding meeting at Fontainebleau, it was decided to set aside the more controversial questions of 'national' identity, such as the creation of a Romanestan, and to concentrate on activities within France. One of the main objectives of the IRC/ CIR in these early days, according to Klímová, was rather the settling of the question of reparations for Roma relating to wartime activities, with, it is claimed, more than 4000 individual compensation requests being collated and submitted to the French Ministry of Veterans and War Victims.<sup>86</sup> In addition to the pursuit of reparations, the IRC sought recognition on the international level, establishing co-operation with UNESCO, the Council of Europe and with a Vatican Commission dealing with Justice and Peace. Moreover, as Romani organisations began to appear across western Europe, attention within the IRC turned to establishing themselves as an international co-ordinating body. By 1972, according to Hancock, twenty-three national organisations across twenty-two countries had been linked under the IRC umbrella.<sup>87</sup>

A year earlier, 1971, the IRC had held the first World Romani Congress, in London, with participants attending from western, central and eastern Europe, North America and Asia.<sup>88</sup> As well as affirming the Romani flag (with the addition of a red, sixteen-

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<sup>86</sup> Klímová, 51- 52. Only a few hundred of the applicants were apparently successful in gaining small sums.

<sup>87</sup> Hancock, 'The Eastern European Roots of Romani Nationalism'. Klímová cites various first-hand sources as suggesting that the IRC represented 12,000 Roma at that time through direct affiliation through their local organisations and a further 45,000 affiliated in a less obvious manner. Klímová, 57. Klímová, following Willets, notes that the transnationalisation of the Romani Movement occurred concurrently with that by similar movements and organisations; thus, it should be seen within the context of wider changes to the global climate in the early 1970s. Klímová, 36, citing Peter Willets (ed.), *Pressure Groups in the Global System: The Transnational Relations of Issue- Orientated Non-Governmental Organisations*. London: Frances Piter, 1982.

<sup>88</sup> The Congress had been in the planning since 1966 but the inability to gain permission for leaders behind the Iron Curtain to attend saw it constantly postponed.

spoke *charka* to the horizontal blue and green bars<sup>89</sup>) and adopting a national anthem, the aim of the congress was made explicitly clear by its chairman. Liégeois cites him as declaring that “[t]he goal of this congress is to unite Roma throughout the world ... to bring about emancipation as we see it, and according to our own ideals; to advance at our own speed.”<sup>90</sup> The slogan *Opre Roma!* (Arise Roma!) was adopted and April 8 (the first day of the Congress) declared Romani National Day. In addition, the Congress pronounced itself to be the consultative authority of the Romani people in relation to the UN and other international bodies, and agreed to send a delegation to the UN to push for nationality status.<sup>91</sup> According to Klimova’s reading, the agreement to request *nationality* status for the Movement must be distinguished from the claim to nationhood. This distinction is apparently based upon the differentiation in socialist thought between nations and nationalities, in which the former was held to be the apex of ethno-national development and thus deserving of self-determination, at least in theory; nationalities, on the other hand, found themselves lower down the scale of ethnic ‘development’ and were to be considered only worthy of autonomy rather than outright independence.<sup>92</sup> This line of thinking by the Congress was obviously heavily influenced by the delegates from central and eastern Europe – the realm in which any such claim was likely to be made – and the awareness that any claim to nation status would inevitably raise the controversial issue of territory, a misunderstanding that the Congress apparently wished to avoid.<sup>93</sup>

The International Romani Union (IRU) was formed from the IRC/ CIR in 1977, according to Acton and Klimová, rather than the usual date given of 1971.<sup>94</sup> A permanent secretariat was established, although with no actual physical location. This new body organised the second World Romani Congress in 1978, held in Geneva,

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<sup>89</sup> The adoption of the Chakhra as the centrepiece of the Romani flag highlights the strength of the self-understanding of Indian origins, corresponding as it does to that on the Indian National flag. However, if Klimová is correct and the earlier conference did not actually take place, the flag was presumably designed at this point rather than affirmed.

<sup>90</sup> Cited by Hancock, ‘The Eastern European Roots of Romani Nationalism’, 16.

<sup>91</sup> Klimová, 55.

<sup>92</sup> Lenin, *Critical Remarks on the National Question* (1913);  
<http://www.marxists.org/archive/lenin/works/cw/volume20.htm>

<sup>93</sup> Klímová notes, however, that many of the delegates nonetheless continued to hold that the Roma were a nation and that the framing of the claim was thus a political manoeuvre rather than acceptance of inferior status.

<sup>94</sup> Acton and Klimová, ‘The International Romani Union: An East European answer to West European questions?’, in Guy (ed.), *Between Past and Future. The Roma of Central and Eastern Europe*. Great Britain: University of Hertfordshire Press, 2001.

attended by approximately 120 delegates and observers from over 50 organisations across 26 countries, including Europe, India, Pakistan and North America.<sup>95</sup> The acceptance of Indic roots played a prominent role in both these early gatherings. The first Congress, for example, was funded in part by the Indian government and representatives from India took part. At the second Congress, according to Hancock, Indian links were more heavily emphasised, with the Prime Minister of the Punjab and the Punjaban Ministers of Foreign Affairs and of Education all in attendance. Moves were initiated at the second Congress, with the assistance of the Indian dignitaries, to gain United Nations' recognition, and consultative status with the UN Economic and Social Council (ECOSOC) was granted in 1979. Discussions in the plenary centred on calls for recognition from international bodies, as well as the familiar call for reparations and the standardisation of Romanes (the Romani language). The Second Congress went further than the First, with the Social Commission arguing for the need to upgrade the demands of Romani communities in eastern Europe to that of a national minority of Indian origin, in contrast to the decision made seven years earlier in London to avoid contentious claims. According to Klimova, the Congress action programme sought recognition of Romani 'specificity' and their right to preserve it.<sup>96</sup>

The Third Congress in Göttingen, organised by the German Sinte League, was held under IRU auspices in 1982. According to Hancock, over three hundred delegates from across twenty countries participated.<sup>97</sup> The main issue discussed was that of reparations. However, the primary topics of the Fourth World Romani Congress, held near Warsaw in 1990, were cultural, specifically the need to create a Romani literature, and the Congress was successful in standardising the Romani alphabet and initiating the first Romani primer. The Warsaw Congress was, according to Klimova, a meeting of intellectuals rather than a political conference; it was nonetheless, not unexpectedly due to the then recent geopolitical changes, the most well attended Congress of the four, attracting nearly 500 participants from 27 countries.

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<sup>95</sup> Klimová, 58.

<sup>96</sup> Klimová, 59.

<sup>97</sup> Hancock, 'The Eastern European Roots of Romani Nationalism', 19; Klimová, on the basis of the official report of the Third Congress, suggests that the participants came from 22 countries. Klimová, 59.

The Fifth Congress took place in Prague in 2000 and the agenda was dominated by the claim of the IRU to a seat at the UN as the global Romani representative, and the need for internal structural reform to achieve this.<sup>98</sup> Attempts were thus made to provide the thirty-year old organisation with a new structure capable of providing governance to the group's disparate constituents. Reforms aimed at creating a 'semi-governmental body', in the words of Klimova, consisting of an executive, a legislative, judiciary and administrative organs – deemed to be the necessary trappings of a nation – with commissars responsible for portfolios corresponding to traditional ministerial portfolios, such as Foreign Affairs<sup>99</sup>, as well as a court to regulate inter-Romani disputes. A new Charter was created enshrining these changes and was adopted by the plenary.<sup>100</sup> Election procedures were apparently the most complicated thus far and an effort was made to be open and fair: nominations for positions were taken from the floor of the plenary and voting consisted of an open vote among delegates.<sup>101</sup> The Congress also issued the Declaration of Nation, reproduced here as Annex 1, which contains the claim to non-territorial nationhood.

The Sixth World Congress took place in Lanciano, Italy in the autumn of 2004 but little has yet been published on the details of what took place there. The Congress was partly marred by the short notice given to delegates – a mere three weeks, preventing those delegates that need visas to enter the EU or to plan long flights from being able to attend – as well as by the absence of the out-going President, Emil Scuka. In his absence, a new President, Stanislaw Staniewicz, was elected.

The other main Romani organisation with a voice on a pan-national scale is the Romani National Congress, a Hamburg-based break-away from the IRU established

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<sup>98</sup> Much more was discussed and decided upon, particularly within the structure of the themed working groups. For a detailed list of issues, Klimová, 61-65; Acton and Klímová, 168-187.

<sup>99</sup> The full list of Commissar positions follows as it provides a good indication of the predominating concerns not just of the IRU but arguably of the Movement as a whole. The Commissar posts are: Foreign Policy, Holocaust, Economic Issues, Educational Issues, Financial and Budgetary Issues, Human Rights, Romani Language and Language Rights, Management and Informatic [sic.] Systems, Media Affairs, and Commissar without Portfolio. The three remaining positions relate to geographical concerns, and are: Commissar for Central and Eastern Europe, for USA and Canada, and for Australia and New Zealand. Acton and Klímová, Appendix 1, 200.

<sup>100</sup> For full text of the Charter and details of the debates surrounding the adopting of the Charter, see Acton and Klímová, 179-187.

<sup>101</sup> Acton and Klímová, *ibid.*; the plenary elected the 32 members of the parliament, who in turn elected a 14 member Presidium, who were then appointed commissars for specific issues or for geographical regions, and a 7 member court. The meeting of the Presidium was however held in private.

in the 19080s. It is led by Rudko Kawczynski, whose force of personality has drawn an increasing number of young and educated Roma to his side. However, the much more recent establishment of the RNC means that it has no addition to make to the historical account of Romani claims, although of course it draws upon the common history it shares with the IRU. Its recent claims will be considered below, however, and are of equal importance to those emanating from the IRU's Prague headquarters.

Since the 2000 Congress catapulted the Romani Movement on to the international stage afresh, their presence there has been affirmed. Romani delegations from across Europe, the United States, Latin America and Africa converged on Durban for the 2001 World Conference Against Racism to promote the Romani cause.<sup>102</sup> The large and colourful presence of Roma throughout the weeks of the NGO Forum and governmental conference established them as one of the most visible groups present in South Africa. However, the inexperience of the majority of the Romani delegates at this level and the disagreements between members of the different factions of the Movement ensured that the delegation was not as productive as it might otherwise have been.<sup>103</sup>

Klimova's detailed analysis of the Movement on the international level has led her to conclude that between the rather grand occasions of the Congresses, the IRU's work consists of only occasional meetings of the Presidium and infrequent discussions with international organisations or governmental officials; although she does not address other organisations, this is presumably also an accurate description of their activities.<sup>104</sup> It is not the subject of the sketch here to attempt to judge in anyway the

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<sup>102</sup> M. Goodwin, 'Visibility on the international stage: The ERRC delegation at the World Conference Against Racism' (2001) 4 *Roma Rights* 41.

<sup>103</sup> The Durban conference was not, however, a great success in general, and the rejection of the NGO Declaration by the Secretary-General of the Conference saw the paragraphs therein, drafted by the Romani delegation, not repeated in the official, government-drafted, Conference Declaration. All documents from the Durban process are available at <http://www.racism.gov.za/substance/confdoc/> For an assessment of the effectiveness of the delegation in Durban, Klimová, Part III: WCAR Case Study, 279-393.

<sup>104</sup> The IRU held a parliamentary session in Skopje in January 2002. Lobbying attempts within the UN system have been haphazard, however. Despite gaining second-tier consultative status with ECOSOC, as well as with UNICEF and the Department of Public Information (DPI), until the World Conference Against Racism in 2001 the Movement had not taken part in any UN conferences, nor made use of access to the human rights treaty monitoring bodies until the formation of the ERRC in 1998. (It should be noted that the significant involvement of Roma at Durban was largely the result of non-Romani organisations, such as the ERRC and the American Friend's Service Committee). The Movement has also not been able to maintain a permanent representative at the UN and has often relied on non-

success of the Movement in achieving the objectives it has set itself<sup>105</sup> – Klímová’s work does this and her analysis is hardly positive. It is perhaps necessary to note however that the Movement’s interactions with international organisations, and the UN in particular, has not been as productive as they might have been and that this is due in part to a lack of human and financial resources.<sup>106</sup> While the IRU Charter established at Prague provides that membership fees from individual members and member organisations are the main source of income, few pay and the organisation thus continues to rely on sources such as gifts and state governmental and international organisational funding. Meetings thus only take place where specific funding can be found, and it remains difficult to attract suitably qualified candidates for office if they must be self-financing. Klímová has suggested that “[t]he real motivations behind [these meetings] are usually to be found at the nation-state level and their results bear only vague resemblances to the declared ones.”<sup>107</sup> Although the IRU established a lobbying office in Brussels in 2002, for example, it survives by ‘sharing’ the resources of the Transnational Radical Party, headed by a non-Rom, Paolo Pietrosanti, who also served as the IRU Commissar for Foreign Policy up until 2004. The Movement is maintained rather by the efforts of a handful of individuals pursuing their own personal interests, such as Holocaust compensation or cultural matters such as attempts to standardise the Romani language or establish a Romani history.<sup>108</sup>

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Romani representatives of others organisations to present Romani interests at the Secretariat in New York; the prestige of the post, moreover, has meant that there has been much undignified confusion about who was entitled to the position. Details in Klímová, 155-161.

<sup>105</sup> Based on Klímová’s research, the main items of concern for the Movement have been recognition, Holocaust reparations, the formation of Romani cultural institutions, standardisation of the language, campaigning for the promotion and application of individual human rights for Roma within their respective countries, questions of cross-border movement such as passports bearing Romani nationality and immigration and refugee matters, as well as proposals to address unemployment.

<sup>106</sup> There is a chronic lack of financial resources at the international level and the funding is generally only being made available for specific projects; as a result, according to Klímová, most of the Movement’s funding is found either by its constituent organisations or by private individuals (the IRU Presidium, for example, was financed up to 2004 entirely from the pocket of the President, Emil Scuka). Klímová, 66-67.

<sup>107</sup> Klímová, 64. Acton and Klímová have suggested that each Congress took place only as a result of the dedication of local organisers, each with their own agenda to fulfil; for example, they suggest that the Third Congress was organised by the *Verband Deutscher Sinte und Roma* in a move to further establish themselves in order that they may receive German Government welfare programme funding, as well as to consolidate support among their own Sinte constituency. 160-163.

<sup>108</sup> Klímová, *The Romani Voice in World Politics*, 17-18. It is should also be noted that nearly all the officials and members of the IRU hold a number of jobs in addition to their IRU role and are often busy working for the Romani cause through their local and national organisations. See also Hancock, *We are the Romani people*, 123, for the practical difficulties that hamper the Movement’s efforts.

However, the Movement has, according to Hancock's history of its political efforts, seen formal recognition granted the Roma by the UN, international acceptance of the global representative role of the IRU and overtures made by a host of actors, from the Vatican and the Pentagon to Helsinki Watch, for information and consultation. Yet despite the clear limits to the success of the Movement in realising their demands, Hancock concludes nonetheless that the Romani Movement is fostering an emerging sense of what he calls *Jekhipé* ('oneness') among Roma around the world – an assertion that shall be considered in the following chapter.<sup>109</sup>

## **2.2. An analysis of recent Romani claims**

This section analyses the nature of the claims that have been made by the Movement in recent years and will examine the initiatives and proposals that are currently being discussed in its upper echelons. The various claims will be considered in some depth in an attempt to, firstly, unravel what each claim is understood to entail by those making it and, secondly, to be able to place it in the context of wider Romani political strategy. Non-territorial nationhood will be explored in the light of these competing and concurrent demands with the aim of constructing a synthesised analysis of Romani political desires and demands.<sup>110</sup> Klimova has suggested, based on her analysis of the Movement, that it is in search of an ideology and that as a consequence its ideas are incoherent and “open to random influences.”<sup>111</sup> Such a conclusion appears harsh in light of recent publications suggesting a leadership consciously debating appropriate strategies for achieving what is arguably the common aim – recognition as a nation. It will be contended here that disagreement between rival organisations and the various Romani individuals who walk the international stage are to some extent surface disagreements, with differences in terminology masking a core agreement over aims and desires.

### **2.2.1. Conceptions of the Romani Nation**

The brief sketch of the Movement presented above suggests that throughout its history it has been directed by a nationalist drive. While on one level a main concern has been

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<sup>109</sup> Hancock, ‘The Eastern European Roots of Romani Nationalism’, 19.

<sup>110</sup> Of course, this is necessarily the demands and desires of the Movement and, furthermore, the Movement’s elite.

<sup>111</sup> Klímová, 69-70.

the issue of Holocaust reparations and, more recently, concern for the promotion and application of individual human rights for Roma within their respective countries, the belief that Roma constitute a nation has been the mainstay of Romani political organisation. Underpinning the polite requests for territory, the development of a flag and national anthem, the emphasis on the formation of Romani cultural institutions and the standardisation of the language, the ‘issuing’ of passports bearing Romani nationality and even the self-conscious decision at the First Congress to claim only nationality status, is arguably the implicit self-understanding of Roma as a group sufficiently bonded by common characteristics to qualify for the epithet ‘nation’. That the simple fact of mobilising along ‘Romani’ lines is a national claim of sorts is an argument that has been made by one of the founders of the Movement, Ionel Rotaru, who defined Romani nationalism as any anti-assimilationist stance that sought to achieve rights for Roma without abandoning Romani culture.<sup>112</sup> In addition, the history of the Movement is replete with explicit claims for recognition as a nation; that the claim to nationhood has always been at its core is suggested by the fact that one of the first formal contacts with the UN, in 1968, was an IRU petition requesting national recognition of Roma worldwide.<sup>113</sup>

One could argue that not too much should be made of the persistent articulation of nation-type claims. The first half of the twentieth- century saw all minority groups viewed within the nationalist paradigm.<sup>114</sup> However, the insistence on using the language of national identity is arguably significant in the current era in which the protection of group- based rights has been eclipsed by the promotion of individual human rights. While national claims may not be surprising in the sense that the discourse of nationhood will remain the most powerful in the international system as long as the nation-state system remains in place, the insistence upon using the nationalist discourse rather than choosing to work solely within the nation-state systems as either separate minority groups or equality-demanding individuals suggests a conscience decision to do so. Indeed, a leading member of the IRU stated at a recent

<sup>112</sup> Cited in Acton, *Gypsy Politics and Social Change*, 230.

<sup>113</sup> Klimová, 194. That the UN Archives have no record of such a petition probably speaks to the seriousness with which the UN took the Romani Movement at that time.

<sup>114</sup> According to Jackson Preece, “[e]ven a casual survey of the definitions assigned to minority reveals an intimate connection to the concepts of nation and nationalism. The core definition of minority is essentially identical to the core definition of a nation”. Jennifer Jackson Preece, *National Minorities and the European Nation-States System*. Oxford: Clarendon Press, 1998, 29.

meeting of the Movement's elite that his organisation's claim to nation status was designed to move beyond the understanding of Roma as a minority. Thus, instead of Roma being recognised as national minorities within the existing state structure, they would be a nation in their own right.<sup>115</sup> Moreover, the offer of recognition as an Indian minority, with the same status as Indian émigrés, that of 'Indians abroad', including the right to an Indian passport has been rejected in favour of pursuing their own national status, suggesting that belief in a Romani nation is strongly held.<sup>116</sup>

The belief that Roma constitute a nation appears to have been accepted by all sides of the current Romani leadership. At a previous meeting of the leadership at Krakow in 2001, in discussion of the IRU's ideas, the point that other organisations hold it as self-evident that Roma constitute a nation was made forcefully by participants, particularly the leader of the Romani National Congress.<sup>117</sup> Where differences occur, it is arguably more a question of differences in personality or in strategies for achieving recognition as a nation. This is not to suggest, however, that there are not real differences in how the Romani nation is conceived within the Movement, which have clear consequences for the way in which the claim to nationhood is articulated. The different understandings can be grouped into two opposing views.<sup>118</sup> The first has been described as a universalistic position (although perhaps pluralistic might be a better term), by which is meant that the Romani nation, although it certainly exists, can only be an open, loose identity. Such is the sheer diversity of Romani groups in terms of traditions and culture that an attempt to forge a unitary conception of Romani nationhood is held to be fruitless; rather, what binds these groups together is anti-Romani sentiment by *gadžé*. This position is most often associated with the RNC, but has also been stated clearly by Ian Hancock.<sup>119</sup> The second position aims at the

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<sup>115</sup> These comments were reported in PER, *Roma and the Question of Self-Determination: Fiction and Reality*, a report of discussions at a meeting of the Romani leadership at Jadwisin, Poland, 15-16 April 2002; hereafter 'Jadwisin Report'. (The report is available on-line at: [http://www.per-usa.org/Jadwisin1\\_12\\_03.pdf](http://www.per-usa.org/Jadwisin1_12_03.pdf)) Nicolae Gheorghe, another Movement leader, has suggested that such efforts are misdirected. There appears to be no reason, however, why the two – national minority status within the country of residence and nationhood with international recognition and representation – cannot co-exist.

<sup>116</sup> The offer came from the Indian authorities during an IRU visit to India during 2001. Accepting Indian minority status would of course risk expulsion and a forced 'return' to India, a factor of which the participants, were well aware. Details in Jadwisin Report, *ibid*.

<sup>117</sup> PER workshop, Krakow, 9-10 March 2001. *Leadership, Representation and the Status of the Roma*. Princeton, 2001; available at <http://www.per-usa.org/krakow21-2.doc>.

<sup>118</sup> Jadwisin Report, 15-16.

<sup>119</sup> Hancock, 'The Eastern European Roots of Romani Nationalism', 5.

development of a unified nation, focusing on Romani culture and with a codified language and renewed traditions and values; this is the position of the IRU among others. This approach views the diversity among the various Romani groups as harmful and as a fragmentation encouraged by the *gadžé*. For the claim to self-determination to succeed, according to this view, there must be a prior unification of culture, a strengthening of national symbols and empowerment for all groups of Roma. The differences between these two positions are important not only in terms of the type of nation being sought but also because, based on these understandings of the nature of Romani identity, different conclusions have been drawn as to what the main interests of the Roma are: the fight against anti-Romani prejudice or the development of a unified culture.<sup>120</sup> Despite the differing conceptions of Romani identity within the Movement, it is worth noting here however that the self-understanding of Roma as a nation is not confined to the Romani leadership but, in line with Rotaru's comment, flows throughout the modern Movement.<sup>121</sup>

### **2.2.2. The European Roma Forum and alternative national claims**

The early political claims of the Movement were heavily influenced by the similar claims, and later success, of Zionism. The attempts by the Kwieks and by Rotaru to persuade powerful states to grant them territory from within their sphere of empire or autonomous zones within Europe itself should be seen in the context of the Zionist belief in the necessity of a state of their own as the only plausible protection against persecution within European societies. Moreover, while claims to statehood have not

<sup>120</sup> Much of the history of antagonism between the RNC and the IRU can arguably be traced to these very different understandings of Romani identity and thus the interests to be pursued. Because of the fact of daily persecution, the issue is highly emotive; for example, the accusation that while some are debating self-determination, for those in grass-roots communities the question is one of survival. Moreover, this different understanding of the nature of Romani nationhood is key to a second area of dispute between them. The RNC is concerned with involving all levels of Romani activism, whereas the IRU has very much a top-down approach, albeit via the national associations that make up its membership. For example, in their 2002 Lodz statement, the RNC stressed that the European Roma Forum (discussed below) is concerned with organising bottom-up programmes of actions conceived, implemented and empowered by Roma local, regional and national structures. Press Release of the Second Roma World Congress, Lodz, Poland, 1-3 May, 2002, email dated 16 May 2002 (on file with the author).

<sup>121</sup> For a link between the actions of the leadership and the activities of the grass-roots, see Acton's assertion in regard to English mobilisation, that those who paid their subscriptions to the Gypsy Council were not nationalists but instead concerned with stopping sites, schooling and civil protection. "Nationalism is not the work of the Gypsy Council; rather, it is its inspiration, a kind of faith which keeps the officers working when the frequent reversals, failures and backbitings would destroy mere enthusiasts." Acton, *Gypsy Politics and Social Change*, 235. The extent to which nation-defining myths have taken root is considered in the following chapter.

been publicly articulated since the early days of the Movement in the 1970s<sup>122</sup>, limited territorial claims of a sort continue to be discussed among members of the elite. At the Jadwisin gathering, the possibility of demanding territorial autonomy in areas of high Romani population concentration was discussed.<sup>123</sup> According to the report of the meeting, Nicolae Gheorghe, the OSCE Advisor on Roma and Sinti, pointed out that in areas such as Bulgaria's Montana region, where Roma constitute almost 15% of the population, in Varna, Bulgaria, where they make up 10-15% and eastern Slovakia, where they comprise nearly 20% of the population, some form of territorial autonomy may be feasible. Moreover, he suggested that in certain localities Roma form 100% of the residents and noted that there are large Romani quarters or ghettos in many of the cities of central and eastern Europe which could be suitable for a form of self-governance. The example most cited in this regard is the Suto Orizari quarter of Skopje – an independent municipality in which possibly as many as 80% of the 60,000 residents are Romani and which, until 2005, was governed by a Romani mayor. Klimova has suggested that establishment of a Romani enclave in Kosovo has also been considered.<sup>124</sup> Gheorghe made his remarks within the context of his understanding of the EU's promotion of regionalisation and de-centralisation in which, as he sees it, such Romani areas of administrative-territorial autonomous units could be tied into a network, electing Romani mayors and councillors, co-operating together to develop common policies.<sup>125</sup>

However, there are significant objections from within the Movement to the vision of territorially autonomous units, which appear to take two main forms. The first is that appeals for a type of territorial autonomy risk antagonising relations with the *gadžé*, particularly where the new-found self-determination of central and eastern Europe and of the Balkans makes the questions of territory and autonomy so sensitive at the present time. Indeed, this fear seems to not be without grounds.<sup>126</sup> Calls for Romani

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<sup>122</sup> Although the writer Matéo Maximoff compared the First World Romani Congress to the first Zionist Congress in his closing speech to the delegates in 1971, he announced too that the Congress had declared against a Gypsy state. While this was not necessarily the position of the Congress organisers, the mainstream line nonetheless became the slogan 'We must create Romanestan – in our hearts!'. Acton, *Gypsy Politics and Social Change*, 234.

<sup>123</sup> Jadwisin Report, 22.

<sup>124</sup> Klímová, 74.

<sup>125</sup> Jadwisin Report, 28.

<sup>126</sup> The call in 1991 in the Macedonian Parliament by a Romani member for recognition of Roma as a nation and threatening attempts to form *Romanistan* within the boundaries of the Macedonian state

territorial autonomy have also been made by racist mainstream politicians, who envisage the relocation of Roma to depopulated areas where they would be confined within reservations similar to those of Native Americans.<sup>127</sup>

Related, but not identical, is the belief that non-territorial forms of institutionalising recognition are more likely to achieve success. This is perhaps the motivation for the European Roma Forum (ERF<sup>128</sup>) established by a Partnership Agreement with the Council of Europe in December 2004. This initiative has its roots in a speech by the Finnish President, Tarja Halonen, to the Council of Europe Parliamentary Assembly in January 2001, in which Ms. Halonen expressed the need for a consultative assembly of Romani representatives on the pan-European level.<sup>129</sup> Following the report of a working group established under the auspices of the Parliamentary Assembly to study the feasibility of such a body, comprising representatives from the main Romani international organisations, from governments, the EU, the CoE and the OSCE, a joint proposal by the Finnish and French governments emerged in the course of 2003 suggesting the Forum be an autonomous body, independent of the CoE, or any other international institution.<sup>130</sup> In effect, this means formally that the ERF is not a consultative body, but is rather registered as a French NGO with consultative status, albeit with CoE funding.

The agreed aims of the Forum, as detailed in Article 1(1) of the Partnership Agreement with the Council of Europe establishing the Forum, are “to oversee the effective exercise by Roma and Travellers of all human rights and fundamental

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unless his calls were heeded apparently led to angry condemnation from all sides. The incident is cited by one participant in Jawisin as an illustration of the risks in such a strategy. *Ibid.*, 24.

<sup>127</sup> See in this regard the numerous statements by Vadim Tudor, a front-runner in the 2000 Romanian Presidential election and a parliamentary senator, who stated in the Senate in August 1998, for example, that his programme for running the country included “isolating the Roma criminals in special colonies” in order to prevent the transformation of Romania as a whole into a Gypsy camp.” Cited in ERRC, *State of Impunity. Human Rights Abuse of Roma in Romania*. Budapest, 2001, 18.

<sup>128</sup> The Council of Europe’s website refers to the forum as the European Roma and Travellers’ Forum and abbreviates it ‘ERTF’.

<sup>129</sup> The Council of Europe, with its heavy emphasis upon human rights, is arguably the organisation that has been most concerned with improving the situation of Roma, providing for the Specialist Group on Roma, Gypsies and Travellers. For details of the relationship between the CoE and the ERF, see Miranda Vuolasranta, ‘European Forum For Roma and Travellers: From the Finnish initiative to the Franco-Finnish proposal’ (2004) *Roma Rights*; available at [http://errc.org/rr\\_nr4\\_2003/noteb5.shtml](http://errc.org/rr_nr4_2003/noteb5.shtml). Ms Vuolasranta is a special advisor to the CoE on Romani issues.

<sup>130</sup> The report details an agreement on the composition of such a Forum and is known as the Helsinki Agreement of 11-12 March 2002.

freedoms ... [to] promote the fight against racism and discrimination and facilitate the integration of these population groups ... and their participation in public life".<sup>131</sup> According to the CoE website, the Forum will also "make proposals at both the national and international level and take part in European cooperation for the promotion of the interests of these populations."<sup>132</sup> The Forum's mandate can be read as being in keeping with the Movement's national tradition, providing a pan-European representative body capable of giving Roma voice at the national, European and international levels; however, it also meets the demands of those within the Movement who feel that the human rights approach is the most suitable for the advancement of Romani interests.

The European Roma Forum has the backing of the Romani National Congress (RNC), the second of the two large transnational Romani organisations; Rudko Kawczynski is the interim President of the Forum and signed the Partnership Agreement on the Forum's behalf. The ERF could thus be viewed as a rival conception of a Romani future to that of the IRU and the non-territorial nation concept. Support for the proposed ERF extends beyond the RNC network, however. According to the report of the Jadwisin meeting, a majority of participants welcomed the initiative and saw it as opening the door for participation in European institutions at a level of genuine decision-making membership, a sentiment echoed at the 2004 World Congress, where the IRU shared the stage with the RNC in supporting this initiative. The ERF is seen as providing the opportunity for the exercise of Romani self-determination at the European level – the Forum holding out the possibility, in the absence of any organisation able to speak for all, of offering the Movement an officially-mandated representative body capable of transcending traditional divides. The project, however, as of February 2006 appears to be stalled. Although elections have been held for Forum members from national organisations, the results have been contested and the ERF appears to yet begin its work as envisaged under the agreement.

<sup>131</sup> Partnership Agreement between the Council of Europe and the European Roma and Travellers Forum, 15<sup>th</sup> December 2004. Available at <http://www.coe.int/T/DG3/RomaTravellers/>

<sup>132</sup> As of 7 February 2006, the official ERF website was still not operational, hence the information is taken from the CoE website, [http://www.coe.int/T/DG3/RomaTravellers/FERV/default\\_en.asp](http://www.coe.int/T/DG3/RomaTravellers/FERV/default_en.asp); accessed 7 February 2006.

The RNC's endorsement of the Finnish-proposed Forum should be seen in light of their call for a European Charter of Romani Rights.<sup>133</sup> The Charter is intended, in the words of Kawczynski, to "define the legal position of the Roma in Europe and ... prevent the legal gaps, which in the past have led to the displacement of Romani persons across Europe." While the Charter seems at first glance more concerned with extracting specified rights from governments than concerned with recognition per se, Kawczynski begins the report's conclusion by stating that, "[w]ithout the respect of the Roma as subjects of international law, as partners, there cannot be a normal coexistence of the Roma and the majority", suggesting that the RNC's strategy is primarily concerned with gaining recognition for Roma as equals. That the RNC's strategy is explicitly concerned with securing recognition is made clear by the apparent awareness that rights alone will not be sufficient to redress the situation of Roma:

"The current development in Europe however clearly shows that Roma, regardless of their social status, are confronted with overt, anti-gypsy hostility. Such hostility cannot be abolished through welfare or development projects. In order for social development projects to succeed, Roma must be granted guarantees for the protection of civil liberties. This means a change in the political status of Roma toward political, social and cultural self-determination."

Thus, the proposed Charter is not purely a paper document, listing the rights demanded, but was intended to see established a regular forum in which national governments, elected Romani representatives and multilateral organisations could come together to resolve problems. Moreover, the Charter as presented by Kawczynski demands the right to political representation in the European Parliament, the Council of Europe as well as the United Nations, not merely with voting rights, but with a right to veto projects and measures that concern the fate of the Roma community. The demand in the same report for an acknowledgement of elected representatives of the Roma nation – whatever this may mean – and for unrestricted

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<sup>133</sup> *Report on the Condition of Roma in the OSCE Region*, OSCE/ODIHR, Warsaw, October 2000; available online: [http://www.romnews.com/a/RKreport.htm#\\_Toc496896328](http://www.romnews.com/a/RKreport.htm#_Toc496896328). Rudko Kawczynski is the author of the report and uses it to outline the concept of a Charter.

freedom of travel for Romani officials, which is presumably akin to claiming a form of diplomatic status, appears to flow from the recognised need for a change in Romani political status.

In addition to the freedom of cultural and political organisation, the proposed Charter also demands the right to practice and receive language instruction and vocational training in the Romani language, but also the right to run an autonomous school system. The Charter thus incorporates and combines both political and cultural autonomy based on the understanding of the authors that one is not feasible without the other. Political recognition is thus held to be the only means of gaining the respect necessary for existence in equal dignity with other groups.

Where the first reason for making non-territorial demands is political, the second reason for rejecting or moving beyond claims to territory relates to the ideological motivation for calling for non-territorial forms of nationhood. The proposal of a Belgian-based collectivity of Romani organisations, the Romani Activists Network on Legal and Political Issues (RANELPI), who have drawn up the “Moral Charter of the Roma nation in the European Union”, is a good example. The Charter is addressed solely to the European Union and requests that the Union “acknowledges the existence on the territory of its Member- States of a Rromani nation without a compact territory... the European Union declares the Rromani nation living on its territory one of the constituent nations of Europe, in full equality from all points of view with all the other nations which constitute Europe, irrespectively of their possible relations with States and territories.”<sup>134</sup> It is less than clear, however, what it is that is being asked for, besides equality with other nations. As with a number of other similar documents there is a confusion of terminology, with, for example, the project of the proposed frame-statute belonging to the Romani *people* where the main claim is that of *nationhood*.<sup>135</sup> No reference is made to self-determination and it could therefore be assumed that the use of the term people is not intended to hold legal connotations; however, while the document does not self-consciously adopt the

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<sup>134</sup> §6(a) Project of a Frame-Statute (Moral Charter) of the Rromani People in the European Union; available at <http://rinchibarno.free.fr/cm.en.doc>.

<sup>135</sup> While the Belgian organisations’ demands are superficially akin to the RNC, in that they are formulated as a Charter of demands or rights, they are in substance actually based upon a re-articulation of the IRU concept of non-territorial nationhood, actually citing the Declaration.

language of international law, the feel of the claims as a whole cannot arguably be seen in any other context. Yet, there is no suggestion of a representative body, although the chapter on representation and authority within Romani communities suggest that serious thought was given to the issue. It is therefore unclear whether the claim is for the Romani nation to take its place as the Union's 26<sup>th</sup> Member State, or whether the request for recognition as a non-territorial nation within the territory of existing Member-States would see the Romani nation rather on a par with, say, the status of the Welsh or Basque nations.

What all the above claims share, however, is a strong European emphasis; Europe – either the European Union or the wider Council of Europe – provides their framework and their demands are conceived almost solely in these terms.<sup>136</sup> This is arguably for two reasons. Firstly, that of the limiting nature of working within any framework, that one too seldom seeks a place outside it; and, secondly, there are strong practical reasons for choosing to claim a non-territorial nation within the structure of what is the boldest governance project yet. To note the European nature of these demands is not to dismiss them as parochial; on the contrary, there is no reason why such claims cannot sit alongside others. It is however to claims of a global nature that this section now turns.

### 2.2.3. A Non-territorial Nation

The Declaration of Nation of the IRU is the only self-conscious attempt to pitch Romani demands at an international level.<sup>137</sup> The concept of a non-territorial Romani nation first surfaced as a clearly articulated and authoritative claim at the Fifth World Romani Congress, in the form of a Romani 'Declaration of Nation'.<sup>138</sup> Despite the

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<sup>136</sup> The Charter of Romani Rights does include the UN as an international organisation in which it demands representation; however, it is billed nonetheless as a 'European' Charter.

<sup>137</sup> Whilst the Declaration is clearly global in its ambition, the most recent statement from one of the two drafters is purely European in its reach in which he pushes for acknowledgement of the Roma as "The first Europeans to be only Europeans." The present author understands this to be an attempt on behalf of the IRU to respond to the ERF initiative and for the present time the primary focus of the Movement is undoubtedly on the European level. Paolo Pietrosanti, 'The Romani Nation or: "Ich Bin Ein Zigeuner"' (2003) 4 *Roma Rights*; [http://www.errc.org/rr\\_nr4\\_2003/noteb6.shtml](http://www.errc.org/rr_nr4_2003/noteb6.shtml).

<sup>138</sup> T. Acton & I. Klímová, 'The International Romani Union: An East European answer to West European Questions? Shifts in the focus of World Romani Congresses 1971-2000', 13. The Declaration is reproduced as Appendix 3 to Acton & Klímová, 216-217, and is reproduced here as Appendix 1. In terms of legitimacy, it is perhaps important to note that, according to Klímová, although it is claimed by the IRU that the Declaration was passed by the Congress on 27<sup>th</sup> July, the text of the Declaration

departure of the authors of the Declaration from their positions of authority within the IRU, one of the first statements of intent from the newly-elected President is to pursue recognition for Roma as “a nation without territory”.<sup>139</sup>

The Declaration of Nation (Annex 1) is a rather unfortunate document to be such an important vehicle of Romani political demands, suffering from confused drafting and poor English. This being the case, unwrapping the statements it contains inevitably risks a degree of misinterpretation. While the Declaration does not explicitly renounce any claim to territory as such – the word territory does not appear anywhere in the document – it is understood here that the repeated calls for recognition as a *non-state* nation should be read as a rejection of that basic unit of the international system: effective control of territory.<sup>140</sup> The document repeatedly stakes the claim to nationhood and is emphatic in its rejection of statehood.<sup>141</sup> Moreover, this renunciation is understood to be liberating.<sup>142</sup>

Yet non-state nationhood appears to require a strengthening of international law against the wishes of states and there seems to be an appeal to an international community of individuals against the interests of both states and nations: “A transnational Nation as the Roma one needs a transnational rule of law: this is evident; we do believe that such a need is shared by any individual, independently of the Nation he or she belongs to”. It is also clear that the authors are self-consciously making these claims within the context of the changes to global governance and

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was not available for delegates during the conference and was issued only by the IRU President after the Congress had closed. Klímová, 63.

<sup>139</sup> Gratten Puxon, ‘VI. World Congress pledges fight against racism’, posted 10<sup>th</sup> October 2004 on <http://www.romea.cz/>

<sup>140</sup> Such an interpretation is borne out by the subsequent meeting of the Romani leadership at Jadwisin. A paper by Sean Nazerali, ‘Democracy Unrealised – The Roma – A Nation Without a State’, also confirms that the qualitative difference of the Romani claim as regards the claims of other non-state groups is that “they neither have, nor do they wish to have, a territory of their own.” Paper delivered at the ‘Democracy Unrealized’ conference, Academy of Fine Arts, Vienna, 23 March 2001 (on file with the author).

<sup>141</sup> For example, “We are a Nation, we share the same tradition, the same culture, the same origin, the same language, we are a Nation.” The authors are not, however, entirely honest in the claim that “We have never looked for creating a Roma State”, although of course it depends upon whether the ‘we’ refers to the Roma or rather merely to the authors of this individual document (Scuka and Pietrosanti).

<sup>142</sup> “the main characteristic [sic.] of the Roma Nation … of being a Nation without searching for the establishment of a State, is today a great, adequate resource of freedom and legality for each individual”; it is arguably this that raises the claim to the level of ideology. This ideology, furthermore, understands statehood, rather than nationalism, to be responsible for the worst excesses of recent history; thus non-territorial nationalism will “not open the Pandora’s box of nationalism.” Pietrosanti, ‘The Romani Nation or: “Ich Bin Ein Zigeuner”’.

society wrought by globalisation.<sup>143</sup> Indeed, the Declaration not only places itself within the context of these developments, but claims a spot for itself in the avant-garde of visions for reform of the international community. The claim is thus, paradoxically, both nationalist and cosmopolitan.<sup>144</sup>

There have been at least two attempts to flesh out the concept of non-territorial nationhood. According to Sean Nazerali, a non-territorial nation or state would have “an institution of government, a population, but no specific territory. It would be sovereign and autonomous, but would share that sovereignty [with] a wide variety of other levels of institutions, national, regional and international.” This governing body would “work out particular autonomous competencies with other states” based on bilateral treaties similar to the Concordats of the Vatican, the consequence of which would be that there will exist a Romani “government capable and authorised to negotiate as a formal equal with existing state governments”. As for the practicalities of governing a globally-dispersed people, a Romani non-territorial entity would have no monetary policy of its own and thus issue no currency, leaving such matters to the international financial system. It will have no army or means of implementing its will by force. It would determine education policy in a similar way, with an implicit recognition of the Romani nation’s intimate relation to the communities which it lives among; schooling would take place in the cities, towns and villages of the wider community, with secondary education allowing for the realisation of transnational elements of study. The establishment of a World Romani University would provide a spiritual home for Romani students from all over the world. A Romani legal system

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<sup>143</sup> “And we do not want a State today, when the new society and the new economy are concretely and progressively crossing-over the importance and the adequacy of the State as the way how individuals organize themselves.” Sean Nazerali presents a more eloquent statement of how those promoting the concept of a non-territorial nation view the international system and the place of such a concept within it. He repeats, for example, the much noted changes heralded by globalisation, such as the loss by states of effective control over economic policy and the alleged diffusion of sovereignty both upwards and downwards, concluding that “[t]he nation-state as an integrated whole, with few exceptions, is dead” and, later, “the state is losing its position as the fundamental building-block [of the international system]”. Nazerali, ‘Democracy Unrealised – The Roma – A Nation Without a State’.

<sup>144</sup> This is true also for the RANELPI’s Moral Charter, sitting very much in the ideological wash of the IRU. The Declaration, moreover, while explicitly concerned with claiming nationhood, suggests throughout that the realisation of the Romani dream (deliberately aping the language of Martin Luther King) as expressed in the Declaration, i.e. as a non-territorial nation, belongs to every individual on earth. This internal tension in the document is due in some part to the attempt to reconcile the voice of Roma (Scuka) with the ideas of the TRP (Pietrosanti), with the former viewing the Declaration as a claim to collective representation of Roma as a nation and the latter understanding the claim to be for a form of individual representation at the global level on a non-national basis. See Klimová, 82.

would be established, with boundaries of jurisdiction negotiated bilaterally with other actors and developing into a transnational system of justice.<sup>145</sup> Thus, a Romani administration would be based upon the notion of dual citizenship, where they belong both to the traditional state in which they reside and to the Romani nation, both of which simultaneously govern their lives in a manner similar to the double nationality of EU citizens.<sup>146</sup>

The governing body, despite the obvious technical and organisational difficulties, is to be formed by universal suffrage of Roma, with electoral constituencies not necessarily conforming to existing national boundaries.<sup>147</sup> Determination of membership of a Romani nation is to be based upon voluntary self-ascription.<sup>148</sup> Pietrosanti has commented that support for the ERF suggests that the representation of Roma through a committee of associations cannot be sufficient; this is precisely the basis of the RNC's proposal as well as the structure of the IRU, however. His suggestion for the need for direct democracy obviously begs very real practical problems.

The Declaration makes no claim to the right of self-determination; indeed, Romani claims have not until recently actively used the language of self-determination. This reticence is surprising; however the concept of self-determination is believed to have underpinned Romani political motivation throughout the history of the Movement.<sup>149</sup>

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<sup>145</sup> For a description and analysis of the Romani legal system, see Walter O. Weyrauch, *Gypsy Law: Romani Legal Traditions and Culture*. Berkeley: University of Californian Press, 2001; Weyrauch and Maureen A. Bell, 'Autonomous Law-Making' (1993) 103 *Yale Law Journal* 323.

<sup>146</sup> While such ideas suggest the theoretical feasibility of transnational administration, the important practical considerations are yet to be seriously addressed. For example, Nazerali has suggested that the Romani administration could be financed by existing states remitting the VAT paid by Roma or that Romani-owned businesses would pay their tax to a Romani authority, or that, each existing state would hand over a small percentage of its total income tax revenue. While such suggestions are based upon existing tax exemptions for foreign nationals or taxation systems (Canada, in the case of the third suggestion), they fail to take into account both the fact that Roma occupy nearly everywhere the lowest rung of economic status (hence they do not contribute large amounts of VAT revenue) nor that unless a Romani administration is intending to run the services of government, such as health care or public transport, it would seem unlikely that those that do provide such costly services would be willing to forgo certain tax revenues. Cf. Pietrosanti: "The Romani Nation – and its elected parliament – will obviously not be responsible for those policies that form the pillars of the very existence of states", and, somewhat unhelpfully, "The Romani Nation will have to govern what everyone claims Roma should become capable of governing". Pietrosanti, 'The Romani Nation or: "Ich Bin Ein Zigeuner"'.

<sup>147</sup> Pietrosanti, *ibid*.

<sup>148</sup> Nazerali, 'Democracy Unrealised – The Roma – A Nation Without a State'.

<sup>149</sup> For the clear belief among participants that self-determination has always been the principle most relevant in terms of political organisation, see the Jadwisin Report, particularly 23. Prior to this meeting, however, the only organisation to have adopted the language of self-determination itself was the RNC (e.g. Lodz Congress Press Release). It could be that other members of the Movement held it

Yet, former President of the IRU and co-author of the Declaration, Emil Scuka, has in the past made explicit that the call for recognition of nationhood was not making a claim to self-determination.<sup>150</sup> That such a claim to nationhood – one that as noted above is seen as requiring the trappings of a state, such as presidents, courts, and ministers – is best viewed, perhaps necessarily, through the prism of self-determination is confirmed by Nazerali's reference to the principle and his appeal to the Romani leadership to use deliberately the term 'people' in their statements and declarations; "[t]hough not used in the declaration of nationhood..., a declaration of peoplehood should however be seen as implicit within it... The Declaration of Nation should therefore in fact be interpreted as being simultaneously a Declaration of Peoplehood."<sup>151</sup>

However, if most members of the Movement now agree that self-determination is the relevant frame for their claims, there nonetheless remains considerable confusion within the Movement as to what the principle of self-determination is and how it applies. The leadership meeting in Jadwisin suggests that self-determination is in general viewed within the Movement as a question of personal autonomy, that is, as decision-making power effecting control over one's life, either as cultural autonomy or minority self-governance, or as the right to equal participation in the life of society. However, discussions in the Polish town evidenced a variety of understandings of how self-determination might apply to the Roma. In the words of the authors of the meeting's report, "[s]ome view it as an individual or even human right, others as group or minority rights within a nation-state, and still others as the rights of a people and a nation"<sup>152</sup> For those within the Movement who wish to pursue the strategy of

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to be so self-evident that the question of Romani recognition belonged to such a discourse that it was needlessly antagonistic to state it explicitly (cf. Nazerali's almost casual comment that "the Roma are certainly not alone in calling for recognition as a people with a right to self-determination"), or rather simply that self-determination was understood to be a demand for a state. But even in the periods where Roma were making territorial demands, there appear to have been no calls for self-determination.

<sup>150</sup> Moreover, in the most recent statement to come from the duo of co-authors of the Declaration, the relevance of self-determination is again denied; however, there is perhaps some confusion as Pietrosanti argues that self-determination "is less important than the freedom to choose the democratic organisation of co-habitation with others" – which would serve as a good description of the principle of self-determination. Pietrosanti, 'The Romani Nation or: "Ich Bin Ein Zigeuner"'.

<sup>151</sup> Interestingly, Nazerali suggests that the confusion between the terminology of nationhood and that of a people is due to the fact that the Romani language does not differentiate between the terms. This can only be a partial explanation as all members of the Romani elite are at least bilingual and will thus be familiar with a language in which the distinction does exist.

<sup>152</sup> Jadwisin Report, 16. In one sense of course, all of these positions are correct. While self-determination is a group right – officially a right of peoples – its inclusion in the International Bill of

Roma as a national minority within their state of residence, self-determination is understood as allowing for cultural autonomy and possibly territorial autonomy; where the aim is nationhood, self-determination provides international recognition. Perhaps the most interesting perspective came from the RNC, whose representative viewed self-determination as concerning power relations; simply put, “[t]hose without it face oppression”. Defining self-determination as being in a position to make decisions oneself, he continued: “[Roma] do not accept non-Roma engaging in projects on behalf of Roma, making decisions about what Romani children should learn or whether they are a nation or not, sending Roma to participate in wars in which they kill each other, or designating their representatives for them.” Rather, Roma “want to participate... having not only a voice but the power to determine themselves what their role... shall be.”<sup>153</sup>

#### 2.2.4. Summary

This brief trawl through the different claims being put forward by various members of the Movement suggests a number of common elements between them. Arguably the thickest common strand between the differing possible conceptions of a Romani future is the claim to recognition of and representation as a Romani nation, at the root of which is the claim to acknowledgement of dignity. Even allowing for rather different conceptions of what this nation should look like, further commonality emerges about how the Romani nation should be made visible: all except the RANELPI have clearly stated the need for a representative body, although they may differ over the form of representation. Both the RNC’s ERF and the IRU’s national claim have suggested the need for an executive governance structure and both claim

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Human Rights suggests its place within the human rights stable and its closeness to the right to chose one's own government (Article 25 ICCPR) suggests that the practice of it is individual. It could even be understood as a minority right, where a group can be characterised as sufficiently oppressed to meet the threshold laid down in GA Res. 2625. Chapter 6 considers the application of self-determination to the Roma in more detail.

<sup>153</sup> *Ibid.*, 18-19. The determination of all the participants to gain more control over the power to make decisions in matters related to them is perhaps born of the failure to achieve this control through efforts at greater participation in national politics; where success has been achieved in seeing Roma designated as a national minority, the result has frequently been that institutions and structures established act as a buffer between Roma and the authorities, easing the path for the latter to avoid their responsibilities. *Ibid.*, at 20. For example, see the critical comment on the National Gypsy Self-Government format in Hungary: Anita Danka and Nicole Pallai, ‘Legal but Illegitimate: The Gypsy Minority Self-Government in Jászladány’ (2003) 4 *Roma Rights* 68. Kawczynski’s comments here tally with the Charter’s demand for veto voting rights.

recognition as a subject of international law with voting rights for Roma in the political bodies of the main international organisations. Moreover, the Movement has always sought representation internationally through the auspices of the UN, not simply as an NGO or even via the observer status granted liberation organisations, but on equal terms with other nations as states. The goal of the Movement has therefore always been to gain a place for the Roma as a fully-fledged international actor, but one defined by a criterion other than effective control of territory, and current demands are a continuation of this.

The Jadwisin seminar suggests that, notwithstanding the establishment of the Romani-'controlled' municipality of Suto Orizari, most of the Movement's current elite are suspicious of claiming territorial forms of autonomy, whether on a political or ideological basis. All understand self-determination as the relevant framework in which to make the Romani voice heard, some explicitly, others indirectly. Moreover, every one of the claims articulated in recent years has self-consciously placed itself within perceived changes in the wider structure of governance, both at the European level and globally. Contrary to the oft-heard claims that Roma wish to isolate themselves, therefore, the call for national recognition is a statement of the desire to participate in and contribute to the societies in which they live: national, European and international.

To summarise, the main political objective of the Movement is to gain official recognition of the fact of Romani nationhood and to establish structures so that its voice can be heard in a position of equality with other nations, nationally and internationally; and that, moreover, the leadership does not consider that a territory of their own is necessary to realise this within the framework of self-determination. Thus although Klimova has suggested that the importance of the Declaration for the Movement should not be overstated as the longevity of its ideas remain to be seen, the commonality between the different calls for recognition suggest that the Declaration and the ideas it espouses should arguably be seen as fitting comfortably within both the past of the Romani Movement as well as within the trend of current thinking.

The claim to non-territorial forms of nationhood is moreover gaining currency not just among the Romani elite, but in the international system as well. The importance of the

situation of Roma in the European accession process had ensured that the Prague Congress was well attended by the media and that the claim to nationhood was quickly picked up and broadcast around Europe.<sup>154</sup> Since 2000, the claim has been repeated in a number of international fora, and was seen particularly in the context of the Durban 2001 World Conference Against Racism.<sup>155</sup> However, despite the language of Roma as a non-territorial nation surviving the negotiations at the NGO Forum in Durban and being present in the NGO Declaration presented to the governmental forum, and despite the expectation at the end of the conference that the NGO provisions relating to Roma were to be adopted by government delegates without alteration, the Romani request for non-territorial nation status is not to be found in the final government declaration.<sup>156</sup> At least one government has nevertheless acknowledged the claim of Romani nationhood. In a memorandum of understanding between the Czech Ministry of Foreign Affairs and the IRU, the Czech government accepted the Roma minority of the Czech Republic as belonging to the Romani nation and conceded their claim to non-territorial nationhood as “a reasonable point of departure in the present world.”<sup>157</sup> Moreover, in June 2001, the then-President of the IRU, Emil Scuka, met with the UN Secretary-General at the United Nations headquarters in New York and presented him with a copy of the ‘Declaration of

<sup>154</sup> For example, “Nous voulons la reconnaissance d'une nation rom non territoriale”, *Liberation*, 25 July 2000; ‘Gypsies in bid for world recognition’, *The Independent*, 26 July 2000; ‘Los gitanos exigen a la ONU que les reconozca como una nación’, *El País*, 26 July 2000; ‘Wie ein Blütenblatt auf grünen Grund’, *Frankfurter Rundschau*, 29 July 2000; ‘Die Roma fordern ihre Anerkennung als Nation’, *Bez*, 29 July 2000; ‘Les Tsiganes réclament la reconnaissance de leur “nation”’, *Le Monde*, 29-30 July 2000. Also, somewhat later: ‘Il sogno dei Rom: “Riconoscete la nostra nazione”’, *Corriere della Sera*, 8 July 2001.

<sup>155</sup> For example, the following paragraph formed part of the statement of recommendations by Non-Governmental Organisations from Central and Eastern Europe, including the countries of the former Soviet Union, addressed to the United Nations World Conference Against Racism, produced at the meeting in Warsaw, 15-18 November 2000. Part of Article 5 of the statement reads:

“...we recommend that the UN confers the status of a non-territorial nation to the Romani people, providing for adequate representation in relevant international governmental organizations.” The statement is reprinted in full in *Roma Rights 4/ 2000*, at [http://errc.org/rr\\_nr4\\_2000/advo1.shtml](http://errc.org/rr_nr4_2000/advo1.shtml).

<sup>156</sup> The debacle surrounding the rejection of the NGO Declaration by the Secretary-General of the Conference, and the inability of delegates to complete negotiations by the end of the conference, meant that final documents were not available until some months afterwards. Although the final *draft* as available at the end of the conference contained the paragraphs relating to Roma as drafted by Romani NGO representatives, including the language of non-territorial nationhood, the final Durban Declaration, as completed in January 2002, does not. Documents are available from <http://www.unhch.ch/html/racism/Durban>

<sup>157</sup> Articles 2 & 3. Memorandum of Understanding and Cooperation between the Ministry of Foreign Affairs of the Czech Republic and the International Romani Union, signed on 4 May 2001, Prague. (On file with the author.) During the course of the Fifth Congress, delegates took part in a seminar on the Romani nation and the accession process in the Czech Senate; however, while the word ‘nation’ featured in the IRU programme detailing the seminar, in the Senate’s documentation the word ‘nation’ was substituted for ‘minority’. Klimová, 63.

Nation'; this meeting represented the first such occasion in which a senior member of the UN has met with Romani representatives, suggesting some degree of recognition, or at least sympathy, for their claims.<sup>158</sup>

Other nationalist movements have had considerable influence on the development of Romani political demands.<sup>159</sup> The designing and adoption of a flag is part of the way in which early Romani nationalism attempted to ape classic nineteenth-century nationalist traditions such as Zionism. Yet, Romani nationalists of the twentieth-century were also quick to see the lessons of the anti-colonialist Black civil rights movements.<sup>160</sup> In the words of Acton, "third-world nationalism, Fanonism and the Black Power writings have given a new language in which to lay claim to self-determination and cultural autonomy *within someone else's power structure.*"<sup>161</sup> The incompatibility of Fanonism and Zionism suggests at least one reason for the inconsistencies within the Movement, sometimes pursuing autonomy within the governing structure, at other times demanding a state of their own. National liberation movements, such as the PLO and SWAPO, and their relative successes in gaining recognition have also provided inspiration for the Movement<sup>162</sup>; however, theirs is not a status to which the Movement can aspire and, moreover, which would not see their calls satisfied. Rather, it could be argued that the assured articulation of non-territorial or non-state nationalism sees the Romani Movement step out from under the shadow of the more vocal nationalist ethoi which were their early inspiration, putting them in a position to offer inspiration to others.

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<sup>158</sup> Headquarters Press Conference by IRU; <http://www.un.org/News/briefings/docs/2001/ROMANIPC.doc.htm>. At the 2001 WCAR in Durban, in response to a question concerning the UN's concern for Roma, Sinti and Travellers, Annan replied that he had met with *the* leader of the Romani people, suggesting that the IRU was successful in persuading the UN Secretariat at least of its claim to be the sole representative of Roma worldwide. Personal recollection of the author.

<sup>159</sup> Acton, *Gypsy Politics and social change*, 234.

<sup>160</sup> Particular lessons have been learnt from the African-American civil rights movement, such as the tactics of passive-resistance and high impact litigation. Members of the Romani leadership met veteran African-American activists at Szentendre in 1995, for example to discuss the parallels between their two causes. Jenne, 'The Roma of Central and Eastern Europe: Constructing a Stateless Nation' in Jonathan Stein (ed.), *The Politics of National Minority Participation in Post-Communist Europe*. NY: M.E. Sharpe, 2000, 206.

<sup>161</sup> Acton, *Gypsy Politics and social change*, 234 (italics his).

<sup>162</sup> The similarity of Romani claims to non-territorial nationhood to pre-Zionist Jewish attempts at recognition are striking, although those articulating the claim within the Romani movement appear not to be aware of this. For details on the development of the concept of non-territorial national-cultural autonomy by the Jewish Bund at the turn of the twentieth-century, see Chapter 5, note 403.

It is in this light of what the Romani claim can teach us about how we understand nationhood, recognition and the nature of a claim to either that it shall be considered throughout the subsequent chapters.

## Chapter 3: On Romani Identity

It is easy to forget how mysterious and mighty stories are.<sup>163</sup>

Although the historical disputes highlighted in the previous chapter are of obvious interest to linguists, anthropologists and historians, they are also of importance in the understanding and acknowledgement of Romani identity. Accepting the concept of a historical diaspora has by and large meant understanding Roma as a distinct and bounded group, an understanding seemingly testified to by the persecution and hostility with which they met in Europe; for while there are no historical records telling us how those who were labelled Gypsies felt about such categorisation, that they were marked out negatively by society is clear. Thus whilst Romani identity is not only conceived of in terms of a historical diaspora, the Movement is to a considerable degree united in understanding Roma as a distinct ethnic group. The varying approaches are laid out below. However, the suggested links to India and the proposed history of migration has not gone unquestioned; anthropologists and sociologists stand at the vanguard of a reinterpretation, or indeed a denial, of Romani history. Following an examination of different conceptions of Romani ethnicity from within the Movement, this chapter will sketch some modern theoretical conceptions of ethnicity and identity before attempting to assess the strength of pan-Romani identity underpinning the claims being put forward in the name of Roma everywhere.

### **3.1 Conceiving of Romani identity**

It has been suggested that all the competing conceptions of Romani identity seek to base identification upon external traits, whether defined in racial, linguistic, cultural or socio-economic terms. In the introduction to his recent thesis examining ethnic politics in the post-Communist countries of central Europe through the perspective of Romani political mobilisation, Peter Vermeersch has suggested that conceptualisations of Romani identity within the Movement can be divided into three approaches: the historical diasporic, cultural and lifestyle affiliations and the biological.<sup>164</sup> His scheme is followed here, although the extent to which the three

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<sup>163</sup> Ben Okri, 'The Joys of Story-Telling' in *Birds of Heaven*. London: Phoenix, 1997.

<sup>164</sup> Peter Vermeersch, 'Roma and the politics of ethnicity in Central Europe: a comparative study of ethnic minority mobilisation in the Czech Republic, Hungary and Slovakia in the 1990s' (unpublished PhD thesis, University of Leuven, 2002), 10.

approaches blend into one another is considerable, with claims frequently combining approaches.<sup>165</sup>

According to Marushikova and Popov, the wider Romani community is divided into “a widespread archipelago of separate groupings, split in various ways into metagroups, groups and subgroups, each with their own ethnic and cultural features.”<sup>166</sup> If this last assertion is correct – that the various sub-groups have their own ethnic (although what exactly is meant by ‘ethnic’ is not clear) and cultural traits – then, in the absence of an ability to comprehensively survey those over whom claims are being made as to their affiliations, those asserting a common over-arching group identity must either claim more in common for these groups culturally than that which divides them, or fall back on a thesis of common origins and a shared biology.

### 3.1.1. A Diasporic Identity?

The first approach that Vermeersch identifies is the most pervasive at the present moment in the Romani movement, that of the historical diaspora, in which Roma are understood to be a nation bound by shared historical roots and common patterns of migration. It is the most common defence to those that question the existence of a distinct Romani ethnicity, although belief in common origins clearly does not implicitly imply a homogenous group today. However, as the disputes over the linguistic evidence and what it actually can tell us about the speakers of the language highlighted in the previous chapter suggest, the diaspora thesis is not without its critics. As several of the linguists or historians that Vermeersch holds as advocates of the migration hypothesis are in fact keen to stress, there is no known record of a migration from India to Europe in the early medieval period that can be connected with the ancestors of today’s Romani-speakers; both Matras and Fraser, for example, strongly emphasise that a considerable level of caution should be employed when

<sup>165</sup> For example, in Frame-Statute (Moral Charter) of the Rromani People in the European Union, §4, the biological is combined with the diasporic. Available at <http://rinchibarno.free.fr/cm.en.doc>.

<sup>166</sup> Marushikova and Popov are ethnographers who have published extensively on the Roma of central and eastern Europe. E. Marushikova and V. Popov, ‘Historical and ethnographic background: Gypsies, Roma and Sinti’, in W. Guy (ed.), *Between Past and Future: the Roma of Central and Eastern Europe*. Great Britain: University of Hertfordshire Press, 2001, 33.

considering the extent to which the origin and evolution of the Romani language can be equated with the origin and evolution of Romani-speakers.<sup>167</sup>

It is this equation of language with its speakers that has provided the basis of the two main criticisms of the diaspora perspective, both of which suggest indigenous European ancestry to those now identified as Roma. The first, by the anthropologist Judith Okely researching English Gypsies in the 1970s, does not dispute the linguistic evidence as such, but rather questions the idea that today's Romani speakers are the direct descendants of those original linguistic bearers. Okely points out that the language could have travelled along the trade routes between East and West without the actual coherent migration of a distinct group bearing the language and she accuses supporters of the diaspora thesis of assuming that language is transmitted through biological descent.<sup>168</sup> For Okely, the acceptance of a bounded people of Indian descent places a number of different groups under the same heading and sets them apart from the European culture around them, of which they are a part. She sees it as a process of exotic-fixation – a phenomenon she dubs an 'Orientalisation of Occidentals', after Said's influential thesis, by which she means that western reification of 'the [oriental] Other' makes them acceptable in a way that acknowledgement of their 'Europeaness' would not.<sup>169</sup> This, according to Okely, neglects the history of the different groups within the countries in which they reside.

In her influential 1980s monograph, *The Traveller-Gypsies*, Okely denies any foreign origins to Gypsies. Rather she holds that it is no coincidence that Gypsies 'emerged' into the light of European society at a time when feudalism was breaking down in the course of the fifteenth- and sixteenth- centuries, "when a multiplicity of persons was thrown into the market place."<sup>170</sup> She presents evidence from the 14<sup>th</sup> century of the

<sup>167</sup> Yaron Matras, *Romani. A Linguistic Introduction*. Cambridge: CUP, 2002, 14; Fraser, *The Gypsies*. Oxford: Blackstone Press, 1992, 10. However, some members of the Movement understand the open acknowledgement by the Indian authorities of Roma as an Indian population as corroborating the linguistic evidence. Hancock, 'The Struggle for the Control of Identity' *Transitions* Sept 1997 36, 43.

<sup>168</sup> Judith Okely, *The Traveller-Gypsies*. Cambridge: Cambridge University Press, 1983.

<sup>169</sup> Judith Okely, 'Some political consequences of theories of Gypsy ethnicity', in A. James, J. Hockey and A. Dawson (eds.), *After Writing Culture. Epistemology and Praxis in Contemporary Anthropology*. Great Britain: Routledge: 1997, 227.

<sup>170</sup> Okely, *The Traveller-Gypsies*, 227. She suggests that the New Age Travellers that emerged towards the end of the last century are themselves in the process of creating their own ethnicity and represent a late-twentieth century version of the Gypsies' earlier formation. She notes that New Age Travellers are

existence of large numbers of native ‘wayfarers’ or ‘rovers’, including performers, peddlers, peasants out of bond, preachers, mendicant friars and pilgrims and from this suggests that it is clear that there were plenty of possible indigenous recruits for nomadic groups who wished to organise themselves along such economic lines and who could use the mysticism associated with calling themselves ‘Egyptian’. Thus, “the Egyptian title was nothing but an assumed identity for many persons with no foreign origin.”<sup>171</sup> In support of this, she cites a pamphlet written in 1610 that suggests any claims of physical differences between the wandering bands and the settled population should be treated with scepticism; according to the pamphleteer, “they goe alwais never under an hundred men or women, causing their faces to be made blacke, as if they were Egyptians”.<sup>172</sup>

Okely’s work has a tendency, however, to succumb to the criticisms that she levels at others. Her criticisms are based in part upon the contention that linguists, ethnographers and activists have dominated the study of the origins of the Roma where they are professionally unfit to do so, the task belonging rather to anthropologists such as herself. However, the main thrust of her thesis relies on her attempts to situate the findings of her fieldwork within an historical background; her argument thus relies heavily upon the interpretation of historical sources, an undertaking for which it would not be pedantic to argue that she is not qualified, and there are key moments in her monograph which leads one to doubt the unbiased nature of the sources she selects and the interpretation thereof.<sup>173</sup>

The second major critique, following similar although more nuanced lines, is the product of collaboration between Dutch social historians, Wim Willems and Leo Lucassen. Willems’ thesis of Romani identity is based upon his comprehensive examination of Gypsy studies itself. His work examines the ‘gynsiologists’ of the

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well on their way to becoming a self-reproducing group i.e. the offspring of such Travellers are choosing partners from among the group.

<sup>171</sup> *Ibid.*, 3.

<sup>172</sup> Cited by Okely, *ibid.*, 4.

<sup>173</sup> Her willingness to accept the voice of an anonymous pamphleteer as an accurate and unbiased source suggests a deliberate suspension of the necessary critical perspective, for example. Acton’s suggestion that from the sixteenth-century there is some evidence to cause speculation that a number of Gypsy leaders were of non-Gypsy origin may be one explanation for how the opinion that the group as a whole only pretended to be of foreign origin began to circulate. Thomas Acton, *Gypsy Politics and Social Change*. London: Routledge & Kegan Paul, 1974, 98.

nineteenth and early-twentieth centuries, such as Heinrich Grellmann, George Borrow, and other members of the Gypsy Lore Society, an organisation founded in London in 1888. The first work to posit the concept of Gypsies as one people was that of Grellmann, a German historian, published in 1783. Working in the second half of the eighteenth century, Grellmann was heavily influenced by the era of romantic nationalism in which Herder was to write of the nation, defined by a common language, culture and *Volksgeist*, as the natural political unit and Grellmann's work on the Gypsies is entirely consistent with Herder's formulations, particularly the notion that language is an expression of all the people.<sup>174</sup> According to Grellmann, Gypsies were entitled to be considered a *Volk* because they lived as a state within a state, with their own morals and customs, own language, marriage practices and a different physical appearance, and for these reasons were inassimilable.

Willems, however, accuses Grellmann of placing all itinerants and similar foreigners under the label 'Gypsy' and in doing so creating a people that he endowed with a common ethnographic profile. It was Grellmann that established Romani as a distinct language and, through comparisons with Hindi, identified India as their homeland – a thesis that appeared to fit because of the similarity of their social position in Europe to outcasts in Indian society. Despite Grellmann's claims, accepted in their entirety by those scholars that followed in his footsteps, that he had simply retrieved or uncovered historical knowledge by scientific analysis of their language, Willems contends that, on the contrary, prior to Grellmann's work there had been no consensus on the way in which Gypsies were defined – sometimes they were vagrants, at other times descendants of 15<sup>th</sup> century pilgrims, elsewhere they were criminals; some sources record them as 'alien heathens', 'spies for the Ottoman enemy' or even 'pseudo-Jews'.<sup>175</sup>

Grellmann was thus responsible, according to Willems, for creating a unity in the way that diverse itinerant groups were thought about under the ethnic categorisation of 'Gypsy' – the view that continues to dominate Romani studies. Thus, for Willems,

<sup>174</sup> F.M. Barnard, *Herder On Nationality, Humanity and History*. Kingston: Queen's University Press, 2003.

<sup>175</sup> Wim Willems, 'Ethnicity as a Death-Trap: the History of Gypsy Studies' in Leo Lucassen, Wim Willems & Annemarie Cottaar (eds.), *Gypsies and Other Itinerant Groups*. Great Britain: Macmillan, 1998, 21.

Romani ethnicity has its roots in this external classification and is the product of a process in which academics (the ‘gynsiologists’), the authorities (church and state), and the population at large have played a role in the labelling and categorisation of various itinerant groups traditionally marginalised by society. Although he understands those being defined to have played some part in this process, it is assumed that their influence was little. The foreign element of Gypsy identity is attributed to the fact that at the time of their appearance in the 15<sup>th</sup> century, they presented themselves as pilgrims from Little Egypt in order to gain safe conduct; ‘in reality’, however, they were “thieves in disguise, charlatans and beggars”.<sup>176</sup> According to Willems, “thinking about Gypsies seems to have been coloured by a tradition of imagery that depicted not only groups and ‘heathens’ as foreigners who were, as non-Christians, wild and uncivilised” but that this was complemented by negative portrayals of Orientals inspired by continuing conflict with the Ottoman Empire, as well as popular belief in the existence of an exotic, half-criminal guild of beggars, replete with its own language, administrations and customs.<sup>177</sup> The dependence of these groups upon external categorisation for their identity is suggested by the variation in their depiction over time. According to Willems, whereas such peoples were initially considered as ‘foreigners’ in the 15<sup>th</sup> century, in the 16<sup>th</sup> century the emphasis was on their ‘heathen’ condition and ‘criminal way of life’, a change attributable to the harshness of the sixteenth-century. By the 17<sup>th</sup> century, the German writers Jacobus Thomasius (1652) and Ahasverus Fritsch (1662) considered Gypsies to be simply a social category of outsiders, originating from various countries and mingling with indigenous beggars and scoundrels. Willems’ conclusion, similar to Oakely, is therefore that ‘Gypsy’ is an invented identity and the bite of his critique is that it is a product of the Other’s imagination, not their own.<sup>178</sup>

Following from their belief that categorisation has been an external process, Willems and Lucassen have attempted to place the group of itinerants labelled ‘Gypsies’ within the context of European history and contend that the history of this group is much more complicated than purely one of persecution. The vital economic role of itinerants meant that for the majority of the time they were tolerated and settled for

<sup>176</sup> Wim Willems, *In Search of the True Gypsy. From Enlightenment to Final Solution*. London: Frank Cass, 8.

<sup>177</sup> *Ibid.*, 17.

<sup>178</sup> *Ibid.*, 308.

months before moving on, with no major problems with the communities they stopped among. According to Willems, “[i]t remains... an open question as to whether the ‘Gypsy category’ actually was the source of much specific trouble and was felt to be unusually oppressive.... [i]n contemporary socio-historical research at any rate they only make the scene in a context of poverty, mendacity, vagabondage, marginality and criminality.”<sup>179</sup> Lucassen suggests that the negative image of travelling people thus has a methodological and technical basis as most historians are interested only in criminality, marginality and poverty where such groups are concerned.<sup>180</sup> The one-sided portrayal of Gypsies in the sources, as vagrants, beggars, heathens, allows for the view that they have only ever known persecution and marginalisation, and consistently downplays evidence of integration. Willems points to the musical tradition Gypsies were able to build up, the prosperity of groups of horse traders, occasional absorption into the ranks of the majority, inter-marriage and so on, and notes, further, that as no comparison was made in the historical records between texts referring to Gypsies and those that refer to groups depicted in similar ways vis-à-vis style of dress, physical appearance and manner of trade, and that were felt to be threatening in some way, it is difficult to determine which elements were group-specific and which might, for example, have reflected general attitudes to newcomers.

However, it is not denied by either that the category of ‘Gypsy’ carried seriously negative connotations. Lucassen’s consideration of the formation of the category of Gypsies begins from the question as to why if itinerants were economically useful, they were the subject of such negative categorisation and repressive policies. He dismisses the arguments that migrants were parasites and that therefore prejudice was justified, or that repressive policies were used to control and discipline people who did not fit the ideal of the dominant classes; the first does not fit the evidence that migrants served a vital economic role and the latter, while perhaps containing some truth, he sees ultimately as a conspiracy theory.<sup>181</sup> Whereas Okely placed emphasis on

<sup>179</sup> Willems, *In Search of the True Gypsy*, 18.

<sup>180</sup> Leo Lucassen, ‘A Blind Spot: Migratory and Travelling Groups in Western European Historiography’ in Leo Lucassen, Wim Willems & Annemarie Cottaar (eds.), *Gypsies and Other Itinerant Groups*. Great Britain: Macmillan, 1998.

<sup>181</sup> Lucassen, ‘Eternal Vagrants? State Formation, Migration and Travelling Groups in Western Europe, 1350-1914’, in Lucassen, Willems and Cottaar (eds.), *Gypsies and Other Itinerant Groups*. For the contrary argument that nomadism or itinerary is seen as inherently subversive by the settled society, see Robbie McVeigh, ‘Theorising sedentarism: the roots of anti-nomadism’, in Acton (ed.), *Gypsy Politics and Traveller Identity*. Great Britain: University of Hertfordshire Press, 1997.

the collapse of feudalism, the (not unrelated) key for Lucassen lies rather in the development of the system of poor relief in western Europe. By restricting poor relief in the 15<sup>th</sup> century to the local poor, whilst at the same time refusing citizenship rights to poor immigrants, a category of vagrants and ‘Gypsies’ was created. This had far-reaching effects for the stigmatisation of travelling groups who could expect to be reduced to beggary, whether or not they were. The hostility aimed at those included in this category is understood as belonging to a general mistrust of itinerants, although apparently the necessity of their economic role meant that most were not the lowest of the low in economic terms – a fact that seems surprising in light of their situation today – but could be compared favourably with the lower and middle classes.<sup>182</sup>

The change in the 19<sup>th</sup> century of linking poor relief to the place where one lived (as opposed to originated) no longer made a real difference, according to Lucassen, but forced local authorities to move them on rather than become responsible for providing support. On-going stigmatisation in 19<sup>th</sup> and 20<sup>th</sup> centuries can be linked, especially in Germany and France, to the process of state formation; while states became more and more dependent upon migrant labour, policies of repression towards vagrants and Gypsies became harsher as a consequence of fear of unrest within the upheaval of industrialisation. A fear of criminality and the development of centralised police forces saw special units established, particularly in Germany, to deal with those considered dangerous groups: anarchists, anti-socials, and Gypsies.<sup>183</sup> Thus, in a near-complete denial of a Romani history, Lucassen and Willems claim that there is no evidence that close ties between various groups existed until the genocidal Nazi persecution brought an awareness of a collective fate among the many sub-groups, and, in the light of this, they accuse the modern Romani movement of combining “the idiom of 19<sup>th</sup> century nationalism with that of modern anti-racism”.<sup>184</sup>

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<sup>182</sup> Willems and Lucassen, ‘Gypsies in the Diaspora? The Pitfalls of a Biblical Concept’ (1991) *Histoire Social/Social History*, 260. They note that it was only after the Second World War that many were forced into a hopeless social and economic position; while industrialisation presented obstacles to certain occupations, others thrived and new ones emerged.

<sup>183</sup> Lucassen, ‘Harmful Tramps’: Police Professionalization and Gypsies in Germany, 1700-1945’, in Lucassen, Willems and Cottaar (eds.), *Gypsies and Other Itinerant Groups*.

<sup>184</sup> “It is clear that by lumping together different itinerant groups, with divergent ethnic identities, in one racial category, the Nazis not only succeeded in rounding up and killing many of them, but also to a large degree stimulated the feeling among their victims that they had more in common than they thought.” Willems and Lucassen, ‘Gypsies in the Diaspora? The Pitfalls of a Biblical Concept’, 264.

### 3.1.2. Identity as Lifestyle

The second approach categorised by Vermeersch is of the Roma as a group typified by a common culture and lifestyle, according to which Roma are recognisable by virtue of the shared attraction to the nomadic lifestyle, or by reference to common cultural practices as evidenced through rules of cleanliness, family customs, musical traditions, as well as a similar outlook upon the world – what in Romani is known as *řomanipé*, ‘Romani-ness/ Gypsy-ness’. Such shared attributes are presented as objective evidence of ethnic group identity, according to Vermeersch, and while the thesis of a common Indian origin is accepted, it is the effect of this upon lifestyle and culture that is held to be most significant.<sup>185</sup> The lifestyle view as key to Romani identity is held, for example, by Werner Cohn, who numbers the ‘essentials’ of the Romani lifestyle as the “Romanes language, bride price, ritual feasts, and, specifically, Rom business occupations”. He goes onto suggest that “[t]he bride price and the ritual feast delineate the internal life of the Rom group; the Rom business occupations define the ethos of Rom life”.<sup>186</sup> The declaration of a distinct Romani way of life has been at the forefront of the claim to those who would position Roma as analogous to indigenous peoples and is behind the regular overtures – sometimes strong, sometimes weak – in favour of a special charter of Romani rights.<sup>187</sup> It is a view that has also been endorsed by the European Court of Human Rights in the series of cases concerning the responsibility of the British Government for the continuation of a Gypsy way of life in the United Kingdom.<sup>188</sup>

Willem and Lucassen, however, have argued that Romani occupations as such have never existed, arguing that all traditional occupations were also practised by non-Roma. Further, itinerancy was not historically a special feature of Gypsies but they allege that tens of thousands of non-Roma were also itinerant and thus developed family structures and occupational habits that assisted life on the road. Those that lived this life were, according to Willem and Lucassen, likely to be labelled ‘Gypsy’ and have been stuck with the appellation for centuries. Yet, in contradiction of their

<sup>185</sup> Vemeersch, ‘Roma and the politics of ethnicity in Central Europe’, 12.

<sup>186</sup> Werner Cohn, ‘Letters to the Editor’, *Nationalities Papers*, Fall 1993, Vol. XXI, No. 2, 281-286.

<sup>187</sup> See discussion of the European Charter of Romani Rights, Section 2.2.2.

<sup>188</sup> *Buckley v. UK* (1996): “The Court considers that the applicant’s occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle.” However, the Court also appears to endorse a biological approach, noting that certain applicants are “Gypsies by birth” (See also, *Chapman et al. v. UK* (2001); *Varey v. UK* (2001)).

opinion on the role of the *Porrajmos* in creating a Romani identity, they note that such labelling “could easily lead to the development of ethnicity” bound up with traditional occupations; “[f]or it was the economic choice of an itinerant profession *with* the family, an overt travelling way of life, that set off the stigmatisation.”<sup>189</sup>; indeed, “[i]t is undoubtedly true that so-called Gypsy groups shared an itinerant lifestyle in the past, that there was an ethnic awareness and solidarity within the subgroups and that at that internal group level, there was a connection due to the common culture, etiquette and relationships”.<sup>190</sup> Similarly, Stewart, despite denying Roma ethnic group status, details the degree to which Roma in Hungary have deliberately maintained their culture and separateness in the face of attempts to assimilate them into mainstream society.<sup>191</sup>

However, there is certainly a degree to which, as Vermeersch also notes, that emphasising this perspective promotes stereotyping of Roma of the kind that sees an intrinsic link between Romani identity and anti-social behaviour, albeit perhaps with the romantic tinge of horses, hooped earrings and long floaty skirts.<sup>192</sup> For example, Cohn, a Professor of Sociology, states that Romani occupations are confined to fortune-telling for the women and menial trade work, both of which one can “characterize as [belonging to] the confidence racket”.<sup>193</sup> More harmful is that the promotion of Romani identity as a distinct way of life also allows for an entrenchment of forced segregation of Roma from mainstream society under the cynical claim that the nomadic way of life requires protection; during the 1980s and 1990s, ten of the twenty Italian regional governments, for example, adopted laws for the “protection of nomadic culture”, building segregated camps to protect Roma from their inauthentic desire to live in flats or houses.<sup>194</sup> Emphasising the cultural distinctness of Roma also

<sup>189</sup> Willems and Lucassen, ‘Gypsies in the Diaspora?’, 9 (emphasis mine).

<sup>190</sup> *Ibid.*, 14.

<sup>191</sup> Michael Stewart, *The Time of the Gypsies*. Oxford: Westview Press, 1997.

<sup>192</sup> For two rather different examples of the classical stereotyping of Roma in mainstream English-language culture, see Jennifer Lopez’s video to her single ‘Ain’t It Funny’ (in which Gypsies are sultry, rhythmic dancers representing the archetypal romantic free-spirit) and Reginald Hill’s *A Killing Kindness*, (HarperCollins, 1980), one of his Dalziel and Pascoe detective novels, in which the Gypsies are dirty thieves and the main Gypsy male character beats his common-law wife.

<sup>193</sup> Cohn, ‘Letter to the Editor’.

<sup>194</sup> European Roma Rights Center, *Campland: Racial Segregation of Roma in Italy*. Budapest, 2000. The report notes that such attitudes continue undimmed; the Italian Head of Delegation, Mr. Luigi Citarella, stated to the 54<sup>th</sup> Session of the Committee on the Elimination of Racial Discrimination in March 1999 that Roma, as natural nomads, “preferred to stay in the camps”, despite considerable evidence to the contrary.

risks validating the charge that Romani communities must share responsibility for their marginalisation from the mainstream.<sup>195</sup>

### 3.1.3. Blood-brothers

The third approach identified by Vermeersch is that of the Roma as a biologically-related group, whereby Romani identity is primarily identified by common genetic or phenotypic traits. Hancock is the leading proponent of Roma as a genetically bound and thus distinct group, who claims, for example, that they made the journey from India to Europe ‘intact’ (he writes of a “Romani core of direct retention genetically and historically”), and that, while the absorption of outsiders during their travels accounted for some variation in certain traits distinguishing one group from another, “it has not led to the dissolution of the Roma as a genetically related people”.<sup>196</sup> Hancock cites a 1987 Harvard medical study of Roma in the United States which established that – on the basis of blood group, haptoglobin phenotypes and HLA tests – those examined constituted a “distinct racial group with origins in the Punjab region of India”.<sup>197</sup>

Moreover, there is, according to Fraser, rudimentary scientific evidence to suggest an ethnic link to the Indian sub-continent, supporting Hancock’s assertion that the Roma are the descendants of a coherent original group. Investigations carried out post-war in the 1940s into blood groups found that of various samples taken from Romani populations in Europe, a level of B gene frequency was discovered at well above European levels, it being more than twice as frequent in India as in Europe.<sup>198</sup> While

<sup>195</sup> See the editorial in *The Guardian*, 8 April 2000: “The Roma are perhaps the most singularly disliked ethnic group in the world... the Roma too are part of the problem, through the persistence of a culture that is as much a source of their marginalisation as is the majority prejudice against them.”; cited in Hancock, *We are the Romani people*, 60. Hancock has, however, also noted that the reverse is true of certain Romani communities, that one legacy of enslavement is an over-reliance on the non-Romani world, both in terms of material goods and prestige. *Ibid.*, 97.

<sup>196</sup> Hancock, ‘The Eastern European Roots of Romani Nationalism’, *Nationalities Papers*, Vol. XIX, No. 3, Fall 1991, 3, 8.

<sup>197</sup> *Ibid.* Hancock goes on to cite approvingly the English Appeals Court decision in *CRE v Dutton* (1988) ([1989] 1 All ER 306), which ruled that Gypsies formed “a distinct racial group [which...] had not lost their separate identity”. Moreover, the belief that Roma made the migration intact leads Hancock to explain differentiation between groups as a survival strategy in the hostile European landscape, small groups being better able to live unobtrusively on the fringes of society.

<sup>198</sup> Studies cited by Fraser, *The Gypsies*, 24. Rhesus frequencies were also found to be consistent with an Indian origin. For more scientific detail, see K.N. Sareen, ‘The role of biochemical genetics in tracing the origin of a human group’ (1976) 2(1) *Roma* 41; cited in Hancock, *We are the Romani people*, 70-71. Hancock cites several genetic studies in this later work, which all point in the direction of a direct genetic link to India.

this may be encouraging for those advocating the genetic line, further studies on Roma – in Britain, Sweden and Slovenia – found results that deviated from the earlier studies while still differing significantly from patterns in the surrounding populations.<sup>199</sup> The difficulties of such physical investigations highlight the problems inherent in deciding who belongs to a given group; as Fraser points out, only one marriage in a hundred with a non-Romani since any migration would have brought the present proportion of non- Indian ancestors to just over half the current population. Population genetics are thus suggestive, but not conclusive.

The concept of genetic kinship is, however, increasingly controversial. In a number of different fields of study, the concept of ‘race’ as a purely biological category has been the subject of urgent debate and is certainly no longer accepted unquestioningly.<sup>200</sup> In addition, despite the difficulties of determining genetic inheritance, particularly where one relies on factors such as blood groups or physical characteristics, there is clearly something disturbing to talk about identity as being genetically- related; replacing the word ‘dissolution’ with ‘dilution’ in Hancock’s assertion above, for example, would make many people at the very least deeply uncomfortable, with all its attendant associations with social Darwinism and, of course, Nazi eugenics. Indeed, the use to which Grellmann’s work was put by founding members of the Gypsy Lore Society was explicitly based upon rudimentary genetic determinism. The failure of Grellmann’s theories to accord with their fieldwork observations saw the differences attributed to a lack of authenticity among some sub- groups. They were not ‘real’ or ‘pure- blooded’ Gypsies. According to George Borrow, author of *Lavengro* (1851) and *The Romany Rye* (1857), it was only very rarely that one met a member of the ancient race. This concept of a true but all but extinct ‘noble savage’ type of Gypsy was picked up by Robert Ritter, a youth psychologist and criminal biologist, who was to become the foremost Nazi eugenicist. Ritter’s early work sought to divide peoples into ‘natural’ and ‘cultured’; Gypsies, as part of the former, were compared to hunters and gatherers and were deemed incapable of keeping up with the pace of civilisation – the stagnation in their mental development explained their parasitical behaviour and

<sup>199</sup> Fraser, *The Gypsies*.

<sup>200</sup> Academic uncertainty concerning race has long been recognised by the courts; for example, in *Ealing Borough v. Race Relations Board*, the House of Lords ruled that there is very little, if any, distinction to be made in biological terms between so-called races, and that it would thus be unwise and most undesirable to make membership of a particular group dependent upon any form of biological proof. [1972] *Law Reports*, Appeal Cases 342.

restlessness. Moreover, the unacceptable mixing of Gypsy blood with German blood produced a group much worse than the ‘true Gypsies’ because their potential for deviance was strengthened by German cleverness and boldness. Ritter’s research established that 90% were of mixed blood and it was the alleged impurity of Romani blood that apparently served as one of the prime justifications in Nazi ideology for the *Porrajmos*.<sup>201</sup>

However, despite the ethical concerns, claims of genetic relationship are seen by some, such as Hancock, as necessary to addressing the historical stigmatisation of Romani culture and their way of life as inherently inferior precisely because Roma are deemed not to constitute an ethnic or racial group, thus allowing their existence to be explained away as social deviance and criminality. The strong desire to gain acknowledgment of the separate biological status of Roma is arguably a response to the attitudes of Communist authorities; the denial of national minority standing and the subsequent suppression of Romani culture represent a more immediate memory of persecution for the majority of Roma than the experience of racial selection under Nazism. Moreover, an ethnic emphasis and the biological understanding this term commonly retains is understandable in light of recent denials of the racial nature of crimes against Roma in certain countries of central and eastern Europe on the basis that Roma do not constitute a distinct racial, ethnic or national group.<sup>202</sup> Many Roma, particularly in central and eastern Europe, remain darker-skinned than the majority surrounding population and are thus easily identifiable as such to racist attackers.<sup>203</sup> Yet, the actual consequences of pushing the understanding of Romani as a bounded genetic group may be that, to the ears of those who wish to hear a particular message, it will be confirmation that the existing connection believed by many between Roma and social deviance is in fact innate, that it is in their very blood.<sup>204</sup>

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<sup>201</sup> Willems, ‘Ethnicity as a Death-Trap: the History of Gypsy Studies’.

<sup>202</sup> For details of cases from the Czech and Slovak Republics in which courts have dismissed charges for racially-motivated homicide on the basis that Roma are not a racial group, Gioia Maiellano, ‘The Penumbra of Race’ (2000) 4 *Roma Rights*; at [http://errc.org/tr\\_nr4\\_2000/legal\\_defence.shtml#10rev](http://errc.org/tr_nr4_2000/legal_defence.shtml#10rev)

<sup>203</sup> Hancock cites a 1992 study by Mastana and Papiha that finds that there has been considerably more inter-marriage with non-Roma in western Europe than in the east, claiming to explain the difference in external appearance between Roma in eastern Europe and those in the west. (Hancock, *We are the Romani people*, 71). This is not to suggest that appearance is a hard and fast guide even in CEE to who is and who is not Roma but political correctness should not blind to the fact that the majority populations believe that they can identify Roma on the basis of skin-colour.

<sup>204</sup> The belief in the defining importance of genetics led Roma directly to mass sterilisation, live experimentation and concentration camps. It is not difficult to understand the reluctance of many –

### **3.2. The Romani archipelago**

The strong desire to uncover a common origin or a biological identity is arguably driven, at least in part, by an acknowledgment of the real differences between those groups that place themselves, or are placed by others, under the heading of ‘Roma’.<sup>205</sup> The complexity of the internal subdivisions between groups categorised as Roma are of real importance in understanding any attempt to mould a common identity and some space is thus given here to providing an impression of the nature and degree of those differences.

If one accepts the Indian thesis, the differences seen today can be explained both by reference to the likely migration pattern of commercial nomads – that of distinct but similar groups with cultural practices based around the skill-set they possessed – as well as to a post-migration history that saw considerable variation in practices of persecution as the boundaries of Europe’s nascent nation-states slowly solidified. The centuries of forced assimilation and repression have, it is argued by many, impacted greatly on the creation of this myriad of Romani groups from once similar customs. The attacks on Romani language and culture, including in some countries a ban not just on the traditional nomadic lifestyle but on being Romani itself, differed in intensity from country to country and have resulted in a number of substantive differences between Romani groups both within and across borders.<sup>206</sup> The prohibition of the use of the Romani language across much of western and central Europe and particularly those areas under Habsburg rule has had, for example, a considerable impact upon the continuing use of the Romani language; whereas more than 70% of Hungarian Roma (the *Rumungri*) use Hungarian as their mother tongue, in Macedonia the vast majority of Roma speak Romani as their first language. Those groups, for example, that suffered enslavement in the Danubian provinces of

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perhaps fair to say, mainly non-Roma – within the Romani movement to pursue the genetic strategy in search for greater recognition. However, the work of Okely, Willems, Lucassen and others has also attracted strong criticism as providing succour to those who would see Roma as belonging to a socially deviant subculture.

<sup>205</sup> Marcel Courthiade provides a detailed and helpful breakdown of the *rromane endană* (Romani groups) into stratum and sub-groups within them on the basis of historical background and linguistic features. Courthiade, ‘The *Rromane Endaja*’, available online at [http://www.dromedu-forum.org/fileet/The%20Rromani%20Endaja%20\(groups\)%20by%20dr%20Marcel%20Courthiade.pdf](http://www.dromedu-forum.org/fileet/The%20Rromani%20Endaja%20(groups)%20by%20dr%20Marcel%20Courthiade.pdf) accessed 22 March 2004.

<sup>206</sup> For a survey of the different anti-Gypsy laws brought in across Europe in the early modern era, see Fraser, *The Gypsies*, 129-189.

Wallachia and Moldavia are different to those that did not and within those that were enslaved, patterns of division are largely determined by the various categories created during slavery, an example being the *Vatrashi* – a name derived from the Romanian word, *vatra*, meaning ‘fireplace’ and hence domestic slaves (they are also known as *kherutno*, ‘those who live in houses’). Repressive practices and attempts at assimilation continued throughout the twentieth century. If one accepts the indigenous European thesis, however, the existence of this archipelago is explained by the fact that the various groups never shared a common history.

The grind of daily marginalisation and on-going fear of violence has also had a considerable impact on Romani lifestyles and identity, with a number of groups seeking to distance themselves from the label ‘Roma’. The *Ashkalia* of Kosovo are a prime example of a group ‘understood’ to be Roma by external observers but who themselves do all they can to decry any such association.<sup>207</sup> Numerous Muslim Romani communities are also engaged in distancing themselves from identification as Roma or Gypsies. Many, especially in Bulgaria and eastern Macedonia, speak Turkish, being bilingual Turkish/ Romanes, and thus claim affinity with the Turks. In Kosovo and western Macedonia, identification with the Albanian community dominates, although there are a number of Romani communities in Kosovo who identified with the Serb population and suffered persecution at the hands of triumphant Albanians as a consequence following 1999 and NATO intervention.<sup>208</sup> This desire to affiliate to a different minority is a consequence of the permanent historical exclusion of those labelled Roma or ‘Gypsy’; although the Balkan nations are historic enemies, they are of equal standing, whereas the Roma are the community of the lowest standing, “incompatible with the others”, according to Marushakova and Popov.<sup>209</sup>

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<sup>207</sup> They have, for example, established their own political parties, such as the Ashkalia Democratic Party of Kosovo, formed in December 1999. The persecution of those held to be Gypsies by both the Albanian and Serb communities in Kosovo – each side considers the Roma to have collaborated with the other – makes perfectly understandable the reluctance to be associated with the categorisation.

<sup>208</sup> The ERRC has extensively detailed the acts of violence and oppression against Kosovo’s Romani population, including the Ashkali and Egyptians: <http://errc.org/publications/indices/kosovo.shtml>, including the most recent *Roma Right* quarterly, which focuses exclusively on Roma in Kosovo.

<sup>209</sup> Marushakova and Popov, ‘Myth as Process’, in T. Acton (ed.), *Scholarship and the Gypsy Struggle*, 85. Also, Ger Duijzings, ‘The Making of Egyptians in Kosovo and Macedonia, in C. Govers and H. Vermuelen (eds.), *The Politics of Ethnic Consciousness*. London: Macmillan, 1997.

The rejection of attempted affiliation by other minorities has seen the search for a non-Romani identity lead some groups to develop new or fall back upon former designations as a means to scraping their social status off the floor; the Albanian-speaking *Yevgi/ Egyptchani* in Albania or the *Egypti* in Kosovo, Macedonia and Serbia are good examples. Similarly, where Turkish-speaking Roma have not been accepted as ‘Turks’ by the surrounding Bulgarian population or the Bulgarian Turks, some have simply called themselves *millet* (‘people’) or ‘Muslims’.<sup>210</sup> The confusion as to who belongs to the heading ‘Roma’ concerns not just those who seek to deny such affiliation but also those who are denied it; groups who practice a traditional travelling lifestyle, such as the Yeniches who travel through Belgium and France or the Woonwagenbewoners in the Netherlands, have been categorised as indigenous by the authorities and are thus denied ‘foreign’ Romani status.<sup>211</sup> However, there have been cases in which Romani identity has provided protection or opportunities, as Willems and Lucassen have alleged. Indeed, Willems has gone so far as to suggest that various itinerant groups are ‘hiding’ behind the label ‘Gypsies’.<sup>212</sup>

The identity of Romani subgroups has not only been shaped by fear (or opportunity), however, but has also developed in a perhaps less negative dialectic with the communities surrounding them.<sup>213</sup> Roma traditionally differed, and to a certain extent continue to do so, in religious belief according to the country in which they reside and to their relationship with the different ethnic groups they lived among. The main difference between Romani groups in the Balkan Peninsula, according to Marushiaкова and Popov, for example, is that of religious affiliation – either Islam (*Xoraxane Roma*) or Christianity (*Dasikane Roma*) – and they constitute more or less

<sup>210</sup> Marushiaкова and Popov, *ibid.*, 86. Such is the desperation to adopt another identity that groups also adopt/ create a history; the *Usta Millet* in area of the town of Dobritch have recently claimed descent from an unknown tribe of blacksmiths from Afghanistan whom they allege were the most famous of the gunsmiths under the Ottoman Empire, for example.

<sup>211</sup> The uncertainty is also suggested by the varying ‘group’ titles used by the international community; ‘Roma, Sinti and Travellers’ was the accepted form of address at the World Conference Against Racism, whereas the CoE uses Roma/ Gypsies and Travellers. It is not simply national authorities, however, that reject the inclusion of travelling populations. There are many within the Romani movement who do not accept the inclusion of Travellers or their association with Romani suffering. This was made clear at the World Conference Against Racism by a number of Romani activists. See Klimová for an account of the confrontation between the European Roma contingent and representatives of the Irish Traveller movement, Part III: WCAR Case Study.

<sup>212</sup> Willems, *In Search of the True Gypsy*, 2.

<sup>213</sup> Although, one should not forget the power differential traditionally present between the communities and the impact such a factor plays in any dialectic between them; nevertheless, this is perhaps true of any interaction and there is a danger of overplaying it.

autonomous groups within each locality, being divided at a number of hierarchical levels as well as internally divided into various sub-groups.<sup>214</sup> In addition to differentiations imposed or influenced by outsiders, traditional internal differences such as occupation are also at the root of quite fundamental variations in culture and behaviour. Moreover, the seemingly limitless proliferation of communities is aggravated by the majority populations using an identifying name other than the self-appellation of the group; the *Rudura/ Ludura* are one such meta-group, spread throughout the Balkan Peninsula, also known as *Kopanari* (cradle-makers), *Koritari* (trough-makers), *Vlasi* (Wallachians), *Karavlasi* (black Wallachians) and so on by the surrounding majority communities. However, the *Rudera* have maintained a number of intergroup divisions based on traditional occupations – for example, the *Lingurara* (spoon-makers), *Ursara* or *Mechkara* (bear-trainers) – as well as on regional features – such as the *Monteni* or *Istreni*. The *Rudera* are interesting on another level, however. They have ‘forgotten’ their mother tongue of Romanes, speaking their own dialect of Romanian, and have also apparently ‘discarded’ certain other ethnic and cultural traits, and have thus been described by ethnographers as “inclined to change their ethnic allegiance”<sup>215</sup>; for example, the *Rudera* often present themselves as *Vlaxs* (Old Romanians), although some groups chose to distance themselves both from Romani as well as Romanian identity.<sup>216</sup> Many other groups have, however, to varying extents maintained their own distinctive cultural traits; for example, in Romania, the groups and subgroups of the category *Leyasha*.

<sup>214</sup> Marushakova and Popov, ‘Myth as Process’, 36; they provide examples of subdivisions at several levels dependent on specific features in the countries of the former Yugoslavia: *Arli, Gurbeti, Dzhambazi, Bugurdzhi, Muhadzhiri, Gabeli, Chergara, Khanyari, Tamari, Romtsi, Slovenska Roma*. There are apparently corresponding differences between Romani groups in Bulgaria and Albania. Courthiade alleges, however, that such names are not an accurate guide to religious denomination as often the groups in question have adopted a different faith after being named. Courthiade, ‘The *Rromane Endaja*’.

<sup>215</sup> Marushakova and Popov, ‘Myth as Process’, 37; they designate this ability or inclination “preferred ethnic identification”. There is, however, a tinge of cynicism that hangs about such a statement and it is perhaps worth bearing in mind that many indulge in ‘preferred ethnic identification’, such as a child born in England to English parents but brought up in Scotland choosing to identify themselves as either English or Scottish.

<sup>216</sup> The confusion is not assisted by the practice of dissembling or giving the ‘expected answer’ in dialogue, particularly with outsiders. According to Courthiade, “a Rrom from Northern Hungary may self-identify as *Muzsikus* to local peasants, as *Romungro* to other Rroms... as *Magyar Cigány* to the authorities and as *Karpáti Rrom* to ethnologists” and “when using these names, he/ she will conform to the interlocutor’s expectancies in order to achieve the best possible dialogue with him.” ‘The *Rromane Endaja*’.

Even within a single country, there can be a variety of groups and subgroups, highlighting the fact that Roma are no respecters of state boundaries. Hungary provides a good example of a country that appears at first glance to possess a fairly homogenous Romani group, and indeed, the vast majority of Roma living in Hungary belong to the *Rumungri* – a settled group that no longer speak Romani as noted above and, according to Marushakova and Popov, have lost many of their ethnic and cultural characteristics.<sup>217</sup> However, there are also small numbers of Romani-speaking *Rumungri*, mainly in eastern Hungary, as well as very small numbers of *Slovenska Roma* and *Vlashika Roma*, the latter divided into the sub-groups *Lovari*, *Kelderari*, *Churari*, *Drizari*, *Posotari*, *Kherara*, *Cherara*, *Khangliari*, *Tsolari*, *Mashari*, *Bugura*. A community of Romanian-speaking *Boyasha* with its own subdivisions also finds its home in Hungary. Moreover, *Rumungri* (also known as *Ungrika*) are also found in sizeable numbers in southern Slovakia and Transylvania, sub-divided amongst themselves into Romani-speaking and Hungarian-speaking groups.

Marushakova and Popov point out that while the *Rumungri* have lost their language and many of their cultural traditions, other subgroups have maintained the use of the Romani language and preserved not only traditional cultural ways, but also the institutions of internal governance, such as the public tribunals: the *Kris* of the *Olah* in Central Europe, the *Meshariava* of the *Kardarasha* of Bulgaria and the *Sendo* or *Syondo* of the Russian or Polish Roma.<sup>218</sup> The closed nature of Romani communities has nonetheless not prevented the intrusion of modernity and few groups remain orthodox in their practices, adhering to the strict standards of traditional Romani purity laws, despite the popularity of the self-appellation *Rom Tsiganyaka* ('true Gypsies') among many groups and sub-groups.<sup>219</sup> Moreover, different groups experience varying levels of acceptance by the surrounding population and although they all suffer discrimination where understood to be Romani by their neighbours, at

<sup>217</sup> Marushakova and Popov, 'Myth as Process', 39.

<sup>218</sup> Marushakova and Popov, *ibid.*, 39. For an interesting comparison of the two main forms of Romani law – the feud and the kris – see Acton, Caffrey and Mundy, 'The Theory of Gypsy Law' in Acton (ed.), *Gypsy politics and Traveller Identity*. Great Britain: University of Hertfordshire Press, 1997.

<sup>219</sup> O. Weyrauch and A. Bell, 'Autonomous Lawmaking: The Case of the "Gypsies"' (1993) 103 *Yale Law Journal* 323, 342-252. For details of Romani purification traditions as they relate to food, see Milena Hübschmannová, 'To Eat is to Honour God: Xhaben – Pat'iv le Devleske', in T. Acton (ed.), *Scholarship and the Gypsy Struggle*. Great Britain: University of Hertfordshire Press, 2000. Also, see Hancock's chapters 'Cuisine' and 'Health' in *We are the Romani people*, 80-90.

the very least they face different types and scales of problems. Wealth, for example, can vary dramatically within Romani communities, from those who barely subsist to those that live in palatial houses as the richest family in the neighbourhood. This picture is further complicated by the suggestion that Romani groups in the former Communist countries of central and eastern Europe also assert a strong sense of belonging to the state in which they live – a layer of civic pride apparently lacking in the Roma of western Europe and north America.<sup>220</sup>

The historical lack of unity between the various sub-groups, even to the extent that some groups refuse to recognise themselves or others as Roma, is perhaps best suggested by the allegation that the Romani language contains no traditional word, it has been suggested, to refer to the Roma as a whole.<sup>221</sup> The large discrepancy that usually exists between government statistics on the number of Roma resident in a given country (where authorities keep ethnic data) and the figures suggested by Romani groups or activist organisations is further indication that there is no clear accepted understanding as to who or what is Romani.<sup>222</sup>

Indeed, given the more likely assumptions about their early origins – that of small groups, dispersal, nomadism – it could perhaps be considered surprising if these various groups, despite sharing a common language, had maintained a sense of shared culture. Although the diaspora is frequently compared to that of the Jews, indeed the Jews were the mould for Grellmann's classification, the Roma had no priestly caste and thus no custodians of tradition, no written language, no texts that enshrined a shared corpus of beliefs or morality. Romani identity has, of course, been fashioned and re-moulded under a multitude of influences. They have assimilated innumerable elements from those around them which bear no connection to India and they have

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<sup>220</sup> This is suggested by Marushikova and Popov, 'Myth as Process', 41.

<sup>221</sup> The term *Rroma* does not express feelings of belonging to a Romani people, but simply describes someone who is not *gadžé*, deriving from 'Rom' – 'man' in most dialects. Similarly, words which could be translated as 'nation' are actually a modern extension of meaning for words traditionally used only in reference to one's particular tribe or group; so, for example, *vitza*, often translated as 'nation', refers to one's extended family – *my* people. Other translations for 'nation', *nacija* and *nipo*, are Slavic and Hungarian imports respectively. Moreover, the term *gadžé* is not used to refer to all non-Roma, but to a specific group of non-Roma in some form of relationship with the Romani group in question; so that, as a rough illustration, where in England the author is *gadžá*, in Macedonia she is simply a foreigner.

<sup>222</sup> For the difficulty in collecting statistics on Roma, see 2 *Roma Rights* (2004); also PER Report, *Roma and Statistics* (2000); available at <http://www.per-usa.org/reports/PERStrasbourg.pdf>

ceased to be in any recognisable way Indian, if indeed their origins ever lay in that direction.<sup>223</sup> Yet, as Fraser has commented, “one cannot cease to wonder at their extraordinary tenacity.”<sup>224</sup>

Yet as a consequence of the undoubted and quite fundamental differences between different Romani groups, Marushiaкова and Popov have labelled recent attempts to use the term ‘Roma’ for all subdivisions, and related projects such as the attempted standardisation of the Romani language, as little more than the nationalist efforts of a thinly educated layer of what they term in a derisory manner, ‘professional Roma’.<sup>225</sup> According to the anthropologist Michael Stewart, the Gypsies he lived amongst in Hungary did not consider themselves to possess a homeland, did not dream of one nor of claiming any territory; from this, Willems and Lucassen have concluded that the obsession with origins is not theirs and that “[w]hat makes them [Roma] special is that they are quite happy in this condition.”<sup>226</sup> On the basis of his fieldwork, Stewart asserts that Roma do not have an ethnic identity, concluding rather that their identity is constantly re-constructed in the present in relations with those around them, not something inherited from the past.<sup>227</sup> Werner Cohn has waded into the debate, stating with certainty not just that “there are no meaningful loyalties beyond the extended family” but that talk of ‘Gypsy nationalism’ can only elicit among Roma “merriment or scorn and, in any case, lack of comprehension.”<sup>228</sup> Moreover, what empirical evidence there is of feelings of (political) identification among Roma – electoral success of Romani political parties in the countries of central and eastern Europe – would suggest that there is little interest in supporting parties that seek to represent the Romani community as a whole.<sup>229</sup> It is appreciably harder to acknowledge a claim to recognition of a transnational identity where there is a fundamental lack of a sense of unity between Romani communities even in the same country. Furthermore, the dispersal of groups all over the world across the centuries coupled with the relative poverty and poor education that plagues Romani communities nearly everywhere, has

<sup>223</sup> It appears to be accepted knowledge among interested academics that the vast majority of Roma have no knowledge of their alleged Indian origins; the truth of this is impossible to verify.

<sup>224</sup> Fraser, *The Gypsies*, 44.

<sup>225</sup> Marushiaкова and Popov, ‘Myth as Process’, 49.

<sup>226</sup> Willems and Lucassen, ‘Gypsies in the Diaspora?’, 6

<sup>227</sup> Stewart, *The Time of the Gypsies*, 28.

<sup>228</sup> Cohn, ‘Letter to the Editor’.

<sup>229</sup> Vermeersch, ‘Roma and the politics of ethnicity in Central Europe’.

meant that many continue to be ignorant of communities claiming kinship in other countries, particularly where those countries are on other continents.<sup>230</sup>

Nor are non-Romani ethnographers and sociologists alone in holding that Roma as a meta-group does not exist. A prominent Hungarian Romani activist, Angela Kóczé, stated in a public debate on the future of the Romani movement: "...one unified Romani community does not exist in Europe, although there are many different Romani groups, each with its own distinct culture and community history. There is only one common feature of Roma: the oppressed identity...".<sup>231</sup> Similarly, the leader of the Romani National Congress has commented: "One must accept that the Roma are diverse, hold different traditions and cultures, and that any attempt to forge a unitary nationhood out of them is fruitless."<sup>232</sup> And yet, their identity and culture remain sharply distinct from the *gadze* that surround them and upon whom they are dependent for their economic livelihood.

### **3.3. A Pan-Romani identity?**

How then are we to understand Romani identity, assuming that we are to suggest that it exists at all?<sup>233</sup> While the nature of identity will be considered in greater depth in a subsequent chapter, it is worth making a few brief remarks about the nature of group identification on the basis of social identity theory in order to contextualise the most likely sense of Romani identity, before considering whether or not a pan-Romani identity can be said to exist. In this regard, post-colonial identity is instructive in understanding the process of Romani national claims.

#### **3.3.1. Ingroup/ Outgroup Distinctions**

Much research on the nature of identity has suggested that the relative influence of the group to an individual's identity is flexibly influenced by the context. Identity is

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<sup>230</sup> The transformation in global communications, bringing ease of access to information, is changing this, but slowly; that subsistence Romani communities in central and eastern Europe do not have access to the internet, for example, can be safely assumed.

<sup>231</sup> The participants comments have been published in 'The Romani movement: what shape, what direction?', (2001) 4 *Roma Rights* 28, available on-line at <http://erc.org>.

<sup>232</sup> Statement by Rudko Kawczynski at a workshop in Krakow, 9-10 March, 2001; published by Project on Ethnic Relations, *Leadership, Representation and the Status of the Roma*. Princeton, 2001.

<sup>233</sup> Klímová has asserted, for example, that 'Roma' is a "political term"; *The Romani Voice in World Politics*, 13 (emphasis hers).

variable and at any one time different aspects of our identity may come to the fore, whether a form of social identity, relating to our group membership, or as a form of role-playing, for example, as a customer or as a professor before a group of students. In a claim arguably key to an understanding of Romani identity, social identity theory suggests that whereas the presence of members of an ‘outgroup’ raises the salience of our ‘ingroup’ identity; where only members of the ingroup are present or relevant in a given context, the meaningful distinction for identity is between sub-groups or individual members of the ingroup.<sup>234</sup> Where national identity is only strongly felt in the presence of those who are not, in my case, English; for Romani groups, the bond they share is only strongly accentuated in the face of non-Roma. A Romani national identity, it can be suggested, is therefore no different from other national identities; while individuals of more established national identities do not put their national identity above all other aspects of their identity most of the time, nor do members of Romani groups.

### 3.3.2. Post-colonial Identity

While ethnic identification can be understood in terms of a constant comparison of cultural similarities and differences at varying levels of consciousness, it is suggested that those groups or societies coming to terms with long-term oppression have slightly different needs. The attempt by mainstream Romani scholars and activists to institutionalise the diasporic thesis of Romani origins arguably fits well into the mainstream post-colonial understanding of identity, as epitomised by those such as Frantz Fanon. In this conception of identity, it is the rediscovery of cultural identity as reflecting a common historical experience that provides members of such a group with a stable and unchanging frame of reference and meaning, and that has been the building block of post-colonial societies coming to terms with the colonial legacy. Fanon wrote of “the secret hope of discovering beyond the misery of today, beyond self-contempt, resignation and abjuration, some very beautiful and splendid era whose existence rehabilitates us both in regard to ourselves and in regard to others.”<sup>235</sup> As Walzer notes, nations that are forced to endure oppression, servitude or exile over a

<sup>234</sup> Dominic Abrams and Michael A. Hogg, ‘Collective Identity: Group Membership and Self-Conception’ in Hogg and Tindale (eds.), *Blackwell Handbook of Social Psychology: Group Processes*. Oxford: Blackwell, 2001. H. Hausendorf and W. Kesselheim, ‘The Communicative construction of group relationships. A basic mechanism of social categorization’ in A. Duszak (ed.), *Us and Others. Social Identities across languages, discourses and cultures*. Amsterdam: John Benjamins, 2002.

<sup>235</sup> Fanon, *The Wretched of the Earth*. London: Penguin, 1963, 170.

long period of time accommodate themselves to their suppression by telling stories that explain their weakness – the Jewish story of exile being “punishment for their sins” being a good example. Those that wish to liberate such nations must thus develop, according to Walzer, a different historical literature, one that celebrates ‘heroism-even-in-defeat’ or claims a stubborn resistance to their oppressors in order to point to a national revival.<sup>236</sup> The attempt by some to gain acknowledgment of migrating ancestors as warriors can be seen as sitting within such rehabilitatory desires.<sup>237</sup> The actual veracity of the diasporic claims are thus irrelevant; arguably such origin claims are less important in terms of the hidden experiences being brought to light following ‘colonial’ oppression than they are with the production or modification of identity through the re-telling.

The ‘re-’telling of origins can therefore be seen as a reclaiming by Roma of their identity. Stuart Hall has suggested that the relationship between cultural identity and historical experience has as a flip-side rupture and difference, whereby “identities are the names we give to the different ways we are positioned by, and position ourselves within, the narratives of the past.”<sup>238</sup> The rejection of the dominant narrative in which Gypsies are portrayed as vagrants, beggars and thieves can be understood as, what Hall has termed, an “inner expropriation” of their identity.<sup>239</sup> In this process of inner expropriation, cultural identity is not fixed; it is neither universal nor transcendental, nor does it possess fixed bearings.<sup>240</sup> Yet cultural identity has its histories, narratives of the past that have a real symbolic effect. Hall uses the relationship of a child to its mother, as “always- already after the break”, as a metaphor for our relationship to the

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<sup>236</sup> Michael Walzer, “Every national-liberation movement has to rewrite the history of the nation it aims to liberate.” Walzer, ‘History and National Liberation’, in Shapira and Penslar (eds.), *Israeli Historical Revisionism. From Left to Right*. London: Frank Cass, 2003, 1.

<sup>237</sup> The attraction of elevating those claimed as ancestors from a “motley band of minstrels and low-caste vagrants”, as Fraser has put it, to high-caste warrior status is clear and understandable. *The Gypsies*, 26.

<sup>238</sup> Stuart Hall, ‘Cultural Identity and Diaspora’, in Jonathan Rutherford, *Identity. Community, Culture, Difference*. London: Lawrence & Wishart, 1990, 225.

<sup>239</sup> *Ibid.*, 226. The relevance of the comparison is supported by the assertion of a Romanian Romani activist, Delia Grigore, that the Roma enslaved in the Romanian lands internalised their inferiority. Grigore, ‘The Romanian right and the ‘strange’ Roma’. *Open Democracy*. 28 July 2003.

<http://www.opendemocracy.net/debates/article.jsp?id=10&debateId=96&articleId=1387>; accessed 9 January 2004.

<sup>240</sup> Hall cites Derrida’s attempt to capture a sense of difference that is not pure ‘Otherness’ with the word *difference* – a concept according to Hall remains suspended between the French verbs ‘to differ’ and ‘to defer’. As one shades into the other, an understanding is created in which meaning is always deferred.

past – a past always constructed through a mixture of memory and myth. The attempt to provide Roma with a basis of their identity, whether through narrating an early common historical experience or by emphasising cultural or biological features they share is a reclaiming of their identity from the control of others. Hancock is clearly very much aware of the destructive power that comes from controlling another's history; in presenting his history of Romani nationalism, he writes, “[p]art of the process of devaluing a people entails eradicating or trivializing their history and aspirations”.<sup>241</sup> Hall's conception of identity not as an essence but as a positioning means that there is always a politics of identity, an on-going debate on relative positionings.

Hall's experience of an Afro-Caribbean identity, in which he grew up in Jamaica but has lived his adult life in the UK, has led him to redefine our understanding of diasporic identity in way that emphasises a necessary diversity. Using the French Caribbean as an example, Hall suggests that while there exist profound differences between, say, Martinique and Jamaica, in which the boundaries of difference are continually repositioned in relation to different points of reference, in relation to the developed world, they occupy the same position on the periphery, and yet stand differently in comparison to that Other, having negotiated their economic, cultural and political independence differently. Yet, in relation to other peoples of Latin America, they are, however, fellow islanders with a very similar history. Hall uses the word ‘diaspora’ in relation to people of the Caribbean, but he uses it metaphorically rather than as the traditional reference to a scattered group longing for return to a sacred homeland. This customary definition he sees as the imperialising, homogenising belief in ethnicity. Instead he defines the diasporic experience as one marked by the recognition of a necessary heterogeneity and diversity of experience, defined by hybridity – an understanding of identity that exists through, rather than in despite of, difference. While Hall understands this to be the hallmark of a diasporic identity such as his own, it is perhaps also a way in which to understand all cultural identities in multicultural societies. British culture, as any other, is constantly being produced and reproduced, absorbing difference and undergoing repeated transformations as a

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<sup>241</sup> Hancock, ‘The Eastern European Roots of Romani Nationalism’, 6.

consequence.<sup>242</sup> The complexity of commonality of feeling that exists for Hall in his identity as a British Afro-Caribbean is helpful in attempting to understand the relationship between the different sub-groups categorised under the generic heading ‘Roma’.

### 3.3.3. Řomanipé as a source of pan-Romani identity

Those who seek to question the existence of Roma as a meta-group capable of providing any meaningful focus of identification are arguably correct to suggest that there is at present no strong sense of unity among Roma and that very few are active in the politics of the Romani movement. It would not perhaps be an exaggeration to suggest that few are even aware of the Movement or the leaders at the international level that claim to act in their name.<sup>243</sup> The use to which linguistic evidence has been put in attempting to determine the ethnic and social backgrounds of the outcasts lends credence to those who see the quest to reveal the origins of Roma as being at heart a nation-building exercise. However it would be wrong to over-play this. There is also much that the different Romani groups share and hold in common. It is equally as arguable that Roma do largely share common cultural traditions, a common history – at least as common as that the Jews share, for example –, and perhaps most importantly a common language. It can be argued that even where considerable numbers have been forcefully divorced from the Romani language, the cultural conventions which underpin language remain, so that where two groups of Roma require translation they are arguably speaking the same language.<sup>244</sup> This is true even for Romani groups as far separated as South America and Africa are from Europe, for some degree of a common bond does seemingly exist.<sup>245</sup>

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<sup>242</sup> John Arlidge has suggested that the ability of modern British identity to absorb and adapt has itself become part of that identity – an idea presented in the assertion that youth culture in Britain is ethnically ambiguous. See ‘Forget black, forget white. EA is what’s hot’, *The Observer*, 4 January 2004.

<sup>243</sup> Misgivings about the so-called Romani movement ('the Gypsy industry') are presented by Ian Hancock, a Romanichil and former IRU representative to the UN, in his contribution to ‘The Romani movement: what shape, what direction?’, (2001) 4 *Roma Rights* 18. Hancock’s attitude is perhaps surprising in light of all that he has done to shine light upon the historical and linguistic origins of Roma as a common people.

<sup>244</sup> J. Tully, *Strange Multiplicity*. Cambridge: Cambridge University Press, 1995. Moreover, Roma are not the only group for whom division is a problem; the Kurdish people do not share a common language, do not belong to a single ethnic group and are riven with internal quarrels and ancient rivalries. Yet there are arguably few who would suggest that the Kurds are not a nation.

<sup>245</sup> These assertions are largely based on the author’s own experience watching different Romani groups from all over the world interact and work together at Durban, and her conversations with

This common bond is perhaps best summed up by Hancock's observation that while, "[m]embers of one group might deride members of another group as not being real 'Gypsies', and when pressed will say it is because 'they are not like us'... when asked whether they are Gypsies or *gadžé* they will say they are Gypsies."<sup>246</sup> Hancock's claim is not that Roma share a sense of being a single people but that the fundamental nature of Romani identity is the division of the world into Roma and *gadžé* and that from this flows the related notion of *řomanipé* ('Romani-ness'). While few groups have retained the strict tenets of ritual purity, non-Roma and non-Romani behaviour are nonetheless, according to Hancock, considered as threatening to *řomanipé* and thus to be avoided.<sup>247</sup> Romani children are taught about the non-sanitary and poor behaviour of *gadžé* and *gadžé* culture; for example, in Romanes the words for man, woman and child differ according to whether the reference is to Roma or *gadžé* and spending too much time with non-Roma is considered a harm that can only be rectified by spending time with other Roma. Thus, it is not crucial which features the various groups purportedly share, but what all are not. Hancock concludes that "*řomanipé* may be seen as the Gypsies' transportable homeland."<sup>248</sup> One member of the Romani leadership has similarly described the nature of Romani identity, as "a diaspora living somewhere in the air."<sup>249</sup>

Yaron Matras has noted that while the system of terms for 'nations' is of mixed origin in Romani and although the term exists in opposition to what is non-*Rom*, it is nonetheless widespread as a 'cover- ethnonym', with group-specific ascriptions following geographical, religious or occupational specificities.<sup>250</sup> On this linguistic basis, he notes that Romani self-ascription may be layered. It is suggested that this is the key to addressing Romani identity, as it arguably is for the identity of any

Romani colleagues there, and are no more scientific than that. They are, however, impressions shared by others.

<sup>246</sup> Hancock, 'The Eastern European Roots of Romani Nationalism', 5.

<sup>247</sup> A good comparison would be with non-Orthodox or lapsed Jews. Simply because they have failed to maintain or have no desire to maintain the strict practices of Orthodoxy does not of course entail that such people cease to be Jews or have more in common with gentiles than with their fellow (orthodox) Jews.

<sup>248</sup> Hancock, 'The Eastern European Roots of Romani Nationalism', 6.

<sup>249</sup> Ondřej Giňa, cited in Jenne, 'The Roma of Central and Eastern Europe: Constructing a Stateless Nation' in Jonathan Stein (ed.), *The Politics of National Minority Participation in Post-Communist Europe*. NY: M.E. Sharpe, 2000, 205.

<sup>250</sup> Matras, *Romani: A Linguistic Introduction*, 26.

individual. The fact that a person may belong to the Hungarian-speaking *Rumungri*, while simultaneously identifying with the Hungarian state, does not prevent the development of a sense of belonging to a wider group such as one encompassed by the term ‘Roma’.<sup>251</sup> Indeed, Marushakova and Popov, despite their condemnation of attempts to suggest a unity amongst Roma, nonetheless define Roma as an “intergroup ethnic community”.<sup>252</sup> Courthiade has suggested that authorities have a tendency not simply to over-emphasise the differences between Romani sub-groups – which he suggests is “radically contrary to the Rromani tradition” – but that it forms part of a deliberate political strategy; thus, the differentiation by those in power between old-settlers and newcomers, for example, the distinction made between *Magyar Cigány* and *Oláh Cigány* in Hungary.<sup>253</sup> On the basis of his research, Courthiade has concluded that, “[t]he various groups and sub-group identities make up indeed a cultural wealth, but they should not be exaggerated at the expense of the feeling of Rromani commonality”. In accepting Hall’s definition of a diasporic identity as defined by hybridity, it is possible to conceive of a Romani identity that derives its strength precisely from its heterogeneity in its difference from the out-group, *gadžé*.

Willems has argued that the primordial standpoint dominates Romani studies. Criticisms of the diasporic thesis seems to be reducible to a rejection of the belief that Romani ethnic identity is “an uncontested given”, in the words of Willems. Indeed, it has been argued by a number of competent commentators that the term ‘Roma’ is itself intimately connected to the cause of political mobilisation; the use of the term thus cannot be neutral and is necessarily bound up with the question of historic origins and the existence of the group as a distinct ethnic entity.<sup>254</sup> However, to accept the existence of Romani identity does not require acceptance of a primordial perspective that sees Romani identity as forged for all time in a migration across the Asian and European landmass. Moreover, both the Okely and the Willems/ Lucassen critique appear to gain much of their steam from the rejection of and indignation at the

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<sup>251</sup> This is especially true if one thinks of the ability of different groups to identify with a state, or of the implicit belief that membership of the human race is normative rather than the purely biological embedded in western culture and global diplomatic-speak.

<sup>252</sup> Marushakova and Popov, ‘Historical and ethnographic background: Gypsies, Roma and Sinti’ in W. Guy (ed.), *Between Past and Future*, 33.

<sup>253</sup> Courthiade, ‘The Rromane Endaja’,

<sup>254</sup> Peter Vermeersch, ‘Roma and the politics of ethnicity in Central Europe, 6. Klimová has made a similar point, as have Marushakova and Popov.

concept of the ‘true Gypsy’. One can, however, also reject the notion of the ‘true Gypsy’ as a product of its time, that of romantic nationalism, and as inherently false, without needing to accept that Romani identity is solely an imposition by others upon random itinerants. All identity is forged and the reasons for that forging is not the most important factor if the people concerned take the identity unto themselves. Further, the claim that the primordial standpoint dominates claims of Romani identity is arguably belied by belief in the concept of *řomanipé* as the defining aspect of identity, which is neither a biological nor an historical given. It refers rather to a strong cultural bond, and delineates a community of shared meaning. In this context, whether one can ‘prove’ a shared ethnicity on the basis of an historical diaspora or whether blood underlies a national claim is irrelevant.

It should be noted that the work of Willems and Lucassen is historical in nature and thus the role of Roma themselves in fostering a Romani identity necessarily remains outside the scope of their consideration, the Romani perspective being almost totally absent from the historical sources. Even where one accepts the Willems/ Lucassen thesis that Romani identity was formed to a large extent by external categorisation – so that the term ‘Roma’ is in a sense a negative identity tool – it does not make it any less powerful.<sup>255</sup> Indeed, the historical evidence they present suggests that sustained categorisation over time can generate strong ethnic group feelings. If persecution forged the Roma, they then are no different from many former colonial identities, which owe their existence to the drawing of a border on a map by a civil servant sitting in London or Paris.

It is clear that there is no cut-and-dry way, no unproblematic means, of defining Romani identity. Yet this is true of ethnic identities in general; attempting to define what it means to be English, for example, has become almost a full-scale industry in the last few years if the number of works produced on the subject is anything to go by.<sup>256</sup> Similarly, there is little sense of unity among English people and while we may not be divided along such seemingly clear-cut lines as ethnographers have suggested

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<sup>255</sup> Acton’s understanding of Romani identity, for example, is precisely as one generated by the perception of outsiders that the various groups constitute a unity of sorts. Acton, *Authenticity, Expertise, Scholarship and Politics: Conflicting Goals in Romani Studies*. Inaugural Lecture. Greenwich University Press, 1998, 11.

<sup>256</sup> For example, Jeremy Paxman, *The English*. London: Penguin, 1999.

is the case for Roma, fundamental divisions exist between north and south, urban and rural, between classes or different political affiliations, to say nothing of the multinational/ multicultural mosaic that exists across Britain as a whole. Even those institutions – the monarchy, Parliament, the English football team – that traditionally formed a focal point of identity equally form an axis of division. The point is that, although it is of importance to be aware of the cultural variations among groups that designate themselves or are designated by others as Roma, there cannot help but be a whiff of something unpleasant in an overdue emphasis on such differences.<sup>257</sup> As all ethnicities are created and identities forged, there is nothing natural about ours and nothing unnatural about any current attempts to suggest or justify a common feeling among Roma. Hall's understanding of identity as a positioning reveals the nonsense that is the criticism of those that accuse the Romani movement of seeking to construct a Romani identity from the myth of Indian origins; all identities have such a relationship with their past.<sup>258</sup> Thus, where Roma claim an Indic past, the Indian authorities acknowledge their Indian roots and the 'fact' of Indian origins is increasingly accepted in the international community, wherefore should such an identity claim be negated for lack of historical evidence?

It is interesting that despite criticisms over the question of whether Roma should be understood as a homeland-less diasporic group, the majority accept the definition of Roma as an ethnic group; those such as Stewart appear very much to be in the minority. The constructed nature of ethnicity ensures that the appellation is of course meaningless in itself; its significance lies in the heavy weight accorded those feelings of identity and belonging that are deemed to be 'ethnic'. Vermeersch has suggested viewing Roma as "a category" and not "as an entity in reality". Romani identity thus becomes "not a matter of biology, lifestyle, descent, or any other 'characteristic'; but rather, the product of classification struggles involving both classifiers and those

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<sup>257</sup> The uneasiness that attaches to any questioning of the existence of Romani identity is related in part to the fact that it has systematically been considered of lesser worth than other identities. For example, in the socialist states, the Marxist-Leninist theory of the hierarchical development of society, from tribe to nationality, to nation, saw Roma deemed too primitive to be considered even a nationality. They were thus denied the rights of minorities recognised as nations or nationalities.

<sup>258</sup> The British relationship to the events, perceived experiences and victories of World War II arguably present a classic modern example of the dialogue between the past and the endless process of becoming of current identity. Modern British culture is steeped in direct and more subtle references to the perceived nobleness of British conduct during the Second World War.

classified".<sup>259</sup> The emphasis on a classification perspective allows one to remain sensitive to the fact that the same group of people are often identified differently by different observers and by themselves, a particular concern with the wealth of plurality associated with the heading 'Roma'. Yet while there may be something deeply unsatisfying for liberal cosmopolitan academics about ethnic claims, it is a powerful language to appropriate in terms of recognition claims and, moreover, is simply a way of saying that there are crucial differences in the socialisation process between groups. If individual Roma feel different from those around them, sufficiently different that the majority culture is effectively alien to them, whether that is expressed in terms of ethnicity or culture – putting questions of essentialism to one side – appears semantic.<sup>260</sup>

Moreover, there is a suggestion that Romani communities – those who have never heard of the IRU or the ERRC, for example – have taken unto themselves the thesis of Indian origins. Marushiaikova and Popov in their research into the process of myth creation among Romani communities in the Balkans, typical apparently of 'historical neo-mythologising' in the region, have concluded that the 'Indian thesis' has achieved widespread penetration in Romani folklore, beginning gradually in the early twentieth century, picking up speed with the advancement of the international Romani movement in the 1970s and finally reaching near saturation following the changes in 1989 that allowed for western publications to circulate freely.<sup>261</sup> The seminal work by Donald Kenrick, *From India to the Mediterranean*, first appeared in a Bulgarian translation in 1998, for example, and has already inspired Romani poets to create myths and legends based upon its historical narrative. Thus, whether or not the belief that there exists a group, ethnically-bound, that can be traced by means of language to an Indian beginning is acceptable to academics becomes, quite literally, academic. The ancient legends of the founding of England were highly instrumental in forging an English nation anew out of the divide between the Norman invaders and the native

<sup>259</sup> Vermeersch, 'Roma and the politics of ethnicity in Central Europe', 14.

<sup>260</sup> Cf. Stewart, who suggests that achieving acceptance of the label 'ethnic' rather than 'social' risks supporting the rightist assertion that cultures are closed and internally coherent systems. Stewart, 'Communist Roma Policy 1945-1989 as seen through the Hungarian Case' in Guy (ed.), *Between Past and Future*.

<sup>261</sup> Marushiaikova and Popov, 'Myth as Process', 81-2, 87. One legend heard by Marushiaikova and Popov concerns a chief Berko who fought in India before bringing his army westwards to new lands and established the town Berkovitsa, in north-west Bulgaria. It is worth noting that the legends remain very much influenced by the surrounding majority culture, despite the adoption of Indian ancestry.

population but no-one would suggest today, for example, that there is any historical evidence to substantiate them.<sup>262</sup> It was not the historical truth of these legends that mattered but that people believed them. Similarly, it has been reported that photocopies, in varying degrees of completeness, of the seminal study of Romani Law by Weyrauch and Bell in 1997 in the *Yale Law Journal* have been circulating widely among European Romani intellectuals.<sup>263</sup>

In terms of assessing the strength of pan-Romani identity, the geographical scope of the Movement is a reminder that although participation may not be deep it is certainly broad. The IRU's website for example claims representative affiliation from organisations in 33 member and 19 candidate countries.<sup>264</sup> The fact, for example, that there are groups in Latin America and Africa asserting their Romani identity – a pan-American Romani congress is being planned as of late 2005 – and that they are claiming affinity with Roma in Europe and the rest of the world, as suggested by calls to hold the next World Congress in Mexico, would suggest that those removed from Europe in the sixteenth and seventeenth century managed to establish themselves there as distinct and passed this distinctness onto their descendants.<sup>265</sup> While there is a continuing debate within the Movement as to whether Romani identity is primarily

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<sup>262</sup> Anthony Goodman, 'God's Own People: The English and their Neighbours in the Middle Ages', Inaugural Lecture, University of Edinburgh, 1994 (on file with author). It is interesting that the notion of the Roma as God's Chosen people can apparently be found throughout the Balkans today, suggesting perhaps that Romani nation-building is following the same path as the English and French before it. (Details in Marushiaikova and Popov, 'Myth in Process', 92).

<sup>263</sup> T. Acton, S. Caffrey and G. Mundy, 'Theorising Gypsy Law' (1997) 45 *American Journal of Comparative Law* 237, 237.

<sup>264</sup> The list Klímová provides of affiliated countries is as follows: Albania, Austria, Belgium, Belorussia, Bosnia Herzegovina, Bulgaria, Canada, Czech Republic, Denmark, Estonia, Finland, Germany, Ireland, Israel, Italy, Kosovo, Latvia, Lithuania, Macedonia, Mexico, Moldova, the Netherlands, Norway, Poland, Romania, Russia, Slovakia, Slovenia, Sweden, Switzerland, the United Kingdom, Ukraine and Yugoslavia. The candidate countries are: Argentina, Bangladesh, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Egypt, Greece, Hungary, Iran, Lebanon, New Zealand, Portugal, Spain, Syria, United Arab Emirates and Venezuela. Klímová cites the IRU website as her source, but the present author has been unable to locate a website for the IRU using the reference Klímová provides, nor using 'Google'. It appears that the IRU have been off-line for more than a year. Klímová notes that previous long-term members have been excluded – most notably India, the US and Australia – and others, particularly two with large Romani populations – Hungary and Spain – have been relegated to candidate members; this is probably connected to the fact that they were not represented in Prague at the Fifth Congress. Klímová, 'The Romani Voice in World Politics', (unpublished PhD thesis, University of Cambridge, 2003), 65. The extent to which there are active associations outside Europe is worthy of comment; see the list of associations available at Patrin (updated last in 2002 only): <http://www.geocities.com/~patrin/orgs.htm>.

<sup>265</sup> The persistent assertion of Romani identity is particularly noteworthy in the countries of Latin America, where claiming indigenous status would appear to be much more rewarding at the present time. Hancock, *We are the Romani people*, 26-28.

European or Asian<sup>266</sup>, it is arguably a non-debate; they can be and are both, and the extent to which they are one or the other will depend upon the context.

Acknowledging a form of pan- Romani identity does not require accepting that *řomanipé* forms the only horizon of significance, nor that for the majority of Roma the matter of identity is secondary to the pragmatic concerns of basic subsistence on a day-to-day basis. Support for a claim to recognition arguably requires only that it constitutes a significant horizon of significance; understanding the basis of Romani identity as the fundamental distinction between Roma and *gadžé* entails that wherever such individuals are confronted by *gadžé*, their self- identification as Roma comes to the fore.

It should however be stressed that this work is not concerned with showing that a ‘sufficient’ sense of pan-Romani identity exists in order to give merit to the claim to non-territorial nationhood. Legitimacy, as shall be discussed, is of course of vital importance, and legitimacy is to a large degree premised upon the strength of identity among a group, but identity is not necessarily linked to ethnicity. Further, a claim to recognition is not possessed of an all-or-nothing nature, and even were one to accept that those making this particular claim have failed to build sufficient legitimacy among those identifying or identified as Roma, it would not be a reason to fail to take Romani claims seriously. Claims are only ever more or less successful and where one would place the Romani claim on such a continuum at present is arguably less interesting than the nature of the claim itself. The next section considers a theoretical framing of the claim.

### **3.4. The Romani Movement as Identity- Building: a short riposte**

There is something distasteful about the manner in which the debate concerning Romani identity is often conducted and it is worth a short response.<sup>267</sup> For example,

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<sup>266</sup> A. Mirga and N. Gheorghe, *The Roma in the Twenty-First Century: A Policy Paper*. Princeton: PER, 1997; at [http://www.per-usa.org/21st\\_c.htm](http://www.per-usa.org/21st_c.htm) Also Hancock, ‘The Struggle for Control of Identity’. While noting that Roma are as European as any other group, Hancock emphasises the global diasporic and the increasing levels of contact between trans-continental groups via the internet (79).

<sup>267</sup> This author has been struck by the vitriolic exchanges in the pages of *Nationalities Papers* (a selection were printed in Vol. XXI (2), Fall 1993) sparked by the Hancock article referred to throughout this section.

Okely notes caustically that the claims of ‘Romani’ nationalism, at least as heard in Great Britain, were actually articulated by non-Romani activists who have nonetheless assumed a leadership role in the Romani movement. She continues in a mocking tone that Macedonia was the destination being muted for the realisation of Romanstan and comments that, “[g]iven the relative silence on the subject among the mass of Gypsies, this was in effect the ethnocentric imposition of a sedentary model upon a traditionally nomadic people.”<sup>268</sup> She suggests too that the symbolism of flags and national anthems were equally an imposition by Giogios (the Romanichil dialect for *gadžē*), and that Gypsies themselves rarely responded to them. The move she sees from nationalism to ethnicity and human rights is a product of the changed climate in the late 1980s and since, and is one in which the thesis of Indian origins continues to have, in her words, ‘political mileage’. For Okely, “[i]ndigenous, European ancestry is not seen as a politically useful route to recognition”.<sup>269</sup>

While the academics accuse the activists of allowing passion to blind reason, they themselves seem no less absolute in the certainty of their opinions, applying liberal doses of sarcasm to their discussions of others’ work; the nature of Okely’s comments on the role of non-Roma in promoting the Romani cause and the almost gleeful insensitivity of Willems and Lucassen in discussing the role of the Nazis in fostering a sense of identity serve as good examples. Similarly, Cohn is not satisfied with questioning the academic skills of those who support what to him can only be the myth of Romani nationalism but assigns bad faith motives to their efforts, labelling them the ‘Boasters’, the ‘Scribblers’ and the ‘Promoters’.<sup>270</sup> In this vein, Jenne comments that “Romani activists often appear less concerned with ‘authenticity’ regarding the actual nature of their present identity than they are with constructing an identity that is the most useful in formulating and advancing collective interests.”<sup>271</sup> What such academics appear to be asking for is a recognition of doubt in placing the origins of identity, but the academic niceties of openness to contrary opinion is hardly the manner in which identities are born.<sup>272</sup> The perspective of these writers is one that

<sup>268</sup> Okely, ‘Consequences of theories of Gypsy ethnicity’, 230

<sup>269</sup> Okely, *ibid.*

<sup>270</sup> Cohn, ‘Letter to the Editor’.

<sup>271</sup> Jenne, ‘The Roma of Central and Eastern Europe: Constructing a Stateless Nation’, 205.

<sup>272</sup> As Walzer writes, “Nationalism is a burden for people whose nation-state is, so to speak, already achieved” and the ability to entertain ‘revisionist’ accounts belongs to identities secure in themselves – for all their doubt as to what it entails, the English identity, for example, has established itself. Romani

juxtaposes an objective rational academic view with the passion of the activists. Jirí Lipa, for example, has accused Hancock's article of being "calculated to appeal to emotion rather than to logic".<sup>273</sup> They appear horrified that 'the historical' and 'the political' have been mixed; "historical knowledge (or lack of it) and political aims have inevitably become intertwined by the leaders of these parties and social movements."<sup>274</sup> Yet such a perspective is clearly nonsensical. That, as Hancock has stated, "[p]art of devaluing a people entails eradicating or trivializing their history and aspirations", should not prevent consideration of Romani history and identity-formation by both Roma and non-Roma, but it should nonetheless guide it.

If myths of Indian origin, if indeed they are myths, are useful in gaining recognition, protection and autonomy, whether because they build positive feelings of identification as Roma among Romani communities or because of *gadžé* desires to exorcise the Other, it would be odd to decry the Romani leadership for supporting them. Indeed, as Karl Deutsch noted, a nation is "a group of people united by a common dislike of their neighbours and a common misperception about their ethnic origins", albeit that in the Romani case of course, it is rather a common dislike shared by their neighbours.<sup>275</sup> Moreover, as Hall's work suggests, all identities involve positionings and for post-oppression groups in particular a reclaiming of their identities is a necessity. Thus that the Romani Movement, in its broadest sense, is clearly in a process of reclaiming Romani identity via the creation or re-telling of positioning narratives is neither surprising nor deserving of the vitriol it has attracted.

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identity is at the early stage of its journey and, as such, cannot be expected to confront historical 'truths'. Walzer, 'History and National Liberation', 4.

<sup>273</sup> J. Lipa, 'Letters to the Editor', *Nationalities Papers*, Fall 1993, Vol. XXI, No. 2, 269-272.

<sup>274</sup> Willems and Lucassen, 'Gypsies in the Diaspora?', 6.

<sup>275</sup> Quoted in Bart Driessen, *A Concept of Nation in International Law*. The Hague: T.M.C. Asser Instituut, 1992, 9.

## **Section 2**

## Chapter 4: Recognition: Theories and Practice

It is through the fictions and stories that we tell ourselves and others that we live the life.<sup>276</sup>

No man is an island, entire of itself.<sup>277</sup>

It has been asserted that the Romani claim to nationhood is first and foremost a claim to recognition. If this is the case, the Roma find themselves in good company; the politics of recognition dominate current considerations of inclusive political participation. A deluge of claims sits alongside a normative shift in political theory. The demands for inclusion by groups as diverse as anti-colonial movements, feminists, gay rights groups, and all manner of those designated national, ethnic or cultural minorities have changed the way in which we conceive of social justice. The emphasis is arguably no longer on economic and material redistribution; although such demands have not disappeared, they have become subsumed in a more profound claim for societal equality based upon recognition of and respect for difference. Rousseau-type conceptions of the body politic have been sidelined as recognition theorists return to the *polis* of ancient Greece and Kantian respect is eschewed in favour of Hegelian-based recognition.

While it has long been appreciated that the approval of one's fellow man has been a driving force of history – concepts of courage and honour are arguably as old as records of man's interaction with one another – what is understood by honour has changed over the centuries. In ancient times, honour related to the worth of the individual and was judged according to one's deeds; one thinks of the willingness to face down impossible odds and die in the so doing typified by the great warrior heroes such as Achilles or Coriolanus. In the Middle Ages, honour was related to birth rather than character or deeds. However, the concept of recognition as it is used today in the political theory or legal literature bears little resemblance to such notions of honour. The medieval world in which one's place was a given<sup>278</sup> has been replaced by the belief, at least in the western world, that who one is is determined less by a rigid

<sup>276</sup> Ben Okri, 'The Joys of Story-Telling' in *Birds of Heaven*. London: Phoenix, 1997.

<sup>277</sup> John Donne, Meditation XVII, *Devotions upon Emergent Occasions* (1624). (Ed. Andrew Motion, Great Britain: Vintage Press, 1999).

<sup>278</sup> Charles Taylor, 'The Politics of Recognition' in A. Gutmann (ed.), *Multiculturalism: examining the politics of recognition*. New Jersey: Princeton University Press, 1992. Although this should not be overstated, as Taylor has a tendency to do. There were always those that bucked the trend.

social structure or the glory-based heroism of Homer than by the cultural groups to which we belong and what we chose to do with that inheritance. Recognition, as the term is used in contemporary thinking, fundamentally concerns identity and is thus more than our standing in the eyes of others; it is rather the means by which we know who we are and who others are in relation to us.

The aim of the first part of this chapter is to consider what recognition is and why it matters. The second part will consider what a claim to recognition implies and examine recent attempts to theorise a politics of recognition. The suggestion will be that recognition is so crucial because of its relationship to the autonomy of the individual. This relationship exists on two levels: the first is that of the psychological, and the role recognition plays in the development of the self; the second that of the political, and the ability to participate in determining the rules that govern us. The two parts of the chapter correspond to the psychological and political aspects of recognition.

#### **4.1. Recognition and the Situating of the Self**

It has long been accepted that identity is not as uncomplicated or transparent as once thought; it is, rather, deeply complex and multi-tiered. Indeed, there are as many theories of identity as theorists. Identity has filtered across the disciplines throughout the social sciences and humanities and through into the vernacular, filling the space vacated by the great meta-narratives. Identity talk is everywhere.<sup>279</sup> However, while one of the strongest characteristics of modernity is the rise in awareness of ourselves principally as individuals and the related failure to connect to a wider context<sup>280</sup>, the understanding of our ‘selves’ as ultimately social, with our identities intimately and necessarily bound up with the communities and cultures in which we live, has begun to take on the mantle of received opinion.<sup>281</sup> The Cartesian thinking self, who inhabits his own personal realm and is formed both prior to and independent of

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<sup>279</sup> Brubaker and Cooper, ‘Beyond “identity”’ (2000) 29 *Theory and Society* 1.

<sup>280</sup> The inability to connect to moral horizons wider than ourselves is identified by Taylor as one of the three malaises of modernity. Taylor, *The Ethics of Authenticity*. Cambridge Ma.: Harvard University Press, 1992.

<sup>281</sup> David Bakhurst and Christine Sytnowich (eds.), *The Social Self*. London: Sage, 1995.

interaction with others and that for so long dominated philosophical enquiry, has arguably been decapitated in favour of the situated self.

An understanding that the self is necessarily formed in interaction with others was developed by Hegel in the context of the post-Kantian acceptance of subjectivity. Hegel's account of recognition is concerned with situating the individual in the world – what Honneth has recently referred to as pre-cognitive recognition – and gives the concept much of its moral force. Recognition in its contemporary usage appears to owe its conceptualisation almost entirely to Hegel and what follows is a necessarily simplistic and limited rendering of Hegelian recognition theory.<sup>282</sup>

#### **4.1.1. The Hegelian Dialectic and the Path to Freedom**

Recognition for Hegel is central to his conception of ethics and for the attainment of ethical life; as such, the concept is his most important and appears throughout his works. This latter point is important in redressing the negative account of Hegelian recognition taken by scholars from the *Phemonology of Spirit*, which represents the most explicit rendering of the concept. The *Phemonology* is an introduction to Hegel's system of philosophy and takes a sceptical approach to the forms of consciousness; the emphasis is on negativity and self-subversion and recognition is accordingly presented in terms of struggle and domination. It is the failure to achieve recognition that is emphasised. However, in the works grouped together in the *Encyclopaedia*, a more positive account of the necessary process of recognition is discernable. What follows is a general consideration of recognition in the *Phemonology* in the light of Hegel's other writings.

Building on the work of Fichte and Schelling, Hegel conceives of subjectivity as inter-subjectivity. Hegel's self is a restless, driven, negative identity that transcends itself through the desire for the other to the point that the other is no longer external to the self but mediates the relation of the self to itself. The dialectical process that consciousness undergoes in the course of the *Phemonology* is one of realisation that

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<sup>282</sup> This section relies heavily upon Robert R. Williams, *Hegel's Ethics of Recognition*. Berkeley: University of California Press, 1997; but also, Terry Pinkard, *Hegel's Phenomenology. The Sociality of Reason*. Cambridge: Cambridge University Press, 1996; Paul Franco, *Hegel's Philosophy of Freedom*. Yale: Yale University Press, 1999; Allen Wood, *Hegel's Ethical Thought*. Cambridge: Cambridge University Press, 1990.

its knowledge does not correspond to any reality outside of itself, independent of itself, but is something to which it is related. Thus where the mark of ‘consciousness’ is the presumption that our experiences are the result of forces external to us, what is learnt in the dialectic of consciousness is that “consciousness of anything presupposes some sort of active self-relation to it, that ‘consciousness’ is always a form of ‘self-consciousness’”.<sup>283</sup> The general form of dialectic progression begins with a form of reflective life (the will) considering certain beliefs and actions to be authoritative reasons; this reasoning generates within itself sceptical objections (generating its own ‘negation’) so that the ‘will’ is unable to reassure itself that the reasoning that it takes to be authoritative is in fact so. Such scepticism leads to a transition and the new form of reflective life takes its current reasoning to have been necessary to resolve the previous issues that were self-undermining, which in turns generates its own scepticism and the progression continues. This compulsion is internally-generated.

While this dialectic of scepticism leads to self-consciousness, self-consciousness is not full selfhood. Hegel characterises self-consciousness simply as ‘desire’, so that where ‘consciousness’ sought truth in the world external to it, self-consciousness in the form of desire seeks certainty of itself by negating all otherness. However, self-consciousness’ desire cannot be sated by mere objects; such satisfaction is but fleeting. It is in the endless pursuit of satisfaction that self-consciousness becomes aware of the independence of the object and that, crucially, such independence means it can achieve satisfaction only when the object affects the negation itself. The only object that can effect such a transformation is another self-consciousness and thus it is only in being recognised by another self-consciousness that it can achieve the self-certainty it so desperately desires. The two self-consciousnesses encounter each other seeking recognition of their existence.

Recognition can, however, fail and the famous example of the failure to overcome desire and achieve recognition is that of the master and servant in the *Phemonology*. In the *Phenomology*, as is well-known, the encounter of the one with the other results in a life-and-death struggle between them, stemming from the understanding of both that satisfaction of their desire can only be sated through negation of the other; each

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<sup>283</sup> Franco, *Hegel’s Philosophy of Freedom*, 88

thus risks his own life in seeking to negate, i.e. kill, the other. One outcome of this struggle is that one or both parties is killed, but where they both survive, it is because one prefers servitude to death and the resulting relationship is thus one of subordination – that of the master and the servant – in which one receives recognition from the other, without granting reciprocal recognition in return. Such recognition is, however, famously flawed, for the recognition the servant can offer is ultimately worthless. Only another self-consciousness of equal stature can provide the self-certainty that the one is seeking and the master's victory is thus a pyrrhic one.

However, although recognition is the encounter between two self-repulsing negative selves, it does not entail that the relation to the other is inherently negative.<sup>284</sup> Hegel provides additional modes of recognition which do not generate opposition or where such opposition is transcended, such as in the constitution of family relationships or in the affirming recognition that exists in forgiveness. Whilst it is desire that drives the self towards the other, the shock of the initial encounter must be transformed from a desire to conquer the other to desire for the other if genuine recognition is to occur.

Recognition of the self is thus a state of mediated self-identity, in which knowledge of the self thus must pass through the other; in the famous terminology, the self is only for itself by being for another and is only for another by being for itself. The self is subject in that it recognises the other and object in that it is recognised by the other. A self cannot be in isolation; nor is there another path to oneself accept through the inter-subjective mediation of another.<sup>285</sup> Recognition is thus a process of mutual

<sup>284</sup> Williams has persuasively argued that the fixation in Hegelian recognition on the *necessity* of recognition as a struggle resulting in the oppression of one by the other is a result of a flawed interpretation in the hugely influential account of Alexander Kojève in the first half of the twentieth century. He counters that recognition is a general concept of intersubjectivity in Hegel's thought, in which the master-slave dialectic does not exhaust the possibilities for recognition. The background of the *Phemonology* as a state of nature in which individuals confront one another without the mediation of social institutions is one explanation for the struggle that results; the search for recognition entails a great risk and is yet necessary, resulting in the attempt of each to dominate the other. But there is no suggestion that where background conditions are more civilised that the process of recognition must pass through a stage of struggle or of domination. Williams, *Hegel's Ethics of Recognition*, 10-13, 60, 67.

<sup>285</sup> In the account of the master and the servant, the servant 'comes to' himself/ herself not though the process of inter-subjectively mediated recognition but through self-sacrifice and labour. The emphasis placed by influential interpretations of the *Phemonology* on the master-slave relationship distort Hegel's development of recognition in later works; while in the Jena works labour stands as an independent dialectic of relation, alongside symbolic representation and interaction, these were unified in the concept of an inter-subjective *Geist*, depriving labour of its independent role. According to

constitution, or, in Hegelian terms, a ‘doubling’ of self-consciousness. The mediating role each plays in reflecting back the self to itself means that both depend not only on their relationship with each other but on the relation of the other to itself i.e. the self-understanding of each. Neither can change without altering the self-conception of the other. Hegel’s doubling of consciousness has led to the criticism that recognition – in achieving a union – fails to respect difference, necessarily repressing it. However, Hegel follows Schelling in maintaining the ontological separation of subjects, so that intersubjectivity precludes direct access to or knowledge of the other. The two self-consciousnesses do not merge and form one, but maintain their distinctness – their ego – while only being able to know themselves through the confirmation and mediation of the other: the union – the concrete universality of the ‘We’ – is a differentiated one.<sup>286</sup>

The process of recognition must thus follow three stages: firstly, the initial encounter in which the self loses itself before the other through its inability to see anything but itself in the other; secondly, the attempt to cancel this loss, which can itself take two forms: either elimination or domination of the other, or an accommodation with the other. For Hegel, if the self is to ‘return’ to itself from its ‘othered’ state, it must abandon attempts at mastery and control and take the second of the two paths. This entails the third and final stage of recognition: releasing the other and allowing it to go free. The consequence of the process is that the negative self-repulsing aspect of desire is ‘decentered’ and ‘relativized’ by contact with the other and ‘enlarged’ and ‘legitimated’ by the other’s recognition.<sup>287</sup> The inter-subjectively mediated return to self is only possible with a mutual releasing of each other, of allowing the other to be, a state not of indifference but freedom through each other. According to Williams, “[g]enuine recognition ... involves the mutual mediation of freedom”.<sup>288</sup>

The accounts of recognition and freedom thus merge, so that the being at home in other (*bei sich im Anderen*) is not a limitation to one’s freedom but the actualisation of

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Habermas, labour was subsequently subordinated to recognition and the ability of the slave to self-liberate was re-written. Williams, *ibid.*, 66, citing Habermas.

<sup>286</sup> In Williams’ helpful phrasing, “the subjects remain independent in their identity, and are identical in their independence”, *ibid.*, 73. The union is thus not a fusion but a relationship, but necessarily a close one.

<sup>287</sup> Williams, *ibid.*, 56-7.

<sup>288</sup> Williams, *ibid.*, 10.

it: recognition becomes the practical realisation of freedom. Yet, freedom cannot be achieved through domination or violence. Recognition is thus paradoxically necessary, yet cannot be coerced. If coerced, it is inauthentic and cannot achieve its aim. It must be freely given by the other, who in turn must be allowed his/her freedom. Freedom in and through the other is not simply a question of allowing the other to be or of being open to the other, but also of affirming the other as they determine themselves to be. The releasing of the other also confirms both its identity and its difference in that identity.

Hegel's concept of freedom is a state not located within the self but realisable only in a relation in which being-for-other is being-for-self; so that freedom, like the self, is intersubjectively mediated and is knowable only in the setting of the social. While for Kant, union constituted a limitation on freedom, Hegel viewed autonomy as not only realisable but only knowable via co-existence in a community. Individuals are not prior to community but abstract from a larger social whole in which union and autonomy are not alternatives but are the necessary components of a comprehensive intersubjective concept of freedom.<sup>289</sup> Relation with the other is not to be conceived as a limitation on freedom but as the necessary condition of it; in Hegel's words, "since freedom consists in my identity with the other, I am truly free only when the other is also free and recognised as such by me."<sup>290</sup> Genuine freedom is thus a state of being at home with one's self in the other (*bei sich in anderen zu sein*). The relationship of freedom to recognition is such that what the self is searching for, according to Williams, is not recognition as such – i.e. recognition of the mere fact of one's existence – but the recognition of one's autonomy.

The Hegelian self, therefore, is one that is reflexively constituted and radically contingent upon the actions of others.

#### **4.1.2. The Social Self, Identity and the story that we tell ourselves**

Hegel's dialectic of recognition has received considerable support from psychologists. Self, in the discipline of psychology, is held to be acquired, an acquisition that ties the

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<sup>289</sup> Williams, *ibid.*, 80-1.

<sup>290</sup> Williams, *ibid.*, 82.

individual to those around it and makes them part of the self thus created.<sup>291</sup> Children become entangled in the webs of meaning into which they are born through the language they take on. They construct those meanings for themselves not simply by learning the name of an object or thing but by observing the way in which those around them act towards such objects; thus by absorbing the relationships between words and actions, and between the system of labelling things and the range of acts that are socially possible within that world. Each child is an object within this construction, so that each child learns the meaning of *their* self in the same way that they learn the meaning of any other object: it is found in the way that others act towards it.<sup>292</sup> Thus self-definitions are profoundly shaped by the world into which we are born; for some social psychologists, the group and the individual are inseparable, at least in terms of value assignation by the individual.<sup>293</sup> In the words of Habermas, one becomes “individualized only through a process of socialization”.<sup>294</sup> That individuals are ‘made’ through a complex process of socialisation is no longer shocking and Taylor has confidently suggested that the “fundamentally dialogical character” of human life is its most general feature.<sup>295</sup>

That the self is a social construction sustained within a social situation is not to suggest that its formation is not highly complex or that each self is not an active participant in the creation of his or her own self. Identity is not simply that which is created for us by others; like a ball of clay, it has its own ‘properties’ but is given form by others. While our personal identity is deliberately developed in contrast to our social identity – it defines what marks one as an individual off from the community, the sense of self one constructs over time – it is created in the context of

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<sup>291</sup> John P. Hewitt, *Self and Society. A Symbolic Interactionist Social Psychology*. Boston: Allyn and Bacon, 1997 (7<sup>th</sup> ed.).

<sup>292</sup> In the words of Hewitt, “Although individuals do develop defences against definitions they do not like, and although they acquire some degree of autonomy from others, people nevertheless generally mean to themselves what they mean to others, because they see themselves as others see them.” Hewitt, *ibid.*, 81. In reacting against the characters we are assigned as children, we reaffirm the importance of those early definitions.

<sup>293</sup> This is apparently true even of the individualistic societies of North America, Europe and the Antipodes. Dominic Abrams and Michael A. Hogg, ‘Collective Identity: Group Membership and Self-Conception’ in Hogg and Tindale (eds.), *Blackwell Handbook of Social Psychology: Group Processes*. Oxford: Blackwell, 2001.

<sup>294</sup> Habermas, ‘Struggles for Recognition in the Democratic Constitutional State’, in Gutmann (ed.), *Multiculturalism: examining the politics of recognition*, 113.

<sup>295</sup> Taylor, ‘The Politics of Recognition’, 33.



the web of meanings that mark our social world.<sup>296</sup> There is thus something inherently contradictory about an assertion of difference; by asserting our difference from others, we are necessarily acknowledging our interdependence on them. Yet culture is neither a given nor can it be said that we participate in it voluntarily. We do not simply adopt our culture wholesale but interact with it, within it, but it always defines the boundaries of possibility for us and therefore we can not eschew it or pick another one we like the look of better. We can learn languages and chose to live in any other country that will allow us to, but we cannot, it seems, ever throw off entirely the trappings of our native culture.<sup>297</sup>

The relationship of the self to identity is not, therefore, straightforward. Yet identity seems fundamental to any understanding of recognition. As any attempt to lay down a definitive explanation of identity is a hopeless task, given the complexity and multiple disciplines involved in the field, this section will simply attempt to give a simple indication of the way in which identity is understood here because it is important for the understanding of recognition developed.

In attempting to understand the relationship between self and identity, cognitive psychologists have identified narrative as the crucial link between identity and the self. According to cognitive psychologists, "both memory and self are constructed through specific forms of social interactions and/ or cultural framework that lead to the formation of an autobiographical narrative."<sup>298</sup> McAdams sees adolescence as the period in which individuals seek to integrate the disparate elements of their life – their roles, talents, natural tendencies, experiences, social involvement – both synchronically<sup>299</sup> and diachronically<sup>300</sup> into "a patterned configuration of thought and

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<sup>296</sup> Taylor, *The Ethics of Authenticity*.

<sup>297</sup> There are of course those that attempt to step beyond their national origins in terms of their lifestyle and imagination. See Jeremy Waldron, 'Minority Cultures and the Cosmopolitan Alternative' in Will Kymlicka (ed.), *The Rights of Minority Cultures*. Oxford: Oxford University Press, 1995. However, the bond between an individual and his or her culture, while not pre-determining, is an enormously powerful force which few choose to resist. This does not suggest that identity is not responsive to external forces of change; but wearing Italian shoes, American jeans, eating French food or learning Japanese does not constitute an abandoning of one's culture horizons. It is rather a re-defining of one's cultural understanding from within the boundaries of those horizons.

<sup>298</sup> Robyn Fivush and Catherine A. Haden, 'Autobiographical Memory, Narrative and Self', in Fivush and Haden (eds.), *Autobiographical Memory, Narrative and the Construction of a Narrative Self*. Mahwah, New Jersey: Lawrence Erlbaum Associates Publishers, 2003, vii.

<sup>299</sup> i.e. across role and relationship inconsistencies; e.g., talking to my colleagues depresses me but I feel happy when with my friends.

activity” that provides their life with a degree of “psychosocial unity and purpose”.<sup>301</sup> This is done by constructing a narrative from a series of self-defining stories which create “an internalized and evolving self” across both contemporaneous and temporal contradictions. We endow these stories with symbolism, integrative themes and personal meanings that make sense of us to ourselves as we look back at our past, consider the present and anticipate the future. This explanatory configuration is, according to McAdams, identity, and provides the individual with a specific niche for the self in the wider world.

While individuals may not have the tools to construct identity until adolescence, the process begins in childhood through parental guidance in the development of personal memory. Parents impart the narrative structures of their culture to the child which are the fabric from which they form their identity. While it may therefore seem that we can choose who we are by choosing which stories to rank as self-defining, the choice is not altogether free. The culturally-determined structure of a narrative, the way in which choices about which stories to select are situated within a social and historical context that make some choices more appropriate than others, better or worse than others, and that choices are constrained by the different options open to an individual by way of gender, social class, ethnicity, and so on, all entail that each individual’s construction of their narrative cannot be boundless. All cultures tell stories but what is understood to be a good story thus depends on the culture in which it is being told. Our story is inherently social.

If our identity is a story of ourselves that we tell and re-tell all our lives, identity cannot be conceived of as static; it is rather inherently dynamic, constantly shifting as new experiences and interactions continue to shape our personal narrative. The modern emphasis upon ‘individualized identity’, in the words of Taylor<sup>302</sup>, sees the self as a reflexive project that is very much work in progress.

The Arendtian conception of the human condition provides a similar understanding of identity. For Arendt, the answer to the question ‘who are you’, can only be answered

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<sup>300</sup> i.e. in time; e.g. I used to enjoy the company of others but now I am very antisocial.

<sup>301</sup> Dan P. McAdams, ‘Identity and the Life Story’, in Fivush and Haden, *Autobiographical Memory, Narrative and the Construction of a Narrative Self*, 188.

<sup>302</sup> Taylor, ‘The Politics of Recognition’, 28.

through speech and action<sup>303</sup>, for these are the modes in which men appear to one another *qua* men. It is in acting and speaking that we reveal our unique individual personality to the world. Famously, humans undergo a second natality as they enter the public realm; with word and deed we clothe the naked self that marked our first birth. Yet, for Arendt there is something *inadvertent* in the revelation of one's self. The 'who' that emerges from our words and deeds is hidden from the self doing the revealing. We must reveal ourselves anyway, for it is only through public disclosure and corresponding recognition that we achieve presence in the public realm, which for Arendt is the purpose of human existence. While we may not agree with Arendt that the purpose of human existence is life in the public realm, her claim that "nobody is the author or producer of his own life story" seems intuitive: the self is the hero, but *not* the author. The reason for this is that we are not the masters of our own actions, which is not to say that we are not responsible for our actions, but rather that action is by nature "boundless". Action acts upon others capable of their own actions, who react and thereby begin a new action. "[T]he smallest act in the most limited circumstances bears the seed of the same boundlessness, because one deed, and sometimes one word, suffices to change every constellation."<sup>304</sup>

However, it is not just for the actual self that the revelation is ungraspable. Arendt understands that the moment at which we attempt to pin down someone's identity or character through words, "his specific uniqueness escapes us".<sup>305</sup> She notes the impossibility of "solidify[ing] in words the living essence of the person as it shows itself in the flux of action and speech" while insisting upon the inevitability of disclosure in any action of men, no matter how worldly the task at hand.<sup>306</sup> No-one, it seems, can capture the essence of an individual. Arendt asserts that the full meaning of an individual life – the identity of the hero of a particular story – can only be understood at the end. Individual human essence thus only comes into being when life has departed, when there is nothing left but a story; famously, Arendt asserted that

<sup>303</sup> Action, for Arendt, (and speech is ultimately a form of action) consists of the exercise of freedom in the world, where the world is understood as a form of the ancient *polis*. Identity for Arendt is necessarily a public identity. Arendt, *The Human Condition*. New York: Doubleday Anchor, 1959.

<sup>304</sup> *Ibid.*, 170. This is arguably the theme of much of Greek literature, e.g., *Antigone*.

<sup>305</sup> *Ibid.*

<sup>306</sup> *Ibid.*, 161-3. "Every action must 'contain' the agent's identity somewhat in the sense that a bank check [sic.] must bear a valid signature for it to be recognized as such", in the words of Tsao. Roy Tsao, 'Arendt Against Athens' (2002) 30 *Political Theory* 97, 104.

only he who does not survive his great self-defining act can be the master of his own identity.<sup>307</sup> Thus while identity is a life-story with the self as hero, that identity is never knowable and the implication is that to attempt to grasp it, to fix identity, is to impose a form of death.

Recognition must, therefore, grasp the nettle of temporality. If identity is the whole of a life-story, the identity of the living is only ever contingent, temporal. Any form of recognition must therefore incorporate this understanding of the radical contingency of identity and thereby the interdependence of our identity with others without merely paying lip-service to it.

#### 4.1.3 Charles Taylor's authenticity in horizons of significance

Charles Taylor has set the agenda in the field of recognition for many years, providing a contemporary understanding of the Hegelian dialectic. Much commented upon, his writings continue by and large to define the terms in which recognition is understood.<sup>308</sup> This section traces his arguments.

Taylor's theory of recognition can be seen as containing two vital stages. The first stage is that of the dialectical nature of identity – understood to be the defining characteristics of what makes an individual unique – , that who we are is determined by not just by our relationships with significant others on an intimate level (parents, siblings, wider family and friends), but also, significantly, on a broader public level.<sup>309</sup> It is this broader societal level that sees the encounter between two individuals in the *Phenomenology* transposed to a group level. It is not only the nature of the dialogue of recognition with those around me that determines who I am, whether I consider myself a coward or clever or ugly – the constant repetition of moral judgements to a child that determine how they see themselves and which one can never really shake off – but also the attributes that I share with those intimate others – my skin colour,

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<sup>307</sup> Achilles is the example Arendt uses; Coriolanus would be another.

<sup>308</sup> See, *The Ethics of Authenticity; The Sources of the Self: The Making of Modern Identity*. Cambridge Ma.: Harvard University Press, 1989; and 'The Politics of Recognition'. For a sharp critique of his ideas, see, in particular, Patchen Markell, *Bound by Recognition*. Princeton: Princeton University Press, 2003.

<sup>309</sup> The term 'significant others' is that of George Herbert Mead's; *Mind, Self and Society*. Chicago: University of Chicago Press, 1934.

my language, my religion, my *Weltanschauung* – those characteristics that are necessarily group-based and normally congregate under the general heading of ‘culture’.

This first level connects to his development of ‘authenticity’. Taylor follows Herder in suggesting that each of us has an original way of being human, or in Herder’s words, “each person has his or her own measure” so that, in Taylor’s voice, “there is a certain way of being human that is *my* way. I am called upon to live my life in this way... this gives a new importance to being true to myself. If I am not, I miss the point of my life, I miss what being human is for *me*.<sup>310</sup> One’s own original way of being is something that one can only discover oneself, and the articulation of that self-understanding is to realise a potentiality that is all one’s own. It is this that gives authenticity enormous moral significance. Thus, “being in touch [with oneself] takes on independent and crucial significance. It comes to be something we have to attain to be true and full human beings.”<sup>311</sup>

However, in discovering our measure, we are not acting in isolation. If the first step is the role of recognition in constituting ‘authentic’ identity on both the personal and public levels, the second concerns the link of identity to human agency. Taylor’s understanding of human agency follows from his belief that our ability to weigh up the qualitative value of our various desires, to assign worth to our motivations – what he terms, partially following Frankfurt, second order strong evaluations – are not only the mark of humanity, what separates us from the beasts, but that bereft of the ability to make such evaluations, our personal existence shatters.<sup>312</sup> Not only is the capacity

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<sup>310</sup> *The Ethics of Authenticity*, 28-29; italics his. Herder was also the first to suggest that just as each individual has an authentic identity, our own particular way of being – an essence – so do the groups, cultures and nations to which we belong. According to Taylor’s interpretation of Herder, a *Volk* should be true to itself; Germans should not try to be inevitably second-rate Frenchmen but must develop their own way of being.

<sup>311</sup> *The Ethics of Authenticity*, 26.

<sup>312</sup> Taylor, ‘What is Human Agency?’ in *Human Agency and Language. Volume 1 of Philosophical Papers*. Cambridge: Cambridge University Press, 1985, 15-16, 34. Frankfurt identified a key distinction between first- and second- order desires. The former defines the ability to choose to satisfy certain desires over others, an ability the human animal shares with a number of others; the latter, corresponds to our allegedly unique ability to evaluate those desires. (H. Frankfurt, ‘Freedom of the will and the concept of a person’ (1971) 67 *Journal of Philosophy* 5). Taylor extends Frankfurt’s scheme to encompass weak and strong second order evaluations, those in which we are solely concerned with outcomes (what do I most feel like right now: eating lunch or going swimming?) and those in which we decide upon the quality of motivation (I shall go swimming because I wish to be fit and healthy and eat lunch afterwards, despite the fact that I am hungry now).

for strong evaluation considered by Taylor to be essential to the sort of depth we hold elementary to humanity but these ‘fundamental evaluations’ are also inseparable from the individual self because they define not simply what a self desires, but what kind of life they desire, “what quality of agent they are to be”.<sup>313</sup> For while our first-order desires – our biological needs – are given, those of the second-order are not merely given, but are also endorsed by the individual and hence engage our responsibility. Taylor’s point is that although these second-order desires form the horizons of significance within which we operate – whether an action is deemed shameful or the relative values accorded such things as courage or love –, the existence of which is not chosen and whose development is a group activity, we engage with these horizons and make our own choices within them. To do otherwise, and act outside this structure, would be ‘inauthentic’.

The crucial point in Taylor’s argument is rather that not only *do* we act within these cultural or community standards but that we can *only* act within this cultural frame; in Taylor’s own words, “our existence as persons, and hence our ability to adhere as persons to certain evaluations, would be impossible outside the horizon of these essential evaluations”.<sup>314</sup> The importance of this horizon for Taylor is that its loss is disorientating and disaggregating, leading to an ‘identity-crisis’ of terrifying magnitude. Whether or not one accepts the strong concept of agency and recognition that Taylor develops, the social self arguably does mean that the group defines the boundaries of possibility for the individual.<sup>315</sup> What lifts a group to the level of ‘encompassing’ for Margalit and Raz is that it defines the boundaries of its members’ world. According to Margalit and Raz, “[f]amiliarity with a culture determines the boundaries of the imaginable. Sharing in a culture, being part of it, determines the limits of the feasible.”<sup>316</sup>

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<sup>313</sup> *Ibid.*, 34.

<sup>314</sup> *Ibid.*, 34-35.

<sup>315</sup> This is, of course, a generalisation. There will always be some who are able over the course of decades to step out from the culture in which they were formed in their childhood, or who never quite made the connection in their youth (see Waldron, note 297). However, the cost involved means that it is arguably sufficiently true for most individuals to survive generalisation.

<sup>316</sup> Avishai Margalit and Joseph Raz, ‘National Self-Determination’ (1990) 87 *Journal of Philosophy* 439, 449.

It is this link between authenticity and agency that gives recognition in Taylor's account its extraordinary moral force. If one accepts the dialogical character of human existence, of the self as necessarily situated, the judgement of others matters in forming me; and if the point of my individual existence is to give expression to that individuality within me, the role of others in determining whether or not my life will be meaningful is a vital one. Further, as my life is inevitably wrapped up with the cultural community to which I belong, the importance of the way in which my group is judged necessarily also shapes how I view myself and my search for the authentic me. The Cartesian turn to subjectivity and the loss of certainty in the external world that are such defining features of modernity sees authenticity become the path of men's existential search for deliverance. Defining our identity reaches to the heart of the meaning of our existence. Where our forebears sought salvation in sacrifice and worship, good works and faith, we are to find it within ourselves. In Taylor's words, "To know who I am is a species of knowing where I stand. My identity is defined by the commitments and identifications which provide the frame or horizon within which I can try to determine from case to case what is good, or valuable, or what ought to be done, or what I endorse or oppose."<sup>317</sup> Thus, where someone defines themselves as European, Catholic or Romani, they are not merely saying that they are attached to the European, Romani or spiritual way-of-life, but that these categories provide them with a frame within which they determine the meaning of their life. Moreover, that the self and its identity are necessarily situated means of course that the marking of a different identity can only be done in the context of a specific situation, so that in asserting a separate identity, one is necessarily and at the same time asserting the context. While this is true of the individual within a community, it is also the case for groups within a multi-cultural grouping. Thus, where Hungarian Roma assert their Romani identity they are, in part, at the same time necessarily asserting their Hungarian identity. When I assert my Englishness, I am co-temporaneously also asserting whatever I understand to be in opposition to it. Any account of recognition must necessarily take into account the refracted nature of identity.

#### **4.1.4. Misrecognition or Why Recognition Matters**

Where mutual recognition is understood as the process not simply by which we come to know ourselves, but how we come to *be* who we are, where it is the means by

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<sup>317</sup> Taylor, *Sources of the Self*, 27.

which we have the freedom, space and security to discover what it is to be ourselves, the possibility of misrecognition creates a frightening scenario. Taylor has suggested that the inwardly-derived, personal, original nature of identity entails that recognition cannot be automatic and is more complicated than times past in which one's public identity was by and large determined by one's place in society. The understanding that identities are formed in open dialogue has "considerably raised the [political] stakes. Equal recognition is not just the appropriate mode for a healthy democratic society. Its refusal can inflict damage."<sup>318</sup> Misrecognition, the refusal or failure to recognise an individual or group as an equal and as they see themselves, can thus inflict enormous psychological harm on both an individual's identity and a collective identity. In perhaps his most famous sentence, Taylor writes, "misrecognition shows not just a lack of due respect. It can inflict a grievous wound, saddling its victims with a crippling self-hatred" and thus, "[d]ue recognition is not just a courtesy we owe people. It is a vital human need."<sup>319</sup> Where recognition, following Hegel, is seen as crucial in enabling the development of full human subjectivity, misrecognition arguably leaves that subjectivity stunted and deformed, such that Hegel asserts that verbal injury or insult is a 'universal crime'; it is a linguistic symbolic violence that negates the other while presenting the outward appearance of non-violence and recognition. "The word of abuse transforms the victim's totality into a nullity."<sup>320</sup>

That misrecognition inflicts harm appears now to be widely accepted. But what is the nature of the harm that is inflicted? Taylor understands recognition to be linked to

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<sup>318</sup> *The Ethics of Authenticity*, 49.

<sup>319</sup> Taylor, 'The Politics of Recognition', 26. The notion that lack of recognition inflicts a form of violence upon the psyche finds support in scientific research and a number of recent studies suggest that rejection is not only akin to physical harm but actually impacts upon physical well-being. In an article published in the *New Scientist* on 9<sup>th</sup> October 2003, scientists at the University of California found that brain scans revealed that social exclusion triggers a reaction in two regions of the brain also activated by physical pain. The article, entitled 'Rejection really hurts', quotes one of the scientists as saying: "The need for social connectedness isn't just something self-help authors cooked up. It's a basic need programmed into a primitive part of our brains like thirst and pain and hunger." An earlier study by the University of Wisconsin, published in the *New Scientist* on 2<sup>nd</sup> September 2003, has linked negative emotions to a lowered immune system and an investigation by the Case Western Reserve University of Ohio, reported in the *New Scientist* on 15<sup>th</sup> March 2002, registered 'dramatic' decreases in IQ and the ability to reason analytically linked to social rejection, as well as an increase in propensity to violence. The project leader is quoted commenting on his team's findings, "To live in society, people have to have an inner mechanism that regulates their behaviour. Rejection defeats the purpose of this, and people become impulsive and self-destructive." Such behaviour, it could be argued, is seen in traditionally marginalised groups in society, whether it be an impoverished underclass in mainstream society or a racial or ethnic group battling historic exclusion. All articles accessed *New Scientist* website, 10<sup>th</sup> October 2003.

<sup>320</sup> *Philosophie des Geistes*, 1805/06, 215; cited in Williams, *Hegel's Ethics of Recognition*, 104.

agency in the strong sense – the ability of the individual to act – and the achievement of authenticity. Recognition has thus been understood by both its supporters and detractors as falling within the parameters of ethics, of the good life, in contrast to questions of justice.<sup>321</sup> The harm of misrecognition is understood by Taylor and a number of other recognition theorists such as Honneth, as well as Habermas, in ethical terms, as denying the subject the capacity to find their own authenticity and achieve the good life, however they define it. Nancy Fraser has however sought to place recognition claims within an expanded conception of justice and, in her words, to “resist the turn to ethics”, removing recognition politics from the dominant inheritance of Hegel and placing it instead within that of Kant. Fraser’s approach rejects the emphasis on the psychic element of recognition over the social, seeing recognition instead as a question of social status. In this status model, misrecognition is not understood to deform group identity but implies social subordination; recognition, therefore, “is a remedy for social injustice, not the satisfaction of a generic human need”, aimed not at proclaiming an equal worth of the devalued culture, but to establish parity of participation in society.<sup>322</sup> For Fraser, misrecognition is wrong not for the psychological injury it inflicts but because it constitutes an instance of institutionalised subordination and such social arrangements are “morally indefensible whether or not they distort the subjectivity of the oppressed.”<sup>323</sup> However, while Fraser’s emphasis on the social subordination element of recognition is welcome, her account fails to give sufficient explanation for why it is that social subordination or rejection matters, why equality is held to be such a fundamental value.

Yet, the strong concept of authenticity is not fully shared here either, as it seems, at least to this author, too deterministic in its view of the relationship between culture and the individual. Further, the notion of an authentic way of being appears to suggest an end goal that an individual can know and is searching for, rather than allowing for a form of identity that acknowledges the radical contingency of interaction and therefore of identity itself. There is arguably a fine line between accepting that

<sup>321</sup> Nancy Fraser makes this point forcefully. Fraser, ‘Recognition without Ethics?’ in Scott Lash & Mike Featherstone (eds.) *Recognition and Difference*. London: Sage, 2002, 26

<sup>322</sup> Fraser, *ibid.*, 30.

<sup>323</sup> *Ibid.*, 27. Fraser thus does not deny that misrecognition may have the psychological affects ascribed to it but holds rather that this not the best approach.

identity is a pre-requisite for agency and failing to acknowledge that we can never know what authenticity is for us. The failure of recognition undoubtedly affects the ability of an individual to function in the social setting, however, and what both Fraser and Taylor are attempting to articulate is this sense that recognition impairs the functioning of the individual within society.

This impaired functioning should be understood both as a consequence of psychological harm and of the negative affect on security of being, and, hence, on one's ability to participate in the social realm. Hegel's account of recognition, in which misrecognition inflicts psychological harm by rendering the individual unfree, is instructive here. It is suggested that there are two elements to this, corresponding to the accounts of positive and negative liberty given by Berlin.<sup>324</sup> The relationship between recognition and agency and between recognition and ontological security can be understood through the lens of negative liberty: that the failure to accord recognition limits agency, complicating the relationship between the individual and their culture, as well as limiting their freedom of movement in the wider social world. The lack of security of being that misrecognition engenders, places constraints upon the ability of an individual to pursue their life and their own individuality. Recognition, or rather misrecognition, is therefore, as Jason Lindsey has highlighted, also linked to physical security.<sup>325</sup> Those who lack recognition, who are not viewed as equals, are more likely to be victims of discrimination and of acts of violence. Lack of recognition also affects the distribution of goods within society, creating a circle of deprivation and despair in which those on the margins are socially rejected because of the consequences of social deprivation, and remain impoverished because they exist on the margins.<sup>326</sup> The combination of poverty and rejection also hinders political participation in the formal institutions of governance.

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<sup>324</sup> Isaiah Berlin, 'Two Concepts of Liberty' in Berlin, *Liberty*, Henry Hardy (ed.), Oxford: Oxford University Press, 2002.

<sup>325</sup> See Jason Lindsey, 'Conceptualising Demands for Recognition as Ontological Security', unpublished paper, available on-line at <http://www.politicaltheory.dk/conference/res/papers/5202003145058JLindsey%20Paper.pdf>. The Roma, unfortunately, provide good examples of this. See <http://errc.org> for a quarterly report on the violence of which Roma are victims throughout Europe.

<sup>326</sup> In Douzinas' words, "Lack of assets not only leads to poverty and material hardship but also excludes people from universality and the recognition it bestows." Costas Douzinas, 'Identity, Recognition, Rights or What Can Hegel Teach Us About Human Rights?' (2002) 29 *Journal of Law and Society* 379, 389. This is not the case for all those that claim recognition, however.

Security of identity in society and belonging is of fundamental importance to our well-being. It is intuitive that anyone who has felt excluded from an identity group to which they feel strongly attached will experience a powerful sense of disorientation and loss. Recognition, then, is vitally connected to our individual self-esteem and self-respect. Misrecognition robs us of our dignity; it can render us, in our own eyes, worthless. Dignity cannot be conceived of in the abstract but is a product solely of social interaction; it is personal. It is perhaps most noticeable in its absence, in relationships that seek to dominate and shame: in the power of the torturer over his victim, of a man humiliated before his family, of a woman at the hands of a violent partner. There can be no dignity in situations of oppression<sup>327</sup> and part of the desire for recognition is less a desire for dignity than the desire not to be robbed of it.

Recognition is also, however, the process in which we come to know ourselves and realise our full potential as individuals. It is this freedom of self-development that Berlin, following Hegel, Green and Bosanquet,<sup>328</sup> labelled ‘positive freedom’ – a concept which has striking similarities with Taylor’s consideration of authenticity. For Berlin, we are not only not free where there is a constraint holding us back – negative liberty – but also where we are not able to fully realise our potential – where we are, in his words, an object rather than a subject. In Berlin’s words, “I wish, above all, to be conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by reference to my own ideas and purposes. I feel free to the degree that I believe this to be true, and enslaved to the degree that *I am made to realise that it is not.*”<sup>329</sup> Although Berlin at first appears to be referring to being one’s own master, or, later in the essay, the notion of self-mastery, these are both elements of negative liberty whereby the self is either constrained or places constraints upon itself in order to control its passions. However, following Skinner’s reading, Berlin’s intention with the concept of self-mastery was in fact self-realisation

<sup>327</sup> Wole Soyinka, ‘The Quest for Dignity’ lecture in *Climate of Fear. The Reith Lectures 2004*. Great Britain: Profile Books, 2004, 92-4. Soyinka argues that is thus misplaced to talk of dignity in situations of suffering; for as Soyinka has put it, “[w]hen the being that is labelled ‘slave’ acquires dignity, he has already ceased to be a slave”.

<sup>328</sup> For an account of the development of positive freedom from Hegel to Berlin, see Quentin Skinner, ‘A Third Concept of Liberty’, *London Review of Books*, Vol. 24, No. 7, 4 April 2002.

<sup>329</sup> Berlin, ‘Two Concepts of Liberty’, 178, (italics mine). What Berlin’s phrasing nicely captures is that this freedom, or ontological security, is never achievable but that there is nonetheless a world of difference between the master and the slave in whose relationship one attempts to off-set the contingency of action and of being by imposing those costs on the other. For such an interpretation of the master-slave dialectic, see Markell, *Bound by Recognition*, 102-112.

and the freedom to become the best self one can<sup>330</sup>; there are thus, Skinner adds, as many forms of positive freedom as there are human beings. Berlin himself, despite noting that, “[t]he lack of freedom about which men or groups complain amounts, as often as not, to the lack of proper recognition”, denies that recognition itself is a form of freedom, although “it is something no less profoundly needed and passionately fought for by human beings”.<sup>331</sup> However, his understanding of positive freedom as the idea of the self at its best captures the concept of authenticity in its meaning here, as the opportunity to tell the best stories about ourselves one can. As Berlin wrote in 1958, “Paternalism is despotic, not because it is more oppressive than naked, brutal, unenlightened tyranny ... but because it is an insult to my conception of myself as a human being, determined to make my own life in accordance with my own (not necessarily rational or benevolent) purposes ... If I am not so recognised, then I may fail to recognise, I may doubt, my own claim to be a fully independent human being.”<sup>332</sup>

Misrecognition of a group, then, can deny its individual members the ability to fully realise themselves and thus takes away a vital element of their freedom, imprisoning them as the master does the slave.<sup>333</sup> The best known example of this is perhaps the harm done by colonisation.<sup>334</sup> Not only did the colonial powers strip the lands they invaded of natural resources and enslave parts of their populations, they inflicted enormous psychological harm as well. According to Stuart Hall, a defining part of the colonial experience, and arguably of all subjugation, is the ability of the dominant not only to establish a category of Other of those they are oppressing but to subject them

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<sup>330</sup> Berlin notes that this conception of freedom is the antithesis to the Kantian doctrine of human freedom, whereby the freedom of human beings is internal and requires no public recognition. Berlin, ‘Two Concepts of Liberty’, 202, note 2. In contrast, Hegel captures the paradoxical situation in which the ability to be free occurs only through a process that is the antithesis of autonomy.

<sup>331</sup> Berlin, *Ibid.*, 201, 204. His denial of a link between recognition and liberty proper appears to be largely due to his understanding of recognition as concerning group identity and desires rather than of an individual member of a group.

<sup>332</sup> Berlin, *Ibid.*, 203.

<sup>333</sup> We should, however, be careful about assuming that all misrecognition is automatically harmful. Occasionally misrecognition may be felicitous for an oppressed or weaker party and may win them gains they would not otherwise have achieved; one thinks perhaps of the way of which indigenous groups have gone from being backward in the eyes of the international community to being viewed as the possible saviours of our planet. Both I would suggest are examples of a failure to listen to indigenous peoples themselves and of projecting our own fears and desires upon them; in the latter case, however, it has gained indigenous groups in north America and Australasia a considerable amount of self-government.

<sup>334</sup> It was Frantz Fanon who did most to elucidate this psychological element of colonialism. ‘On National Culture’, *The Wretched of the Earth* (1963). London: Penguin Classics, 2001, 169.

to that knowledge and to force them to experience themselves as ‘Other’.<sup>335</sup> The colonialists constructed an elaborate narrative of those they subjugated as backward, uncivilised barbarians, something less than fully human and this is a legacy – a self-narrative –from which now independent people continue to struggle to free themselves.

Recognition is thus a vital process in the constitution of the self and the development of that self in the story of our lives. The necessary situation of the self in a culture that frames and shapes an individual’s self-narrative implicates cultures and such encompassing group identities in the process of recognition. Much like long-term verbal or physical abuse leaves an individual psychologically wounded, fearful and debilitated in terms of their ability to act, the failure to accord a group equal respect and recognise them as free and equal can cause similar injuries to individual members: members may be rendered deeply insecure, an insecurity that inhibits them from acting and thereby denies them choices available to others. The lack of recognition arguably, then, renders one unfree by erecting barriers to full functioning in the social realm, and hinders the exercise of positive freedom in the journey of one’s life.

Recognition, as described in this first part of the chapter, is simply the on-going never-achievable desire for ontological security, for a secure realm in which one can be free. What groups that claim recognition in all its various forms, from nationhood to demands for greater respect, are asking for, therefore, is not simply recognition – that they have already – but a re-positioning of the recognition dialectic that sees the relationship become one of equal mutual respect. Recognition is mutual respect at its most fundamental level, without which there can be no equality and no dignity. The dynamism of the dialectic of recognition entails, also, that recognition is necessarily active. How we are to understand equality and participation at the public level is the subject of the second part of this chapter.

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<sup>335</sup> Stuart Hall, ‘Cultural Identity and Diaspora’, in Jonathan Rutherford (ed.), *Identity. Community. Culture, Difference*. London: Lawrence & Wishart, 1990.

## ***4.2 Recognition and the Political***

The main challenge of contemporary political philosophy is arguably the attempt to deal fairly with what is widely accepted as the fact of plurality. The recognition discourse is re-defining the terms of this debate, but any consideration of what form recognition should take must necessarily chart a course between group rights and the rights of the individual, between communitarian tendencies and the basic tenets of the liberal faith. The remainder of this chapter attempts to do that, although in very limited fashion.<sup>336</sup>

The suggestion will be that although liberalism, currently the dominant political discourse, is right to locate the basic moral unit as the individual, it is incapable of dealing appropriately with the degree to which each individual is situated in his or her cultural milieu. Similarly, while recognition claims tend towards communitarian-type arguments, it is important not to loose sight of the purpose of recognition – the well-being and freedom of the individual. The aim is to find the best balance possible between acknowledging the situated self and maintaining the place of the individual as the centre of concern, whilst simultaneously acknowledging that a fair balance is unachievable and that the best we can do is to acknowledge the tendency towards hegemony and the corresponding need to keep any system open to contestation. This section very briefly charts the attempts of a number of theorists to locate an equitable balance, before considering in greater depth the work of James Tully, whose attempts to keep open the possibilities to challenge both the procedural and normative foundations of society strike this author as the most likely to provide opportunities for genuine recognition.

### **4.2.1. A Liberal Response**

The great success of liberalism has been its founding belief in the freedom of individual conscience and the corresponding right of the individual to choose his or her own beliefs and way of life. This realm of freedom is protected by individual rights against the state, whose role it is to provide a neutral public forum in which individuals from a wide variety of cultures and beliefs can come together to organise a

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<sup>336</sup> The account given is strictly limited to the impact such considerations have on the process of recognition. Inevitably, nuances and refinements of individual theories are excluded.

common political life despite possibly widely diverging opinions of the good life. By making rights the means of defining social interaction, liberalism has attempted to limit public interaction to these boundaries.<sup>337</sup>

While recognition concerns appear to have redefined justice for many liberals, so that liberalism's normative aim is no longer primarily the eradication of material inequality but the need to achieve equality through a focus on mutual respect<sup>338</sup>, the basic principles of the freedom of the individual as paramount, and the neutrality of the public arena remain at the core of liberal recognition attempts. Collective deliberation in the political arena is not a good in itself, therefore, but a means to safeguard the private autonomy of its members; and while liberals have long acknowledged the importance of an inclusive form of politics, they have traditionally sought to achieve this through difference-blind policies at the public level that emphasize the equal citizenship of all and safeguard the private autonomy of each to live their own conception of the good. A number of progressive liberal theorists have, however, sought to develop a politics of recognition, arguing that not only are group-based rights not a breach of the liberal faith but are quintessential to achieving liberal justice. Two such accounts will be considered here with the aim of considering whether a group-based rights approach in which difference is tolerated can offer genuine recognition.

### A. Special status rights

Will Kymlicka has famously argued for the necessity of 'special-status' for national minority groups to supplement individual human rights in a multi-national society.<sup>339</sup> He justifies this difference-based approach and the breaking down of the traditional barrier between public and private on the basis of individual choice, which he suggests can only be meaningful in the context of cultural membership; access to

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<sup>337</sup> E.g., John Stuart Mill, *On Liberty and Other Essays*. Oxford: Oxford University Press, 1998.

<sup>338</sup> Alex Honneth, 'Recognition or Redistribution? Changing Perspectives on the Moral Order of Society' in Lash and Featherstone (eds.), *Recognition and Difference*. Convincing accounts of the internal relation between recognition and distribution struggles have been put forward by Tully, 'Struggles for Recognition and Distribution' (2000) 7 *Constellations* 469, Nancy Fraser, 'Rethinking Recognition' (2000) 3 *New Left Review* 107 and 'Recognition without Ethics?'; and Iris Marion Young, *Justice and the Politics of Difference*. New Haven: Princeton University Press, 1990. The internal relation between recognition, distribution and representation is picked up in chapter 7.

<sup>339</sup> Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Oxford: Clarendon Press, 1995.

one's culture is a prerequisite of individual freedom for Kymlicka. Private acceptance of different cultures is not sufficient and is why instead political recognition is necessary. Appealing to arguments of equality, historical precedent and the value of cultural diversity, Kymlicka makes the case for special rights for certain groups.<sup>340</sup> The institutionalisation of difference is necessary, according to Kymlicka, to ensure adequate recognition for minority groups in the face of a superficially neutral politics that is in fact, and can only be, discriminatory. Kymlicka thus justifies the granting of different rights and entitlements on the basis of individual autonomy. The right to cultural identity is an individual right: the right to *a* culture, not to a particular culture, i.e. mine.<sup>341</sup>

While the rights that liberal minority rights will allow go so far as forms of self-governance for certain groups such as indigenous peoples, the basis of Kymlicka's theory is that internal claims of the group must be separated from the external claims minority groups make. The latter refer to claims the group makes for representation and recognition against the wider society, while internal claims concern internal restrictions upon behaviour and beliefs of members of the group. These internal restrictions cannot be tolerated in a liberal society.<sup>342</sup> The tolerance Kymlicka offers is thus a limited and specific version of tolerance i.e. solely that which respects and furthers the autonomy of the individual. Co-existence with non-liberal minorities is to be accommodated by a *modus vivendi* in which liberalism is not forced upon national minorities, particularly those that are entitled to self-governance rights, but under which liberals have a duty to speak out against illiberal practices. Non-liberal minorities are thus to be tolerated, but not accepted.

While this brief synopsis does not do justice to Kymlicka's theory, there are clearly a number of problems with a liberal theory of minority rights for any recognition dialogue. Firstly, a rights-based theory fails to take sufficient account of the

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<sup>340</sup> The rights one is entitled to depend, according to Kymlicka, on the group's status as a national minority, a religious or ethnic minority, or immigrant. See, in particular, *Multicultural Citizenship*, 26-33.

<sup>341</sup> Part of the compromise Kymlicka makes in attempting to reconcile special provisions for groups with the liberal platform of equality is to emphasize freedom; but by viewing the importance of culture as sustaining the ability to evaluate and choose among various life options, freedom becomes the ability to choose one's culture. See Avishai Margalit and Moshe Halbertal, 'Liberalism and the Right to Culture' (1994) 61 *Social Research* 491.

<sup>342</sup> Kymlicka, *Multicultural Citizenship*, 35-44, 151-172.

participatory element of recognition, providing instead a pre-packaged parcel of special rights and privileges for those groups claiming recognition. Such an approach arguably leads to political stasis, as interests and identities become entrenched, imprisoned in the definitions that legal provisions require. In seeking a once-and-for-all recognition embedded in constitutional rights, either to equality or to special exclusions or privileges, the risk is run of reifying a single interpretation of identity, closing off the possibilities of change via interaction with others. Rights necessarily express and uphold pre-existing identities, and the idea of identity developed in this chapter suggests that recognition is inevitably belated and therefore cannot be captured in a rights form.<sup>343</sup> The law necessarily generalises and, as Douzinas writes, “the universalizing logic of the law always fails the uniqueness of the other”.<sup>344</sup> The desire for the other always remains one step ahead of the law. A right to be different does not necessarily imply active engagement that recognition requires; it can also be isolating, alienating, and coercive, acknowledging difference and seeking to preserve it by separating it off from ‘normality’.<sup>345</sup>

A rights-based approach also suggests an imposed solution. While a group may express its preferences and while these preferences may be taken into account, the relationship between state and claimant group is not an equal one and therefore any agreement is unlikely to have been achieved in equal negotiations. Where genuine recognition in the public sphere is participation as equals, progressive liberalism cannot accommodate it, for the emphasis is on rights and not on the openness of and equality in participation itself. Rights may be part of the recognition process, but legal

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<sup>343</sup> In Markell's words, following Arendt, “action forever outruns the relations of recognition out of which it emerges” and it that therefore, “cannot insulate us against the surprises and reversals of action in which we lose ourselves, sometimes pleasantly, sometimes catastrophically”. Markell, *Bound by Recognition*, 94.

<sup>344</sup> Douzinas, ‘Identity, Recognition, Rights or What Can Hegel Teach Us About Human Rights?’, 403.

<sup>345</sup> Povinelli has provided a quite devastating account of the engagement of Australian multicultural self-understanding with the Aboriginal Other via the courts. She notes that in their recent decisions on native title, courts first delineate the differences between ‘Australian’ and Aboriginal cultural systems and practices, while simultaneously establishing a formal value relationship between types of Aboriginal cultural performance; they then tie the recognition of native title rights to the judicial judgment of how successfully Aboriginal groups perform their ‘difference’. Her dissection of the hailed *Mabo* decision suggests a case framed not as a grappling of two cultures over conceptions of land, society, ownership etc but as a moral dilemma for Anglo-Celtic Australians in which Aboriginal culture is simply a mirror. Elizabeth A. Povinelli, ‘The State of Shame: Australian Multiculturalism and the Crisis of Indigenous Citizenship’ (1998) 24 *Critical Inquiry* 575, esp. 588-591.

recognition must be only a link in the chain of the on-going negotiation of recognition.<sup>346</sup>

Finally, while a weak version of toleration is undoubtedly vital in plural societies, and while relativism has no place in recognition, toleration, as liberalism's earliest exponents were well-aware, is also the expression of power.<sup>347</sup> By 'allowing' a group to choose its way-of-life, the majority declares itself master and thus explicitly denies genuine recognition to others. Further, tolerance is inherently negative, keeping the Other at arm's length distance, and passive, in contrast to the positive public and active acceptance that recognition requires.<sup>348</sup> Engagement between the liberal mainstream and 'non-liberal' cultures, where such terms define the encounter, can only be a civilising mission.

Indeed, any engagement with other cultures where the standard of normality is liberalism cannot begin to address domination where liberalism itself is the hegemonic discourse.

## B. Habermas and constitutional patriotism

Habermas has sought to avoid many of the critiques levelled at the liberal theory of minority rights in his insistence upon the necessity of deliberation in any conception of liberal democracy. While his approach is rights based, he not only by and large avoids the critique of rights outlined above by recognising the need for a counteraction to the universalising and deterministic logic of the law, which he sees as provided by the open deliberative forum of civil society, but makes a solid argument

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<sup>346</sup> Douzinas has noted that while rights constitute bargaining chips in negotiation of identity, the dialogue of construction of that self with others takes place *against* "the monologue of legal subjection". Douzinas, 'Identity, Recognition, Rights or What Can Hegel Teach Us About Human Rights?', 386. This is not to suggest of course that rights are not an important and necessary part of public recognition; legal recognition is an important part of Hegelian theory and thus of more recent theorists of recognition such as Honneth, *The Struggle for Recognition* (Tr. Joel Anderson, MIT Press, 1996), and Douzinas himself. It is rather to suggest that rights alone cannot be sufficient.

<sup>347</sup> "Toleration is not the opposite for intolerance, but is the counterfeit of it. Both are despotism." Thomas Paine, *The Rights of Man*, Part 1, (1791) (London: Penguin Classics, 1984).

<sup>348</sup> This is hardly surprising as the liberal doctrine of toleration aims at neutralizing such difference from the public arena. See Anna Elisabetta Galeotti, 'Toleration as the Public Acceptance of Difference' in Rainer Bauböck and John Rundell (eds.), *Blurred Boundaries: Migration, Ethnicity, Citizenship*. Aldershot: Ashgate, 1998.

for the necessity of a legally-based approach to living together in a multicultural society in which there is necessarily no agreement on common values.

Habermas insists that the liberal theory of rights can incorporate the entrenchment of difference and, like Kymlicka, insists that it must do so in order to call itself liberal.<sup>349</sup> Like Kymlicka he relies upon an argument for individual freedom but takes a slightly different approach. Habermas seeks to remind us of the (full) Kantian concept of autonomy, which requires that only to the extent that individuals understand themselves to be the authors of the laws that govern them in their private lives can they be autonomous.<sup>350</sup> A politics of recognition must necessarily foster and protect therefore the identity formation of the individual in all the contexts in which it takes place. When the theory of rights is correctly understood, it must protect the integrity of the individual in the context of their formation in the public sphere. Indeed, because protection of the individual depends upon guaranteeing the integrity of the culture, or ‘life context’, in which they have formed their identity, the democratic process of actualising individual rights to equality necessarily implies guaranteeing the co-existence of different ethnic and cultural groups. For Habermas, all that is required is the actual realisation of a system of rights.<sup>351</sup>

It is in this context that Habermas has developed his theory of deliberative democracy, in which individuals are only free to the extent that they can participate in the forms of communication that determine the collective action of society. Public spheres and civil society act as the forum in which public opinion is formed via communicative action and in which voices of protest can be heard and can act as correctives to the universalising tendency of the legal order.<sup>352</sup> While rights may be both universalising and individualising, they are situated in a political context in which the continual determination of the common good takes place, and their value is seen in their ability to secure the public space of deliberation.

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<sup>349</sup> “We call a political culture ‘liberal’ to the extent that it operates through symmetrical relations of reciprocal recognition – including between the members of different identity-groups”. Habermas, ‘Equal Treatment of Cultures and the Limits of Postmodern Liberalism’ (2005) 13 *The Journal of Political Philosophy* 1, 15.

<sup>350</sup> Habermas, ‘Struggles for Recognition in the Democratic Constitutional State’, 112.

<sup>351</sup> Habermas, *The Inclusion of the Other*. Edited by C. Cronin and P. de Greiff. Cambridge: MIT Press, 1996, Ch. 8: ‘Struggles for Recognition in the Democratic State’, 113, 207-208, 210.

<sup>352</sup> Habermas, *Between Facts and Norms* (Tr. William Rehg). Cambridge Ma.: The MIT Press, 1996, 302-314.

Habermas recognises that modern law is formal, individualistic, coercive, positive and procedurally-enacted, but argues it is that that renders it legitimate. Modern law in fact guarantees freedom because it is a system of norms that are both coercive and positive, safeguarding the autonomy of all citizens equally.<sup>353</sup> This legal constitutionalism is supported by a democratic reflexivity, which itself is the basis upon which law is formed. However, a formal legal institutionalisation of democracy necessarily presupposes shared general background assumptions about the conduct of political life.

Yet Habermas's attempt to reconcile the multicultural nature of society involves an abandoning of the link between the development of democracy and the nation, for to cling to the nation as a pre-constituted entity would be to undermine the autonomy of the people as a self-governing entity and would exclude those 'citizens' that were not members of the nation.<sup>354</sup> The 'we-perspective' that makes self-determination possible is provided rather by membership in the political culture of society. Citizenship is separated from membership of the nation and the political acts as a shared "common horizon of interpretation", rooted in a collective interpretation of constitutional principles from the perspective of a shared historical experience.<sup>355</sup> Citizens thus have access to the on-going discourse on their political self-understanding through debates on current issues. Diversity and differing conceptions of the good life remain distinct from the overarching political culture, which does not "detract from the legal system's neutrality vis-à-vis communities that are ethically integrated at the subpolitical level."<sup>356</sup>

Constitutional patriotism is thus generated by a procedural consensus in which all participate and together define their common character. At the pragmatic level, the consensus is translated into binding decisions that can be implemented, and the law supports and sustains the two levels of moral and political discourse – the political and sub-political. Norms are valid only where they have been agreed to by all those

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<sup>353</sup> *Ibid.*, 451-455.

<sup>354</sup> Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe' (1992) 12 *Praxis International* 1; Th. Mertens, 'Cosmopolitanism and Citizenship: Kant Against Habermas' (1996) 4 *European Journal of Philosophy* 328, 334-340.

<sup>355</sup> Habermas, 'Struggles for Recognition', 134.

<sup>356</sup> 'Struggles for Recognition in the Democratic State', 225.

affected, and where participation in the formation of that agreement has been equal and fair, so that all have had the same opportunity to not simply set the agenda of the debate and question it, but to question the terms of the debate itself. All must have had the opportunity to speak up, where ‘all’ includes any group or person as long as they can justifiably show that they are affected by the proposed norm.<sup>357</sup> While Habermas acknowledges that ideal speech conditions are unlikely ever to be achieved, the notion of a deliberative forum retains a degree of openness, although the need for the formation of a consensus, not simply on the practical decision but on the reasons for that decision, remains. Where the complex cultural mix of society inevitably means that citizens are unlikely to find consensus on values, they must find one in a legitimate process for the enactment of laws.<sup>358</sup>

Yet in this model, the relations of recognition can only be promoted indirectly by the public systems of politics and law and, hence, such dynamics are relegated to the space of civil society and thus to the private interaction of individuals. By relegating our identities to civil society it ultimately fails to allow claimant groups to contest the basic governing norms of society. The assumption that all the groups in society can and do share a common set of interpretation tools means that deliberation in this model does not go all the way up; the debate is defined by the appeal to this public reason. Where one doubts that this common horizon exists or that the appeal to this horizon is stronger than the cultural identities we are supposed to have left behind, there is a danger that the legitimacy of norm formation to which Habermas appeals is often little more than the ability of the majority to assert their culture and beliefs and to force others to accept it.<sup>359</sup> Habermas’ understanding of socialisation as a process in which the individual aligns his interest with that of the collective interest appears to require assimilation to the dominant culture. The model of constitutional patriotism, although it appears to avoid the inflexibility of a rights-based model, in basing an inclusive democracy on appealing beyond our identities to create a common political identity, seems unable to move beyond the co-opting language of politics and constitutionalism.

<sup>357</sup> *Between Facts and Norms*. See also, Seyla Benhabib, ‘Deliberative Rationality and Modes of Democratic Legitimacy’ (1994) 1 *Constellations* 30.

<sup>358</sup> This is similar to the Rawlsian claim for impartiality of the justification process of norms, not their application and differential effects. See, Habermas, ‘Equal Treatment of Cultures and the Limits of Postmodern Liberalism’, 10.

<sup>359</sup> See Chantal Mouffe, *The Democratic Paradox*. London: Verso, 2000, 102-104.

#### **4.2.2. The Politics of Difference: a Communitarian approach**

Charles Taylor's 'politics of difference' is precisely an attempt to acknowledge the importance of one's own particular identity in the public sphere.<sup>360</sup> Where the politics of recognition is essentially a cry for equal treatment, the politics of difference is a call for the recognition of the unique identity of the group in which it is the difference itself that is important and that is entrenched in rights. The politics of difference is, however, more than simply positive discrimination, but allows groups the right to take measures to ensure their continued survival that other groups might not be allowed.<sup>361</sup> It is here that Taylor parts company with the liberal progressives, although not, he claims, with liberalism.<sup>362</sup> By highlighting the particularity of the individual, Taylor justifies an appeal to the unique identity of both individuals and groups. However, by placing groups and individuals in a position of equal importance, he sets up a clash between the rights of the individual and collective rights where a choice will have to be made in each instance between the two. The politics of difference thus recognises the importance of the group by allowing it to take special measures to ensure its survival which may disadvantage individuals both within and without the group concerned.

Although Taylor insists that the politics of difference sits within the liberal tradition, privileging the determination of the group to survive over the choices of individuals is normatively objectionable for those that view the individual as the relevant moral unit. Whilst Taylor argues that the politics of difference can be liberal if it respects diversity within its midst – for example, if it allows, and presumably supports, English-speaking schools for the children of traditional English speakers in Quebec – the burden of exclusion has simply been shifted to a different group on a local level. While the English-speaking culture of Quebec, to say nothing of indigenous culture,

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<sup>360</sup> Taylor, 'The Politics of Recognition'.

<sup>361</sup> The example that Taylor uses is that of the legislation in Quebec forbidding children of Francophones and immigrants to be schooled in English. Whether or not the parents of these children wish to have their children educated in the majority language (at least for Canada and one that is currently the dominant global language) is irrelevant for Taylor as the collective goal of the survival, indeed flourishing, of the French language, and hence Quebec's identity as French-speaking, takes precedence in this instance. 'The Politics of Recognition', esp. 58-61.

<sup>362</sup> Taylor holds that the politics of difference can be accommodated within a non-procedural liberalism: "A society with strong collective goals can be liberal ... provided it is also capable of respecting diversity, especially when dealing with those that do not share its common goals", *ibid.*, 59.

may be allowed rights in the private sphere, the privileging of the French language denies equal recognition of the special contribution of non-French speakers to the life of Quebec in much the same way that French-speakers were/are within Canada. As Habermas has noted, recognition is meant to protect the identity formation of individual members of a culture, not resort to “a kind of preservation of species by administrative means.”<sup>363</sup> The politics of difference, in acknowledging that recognition demands require a place in the public sphere, nonetheless fails to find an appropriate balance between the importance of a particular culture and the rights of the individual.

Moreover, in assuming that what requires recognition is actual difference itself, Taylor reifies group-identity, detaching it from the individuals for whom misrecognition is so damaging. Not only does this fall into the same inflexibility trap as the liberal rights-approach, but leads him, as he honestly acknowledges, down the path of needing to recognise not simply the importance of other cultures for their individual members but their equal worth in comparison with each other.<sup>364</sup> This insistence upon the need for recognition of the equal *worth* of each culture requires us to gain an accurate knowledge of the other(s). On the practical level, as Taylor accepts, this would entail a detailed study of each and every culture – a feat beyond even the most dedicated anthropologist. On the theoretical level, there are two failings with this approach.

The first is that it judges another culture by the terms of our own cultural understanding. While we are rarely able to step outside our own cultural horizons, Taylor’s approach reads as a form of quasi-cultural imperialism.<sup>365</sup> The second problem is linked to the unknowability of identity. Viewing recognition as requiring respect for one’s *actual* identity denies the dialectical nature of recognition itself. Recognition is not a question of examining a culture until we find that it has achieved as much as our own; nor does it require that one holds that each and every culture has their own Tolstoy. Recognition requires instead that one respect and value the

<sup>363</sup> Habermas, ‘Struggles for Recognition’, 130.

<sup>364</sup> ‘The Politics of Recognition, esp. 63-64, 68-73.

<sup>365</sup> As Berlin notes in his reading of Giambattista Vico’s *Scienza nuova*, “each [culture] has its own gifts, values, modes of creation, incommensurable with one another: each must be understood in its own terms – understood, not necessarily evaluated.” Berlin, ‘The Pursuit of the Ideal’ in *The Proper Study of Mankind*. UK: Chatto & Windus, 1997, 7.

individual as an equal, which necessarily involves respecting their choices and the culture that makes that individual who he or she is. Thus we respect a culture for the important role it plays in its members lives, regardless of whether we think that it has produced a writer as good as Shakespeare or a composer of the equality of Mozart, or whether we have much awareness of its particular details at all. Recognition, as it is understood here, is not linked to respect for another's identity or the acceptance of the equal worth of another culture in comparison with one's own, but finds its base in the Kantian categorical imperative to respect individuals as ends in themselves.

#### **4.2.3. Recognition and Agonism: politics as a critical activity**

Another attempt to interrogate the relationship between the individual and the group from the perspective of freedom is that of James Tully.<sup>366</sup> Whereas a liberal theory of minority rights emphasises the importance of equality before the law, Tully, like Habermas, locates democratic legitimacy in the co-equality of the two republican principles of equality before the law and self-governance. Where Tully parts company with Habermas and other deliberative democrats is in the extent to which he holds that culture plays a part in the ability of a citizen to participate in the public forum from a position of equality and thus his understanding of what self-rule requires. Tully's approach entails a turn towards cultural agonism as a means of providing a dynamic sphere of 'mutual recognition' in which all groups can contest the recognition they require, but whilst retaining the centrality of the individual to the purpose of recognition.

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<sup>366</sup> 'Introduction' in A-G. Gagnon and J. Tully (eds.), *Multinational Democracies*. Cambridge: CUP, 2001. at 5-7. Tully, 'Political Philosophy as a Critical Activity' (2002) 30 *Political Theory* 533.

"Practices of governance imply practices of freedom"; indeed, politics should be orientated towards "freedom before justice", so that freedom becomes the condition for any concept of justice, 541, 551. There are other models that address the critiques raised in relation to Habermas' constitutional patriotism, such as Dryzek's discursive democracy or Fraser's participation parity approach, and that are in essence very similar to Tully's form of cultural agonism. C.f. Dryzek, "Democratic politics ... should involve the creative questioning of identities through encounter with disparate others. This is not a deadly struggle, more a matter of play; what matters is that the game never ends.", 58. John S. Dryzek, *Deliberative Democracy and Beyond*. Oxford: Oxford University Press, 2000.

## A. Freedom and the prison-house of language

Tully begins from the premise that culture is “an irreducible and constitutive” component of politics.<sup>367</sup> One cannot remove culture from politics because it is necessarily ever present in the language we use through the inherent understandings and hidden conventions that govern the way in which we use language. The terms we use, the way in which we speak of things, while on the face of it neutral, are governed by layers of cultural understanding.<sup>368</sup> Language, in its thickest sense, holds us captive according to Wittgenstein, and if the majority are unaware of their imprisonment in language, it is by no means a benign captivity for groups of a different culture.<sup>369</sup> The failure to acknowledge the cultural bias of the language we use and the conventions it represents, and to make room for other languages, thus constitutes a grave injustice.

But the failure to acknowledge the exclusionary nature of the modes and norms of discourse is not simply an act of oppression in the personal individual way that Taylor portrays it, although it is that too; nor is it solely the impairment of functioning in society. Rather, the failure to acknowledge the role culture plays in communication and participation has dark implications for one’s ability to be free in society. For if there can be no neutrality, if to be forced to live a culture that is not one’s own can be a prison, the failure to give space to that other culture denies its members equal participation in the political life of the community. It denies, in short, such individuals citizenship and this lack of citizenship in turn denies individuals a say in the making of the rules that govern them. Those that have not consented to the rules but are nonetheless bound by them are not free.

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<sup>367</sup> Tully, *Strange Multiplicity*, Cambridge: Cambridge University Press, 1995, 5. Politics is used in its more comprehensive meaning, so as to include the basic laws and governing institutions of society.

<sup>368</sup> Tully’s thinking is based on an application of Wittgenstein’s method, developed in *Philosophical Investigations*, of resolving philosophical dilemmas by revealing the unseen conventions that govern language and arise in any discussion of a problem and its possible solutions. Tully explores this in *Strange Multiplicity*, 35-57.

<sup>369</sup> Tully uses the example of the relationship between Nora and Thorvold in Ibsen’s *The Dollhouse* to illustrate his point. “Nora is trying to say something that is important to her, but the dominant language in which Thorvold listens and responds misrepresents the way she says it, what she is saying, and her understanding of the intersubjective practice in which she speaks.” Tully, ‘Political Philosophy as a Critical Activity’, 537.

Membership in a given polity is defined by Tully in terms of the two concepts of free peoples and free citizens.<sup>370</sup> A ‘free people’ becomes such by adhering to two principles in equal measure: the rule of law (what he refers to in another essay, following Benjamin Constant, as the freedom of the moderns), whereby all are equally subject to the law, and self-rule (the freedom of the ancients, in Constant’s terminology<sup>371</sup>), whereby citizens impose the law upon themselves.<sup>372</sup> A ‘free people’ achieves the higher status of ‘free citizens’ by subjecting themselves to the law through their own participation. The key element of citizenship is thus participation, and freedom, what he has most recently termed ‘dialogical civic freedom’, is found in the act of participation itself.<sup>373</sup> This conception of self-rule is based upon the principle of ancient constitutionalism, *quod omnes tangit* – that what touches all must be approved by all. Where a group in society are equally subject to the law, but do not have the opportunity for an equal say in the formation of those laws, they are not free. They cannot be citizens, if citizenship is achieved only through engagement in the process. They are, rather, subjects – subject to the law and domination of others.

This understanding of what it is to be a free citizen is not solely a negative form of liberty – freedom from constraint – and this is worth drawing out. What Tully implies by using the language of Constant is that form of freedom which is to be found in Roman law, what Skinner has termed a third concept of liberty.<sup>374</sup> When English parliamentarians attempted to shrug off the yoke of the royal prerogative, they, unknowingly, appealed to an understanding of freedom found in the *Digest* – that, in the words of Skinner, “freedom is restricted not only by actual interference or the threat of it, but also by the mere knowledge that we are living in dependence upon the goodwill of others”. To be a slave is to live one’s life at the mercy of another, no

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<sup>370</sup> Tully, ‘The Challenge of Reimagining Citizenship in Multicultural and Multinational Societies’ in Catriona McKinnon and Iain Hampsher-Monk (eds.), *The Demands of Citizenship*. London: Continuum, 2000, 213.

<sup>371</sup> Benjamin Constant, ‘The liberty of the ancients compared with that of the moderns’, in B. Constant, *Political Writings* (tr., ed. B. Fontana). Cambridge, 1988.

<sup>372</sup> Tully has also used the terms “principle of constitutionalism” to describe the rule of law and the “principle of democracy” to denote self-rule. See Tully, ‘The Unfreedom of the Moderns in comparison to their ideals of Constitutional Democracy’ (2002) 65 *Modern Law Review* 204. He has more recently expressed this by drawing out the dual quality of norms as both normalising and normative. It is the normalising aspect, whereby a rule of recognition, whether formal or informal, institutionalises certain behaviour by all involved that constitutes the injustice of misrecognition.

<sup>373</sup> Tully, ‘Recognition and Dialogue: The Emergence of a New Field’ (2004) 7 *Critical Review of International Social and Political Philosophy* 84.

<sup>374</sup> Skinner, ‘A Third Concept of Liberty’.

matter how well one is treated. Rights cannot compensate for the lack of self-governance.

Relationships, all relationships including of course those of governance, are discourses of power, in which agents act upon the action of others. Tully's understanding of recognition is an elaboration of this most influential of Foucault's observations.<sup>375</sup> For Tully, recognition struggles concern the way in which we view each other as members of any given polity and how we collectively govern *ourselves*. It is the combination of these two elements – recognition as the demand for self-rule and the understanding that culture is ever present in our interactions with others – that renders the need for a radical reconceptualisation of the politics of recognition.

### **B. Freedom as the act of contestation: a version of cultural agonism**

Tully's claims about culture go deeper than merely asserting the ever-present nature of culture in political life. Instead, he makes the claim for cultural identity as 'aspectival'. Where Taylor views identity as being orientated in determined horizons, the loss of which provokes an earth-shattering identity crisis, the aspectival approach sees cultural horizons change as one moves about, so that how one comprehends and relates to otherness is internal to one's own identity. Similarly, "the experience of cultural difference is *internal* to a culture."<sup>376</sup> An outsider thus cannot begin to understand the perspective of the other, but that perspective will change according to the situation. How, then, are we to communicate at all?

Wittgenstein exposed what he called "our craving for generality", by which our contempt for the individual case sees us chained to the attempt to find the commonality in all applications.<sup>377</sup> As one definitive meaning of a term is forever unobtainable, the Wittgensteinian approach seeks understanding through connections created in the dialogical contrast and comparison of concrete examples. Language in the hands of Wittgenstein became a game in which meanings were the on-going outcome of a perpetual batting back and forth between users of *their* meaning of a

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<sup>375</sup> Michel Foucault, 'The Subject and Power' in Hubert L. Dreyfus and Paul Rabinow (ed.), *Michel Foucault: Beyond Structuralism and Hermeneutics*. Chicago: University of Chicago Press, 1982.

<sup>376</sup> Tully, *Strange Multiplicity*, 13.

<sup>377</sup> *Strange Multiplicity*, 105.

term, from which a collective meaning coagulates.<sup>378</sup> While there is no general meaning for a term, word or concept, but as many meanings as users, meaning becomes comprehensible in a stable and unified language-game situation. In this way, understanding one another without needing to comprehend what is said in terms of one's own language of re-description becomes feasible. We negotiate from the position of our own experience, in the knowledge that it is unique to us, but remain open to the perspective of the other.<sup>379</sup> We must strive for 'reflective disequilibrium' – the ability to see our community from multiple perspectives.<sup>380</sup> This ability to change perspectives, to step out of ourselves – as far as that is possible – and see aspectively is, according to Tully, acquired only in the course of participating in intercultural dialogue. We must listen to the stories that others tell about themselves and about others, give our own stories in response and it is in this process that the common and interwoven paths of our multiplicity are revealed to us. It is arguably this that has led Tully to a version of cultural agonism.<sup>381</sup>

Both a Wittgensteinian approach to language and mutual comprehension, and the awareness that the experience of difference is internal to a culture, demanding an aspectival approach to politics, entails that there are no shared norms and no universal principles to which either side can appeal.<sup>382</sup> The purpose of negotiations is to bring the different sides together to uncover the differences and similarities and to find institutions and processes together which can accommodate both. It requires that

<sup>378</sup> *Philosophical Investigations*, 138-42, 243-275; Marie McGinn, *Wittgenstein and the Philosophical Investigations*. London: Routledge, 1997.

<sup>379</sup> As Berlin notes in his reading of Vico, such reasoning does not need to lapse into relativism, for relativism occurs when one accepts that there is nothing more to be said than that comparison of this nature is fruitless. Isaiah Berlin, 'The Pursuit of the Ideal'.

<sup>380</sup> Tully, *Strange Multiplicity*, 25.

<sup>381</sup> Chantal Mouffe and Ernesto Laclau are the most articulate exponents of what can be termed 'political agonism' – an attempt to restore the balance of liberal democracy, a historic articulation in which "liberalism was democratized and democracy liberalised". Mouffe, *The Democratic Paradox*, 3. Agonism, according to Mouffe, does not flinch from acknowledging the violence of the moment of decision and thereby attempts to prevent it from becoming a lasting hegemony. Yet whereas antagonism takes place between enemies who share no common symbolic space, agonism takes place between "friendly enemies" who share a common symbolic space but who wish to see this space organised in a different way. (Mouffe, 13). Tully's articulation of a cultural agonism would however be an affront to Mouffe who sees competing collective confrontation as a means of preventing the, as she sees it, dangerous rise of identity politics. *The Democratic Paradox*, 104. Also, Mouffe (ed.), *Dimensions of a Radical Democracy. Pluralism, Citizenship, Community*. London: Verso, 1992.

<sup>382</sup> In this way, Tully differs significantly from the Habermasian presumption that different groups can agree on shared constitutional principles and unite under a constitutional patriotism. As Tully succinctly puts it, the search for *universality* is a dead-end alley; the world is a multiverse, and hence constitutional dialogue must also be. *Strange Multiplicity*, 131; 'Introduction' in *Multinational Democracies*, 20.

nothing is fixed or pre-decided before the parties come to the negotiating table.<sup>383</sup> Instead, even the rules of the game, indeed especially the rules of the game, are open to discussion and dissent. The only meta-principle in these negotiations is that of *audi alteram partem*, that one must listen to the other side and treat reasonable identity- and culturally-related differences with respect.<sup>384</sup> There is no definitive form of recognition that the negotiations are searching for, no fixed *telos*, so that dialogue is not a means to a consensus but the end in itself.

Where identity is not isolated but intersubjective, the process of interaction itself must therefore be continual, taking account of the fact that identity does not stop developing, cannot be fixed. As mutual recognition is always less than perfect, we have to keep working at it. Where agreement is reached, the disagreement that will inevitably remain, both over interpretation and from the fact that dissent will never be fully resolved<sup>385</sup>, entails that an agreement cannot be the end of the matter but must be open to challenge from the moment of its inception; the range of issues that are the subject of deliberation are also subject to change over time.

It is through a process of continual negotiations that our identity as free citizens is thus formed and our sense of belonging to one people – a free people in Tully's terminology – is generated. For Tully, if citizenship is an activity, then citizenisation –

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<sup>383</sup> It appears to be generally accepted in the field of social psychology that “a central element of relationships in all societies is that people negotiate” and that the three strategies of concession-making, contending (attempting or resisting persuasion) and problem-solving (attempting to locate options that satisfy all parties) occur in all cultures. Peter J. Carnevale and Kwok Leung, ‘Cultural Dimensions of Negotiation’ in the *Blackwell Handbook of Social Psychology: Group Processes*. Edited by Michael A. Hogg and R. Scott Trindale. Oxford: Blackwell, 2001, 482. Hence, it could be suggested that negotiations are not in themselves culturally biased, although the specific format maybe e.g. a table v. a canoe.

<sup>384</sup> Some authors have noted that deliberation itself is exclusive in that it imposes a particular kind of deliberation upon participants i.e. a discourse that is logical, reasoned and dispassionate (e.g. Young, ‘Communication and the Other: Beyond Deliberative Democracy’ in Seyla Benhabib, *Democracy and Difference*. Princeton: Princeton University Press, 1996.). It is for this reason that Dryzek takes the term discourse, in which he includes forms of communication such as argument, rhetoric, humour, emotion, storytelling and gossip. Dryzek, *Deliberative Democracy and Beyond*, 1. Some representatives will always be more articulate than others; but by placing an emphasis on the discourse as continuous and open, it seems less likely that a quick-witted, articulate individual will gain an advantage in the conversation over a lengthy period, as those who are less articulate have time to gather their thoughts and the opportunity to insert themselves in the on-going discussion.

<sup>385</sup> Tully gives three reasons why reasonable disagreement will always remain. Firstly, there are always asymmetries in power and influence; secondly, the identities of those involved in the discussions will alter as a result of them in unpredictable ways; thirdly, as in any game, there is room for manoeuvre in the interpretation of the agreement reached and the interpretation held by the various parties will not be accepted by all. ‘Recognition and Dialogue: The Emergence of a New Field’.

the perpetual becoming of membership in a polity – can only take place through discussion, with reasonable disagreement flowing throughout and at every level of politics. The requirement that all voices be heard applies to all claims, regardless of their status as ‘historically present’ or recent immigrant groups, but mandates, too, that disagreement must flow not only at the level of inter-cultural dispute but at the intra-cultural level as well, so that dissent within the group making the claim and within the members of the majority group itself is also given voice.

Recognition struggles in constitutional democracies are thus struggles, according to Tully, over four dimensions. Firstly, recognition claims involve claims for recognition as membership of that identity in the polity itself; secondly, they involve the relations of governance, including all laws, procedures and patterns that determine the political life of a community; thirdly, claims contest the institutions and procedures of democratic deliberation itself; finally, recognition struggles contest the basic norms, values and principles to which members appeal in determining the first three.<sup>386</sup>

A claim to recognition is thus a claim to participate in society as equal citizens, where participation will vary according to the particulars of each claim. National groups or aboriginal peoples may claim political institutions; minorities, such as linguistic or religious groups, women and others seek participation on equal terms in ways that positively recognise and affirm them. What these multifarious groups share according to Tully is the desire to rule themselves in line with their own ways and customs in mutual mediation with others. The claim to recognition is thus the antithesis of independence claims or isolationist desires. Indeed, isolation is simply not possible according to Tully, and we need to move away from a conception of cultures as hermetically sealed off entities seeking independent self-rule. Rather, cultures are ‘densely interdependent’, overlapping, interactive, internally heterogeneous, transformed and re-negotiated both by their members and through interaction with non-members. The search cannot be, then, for a neutral forum or for a model in which each culture can maintain its traditions and customs, independent from others, but for

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<sup>386</sup> Tully, ‘Struggles over Recognition and Distribution’, 472-3. The norms contested in recognition claims play out in a wide variety of fields and are regulated and enforced in any number of formal and informal ways, as Tully makes clear. Also, Tully, ‘Recognition and Dialogue: The Emergence of a New Field’.

a scheme in which different groups and cultures perpetually work towards a mutual recognition in which their dense interdependence is acknowledged.<sup>387</sup>

### C. Promiscuity v. Hegemony: making recognition meaningful

A number of criticisms can and have been levelled at Tully's version of cultural agonism.<sup>388</sup> One of the most significant relates to the position of the state as mediator in negotiations. The allegation is that cultural agonism fails to challenge the hegemony of the state. For Hegel, *Sittlichkeit* and thus the achievement of recognition between free and equal selves and the freedom that the relationship of recognition entailed were only possible within the structure of the state. Tully's model of constitutionalism, it can be suggested, makes the same 'mistake'. Certainly in *Strange Multiplicity* the state is to act as a moderator in negotiations between indigenous groups, Quebec and the rest of Canada. Yet the state is not, cannot be, neutral<sup>389</sup> and, in this example, in fact represents the non-indigenous, non-Quebec part in the negotiations. To a certain extent, however, this is inevitable. The representative of the majority, at least in democracies, is the state; the asymmetry of power between the majority and groups claiming recognition will not disappear even in situations of agnostic negotiations.

A different but related problem is that for negotiations of this type to function, there will need to be penalties for disengagement or refusing to take part. Tully's actors are trapped together in a canoe and need to negotiate their necessarily common future. The sheer investment demanded of all parties in negotiations in much bigger boats, however, means that powerful players may not be persuaded of the benefits of taking part – indeed, for them, participation may entail more losses than gains – and

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<sup>387</sup> Thus in advocating the need for a neutral forum, cultural agonism differs, say, from a 'politics of presence' as advanced by Anne Phillips, in which it is the presence of members of disadvantaged groups in the institutions of society and governance that is sought. Yet, the presence of different groups will not change the co-opting structures themselves. Anne Phillips, *The Politics of Presence*. Oxford: Oxford University Press, 1995.

<sup>388</sup> I gratefully acknowledge discussion with Kirsty Gover on a number of these points. See, also, Markell, *Bound by Recognition*, 187-189.

<sup>389</sup> Markell argues convincingly against both the assumption of the state as a transparent medium and against the characterisation of the state as always already sovereign. He argues that the state appears to transcend recognition struggles by establishing itself as the hegemon amidst the social, representing its identity as authoritative fact, whereas the invocation of state sovereignty is no difference from other recognition claims and, further, it ignores the way in which the state gives active shape to the 'people' in its continual work of claiming recognition of that identity. Markell, *ibid.*, 26-28.

therefore they need to be convinced that to be outside negotiations is to drown, figuratively speaking. A not-taking-part will, most likely, not be penalty enough for those that are sufficiently powerful to play the master at the expense of others.<sup>390</sup> The more important question then is how to ensure the involvement and continued involvement of all parties, powerful and less so. It is suggested that to ensure willing participation of all, negotiations will need to be authoritative i.e. the process will take important decisions. Such authority will need to be granted by some entity, whether it be the state on the national level, or, on the international level, that the role is played by the illusive ‘international community’. The necessary institutional role as convenor and mediator of negotiations, as well as authorising power, whether state or international organisation, need not be a major stumbling block, however, as long as the mediator does not claim neutrality, and as long as the role itself, as well as the outcome of negotiations, is open to contestation. In stressing the understanding that there is no normativity, no inevitability, in the *status quo*, Tully’s later work arguably makes the best of the necessary involvement of institutions and the fact that the playing field is never level.

A further difficulty related to the permanent danger of failing to recognise hegemonic practices concerns the nature of agonistic forums themselves. An agonistic forum in which debating identity is the explicit purpose runs the risk of highlighting and concretising irreconcilable differences, reifying identity and achieving little. Further, making recognition the focus of negotiations not only highlights discord, but requires that each participant define their identity prior to inclusion in the process, so that identity is understood as an historically given set of facts about who we are – a set of facts that not only precedes us but that governs our actions, determining when we are acting authentically.<sup>391</sup> To a large extent, however, these dilemmas are unavoidable. One possible suggestion for overcoming this is to avoid forums that deliberately serve to highlight differences and focus instead on the *practical* problems that we share by virtue of living together. Where one understands identity as dialogical, as resulting from action rather than merely being revealed through action, prior recognition inevitably constitutes misrecognition. The nature of identity seems to necessitate the conclusion that recognition cannot be achieved by reaching for it but that the

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<sup>390</sup> See Markell’s interpretation of the master/ servant dialectic. *Ibid*, 96-97.

<sup>391</sup> Tully, too, suggests that negotiations begin with mutual recognition. *Strange Multiplicity*, 119.

relationship of identity to action entails that genuine recognition comes about only by acting together.<sup>392</sup> A focus on the practical appears to be a way of moving beyond the problems of recognition without abandoning the concept as unworkable.

Another serious criticism that can be made of cultural agonism relates to the danger of promiscuity – that in it, recognition is loose and cheap, and thus rendered meaningless. For negotiations to be meaningful, they cannot be open to all that claim the desire to enter. The canoe cannot accommodate an infinite number of passengers without sinking. Members of a golf club in rural Gloucestershire may feel that they are misrecognised if the club is not allowed to take part on behalf of its members in discussions concerning global warming – an issue which they are obviously affected by (changes in global weather patterns mean too much rain and a flooded golf course, for example). For these men and women being a golf-player and in particular being a golf-player at this specific golf club is a defining aspect of their identity.

Tully has noted the difficulty that where one views claims not as belonging to a certain type of identity politics, but as claims concerning current norms of mutual recognition, it can be extended to any kind of dispute.<sup>393</sup> Every constitution of an entity or forum necessarily involves exclusion, however; every decision an act of violence, as Mouffe has reminded us. While the golf club is obviously a tongue-in-cheek example, taking Wittgenstein's investigations into language and meaning seriously means accepting that exclusion cannot be straightforward. Indeed, it follows logically from a combined understanding of misrecognition as a grievous harm and of the irreducibility of cultural difference that recognition must be available to all who claim it. To refuse recognition, to impose standards for recognition on the shape or type of entity that claims it, necessarily constitutes cultural domination. However, recognition is not to be found in free-for-all inclusion either.

The problem is therefore to find a means of allowing wide participation in the knowledge that it cannot be limitless, without perpetuating the type of oppression that

<sup>392</sup> Arendt, *The Human Condition*; see *infra* section 4.1.2. See also Fraser's emphasis on participation parity as a means of side-stepping the problem of recognition. Parity is both an objective and subjective condition: the former concerns the distribution of material resources such as to ensure means by which adequate voice can be given; the latter requires that institutional arrangements express equal respect for all participating cultures and ensure social esteem for all. Fraser, 'Recognition without Ethics?', 29.

<sup>393</sup> 'Recognition and Dialogue: The Emergence of a New Field'.

the various theories of recognition sought to overcome in the first place. The ability to contest each and any of the rules of society does not entail having one's demands met. Rather, it implies the right to have one's claim heard and listened to in a spirit of mutual interdependence. Recognition, then, at its very minimum is the right to contest, to attempt to de-stabilise the hegemony of the *status quo*. Criteria for participation must be set, but these criteria must be open to challenge and the challenges must be taken seriously, for the cost of exclusion for a group or entity in terms of recognition may be very high. Nor are challenges necessarily confined to the procedural; but, as Tully's breakdown of recognition struggles into four types suggests, recognition struggles about the 'how' of participation necessarily call into question the values and principles that underpin the ordering of society. Such recognition struggles also therefore impact upon matters of redistribution – the 'how much for whom' questions.

#### **4.3. Summary: The radical contingency of recognition**

This chapter has attempted to suggest that recognition is no less than the currency of human interaction; for Hegel, "the human being is itself the movement of recognition".<sup>394</sup> Recognition is thus necessarily reciprocal and mutual. In society, the relational nature of recognition means that it can never be a simple dialectic struggle between two individuals, between a claimant group and the establishment, but as Tully, has put it, recognition is a multilogue.<sup>395</sup>

Recognition is to be found in participation, in the continuous conversations and dialogues that establish the rules and norms that govern a given polity and the policies that implement them. For Tully, it is only in participation in agonistic negotiations in which all 'languages' can participate as openly and fairly as possible that freedom is to be found. While this form of freedom, following Berlin, can be characterised as negative, Taylor has demonstrated the crucial importance of public recognition for positive freedom, of enabling a group and members of that group to become who they are. Yet, while recognition provides the space for identity-formation – an Arendtian space of appearance – and, as such, is the pre-enabling condition for identity, it cannot

<sup>394</sup> *Philosophie des Geistes*, 1805/06, 197; Williams, *Hegel's Ethics of Recognition*, 101.

<sup>395</sup> Tully, *Strange Multiplicity*, 131.

involve a recognising of identity. Rather, while ontological security cannot be achieved, it can be more or less present, and viewing recognition as participation seeks to avoid the trap of attempting to realise our identity, suggesting instead the security to be found in inclusion, in which our different cultures are equally respected. Only where such a degree of security is present can we be both free from oppression and free to develop ourselves and to tell the best stories about ourselves possible. The positive freedom emphasised by Taylor and the negative freedom highlighted by Tully are both present in Hegel, and Hegel remains important in reminding us that recognition needs both in our attempt to understand and institute a politics of mutual recognition. Ultimately, the validity of a norm of recognition is determined by its normative potential, rather than by its normalising force, that is by the degree of dialogical freedom of those subject to it.<sup>396</sup>

Agonistic deliberation places a great deal of faith in the highly transformative potential of politics. The effort demanded is great and the price for failure is high for all, although the burden is carried in the main by the most vulnerable. The struggle for recognition is not about the status of one group or a ‘type’ of groups, but the nature of reciprocal recognition entails an altering of *all* the relationships within the given polity; no entity or individual is transcendent to the struggle and is thus unaffected by changes to the players in the field.<sup>397</sup> There is a sense in which agonistic deliberations are not natural for human beings, standing in sharp contrast to territoriality and the fencing off of what is mine. It is something instead that we have to continually strive for in the knowledge that we will never get it right. According to the writer Ben Okri, “[t]he fact of story-telling hints at a fundamental human unease, hints at human imperfection. Where there is perfection there is no story to tell.”<sup>398</sup>

However, in seeking to undermine the hegemonic order, recognition must be a struggle and not take the easy path of meaningless recognition for all. Promiscuity of recognition is not an answer. Yet, in order to overcome the hegemony of a static pattern of power relations, we must keep the boat moving. Our journey is a fundamentally different one, then, to that of Odysseus’, for in order that our polities

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<sup>396</sup> Tully, ‘Recognition and Dialogue: The Emergence of a New Field’, 100.

<sup>397</sup> Tully, *ibid.*, 88.

<sup>398</sup> Okri, ‘The Joys of Story-Telling’, Fragment No. 18.

meet the critical challenge there can be no final resting place, no homeland for which we aim, despite a yearning for stability like Odysseus' yearning for Ithaca.<sup>399</sup> Tully has used the figure of an athlete limbering up for combat as the image of agonistic recognition.<sup>400</sup> Perhaps a more appropriate image of participants in a recognition dialectic in which identity will always outrun the bounds of recognition is that of an individual stepping up to the day, in the knowledge of and ready for the contingency it will bring, with the motto 'Come What May' on her lips.

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<sup>399</sup> Jon Ulster, *Ulysses Unbound: Studies in Rationality, Precommitment and Constraints*. Cambridge: Cambridge University Press, 2000. Instead of the traditional pre-committing nature of constitutionalism, therefore Tully offers the image of a chain of dialogue with each agreement being a link in the chain; *Strange Multiplicity*.

<sup>400</sup> 'The Unfreedom of the Moderns in comparison to their ideals of Constitutional Democracy', 219.

## Chapter 5: The possibility of non-territorial nationhood: contradiction or vision?

It was in books that he first learnt of his invisibility. He searched for himself and his people in all the history books he read and discovered to his youthful astonishment that he didn't exist.<sup>401</sup>

The self-conscious and persistent decision of the Romani Movement to claim Romani nationhood and the recent consensus within the Movement that the Romani nation as a whole is – can only be – a non-territorial and dispersed nation require some attempt at situating this claim within recent discourses on nations and nationalism. A number of nationalist demands within developed liberal constitutional states have, over the last 30 years, adapted to take account of the modern challenges facing the nation-state and have developed a sophisticated form of nationalist claim capable of sitting within a state constitutional order. This sub-state nationalism, or neo-nationalism, is an attempt to establish a rival but non-exclusive site of authority inside the state; it demands recognition of a distinct national identity and greater autonomy within the constitutional order while reaching out for participation in the supra-state structures and dynamic sectorial networks that are widely perceived to be challenging the competence of the state to govern.<sup>402</sup> The Romani Movement is thus not alone in putting forward a national claim that does not aspire to statehood. However, while the nation-state is facing a multiplicity of rival claims to its traditional authority and while the de-territorialisation of influence over many of the most important aspects of our lives continues apace, all commentators apparently remain insistent that our primary sense of belonging must remain a territorial one, whether it be state territory or non-state territory. Thus although the Romani claim can be viewed as part of the trend away from statehood, it is alone among contemporary claims in seeking a nation without territory.<sup>403</sup>

<sup>401</sup> Ben Okri, *Astonishing the Gods*. London: Phoenix, 1995, 3.

<sup>402</sup> Michael Keating, 'Nations without States: The Accommodation of Nationalism in the New State Order' in Michael Keating and John McGarry (eds.), *Minority Nationalism and the Changing International Order*. Oxford: Oxford University Press, 2001; Keating, *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era*. Oxford: Oxford University Press, 200. Stephen Tierney, 'Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation-State' (2005) 54 *International Comparative Law Quarterly* 161.

<sup>403</sup> For the development of the concept of non-territorial national-cultural autonomy by the Jewish Bund at the turn of the twentieth-century as an attempt to reconcile the growth of Zionism and socialist ideals, see Henry J. Tobias, *The Jewish Bund in Russia. From Its Origins to 1905*. California: Stanford

People and territory are obviously intimately connected and have over many hundreds of years defined and shaped each other. However the uniting of fixed territorial borders with exclusive political belonging that marked the arrival of the modern has moulded the limits and shape of political organisation for centuries, determining understandings of the nature and look of both nations and states. The political has become entwined with territory – distinct from cultural identities that do not require a territorial attachment. Identity without any attachment to territory, not even of a diasporic nature, cannot therefore be viewed as a national identity.<sup>404</sup> Such reasoning would see the claim to non-territorial nationhood as necessarily contradictory, an attempt to extend the boundaries of a nation to the point of rendering the concept meaningless.

This chapter will attempt to suggest that while territory is instrumental, it is not an indispensable element of the political aspirations that are so fundamental to the definition of a nation. Three points will be suggested. Firstly, the nation is an intrinsically valuable community to the individuals that belong to it; indeed, it is the primary vehicle of our social imagining. The second point is that a nation is solely to be defined as a group that aspires to collective self-governance. Finally, it shall be argued that while territory is instrumental in facilitating the development of that aspiration, and although territory features strongly as a symbol of nationhood, it is not inherent to national claims. It shall be argued that capacity is relevant only in so far as it facilitates the establishment of the legitimacy of a claim. The belief in the necessity of territory is, rather, underpinned by an undue emphasis on the importance of capacity in establishing a national claim. However, where capacity is no longer viewed as a separate element from the legitimacy of aspirational claims to nationhood, territory cannot be held to be an essential element of nationhood.

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University Press, 1972; and Zvi Gitelman (ed.), *The Emergence of Modern Jewish Politics. Bundism and Zionism in Eastern Europe*. University of Pittsburgh Press, 2003. For non-territorial national autonomy as developed by Karl Renner and Otto Bauer, see Ephraim Nimni, ‘Nationalist multiculturalism in late imperial Austria as a critique of contemporary liberalism: the case of Bauer and Renner’ (1999) 4 *Journal of Political Ideologies* 289.

<sup>404</sup> E.g. A.D. Smith, *National Identity*. London: Penguin, 1991, 21. Smith also requires ethnic groups to have some attachment to territory to qualify for the description of ‘ethnic’.

## **5.1. The Nation as intrinsically valuable community**

Nations have long been understood as the primary community of political membership, from the earliest records of the Middle Ages (even, perhaps, antiquity<sup>405</sup>) to the Enlightenment, in which the Crown was replaced by the people as the vehicle of political autonomy. Empire and the potent force of nationalist sentiment spread the nation-state model to the rest of the world and global political organisation remains enthralled to the belief that mankind is fundamentally divided into nations and that these nations possess a territorial homeland. While it is now generally accepted that national identity is a work of collective imagination and thus is no more natural than any other form of identity, the nation is likely to remain the basis of our primary political belonging for the foreseeable future. This is not something necessarily to be lamented. Indeed, this section will present reasons for taking national claims seriously.

There are two types of argument customarily put forward for the need to respect national groups. The first concerns the importance of national identity for the individual. The argument that liberal nationalists make is that national identity is a fundamental part of individual self-identity; that, for whatever reason, as individuals we identify with a national group and this identity must be respected. The second type of argument can be characterised as communitarian and presents the case for the value of the group collectively. As Aristotle notes at the outset of *The Politics*, all associations come into being for the sake of some good.<sup>406</sup> It is this second argument that is considered first.

David Miller, in his comprehensive attempt to rehabilitate the nation, has made the point strongly that nations are not inherently unethical communities, that, rather, they are indeed intrinsically valuable communities.<sup>407</sup> In addition to making the individual argument, he argues for nations as ethical communities on the basis of the relationships of mutual trust and feelings of solidarity that are, he suggests,

<sup>405</sup> See Steven Grosby, 'Borders, Territory and Nationality in the Ancient Near East and Armenia' (1997) 40 *Journal of the Economic and Social History of the Orient* 1.

<sup>406</sup> *The Politics*, Bk. 1, Ch. 1, 1252a2-3. (Tr. Ernst Barker, Oxford University Press, 1995)

<sup>407</sup> David Miller, *On Nationality*. Oxford: Oxford University Press, 1995. Also Margaret Canovan, 'Patriotism is Not Enough' (2000) 30 *British Journal of Political Science* 413.

intrinsically valuable in themselves. There are slight variations on this argument. Others present a view in which they suggest that national feelings of solidarity produce objective goods, such as the survival of one's culture or language, the creation of democratic institutions and so on, all of which other nations may also have achieved but what is important is that it is the relationships within the group that have produced and sustained *these* particular goods.<sup>408</sup> Similarly, Miller argues that only a nation can generate the feelings of solidarity in which deliberative democracy is possible.<sup>409</sup> Miller suggests that it is, in part, an understanding of nations as "communities of obligation" in the sense that members recognise and act upon their bonds to one another that justifies self-governance, for if social justice is to be effectively discharged, duties must be assigned and enforced.<sup>410</sup>

Such arguments highlight the intrinsic value of the nation from the perspective of the goods it produces, but liberal nationalists have sought to reclaim nationalism from the communitarians.

In the attempt to reconcile group rights with the liberal tradition, many scholars have emphasised the importance of the group to individual well-being. There are a number of ways to make this connection. One is to highlight the importance of the group to individual feelings of self-worth. Margalit and Raz take this line, for example, arguing that individual identity is intrinsically bound up with the group and that the esteem with which a group is held in society deeply affects the self-respect of the individual.<sup>411</sup> Others, such as Kymlicka and Taylor, highlight the link between culture and autonomy. Where culture provides the 'horizons of significance' within which individuals are able to make choices about their version of the good life, individual choice is dependent upon the presence of a societal culture, according to Kymlicka.<sup>412</sup> If culture provides the structure in which individual autonomy is meaningful, it makes sense that it deserves some form of recognition and protection.

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<sup>408</sup> See Moore for discussion of Hurka's version of the argument. Margaret Moore, *The Ethics of Nationalism*. Oxford: Oxford University Press, 2001, Chapter 2.

<sup>409</sup> Miller, *On Nationality*, 92, 96.

<sup>410</sup> Miller, *ibid.*, 83.

<sup>411</sup> Avishai Margalit and Joseph Raz, 'On National Self-Determination' (1990) 87 *Journal of Philosophy* 439.

<sup>412</sup> Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Oxford: Clarendon Press, 1995, 75-80; Yael Tamir, *Liberal Nationalism*. Princeton: Princeton University Press, 1993.

The connection to autonomy made by liberal progressives has, however, faced severe criticism. If a culture does not allow individual autonomy, is the suggestion to be that the culture is worthless and should not be granted protection or accorded some form of recognition?<sup>413</sup> It is counter-intuitive that only those cultures that cultivate individual autonomy give meaning and structure to people's lives; the evidence is that people feel very attached to even those cultures that deny them those individual rights that are the mainstay of liberal politics. Further, placing the emphasis on the link between culture and autonomy can also fail to provide sufficient connection between self-government and culture. As Moore rightly highlights, the assumption of the liberal progressives is that cultures, and therefore nations, are significantly different to one another. Moore gives the example of Canada and the U.S. to illustrate that this need not be the case. Culturally there is little dividing line between the two societies and, on this basis, it would be difficult to make the case that if the two countries were to become one, members of either would be rendered 'unautonomous'. Ignatieff's exposition of what he terms the 'narcissism of minor difference' similarly suggests that interpreting national claims through the prism of cultural difference is distorting.<sup>414</sup> Culture is not to be seen as synonymous with nation. This distinction sees Moore put forward an argument concerning fairness as reason for the legitimacy of national claims, that it is privileging of one particular national identity by the state that is unfair.<sup>415</sup>

However, the autonomy argument does not necessarily have to be so shallow as to exclude non-liberal cultures. Whether or not one views the importance of the group as stemming from the framing structure it provides for individual lives or for the role it plays in the individual's sense of self-worth – the reason for its importance is of less concern than what that importance entails – the issue may nonetheless be seen as one of autonomy. The preceding chapter sought to make clear the impact of misrecognition on both the positive and negative freedom of the individual. But a case can be made for taking national claims even more seriously than other group-based

<sup>413</sup> See Moore, *The Ethics of Nationalism*, 55-56.

<sup>414</sup> Michael Ignatieff, *The Warrior's Honour*. London: Vintage, 1999. Ignatieff highlights the cultural similarities of Croats and Serbs, and the fact that their common culture did not prevent a violent assertion of national self-determination, suggesting that it was rather the similarity that was responsible for the brutality of the conflict.

<sup>415</sup> Moore, *The Ethics of Nationalism*, 60.

claims. National claims are necessarily claims about a group's public life. Thus even when individuals cannot enjoy the benefits of membership of any group without being allowed to express it publicly or when denied full participation in the public arena, national identity is privileged because it cannot be a private identity in the way that religious, sexual or even ethnic identities can all be to a certain degree. Nations are the means by which individuals express the desire to rule themselves, one of the most basic freedoms of all. As Moore comments, "there is a non-derivative value attached to ... control over our lives".<sup>416</sup>

To summarise the arguments presented as to why national claims are so important: nations are intrinsically morally valuable communities. This is so either because they produce valuable goods, such as solidarity and bonds of mutual trust as well as ensuring the survival of one's culture; or, the line adopted here, because of the extreme importance that individuals assign to them, whether this be for the part national communities play in individual self-understanding or for the link between autonomy and culture that has been suggested. As Karl Renner wrote in 1899, it "[t]he individual's right to self-determination [that] constitutes the correlate of the nation's right to self-determination"<sup>417</sup>, where self-determination is the most powerful recognition claim that can be made. Ultimately, nations are of such importance because they are the means by which claims to self-governance are made, but they bear that task because they are communities of such value to individuals that we choose to make claims to the governance of our lives through them. Where nations are the medium of the freedom of self-rule, to deny national-self-determination is, then, to deny a group this freedom. Claims to nationhood are therefore ultimately—necessarily—claims to original authority. As the vehicle of political claims to self-governance, national claims cannot be dismissed lightly.

As a final suggestion for why we must take national claims seriously, Ernst Renan's famous description of the nation as a daily plebiscite makes explicit the extraordinary effort required in making and sustaining a claim to nationhood. National claims are

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<sup>416</sup> Moore, following Nielsen, *ibid*, 29; Kai Nielsen, 'Secession: The Case of Quebec' (1993) 10 *Journal of Applied Philosophy* 29.

<sup>417</sup> Karl Renner, 'State and Nation (1899)' in E. Nimni (ed.), *National Cultural Autonomy and its Contemporary Critics*. London: Routledge, 2005.

not for the frivolous.<sup>418</sup> For a group to make and sustain the effort to have their voice heard is perhaps the final reason for taking all claims to the authority to self-govern seriously, no matter how unconventional they may look.

## **5.2. Territorial Belonging: the monopolization of place by the state**

There is little doubt about the importance of land in the imaginations of men. Exile as the greatest punishment that a community can bestow upon an individual is perhaps a universal cultural phenomenon, and one captured in recent times by the sense of displacement and dislocation of those that through migration leave their home for a foreign land.<sup>419</sup> Our attachment to territory arguably began as the need for physical and economic survival. We all must all be located somewhere on the surface of the earth and our security is only assured if we can say that this is our space, these our borders, and defend them. Moreover, we depend upon the land to feed us, and in the wake of the agrarian revolution that allowed mankind to multiply and fill the earth freed of the restraints of our hunter-gatherer ancestors, that dependence grew. These basic needs mean that it is no surprise that classical political philosophy sees the beginning of political community as the defining of its physical borders: only within the confines of the city-walls, for example, can the public good be defined.<sup>420</sup> The appropriation of land by the individual has been suggested as the moment at which a member of the collective became a citizen in Roman political thought;<sup>421</sup> and Rousseau similarly suggested that, “The true founder of civil society was the first man who fenced in a piece of land, thought of saying ‘This is mine’, and came across people simple enough to believe him.”<sup>422</sup> The association of the word ‘settlement’ with Lockean values, under which the proper use of land is to inhabit, enclose and to

<sup>418</sup> Keating, ‘So many nations. So few states. Accommodating Minority Nationalism in the Global Era’, in A-G. Gagnon and J. Tully (eds.), *Multinational Democracies*. Cambridge: Cambridge University Press, 2001, 61; *Plurinational Democracy*, 5.

<sup>419</sup> See, for example, Salman Rushdie, *Imaginary Homelands*. Great Britain: Granta, 1991.

<sup>420</sup> For Arendt, the Greek polity “was quite literally a wall, without which there might have been an agglomeration of houses a town ... but not a city, a political community.” *The Human Condition*. New York: Doubleday Anchor, 1958, 63.

<sup>421</sup> Territory marked the shift from Aristotle’s *zoon politikon* to the Roman *legalis homo*: “[h]umans appropriated the earth, and in doing so became persons and citizens”. See J.G.A. Pocock, ‘The Ideal of Citizenship Since Classical Times’ in R. Beiner (ed.), *Theorizing Citizenship*. Albany: State University of New York Press, 1995, 45.

<sup>422</sup> *Discourse on the Origin of Inequality*. Part II, 54. (tr. Franklin Philip), Oxford: Oxford University Press, 1994.

till the land, in contrast with the improper use made of land by those that merely ‘wander’ over it, dominated the understanding of man’s relationship to land until the second half of the twentieth century.<sup>423</sup> That national communities have been created and sustained on the basis of historical co-existence on a portion of the earth, that the position of individuals within the legal system and within society have largely been defined by their ownership of that land, is reflected in the continuing importance of property in our legal systems, in our sense of political community, in our sense of self. Physical boundaries matter to us. Human beings are arguably bound just as other animals by the principle of territoriality.<sup>424</sup>

The connection between territory and political community is not merely that of security and economic dependence, but there is a strong sentimental attachment to the land itself. Land provides a sense of continuity of culture, tying us to our ancestors and linking us to a collective future. There is something powerful and primordial in the understanding of a place as *the* place which is the realm of one’s being, as the theatre in which the historical memory and meaning that binds a group was acted out. Charles I was executed *here*, Shakespeare was born in *this* house, the Battle of Hastings took place on *this* field. The institutions to which members of a nation form a common attachment are also physically located: churches, pilgrimage sites, universities, theatres, galleries and so on. Territory often as much marks the bounds of one’s imagination as it does the physical extent of political community. The land not only links us to the presence of our ancestors, but our shared culture has, moreover, physical referents: rivers, hills, the sweep of the land but also the man-made – architecture forms a backdrop to the self-definition of a community.<sup>425</sup> The land, including its buildings, is thus a symbolic space with huge emotional significance and frequently becomes a shorthand description of the nation itself: few commentators are able to define the English nation but our culture is replete with eulogies to the English

<sup>423</sup> Benedict Kingsbury, ‘People and Boundaries: An “Internationalized Public Law” Approach’ in Allen Buchanan and Margaret Moore (eds.), *States, Nations and Borders. The Ethics of Making Boundaries*. Cambridge University Press, 2003, 303–4.

<sup>424</sup> See the assertion by Michael Walzer’s that to tear down the walls of the state would not create a world without walls, but “a thousand petty fortresses”. Walzer, *Spheres of Justice*. Oxford: Blackwell, 1983, 39.

<sup>425</sup> In Philip Roth’s latest novel, when a Jewish-American family wish to convince themselves of their American-ness at a time when they feel this identity to be threatened by rising anti-Semitism they take a trip to Washington to view Capitol Hill and the capital’s other landmarks. For the Roth family, those buildings symbolise the liberty of the American Constitution and what it means to them to be Americans. Roth, *The Plot Against America*. London: Vintage, 2004.

countryside.<sup>426</sup> For our ancestors, land was significant because they farmed it<sup>427</sup>, or, if they were aristocratic, their lands defined their political and social identity<sup>428</sup>; for us, it maintains its significance, eulogised in our literature and art.

Moreover, if territory is the physical aspect of the life of the community, it not just reflects but also conditions the identity of the community. The English sense of being an island (albeit that the island is not all theirs) is an undoubtedly strong feature of English identity, and one that has been reinforced over the generations as the seas acted as protection to would-be invaders from the Spanish Armada, to Napoleon, Nazi Germany and now, as some would see it, an over-zealous ‘Europe’. The English inability to articulate their national self-identity is often ascribed to a quiet confidence born of nearly a thousand years of national formation uninterrupted by invasion. Similarly, place gives national identity part of its form. It has been suggested that the rhythm of Jewish culture is tied to the seasonal rhythms of the Eastern Mediterranean<sup>429</sup>; it is clear that their lifestyle, diet, and other important facets of their common identity would be different had the Jewish people established themselves originally in another place.

Territory is thus a concept without which it is difficult to make sense of the way in which human history has unfolded. Yet to what extent is this a consequence of the monopolization of political life by the state? Boundaries are undoubtedly important as the means of organising social space, and thus of creating political life, but do these boundaries need to be physical borders and does the space inside them need to be a monopoly? The state-defining exclusive relationship between a single political entity and a territory is a contingent one, the product of a certain historical era, and not a God-given form of political perfection. Recent scholarship has been at pains to emphasize that political organisation has not always been territorially-based. A

<sup>426</sup> E.g. from Gaunt’s deathbed lament for ‘this blessed plot, this earth, this realm, this England’ in *Richard II* to Constable’s Haystacks.

<sup>427</sup> Vattel, for example, in his authoritative *The law of nations, or the principles of natural law*, determined that “The cultivation of the soil is an obligation imposed upon man by nature” and, following, seems to suggest that in ‘failing’ to cultivate the land, Aboriginals could not be considered nations as they claimed, but were simply savages. Tr. Fenwick, Washington: Carnegie Institute, 1902, 1.8.81.

<sup>428</sup> As the future Henry IV insists following the death of his father in Shakespeare’s *Richard II*, he is not Hereford but Lancaster, and will only recognise an address as such. Act 2, Scene 3, lines 69-73.

<sup>429</sup> George H. White, *Nations, States and Territory. Origin, Evolutions and Relationships*. U.S.: Rowman & Littlefield, 2004, 38.

historical examination of the correlation between rule and territory, for example, has led Ruggie to follow Giddens in defining a system of rule as being compromised of “legitimate dominion over a spatial extension”, where ‘spatial extension’ need not be exclusively territorial.<sup>430</sup> Place is not necessarily territorial.

Prior to the neatness of the Westphalian model, the Europe of the Middle Ages formed an intricate web of over-lapping and intersecting competences and authority – a sprawling mass of small polities: of city-states, bishoprics, noble fiefdoms, towns and guilds, all providing alternative sites of authority which intersected and occasionally clashed with that of Kings and Emperors claiming personal authority over a people or territory and with the Church that claimed *imperium* over all of Christendom.<sup>431</sup> Such patterns of governance find reflection in the relationship of the EU to the Member States, which sees a division of competences, albeit within a clearly defined territory, on a functional basis.<sup>432</sup> ‘Europe’ is less a physical territory than a social process in which boundaries are defined by their fluidity and space is being redefined by the European discourse.<sup>433</sup> Similarly, a federal state such as Belgium uses a multi-dimensional division of political space in order to maintain a balance between the distinct language groups that make up the country; political division occurs both along territorial lines, but also along language lines.<sup>434</sup>

Outside Europe, political organisation has frequently developed and maintained a pattern governed by alternative concepts of space. Nomadic life sees place defined by traditional migration routes rather than exclusive ownership of land. Nomadic existence is not entirely foreign to Europe, as Romani history in Europe makes clear, but like the Roma, concepts of common land and traditional rights of way fell victim to land ownership, whether public or private. Land also has a different meaning for

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<sup>430</sup> John Gerrard Ruggie, ‘Territoriality and Beyond: Problematizing Modernity in International Relations’ (1993) 47 *International Organization* 139, 148.

<sup>431</sup> Jan Zielonka, ‘Enlargement and the Finality of European Integration’, in Joerges, Mény and Weiler (eds.), *What Kind of Constitution for What Kind of Polity: Responses to Joschka Fischer*. Florence, RSC, 2001.

<sup>432</sup> See, for example, Rainer Bauböck, *Transnational Citizenship*. England: Edward Elgar, 1994.

<sup>433</sup> Anssi Passi, ‘Europe as a Social Process and Discourse: Considerations of Place, Boundaries and Identity’ (2001) 8 *European Urban and Regional Studies* 7. ‘Europe’ is also being expanded beyond its frontiers, as Member States demand that prospective immigrants complete immigration tests before leaving their home country.

<sup>434</sup> Arend Lijphart, *Democracy in Plural Societies. A Comparative Exploration*. New Haven: Yale University Press, 1977.

indigenous forms of political organisation, frequently being viewed as sacred but not exclusive.<sup>435</sup> Further, political space is not always a reference to the land. According to one account, in Maori culture although Earth is the mother of all, the victory of humanity's ancestor over all his brothers, bar his brother the wind, entails that descendants of humanity are the chief of the environment of both land and sea. Land is thus not separated from the sea for political and sentimental attachment.<sup>436</sup>

There have also been several examples of explicit attempts at non-territorial group autonomy within Europe, suggesting that the Westphalian model has not always been as neat as it sought to insist.<sup>437</sup> The Ottoman millet system is the classic example of governance based on the personality principle, in this case religion; from as early as the fifteenth century, different religions, such as Greek Orthodox, the Catholic Armenians and the Jews, were allowed the freedom to administer their own affairs in the realm of religion, education and family matters, including questions of marriage, divorce and inheritance.<sup>438</sup> The Jewish community of the Polish-Lithuanian Commonwealth were also the beneficiaries of a considerable degree of autonomy in the governance of its own affairs up until the years immediately preceding the Third Partition, which ended the independence of the Commonwealth. Governing bodies were established at the level of local communities, which then sent representatives to regional and national Jewish councils; these bodies had responsibility not merely for religious matters but also for family, housing and economic matters. They acted as tax collectors and as interlocutors between the community at its various levels and the authorities. Further, the Magyars, the Szekels, the Saxons and the Romanians were all recognised as nations in the Transylvanian diet under the Austria-Hungarian Empire, but the inclusion of the Saxons is striking as, unlike the other three, they were scattered across a wide geographical area. Accepted political claims to self-

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<sup>435</sup> Perry Dane, 'The Maps of Sovereignty: A Mediation' (1991) 12 *Cardozo Law Review* 959.

<sup>436</sup> See Hong-key Yon, 'Maori Identity and Maori Geomentiality' in David Hoosen (ed.), *Geography and National Identity*. Oxford: Blackwell, 1994.

<sup>437</sup> The examples are taken from John Coakley, 'Approaches to the Resolution of Ethnic Conflict: The Strategy of Non-Territorial Autonomy' (1994) 15 *International Political Science Review* 297. Also, Sarah Abrevaya Stein, 'The Permeable Boundaries of Ottoman Jewry' in Joel S. Migdal (ed.), *Boundaries and Belonging. States and Societies in the Struggle to Shape Identities and Local Practices*. Cambridge: Cambridge University Press, 2004.

<sup>438</sup> Although Gypsies were occasionally singled out for attention by the Ottoman authorities, they were not granted any form of self-administration, categorised instead largely by their religious denomination. Fraser, *The Gypsies*. Oxford: Blackstone Press, 1992, 171-176.

governance have not thus always come packaged as a territorial nation in the form of a state.<sup>439</sup>

Similarly, in the inter-war period, national groups in Europe benefited from a number of the increased pressure upon states to allow national minorities some degree of autonomy. The Estonian Cultural Autonomy Law of 1925 allowed any ethnic group of more than 3000 to establish itself as a separate legal entity, levy taxes on members of the group, and to take control of the group's affairs in the areas of education, culture, libraries, theatres, sports, museums and youth affairs. The German and Jewish minorities established their own Cultural Councils in 1926.<sup>440</sup> In the present-day, indigenous self-governance is frequently non-territorial, for example the Norwegian Sami Parliament, where inclusion is based on the personality principle.<sup>441</sup> Another form of personality principle is the consociational model of governance, which has been remarkably successful in the Netherlands, Switzerland and Austria and which continues to maintain a precarious balance in Belgium.<sup>442</sup>

Moreover, there have always been de-territorialised systems of law and governance beyond the state, the most famous perhaps being the *lex mercatoria*, a system of law established by the custom and usage of those trading across borders, firstly in Europe from the twelfth-century and later, from these origins, globally, although many others are now developing.<sup>443</sup> Our attention is drawn to the changing conception of space and place by the emergence of the internet, which has seen the creation of a 'realm' divorced from territory, in which location is important, but where that location is virtual rather than primarily physical.<sup>444</sup> Territory continues to matter, as hardware and users are always necessarily physically located and traditional sovereigns are yet

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<sup>439</sup> In this regard, see Tierney, 'Reframing Sovereignty?', 168-9.

<sup>440</sup> Coakely, 'Approaches to the Resolution of Ethnic Conflict: The Strategy of Non-Territorial Autonomy', 307-308.

<sup>441</sup> Anne Julie Semb, 'Sami Self-determination in the making?' (2005) 11 *Nations and Nationalism* 531.

<sup>442</sup> Lijphart, *Democracy in Plural Societies. A Comparative Exploration*, 25.

<sup>443</sup> For example, the emergence of what Teubner has dubbed *lex sportive internationalis*. See Gunther Teubner, "Global Bukowina": Legal Pluralism in the World Society', in G. Teubner (ed.), *Global Law Without a State*. Aldershot: Dartmouth Publishing Company, 1997, 3-4; also B. L. Benson, 'The Spontaneous Evolution of Commercial Law' (1989) 55 *Southern Economic Journal* 644.

<sup>444</sup> David R. Johnson and David Post, 'Law and Borders – The Rise of Law in Cyberspace', (1996) 48 *Stanford Law Review* 1367. Also, Ralf Michaels, 'Territorial jurisdiction after territoriality' in Piet Jan Slot and Mielle Bulterman (eds.), *Globalisation and Jurisdiction*. The Hague: Kluwer Law International, 2004.

to concede that the virtual realm is beyond the extent of their regulatory authority;<sup>445</sup> yet the battle is over the control of access to information, over borders of a virtual realm and not the physical.

The understanding that a necessary feature of a nation is the attachment to a particular and exclusive portion of the globe stems from the historical understanding that a nation was a nation-state in waiting, thus that national sentiment necessarily required self-determination where self-determination required independence and statehood. Nation has necessarily been defined by its close relation to statehood, and the strong link between territory and identity is in part related to state control of social practices and the apparatus of identity. The dominance of the nation-state has, moreover, forced all other groups to justify their sense of self in relation to it. As this bond is increasingly perceived to be weakening in the face of the challenges of globalisation, it is appropriate to re-conceive nationhood free from the dominant shadow of statehood. If we can imagine the existence of nations without states, we no longer need to define nationhood by the requirements of the nation-state. A nation-as-state required that the boundaries of the nation be co-terminus with the administrative borders of the state and, where they were not, the imagined boundaries of the nation had to be extended to be so.<sup>446</sup> Territorial belonging as the sole basis for political life has sought to edge out competing conceptions of the organisation of political space. In this, it has been remarkably successful, but not wholly so and challenges to the state from above, below and horizontally are highlighting the difference between place and territory. If territory is not the only means of conceiving of political organisation, why is it so widely perceived to be vital to claims to nationhood?

### **5.3. Unpacking the meaning of territory**

Nationalism scholars, it seems without exception, hold territory to be vital to any understanding of what it means to be a nation; territory need not be exclusively held or cherished, but it must be there. This section will attempt to strip back a nation to its vital ingredients and thereby to unpack what vital role territory is understood to play

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<sup>445</sup> Laurence Lessig, 'The Zones of Cyberspace' (1996) 48 *Stanford Law Review* 1403; Jochen von Bernstoff, 'Democratic Global Internet Regulation? Governance Networks, International Law and the Shadow of Hegemony' (2003) 9 *European Law Journal* 511.

<sup>446</sup> Benedict Anderson, *Imagined Communities*. London: Verso, 1991 (revised ed.).

in constituting a nation. It will use the work of two contemporary scholars of note to do so: Michael Keating and Margaret Moore.

### 5.3.1. Imagining the Nation and Claiming It

For both Keating and Moore, although they dress it slightly differently, the crucial element of nationhood is choosing to identify as a nation and asserting that identity on a wider plane. Moore emphasises the subjective component of national sentiment, following other theorists such as Ernst Renan, Yael Tamir, and David Miller among many others. She suggests that the ability of its members to sustain a shared image of themselves as a nation is essential to definitions of nationhood, noting that the list of objective features that are frequently drawn up by those seeking to construct a definition of nation – language, history, culture, a shared public life – are important only in so far as they foster and sustain the most important element: national identity. So-called ‘objective’ factors may give the nation vital nourishing roots but they only give rise to nationhood when a group self-consciously takes them up. Similarly, common values may be a vital part of constituting the social trust that is necessary for accepting the ups and downs of the democratic process; a common language for both social and political communication; a common history, replete with both successes and tragedies, for its ability to foster the bonds of mutual trust. However, although important, such features cannot be part of the definition itself, as a nation may be able to constitute and sustain common feeling without them.<sup>447</sup>

Keating places less emphasis on the fully subjective, asserting that a nation must be historically constituted as a self-governing community.<sup>448</sup> Moore is similarly wary of appearing to suggest that nations can be plucked out of thin air in the absence of a shared history or culture; but emphasising the subjective does not, however, do away with these elements. It does though mean a refusal to draw up a checklist of criteria so that where one is missing a group does not ‘qualify’ for nationhood. Nations do not come from nowhere but are generated by a group itself from a shared historical,

<sup>447</sup> The Permanent Court of International Justice in the *Rights of Minorities in Upper Silesia* case declared that identity could not be subjected to “objective” determination. *Rights of Minorities in Upper Silesia (Minority Schools)* (1928) P.I.C.J. Ser. A Judgements, No. 12; this point is made in Nathaniel Berman, ‘A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Interwar Framework’ (1992) 33 *Harvard International Law Journal* 353, 379.

<sup>448</sup> Michael Keating, *Plurinational Democracy*, 3.

cultural, social or institutional base over a considerable period of time. Moore thus notes that there is a need to distinguish between ‘imagined’ communities, in Anderson’s felicitous phrase, and ‘imaginary’ ones.<sup>449</sup> But what is important in a nation is that a nation is collectively imagined by its members, and not the actual conditions that make that imagining possible.<sup>450</sup>

However, an ethnic group also shares the same objective features that are linked with nationhood and also imagines itself into being. It is thus the nature of the image that a group constructs that is important. A nation imagines itself as a nation. A nation is necessarily a political dream, in which the degree of cultural difference from a neighbouring group is not of real importance. According to Moore, what is distinctive about nations is their political self-consciousness.<sup>451</sup> Nations partake with ethnic groups in the shared myths, history, common characteristics, culture, language, and so on, but it is the way in which nations frame their aspirations that distinguishes them from ethnic groups. For nations aspire to political autonomy; they use the framing language of self-determination to assert their claim to original authority.

Similarly, while Keating understands the nation as lying at the intersection between identity and territory, entities such as the German *Länder* possessed of clearly defined borders and a sense of political identity (in the case of Bavaria, one might say a strong sense) do not constitute nations because they do not assert themselves as such.<sup>452</sup> “One can talk of nationalism in Scotland, Wales, or Quebec”, according to Keating, “since these places are widely recognised as nations, the population see themselves as such, and they have established nationalist movements with defined agendas.”<sup>453</sup> For Keating, the crucial differences between the claims of an ethnic group and of a group that we can rightly call a nation is the claim to self-determination, whereby the claim being made is addressed in the main to the supra-state level; although claims to self-

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<sup>449</sup> Moore, *The Ethics of Nationalism*, 13; Miller too has claimed the need for historical continuity in creating the bonds that bind us. (Miller, *On Nationality*, 23-24).

<sup>450</sup> Anderson, *Imagined Communities*. Anderson, for example, suggests that boundaries of national communities have been largely shaped by vernacular reading communities from the age of print. However, this one criterion does not explain the border between England and Scotland, for example, and an illiterate group that has no reading culture should not be denied the ability to make national claims on this ground alone.

<sup>451</sup> Moore, *The Ethics of Nationalism*, 5-9.

<sup>452</sup> Keating, ‘Nations without States’, 22-23.

<sup>453</sup> Keating, ‘Nations without States’, 23.

determination do not need to result in actual statehood, “[n]ational claims situate the territory or group as a subject of the international order”.<sup>454</sup>

However, despite emphasising the subjective as the defining element of nationhood, Keating and Moore nonetheless hold territory to be a vital element of what it means to be a nation.

### 5.3.2. Territory and the Nation

One of the reasons for Keating’s work being of particular interest here is that he has comprehensively charted the separation of nation from state in the development of non-state nationalism. Taking the nationalist movements of Scotland, Quebec and Catalonia, he has convincingly situated them within the challenges to the nation-state and the corresponding transformation and dispersal of governance functions that globalization and European integration have brought.<sup>455</sup> Where the state is no longer the sole repository of government, Keating has described a space as opening up in which other forms of political loyalties can assert claims without needing to demand full statehood; in his own words, “nationality claims may be treated as a form of normal politics, rather than as zero-sum claims immune to compromise.”<sup>456</sup> However, although identifying as a nation and claiming it on the international stage are the *sine qua non* of nationhood, Keating nonetheless sees territory as playing a vital function in constituting and sustaining national claims. Keating similarly views the new nationalisms as contesting the state in its physical territory and normative space, rather than seeking an identity beyond the territorial; thus, a “new politics of nationalism has emerged in which territorial societies are reinvented and rediscovered, below, beyond and across the state system.”<sup>457</sup>

While noting that the monopoly of the state in defining territory and its meaning has disappeared, Keating holds that control of territory retains its importance on the basis

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<sup>454</sup> Keating, ‘Nations without States’, 24.

<sup>455</sup> It should be noted that Moore has made similar points. Moore, ‘Globalization, Cosmopolitanism, and Minority Nationalism’ in Keating and McGarry (eds.), *Minority Nationalism and the Changing International Order*.

<sup>456</sup> Keating, ‘Plurinational Democracy in a Post-Sovereign Order’, *Queen’s Papers on Europeanisation*, No. 1/2002.

<sup>457</sup> Keating, *Plurinational Democracy*, 17.

of a re-territorialisation of politics.<sup>458</sup> There are three grounds of this re-territorialisation: functional, political and normative.<sup>459</sup> Keating asserts that while the territorial borders of the state may have lost much of their significance due to the globalization of trade, communications and the related development of a form of global culture, the economic re-structuring which is a particular feature of the national claims of groups he has studied are necessarily territorial. Further, he asserts that territory has proved to be the most fertile ground for culture and language policies. Cultural identity in this new nationalism requires an economic base, while a strong cultural identity in turn underpins national economic development in the face of global markets. Similarly, Guibernau has argued that in order to consolidate a specific national identity, a nationalist movement must control two key systems: media and the education system, in order to foster and maintain "a situation in which the language and culture of the nation are employed and cultivated by a large majority of the population on a day-to-day basis".<sup>460</sup> In nearly all cases, control of the education system and media will at the very least require territorial concentration and a degree of territorial autonomy. The strength of common identity necessary for a group to desire nation status is, such an argument suggests, still only capable of generation where the group has a territorial base with which to sustain its 'national' difference.

Secondly, according to Keating, territory is politically necessary as the basis for governing institutions such as the administration of government, justice, and, in certain parts of the world, the welfare state. Keating suggests that there has consequently never been a non-territorial government.

Thirdly, territory is normatively necessary as the basis of a nation allows for a non-exclusive non-ethnic form of nationalism. Keating notes that nearly all of the nationalist movements in western Europe and Canada have moved from ethnic nationalism to civic nationalism and are thus increasingly emphasising the territorial nature of their claims.

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<sup>458</sup> For a similar claim, see Luis Moreno, 'Local and Global: Mesogovernments and Territorial Identities' in W. Safran and R. Máiz, *Identity and Territorial Autonomy in Plural Societies*. London: Frank Cass, 2000.

<sup>459</sup> Keating, 'Nations without States', 26-28.

<sup>460</sup> Montserrat Guibernau, *Nations without States*. Cambridge: Polity Press, 1999, 157.

In Keating's arguments for the functional and normative necessity of territory, its role is almost purely instrumental. It has no value in the conception of nation in and of itself. Its role is rather that of fostering national identity, whether through providing an economic reason for gathering supporters to its banners or through developing common feeling via education and the media. As regards the normative argument, territory allows a claim to be dressed in the internationally acceptable language of inclusion, thus giving rise to a greater chance of being recognised. Yet no national claim is territorial, no nationalism is 'civic'. Nationalism is always about exclusiveness based on commonality of feeling and territory simply allows nations to determine easily the degree of inclusiveness to outsiders they will tolerate. In an era in which ethnic nationalism is 'bad', territory allows this sleight of hand. Keating's argument for the necessity of territory for political reasons is more complex. It is certainly the case that administrations need clearly defined borders; but it is precisely function in the form of territorial administration that the state contributes to the nation-state relationship. Discussions about nations are conducted in the shadow of the state and almost inevitably end up being unspoken discussions about the functionality of the state. It is the intuitive sense of the importance of territory that sees nations as necessarily on a path towards independent statehood. The political necessity argument for territory being a prerequisite is rather an argument about statehood, not about nations. Functional capacity is important, but it is not a prerequisite to making a national claim.

Moore also appears to be making a functional argument about the necessity of territory. Unlike Keating, who gives clear reasons for continuing to hold territory as essential to a national claim, Moore does not explain her move from defining the nation by purely subjective criteria to defining it as "a territorially concentrated group of people who aspire to or accept a common mode of conducting their collective affairs".<sup>461</sup> It seems from the structure of her argument however that territory acts as the bridge from an imaginary to an imagined nation. It shall be suggested in the section that follows that the gap between imaginary and imagined is not one of capacity but of legitimacy. Territory, therefore, cannot act as a bridge, and cannot fulfil the role that Moore appears to assign it.

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<sup>461</sup> Moore, *The Ethics of Nationalism*, 15.

Thus, in conclusion, both Keating and Moore understand territory as vital to the claim to nationhood. However, the role they see territory as performing in a national claim is an instrumental one; territory is not crucial in its own right, for sentimental purposes, for the independent part it plays in identity itself, but is viewed similarly to the other check-list characteristics: for its enabling effect in being able to foster and sustain national identity. The difference with territory is, however, that it is seen by Keating and Moore as the one essential enabling characteristic.

#### **5.4. Nationhood as self-constituting self-governance**

The understanding of nation that is put forward here builds upon the definitions of Keating and Moore. Like Moore, it considers the defining element of a nation to be its political aspiration to self-governance. The claim to nation status is thus understood as a political claim to determine one's own future together. It is a claim to original authority. It is a claim to a degree of self-determination, where self-determination is not viewed solely as a claim to independence or statehood but allows of degrees; where 'international' politics, as Keating suggests, is not a zero-sum game but is viewed as a stage in which a variety of actors play a variety of roles, some small some large, but all important in communicating the play. What makes an encompassing group a nation is the activation of that right to self-determination.

Like Keating, the role of the claim itself in defining a nation is also stressed here. As a claim to original authority, a national claim is necessarily a claim to self-constitution. The act of self-creation remains elementary to a nation where it is understood as primarily defined by its claim to self-governance. It is the act of claiming nationhood that is vital in enabling a group to constitute itself as such. Marx and J.S. Mill among others understood that only by forging one's own destiny through revolution could a people become worthy and capable of self-rule. Rather than revolution, however, it is a plausible claim to nationhood itself that is understood here as self-constituting. What is meant by this is that, firstly, any claim to nationhood as a claim to original authority is inherently a statement of self-constitution – original authority can never be devolved or granted but can only be declared. Any such claim cannot solely be self-

constituting, however, as it necessarily requires recognition.<sup>462</sup> A claim to nationhood is always thus a claim to recognition as a self-governing, self-constituting entity. Secondly, plausibility may depend upon the demonstration of both legitimacy and capacity; however, these two elements are not of equal importance in weighing up a claim to nationhood.

#### 5.4.1. Legitimacy

If a nation is important because it is an inherently valuable community, legitimacy concerns the extent to which a group is indeed valuable to its members. If a group lacks legitimacy in the eyes of its members, it is not a nation. For Mill as well as Rousseau, it was consent that established a *demos*.<sup>463</sup> Hence, legitimacy as used here does not refer explicitly to a group's internal democratic values, or necessarily to values of good governance such as transparency or accountability.<sup>464</sup> It is not determined by other criteria, such as whether a claim is ethnically-based or not, or whether the internal rights of women are respected according to liberal standards. Kymlicka, for example, has insisted upon two fundamental limitations on his liberal conception of minority rights; for Kymlicka, for a minority group's claim to special status to be legitimate it must respect individual freedom within the group – a group cannot restrict the civil and political rights of its members – and it must promote equality between groups.<sup>465</sup> In contrast, the concept of legitimacy developed here does not take account of the opinions and creeds of outsiders, except to the extent that they influence the standards by which members of the group determine what they mean by legitimacy. Democratic accountability and respect for the rights of women may well be an important aspect in establishing legitimacy amongst all members of a group, but, equally, they may not. In the same way that while it is not understood here as necessary that a nation forge itself in blood, it is undeniable that a widespread support for violent struggle, to kill and be killed, can be interpreted as strong legitimisation for the claims being made. Similarly, the means by which a group chooses its leaders – violent oppression aside – is understood to be their own business: the consent of the governed comes in a number of formats. However, if members of the group prevent a

<sup>462</sup> This important point shall be taken up in Chapter 7.

<sup>463</sup> J.S. Mill, 'Considerations on Representative Government' in J.S. Mill, *On Liberty and Other Essays*. Oxford: Oxford University Press, 1998.

<sup>464</sup> See, Thomas M. Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46.

<sup>465</sup> Kymlicka, *Multicultural Citizenship*, Ch. 8.

meaningful sense of autonomy for others within the group, it would certainly bring the legitimacy of the group into question. If a nation is important because of the role it plays in the lives of individual, for there to be a consistency of purpose, the value of the nation must extend to all individuals within the group and there must be a degree of critical self-inquiry from within about the extent to which this is the case.

Furthermore, legitimacy requires a strong sense of commonality. If a claim to nationhood is to be mounted and sustained, it will require considerable investment from group members and may entail difficulties and hardship in the struggle to have their claim heard. Members of the group must consider the claim worth the difficulties and the sacrifices involved. However, the strength of this bond is not determined by territory, although it is almost certainly facilitated by it. A nation is not defined by its borders but defines itself by its borders.<sup>466</sup> Boundaries are omnipresent, but what form those boundaries take, what marks the collective self off from others, is the choice of the entity or polity concerned.

The glue that binds a group together, what constitutes the primary group bond, is neither *soli* nor *sanguinis* but shared meaning, so that what matters most in terms of identity is rather the social distribution and expression of meaning, or, in other words, culture.<sup>467</sup> Culture is understood here, following Hannerz, as the internal world of ideas, experiences and feelings and the public expression of that world, in which the cultural flow concerns the externalisation of meaning and the interpretation of these expressions by others in a continual, dialectical process of producing meaning.<sup>468</sup> Culture cannot, unlike the administrative apparatus of a state, be rigidly defined by territorial borders; although the physical existence of cultural interlocutors determines that a culture must have spatial existence, that space is both neither fixed nor static, but mobile, fluid and receptive and responsive to change. Culture is not bound by physical borders but goes where its members go, blurs and meshes with other cultures,

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<sup>466</sup> This is a problem that goes back to the earliest attempts to define political community and to the traditional dichotomy formed around the distinction between *jus soli* and *jus sanguinis*.

<sup>467</sup> The characterisation of a nation as a community of communication follows the understanding of language and meaning as a set of social practices developed notably by Wittgenstein in his comments on private language (*Philosophical Investigations*) and German thinkers from Weber to Habermas have all sought to understand society as webs of signification.

<sup>468</sup> Ulf Hannerz, *Cultural Complexity. Studies in the Social Organization of Meaning*. New York: Columbia University Press, 1992.

so that borders become points of transition rather than barriers.<sup>469</sup> It is thus not external attributes such as territory – although territory has often played an important role in the generation and sustenance of the webs of common meaning – that constitute the strength of commonality that Vico and Herder described as the spirit of the people. The importance of territory in the minds of men has thus been that it is a space in which value-orientation becomes normatively fixed, in which the social distribution of the modes of meaning are distributed. However, if a group can achieve this common feeling, can spin a web of shared meaning, without an exclusive territorial space in which to construct it, the possession of or occupation of territory becomes incidental.<sup>470</sup> It is ultimately in this way that the insecurity of limitless space is made knowable; physical borders are enablers in the process but are not vital to it. As the title words of one of the most popular hits of the 1980s, ‘Wherever I lay My Hat That’s My Home’, suggests, home is anywhere but one has to first understand what a hat is and what it symbolises.<sup>471</sup> The Roma may be one of the very few groups that have managed to maintain a strong sense of commonality despite the best efforts of far more powerful cultures to break their bonds and assimilate them, but that is a testament to their tenacity not to their non-existence.<sup>472</sup>

It should be noted that the importance of mutual recognition within a group of a shared meaning is that it provides a basis for legitimacy, not that it can be used to provide a seemingly objective criterion by which to judge a nation – a shared web of meaning does not define a group as a nation. It is, rather, necessary in order to generate the desire amongst a group to constitute itself as a nation. To be clear, shared meaning, an encompassing culture, is necessary for a national claim to be mounted, but the grounds for legitimacy are for the group themselves to determine.<sup>473</sup> Requiring

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<sup>469</sup> Charles Westin, ‘Temporal and Spatial Aspects of Multiculturalism’ in R. Bauböck and J. Randell (eds.), *Blurred Boundaries: Migration, Ethnicity, Citizenship*. Aldershot: Ashgate, 1998.

<sup>470</sup> The modern complex flow of information, ideas, people and goods see other webs of shared meaning being spun by all sorts of communities of interest, from professional to business, religion to protest, that transcends borders.

<sup>471</sup> For consideration of how a nation may be spun on a non-territorial basis, see Karl Renner’s exploration of the personality principle. Renner, ‘State and Nation (1899)’, 29.

<sup>472</sup> For details of the cultural means Romani communities have adopted to maintain the distinctiveness, see Michael Stewart, ‘The puzzle of Roma persistence: group identity without a nation’, in Thomas Acton and Gary Mundy (eds.), *Romani culture and Gypsy identity*. Great Britain: University of Hertfordshire Press, 1997.

<sup>473</sup> By suggesting that the borders of shared meaning constitute the boundaries of a nation – admittedly messier than the neat lines of a traditional map – one equally avoids the now dubious ascription of nationality on the grounds of race or ethnicity, (although there will be occasions, and the Roma are

that a claim to nationhood resonate deeply among the members of any given group making a claim to nationhood ensures that a nation cannot be the sole handiwork of an ambitious political leadership or that it systematically discriminates against parts of the group. Further, the benefit of viewing the collective will of a group through the concept of legitimacy rather than via that of subjectivity is arguably that, whereas subjectivity concerns the extent to which a group imagines itself to be a nation, legitimacy requires additionally that the nature of the claim, its content and format, and the perceived legitimacy of the leadership making it, are also continuously evaluated.

In examining the justifications given for Israeli jurisdiction over Eichmann in *Eichmann in Jerusalem*, Hannah Arendt defined territory as both a political and a legal concept in addition to being a geographical one. Despite her earlier insistence upon the necessarily bounded nature of political community, territory, for Arendt, “relates not so much, and not primarily, to a piece of land as to the space between individuals in a group whose members are bound to, and at the same time separated and protected from, each one by all kinds of relationships, based on a common language, religion, a common history, customs and laws.” Arendt continues, “No State of Israel would ever have come into being if the Jewish people had not created and maintained its own specific in-between space throughout the long centuries of dispersion.”<sup>474</sup> Ian Hancock has similarly spoken of *romanipé* as the “Gypsies’ transportable homeland”.<sup>475</sup> It is the formation and maintenance of this ‘in-between space’ that is the basis of legitimacy and thus of a nation. It might more often than not be geographically territorial, but it does not have to be so.

#### 5.4.2. Capacity

If one understands the primary borders of a nation to be those of shared meaning, what matters most for such a group is the transmission of that meaning. Territory

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possibly one example, where the boundaries of shared meaning map more or less the delineation of an ethnic group). What is important, however, is that it need not necessarily be the case. It is full comprehension of and participation in spinning the web that determines membership.

<sup>474</sup> Arendt, *Eichmann in Jerusalem. A Report on the Banality of Evil* (1963). England: Penguin, 1994, 262-3. My attention was drawn to Arendt’s unorthodox definition of territory by Th. Mertens, ‘The Eichmann Trial. Hannah Arendt’s view on the Jerusalem Court’s competence’ (February 2005) *German Law Journal* ([www.germanlawjournal.com](http://www.germanlawjournal.com)).

<sup>475</sup> Ian Hancock, ‘The Eastern European Roots of Romani Nationalism’, *Nationalities Papers*, Vol. XIX, No. 3, Fall 1991, 6.

undoubtedly plays an important role in facilitating that goal; but how important is capacity in establishing a national claim? A national claim is necessarily a claim to political self-governance, and there is thus implicitly a capacity element to any such claim. Capacity is understood it seems, for example by Keating and Moore, as establishing a plausibility test for nations.

- A group is self-constituting because it can articulate a collective voice. A nation, the forum in which one takes collective decisions about the way in which one lives one's life, is necessarily, as Margalit and Raz have highlighted, a community beyond the face-to-face.<sup>476</sup> Renan's 'daily plebiscite' description emphasises the active nature of membership in a nation; as Tully phrased it, citizenship is an activity. All these points suggests a need for collective deliberation and decision-making capacity, as well as the ability to articulate the collective voice and the nation's interests. This is a minimum that a group must achieve in order to establish a legitimate claim. Modern mass communication tools – email, faxes, the Internet, mobile phones and wireless satellite connections – mean that communication and virtual deliberation (which all deliberation beyond the face-to-face is in one sense) is relatively cheap and effective to set up.<sup>477</sup> A culture is necessarily socially distributed and thus the means by which a culture is distributed arguably also provides a pre-established network of communication and interaction in which deliberation as a nation can be conducted.
- However, the ability to muster capacity must not be over-played. The more complex services we expect from the state – law and order, systems of education, healthcare, and transport, international representation, etc. – are extremely difficult to achieve, and necessarily presume the ability to levy taxes. Where we accept that a claim to nationhood is not implicitly a claim to statehood, that nations exist without states, self-governance is a relative term and does not imply that a self-governing entity must provide the full paraphernalia of the modern welfare state to its members in order to have its claim heard. Territory plays an extremely important facilitating role in establishing the legitimacy and the capacity that establishes the nation as a state; for example, Moore has attributed the failure to revive the minority nations in France –

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<sup>476</sup> Margalit and Raz, 'On National Self-Determination'.

<sup>477</sup> For example, see 'Inuit language finds home on net', BBC News Online, 3 November 2004. There is of course the problem of being on the wrong side of the digital divide, which large swathes of the Romani population undoubtedly are.

Normandy, Brittany, Aquitaine, Languedoc and Burgundy – to an early incorporation into the French state in the late Middle Ages, and the consequent lack of any institutional base from which to launch a claim.<sup>478</sup> But while this illustrates the role of territory in facilitating an institutional base, it also illustrates the inability of these nations to sustain a strong feeling of separate-ness without it. Other groups may not, for whatever reason such as the strength of hostility of the majority, require an institutional base to maintain their sense of themselves apart. Capacity is only important in so far as it perpetuates the value of membership in the nation.

Governance, as global interdependence is making us increasingly aware, is a question of degrees and different actors claim and fulfil different competences. Quebec may claim the capacity to manage its own economy within NAFTA and within the dictates of the global economy, and may experience an upsurge in identification with the national claim from a grateful ‘citizenry’; the Welsh nation may claim, via the Welsh assembly, that they have decision-making capacity over the income it receives from Westminster; the Palestinian nation may control certain domestic systems, such as they exist, while lacking the ability to secure its borders against Israeli incursion or collect its own taxes itself. While a national claim carries the normative implication of the right to self-determination, the exact political implications depend upon the aspirations of the individual group and its political circumstances.<sup>479</sup> As Keating notes, the claim to sovereignty may not involve a claim to a sovereign state “but [to claim] to insert themselves into the new complex webs of authority.”<sup>480</sup> In this vein, it is suggested that the alleged ‘re-territorialisation’ in a number of contemporary national claims, should be understood as attempts of these nations to establish the legitimacy of their claim to nationhood; other nations may however choose to establish legitimacy in different ways.

Moreover, models of non-territorial autonomy allow for the development of capacity without territory; as section 5.2 sought to show, history offers a number of examples in which political self-governance was made a reality without reference to territory as an organising medium. Similarly, the model of non-territorial national autonomy

<sup>478</sup> Moore, *The Ethics of Nationalism*, 16. Moore also notes that these nations lack a social base, and it may well be that minority nationalism in France is unrecognised primarily because it lacks legitimacy.

<sup>479</sup> Keating, *Plurinational Democracy*, 5, 26.

<sup>480</sup> Keating, *Plurinational Democracy*, 28.

proposed by Renner and Bauer and based on the ‘personality principle’ was to be made reality via nations as legally guaranteed corporations. These public bodies were to be endowed with legal personality and hold the sovereign competence with regard to national-cultural affairs, organising their own educational systems and forming an autonomous legal system, paid for by levying taxes on their own communities.<sup>481</sup>

Thus, where Keating and Moore view territory as instrumental to nationhood, not merely as symbolic of the nation, but also as functionally and logically instrumental, the claim made here is that where nations are a good in themselves because of their overwhelming value to individuals, only legitimacy can be the determining element of a claim. Keating and Moore set the capacity generating potential of territory as a plausibility test for a national claim, but the suggestion here is that capacity can establish plausibility only in so far as it has an internal relationship to legitimacy. That is, the legitimacy of a claim does not appear from nowhere – Moore’s imaginary nation – but begins in the cultivation of a collective framework of belief. Belief in existence as a nation gains momentum because the aspiration is imaginable and a degree of capacity is important in kick-starting and facilitating that momentum. Plausibility can only be determined by those who believe. There is thus no ‘objective’ level of plausibility that a claim can be required to demonstrate beyond the decision capacity that underpins the collective sense of aspiration. Capacity is therefore necessary only to the extent that it enables a group to imagine a collective identity, a collective good life, and in which the group can imagine a fuller sense of that collective life. Capacity is a part of legitimacy in the claim to nationhood and not an equal element alongside it.

Thus, in place of Moore’s suggestion that we need to distinguish between nations that are successful political communities and nations that aspire to be<sup>482</sup>, a continuum of more or less plausible claims to nationhood, where plausibility is considered through the ability of a claim to muster and sustain legitimacy, is suggested instead. Territory can be important but it is not instrumental to the definition of a nation, because functional and logistical capacity is not.

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<sup>481</sup> Nimni, ‘Nationalist multiculturalism in late imperial Austria as a critique of contemporary liberalism’; also, Nimni, ‘Introduction: the national cultural autonomy model revisited’ in Nimni (ed.), *National Cultural Autonomy and its Contemporary Critics*. London: Routledge, 2005.

<sup>482</sup> Moore, *The Ethics of Nationalism*, 36.

It is thus wrong for others to disparage legitimate national claims that aspire to nationhood because these claims are built into the effective sense of who the individual members are. The documents laying out the doctrine of self-determination make clear that the level of development of a people cannot be viewed as an obstacle to self-determination precisely because it is the generation and maintenance of belief in being a nation that constitute nationhood.<sup>483</sup> What a national claim requires, what it is seeking, and what capacity hopes to establish the grounds for, is recognition. While Chapter 4 sought to suggest the importance of recognition to the well-being and autonomy of the individual, this chapter has hoped to demonstrate what it is that makes national claims special, no matter how unconventional they appear, and thus the additional danger of hegemony where national claims are rejected or misrecognised. Legitimacy-based claims are not a question of 'being deserving' but of the recognition of self-constitution.<sup>484</sup> What such claims do not entail, of course, is the right not to be disappointed. As national claims are necessarily a claim to the supra-state level, the final section seeks to plot a course at the international level through the hegemony/ promiscuity recognition quagmire that this section sought to sketch. It is to the existing avenues of recognition for national claims in the international order that this thesis now turns.

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<sup>483</sup> G.A. Resolutions 1514 and 1541; see Section 6.3. *infra* for consideration of the principle of self-determination.

<sup>484</sup> For a consideration of 'ethnic autonomy' from the perspective of entitlement see William Safran, 'Spatial and Functional Dimensions of Autonomy: Cross-national and Theoretical Perspectives' in W. Safran and R. Máiz, *Identity and Territorial Autonomy in Plural Societies*. London: Frank Cass, 2000.

## **Section 3**

## Chapter 6: Nations and Territory in International Law: defining the problem

To poison a nation, poison its stories. A demoralised nation tells demoralised stories to itself.<sup>485</sup>

The claim to recognition as a non-territorial, necessarily cross-border, nation leads Roma to the realm of public international law as the most appropriate stage upon which to make their claim. Notwithstanding the desire of some within the Romani community to push primarily, if not solely, for recognition as a European minority or nation, the self-understanding of the claim to non-territorial nationhood as a claim of a global nation places it beyond the European realm.<sup>486</sup> Where a claim to recognition is necessarily a claim to recognition of one's autonomy, a claim to nationhood is a claim to autonomy at the international level.<sup>487</sup> How, then, does international law deal with such claims?

Where the preceding chapter sought to make the case for the importance of national claims to the individual well-being of those on whose behalf such claims are made, and thus the primacy of legitimacy over capacity, this chapter considers the extent to which international law is capable of recognising national claims that are not packaged in the nation-state mould. To what extent can international law currently satisfy the implicit claim to (degrees) of self-governance inherent in the demand for recognition as a nation? There are at least two elements that need to be considered. The first is the degree of autonomy to which non-state groups can reasonably aspire under current international law provisions; the second, related, is the level at which the active participatory element of a recognition claim can be fulfilled in international law.

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<sup>485</sup> Ben Okri, 'The Joys of Story-Telling' in *Birds of Heaven*. London: Phoenix, 1997.

<sup>486</sup> This of course does not exclude a second claim at the European level. As Chapter VII will argue, there is no reason why an individual can not make multiple claims to recognition.

<sup>487</sup> All claims to recognition contain a claim to autonomy; if, as was suggested Hegel's dialectic indicates, the claim to recognition is the claim to recognition of one's autonomy – the ability to negotiate one's position with the Other, with society, from a position of equality, where equality is not material but mutual recognition – one cannot be free without being self-governing, whatever form this may take. See section 3.1. *infra*.

International law has had a long-standing interest in the protection of non-state groups. Indeed, one could note that modern international law locates its origins in a settlement primarily designed to defend collective religious rights, namely, of course, the legendary Westphalian settlement.<sup>488</sup> Prior to Westphalia, the desire of international lawyers to protect the most basic rights of indigenous populations in the New World spurred the development of what we would today understand as international law, and a similar concern for minority groups in the inter-bellum period constituted the beginning of the contemporary human rights movement. This humanitarian impulse to protect at least the basic right to existence of non-state groups has been a dynamic force in the development of international law.

However, the case shall be made that rather than legitimacy, it is the possession and effective control of territory that dominates interpretations of the claim to original authority. Thus, where an essential part of the process of gaining mutual recognition is understanding the multiplicity of ways in which exclusion takes place, the aim of this chapter is to work through the ways in which international law excludes a group such as the Roma from participation on a basis of mutual recognition. It begins with an examination of the place of the nation in international law; considers the benefit to groups claiming recognition of international minority rights in the autonomy and participation that they seek; and, finally, expands to consider self-determination and the ways in which the construction of the right to self-determination and the interplay of representation and territory contained therein, work to exclude all that do not fit the traditional paradigm of a people in exclusive control of a given territory.

## **6.1. The Place of the Nation in International Law**

The preceding chapter suggested that the nation was the prime vehicle of our political imagining. This section will consider in brief the place of the nation in international law.

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<sup>488</sup> Natan Lerner, *Group Rights and Discrimination in International Law*. The Hague: Martinus Nijhoff Publishers, 2003 (2<sup>nd</sup> edition), Chapter 1.

### 6.1.1. Nations as States

The well-known statement by Oppenheim that “States solely and exclusively are the subjects of international law” in his 1905 classic, *International Law*, succinctly summarises the traditional approach of international law to the nature of subjecthood.<sup>489</sup> States, not nations, were the first and only subjects of what can be recognised as international law<sup>490</sup>, it being the slow genesis of the state and its unique coagulation of government and territory that augured in the development from the entangled web of medieval relationships to the Law of Nations. States emancipated themselves from their ties to the Church and the Holy Roman Empire and declared themselves equal in rank and dignity alongside each other. They proclaimed themselves sovereign and, via imperialism, imposed this structure of international order upon the rest of the world. The restricted nature of international legal personality in classical international law had much to do with the restricted nature of international law itself. From the inception of what was recognisably international law to the period following the First World War, the Law of Nations was the relationship between sovereign entities in the prosecution of their affairs. States, then, are the traditional sovereigns, but where does this leave the nation? The nation did not exist as a separate entity under the Law of Nations<sup>491</sup>, although the humanitarian impulse which has always been present in international law has meant there has certainly been concern since the late eighteenth and nineteenth centuries for the protection of non-state national groups.<sup>492</sup>

The changing understanding of the nature of the relationship between ruler and ruled, between government and citizen, in the wake of the French Revolution saw the process begin by which states sought legitimacy from the nations or peoples they

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<sup>489</sup> Oppenheim, *International Law* (1<sup>st</sup> ed., 1905), Vol. I.

<sup>490</sup> In contradiction, near limitless range of actors in the European medieval era operated in a world in which the line between ‘national’ and ‘international’ interactions was constantly blurred. Wilhelm G. Crewe, *The Epochs of International Law*. Tr. Michael Byers. Berlin: Walter de Gruyter, 2000, 61-74.

<sup>491</sup> The etymology of the Law of Nations would appear to be a ‘mistranslation’ of *ius inter gentes* or *ius gentium*, the Law of Peoples, rather than anything to do with nations. The lack of relevance of nations in international law in this early period is signalled by the near total silence which this question receives in the literature. Most authors simply presume the existence of states as the only subjects of the international order, even where the subject of their enquiry is nations. E.g., Bart Driessen, *A Concept of Nation in International Law*. The Hague: T.M.C. Asser Instituut, 1992.

<sup>492</sup> In tracing the history of interventionism, Crewe suggests that states were capable of intervening in the internal affairs of other countries, and did so regularly, both for reasons of state and on humanitarian grounds. *The Epochs of International Law*.

claimed to embody. The entrenchment in the international system of the *nation-state* as the basic moral unit came about, according to Nathaniel Berman, in the course of the inter-war years. In the wake of the First World War, the nation was seen as offering an alternative vision of the source of foundational authority in international law;<sup>493</sup> nineteenth-century liberal nationalism became thus a serious rival to the positivistic understanding of the state as the foundational unit of the international legal order. According to Berman, interwar writers, motivated simultaneously by their faith in liberal nationalism and their fearful recognition of nationalism's dark side, attempted to situate the nation as an intermediate category between the individual and the state; their aim was to use the nation and a new awakening of the international order to operate a pincer-type manoeuvre on states and their positivistic nature. Where the nation was necessary to unleash the creativity and energy of the state from the mechanistic attitude of the state apparatus, the international order required new doctrines and institutions in order to keep the explosive unpredictability of nationalist forces in check.

The move to elevate the nation to foundational status found an ally in the active intervention of the new international court. The nation, in the words of Berman, “demand[ed] interpretation”<sup>494</sup> and, when the opportunity arose in the *Polish Nationality Case* (1923), the *Greco-Bulgarian “Communities” Case* (1930), and the *Minority Schools in Albania Case* (1935), the PCIJ took it.<sup>495</sup> Berman’s analysis demonstrates that the Court in each of these cases located the nation as the prime unit of concern, in each case in the face of the ‘statist’ opposition of one of the parties. Yet, the Court also asserted its right to determine the boundaries of the nation and the provisions applying to it, in keeping with the perceived intermediary role of the

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<sup>493</sup> Article 91 of the Versailles Treaty authorising the transfer of territories from the defeated Germany to the new Polish state reflected the new outlook; according to Berman, Article 91 illustrates, “the new respect for subjective choice, legitimisation of state power on the basis of the state’s conformity to the ‘nation’, and the new identification of individuals on the basis of their objective membership in such a ‘nation’”. Nathaniel Berman, “But the Alternative is Despair”: European Nationalism and the Modernist Renewal of International Law’ (1993) 106 *Harvard Law Review* 1792, 1800-1, 1830-1832.

<sup>494</sup> Berman, “But the Alternative is Despair”, 1807.

<sup>495</sup> Advisory Opinion No.7, Acquisition of Polish Nationality (1923), *P.C.I.J. (Ser. B)*, No.7; Advisory Opinion No.17, Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration (Question of the “Communities”) (1930) *P.C.I.J. (Ser. B)*, No.17; *Minority Schools in Albania Case* (1935) *P.C.I.J. (Ser. A/B)*, No.64.

nation.<sup>496</sup> The nation, at least in the eyes of the inter-war writers that Berman highlights, became the justifying basis for the continued existence of the state, yet its foundational authority was to be kept in check by the international order.

Ultimately, however, the nation had no independent position separate from the state. Either the nation was presumed to motivate or legitimise the state, or those that did not constitute minority nations, possessing merely the right to petition the League of Nations. The era of nationalism did not change the nature of personality in the international order *de facto* – it was states that were and remained sovereign – it did though arguably change the moral basis of personality: where the state had previously represented the ruler on the international stage, from the French Revolution onwards, it became increasingly accepted that the state was the representation of a particular nation.<sup>497</sup> The losers in this monogamist co-joining of the nation and the state were offered a limited degree of protection, but those without a mother-state to protect their interests were particularly vulnerable – a fact which the League's minority protection regime sought to address.<sup>498</sup>

In the post-Second World War period, nationalism was in disgrace; the nation was deemed the instigator of enormous suffering and misery, and no-one was concerned to highlight its creative energies in San Francisco. Nor was the new Court so eager to recognise the nation as being of prime concern. Yet, the new organisation was named, like the League of Nations before it, the United Nations and its Charter was proclaimed in the name of the peoples of the world. Like the League, however, it is only states that can be members. This understanding that sees the state as the embodiment of the nation continues to affect profoundly the way in which authority and personality are conceived in international law. The 'losers' continue to be denied

<sup>496</sup> Berman asserts that this alliance between international authority and nationalist desire was boldly reasserted by the Permanent Court of International Justice's judgement in the *Minority Schools in Albania* Case (1935), which saw the Court insist upon its own interpretation of the Albanian Declaration while deferring to the national group's definition of its own requirements. Nathaniel Berman, 'A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Interwar Framework' (1992) *Harvard International Law Journal* 353, 370-2.

<sup>497</sup> Arendt, *The Origins of Totalitarianism*. San Diego: Harcourt Brace & Co., 1973.

<sup>498</sup> There was arguably an element of social Darwinism at work in inter-war views of minority nations and the idea that the survival of the fittest meant that a nation needed to forge itself, fight for the right to exist, and those that failed to make it were unworthy of survival. The League's attempts appear all the more worthy when considered in such a climate. See, Jennifer Jackson Preece, *National Minorities and the European Nation-State System*. Oxford: Clarendon Press, 1998.

international subjecthood. Before turning to consider what international law does for those nations that have not established/ been co-opted by a state, it is helpful to consider the types of nations under consideration.

### 6.1.2. Nation Types

In the preceding chapter, nations were considered from a theoretical perspective in which all nations are necessarily equal because of the importance they play in the individual's life and where all individuals are presumed equal. However, as the foregoing synopsis of the nation suggests, international law is in the paradoxical situation that the recognition of some nations as subjects of international law as states has necessarily meant the denial of others.

Four types of nations can perhaps be distinguished.<sup>499</sup> The first is the victorious nations, those that formed the largest or most powerful group within a state's territory and were chosen to embody the identity of that state. The identity of these nations became the 'national' identity of the state concerned; for example, the relationship between the Prussian nation and the nascent German state prior to the Fourth Republic. Federal or consociationalist type states, in which two (Belgium) or more (Switzerland) nations or parts of nations form the governance of a state on an equitable basis – 'good' multinational states – could perhaps constitute a fifth type, but as these nations have achieved self-governance, if sometimes precarious, and have representation at the international level, they are included in the first type. This type also includes those nations forged by a nation-state, where a particular identity has expanded to become a more inclusive identity, in so far as one can talk, for example, of the German nation, the Swedish nation, and so on.

The second type is what were termed 'minority nations', or in more recent parlance, 'national minorities'. These are the groups that found themselves on the wrong side of a border and were thus separated from 'their' state; these are not strictly nations but rather parts of a nation. They are, however, the prime focus of most minority rights agreements.

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<sup>499</sup> The following typology is not meant to suggest that nations are immutable nor that the category nations find themselves in does not cause them to adapt and form new identities.

The third type are those nations that are situated solely on the territory of one state – a type of intra-state nations – but that are not represented on a basis of equality in the governance of the state; the Maori in New Zealand or the Bretons in France are examples among the many. The border of type 3 from type 1 nations in multinational states is, however, fuzzy and most definitely not static as the task of being a good multinational state is an on-going, shifting and never quite achievable one, in line with the nature of the recognition dialogue.

The final type concerns those nations that are situated across one or more borders and are trans-border nations; these are groups such as the Roma, the Saami, the Kurds, the Basques. These last two types of nation, lacking a state to embody them and denied participation on a basis of equality in the state in which they find themselves, have been denied self-governance, as well as representation and participation at the international level. It is to these groups that the analysis here is addressed. These type 3 and type 4 nations are considered not as nations demanding collective self-governance but as minority groups.<sup>500</sup> This chapter thus turns to a consideration of the capacity of international minority norms to offer recognition to a non-state, and ultimately a non-territorial, nation.

## ***6.2. A nation as a minority group***

The Treaty System of minority protection established by the League of Nations, which formed one of the defining features of international law in the inter-war period, ceased to exist with the (formal) collapse of the League in 1946.<sup>501</sup> The system that emerged from the San Francisco Conference establishing the new United Nations, as is well-known, marked a substantial shift from group protection to individual rights. The shift in focus saw collective rights shunned in favour of an understanding of violations of human dignity based upon a group characteristic through the alternative

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<sup>500</sup> It is as a series of minority groups that the Roma are considered by the individual countries in which they reside (e.g. under the 1993 Hungarian Minorities Act (LXXVII) they are listed as a national minority), but also by international organisations such as the OSCE and the Council of Europe.

<sup>501</sup> The minorities' treaties lost their force either because of desuetude or *clausula rebus sic stantibus* – a substantial change of circumstances, rendering a pre-existing obligation mute.

lens of an individual right to non-discrimination on the grounds of racial, ethnic, national, religious or cultural origins.<sup>502</sup>

### 6.2.1. The International Treaties<sup>503</sup>

As human beings, members of a non-state group such as the Roma are of course entitled to the protection offered to all under individual human rights measures, without discrimination. Equality and non-discrimination are considered the foundations of the human rights regime and, as principles, have clearly attained the status of custom and are thus binding on all. The human rights treaties thus provide strong guarantees against racial discrimination in the form of the International Convention on the Elimination of Racial Discrimination (ICERD), and the protection these provisions offer can be hugely important for minorities, at least as a statement of principle. For example, Article 5(c) of ICERD and Article 25, in conjunction with Article 2, of the International Covenant on Civil and Political Rights (ICCPR) guarantee rights of individual political participation, both in the right to vote and the right to stand for election or serve in the public service, without discrimination of any kind. Similarly, the International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees the right of individuals to participate in cultural life and of parents to select education for their children according to their convictions.<sup>504</sup> The ICCPR, moreover, provides for the protection of activities important to the

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<sup>502</sup> A further indication of the marked nature of the shift can be seen in the fact that anti-Semitism does not appear anywhere in the post-war documents, despite widespread knowledge of the Holocaust and in contrast to inclusion of the Jews in five of the fifteen inter-war minority treaties. Anti-Semitism did not make a re-appearance at the international level as an object of concern until the 1990 Copenhagen Document. Lerner, *Group Rights and Discrimination in International Law*, 130-137.

<sup>503</sup> This section does not consider regional human rights or minority norms and European instruments are beyond the scope of this work. Nor does it consider conventions and documents solely related to indigenous peoples. The Indigenous Populations' Working Group is considered in the following chapter, but for reasons of process not because of the substantive norms it contains.

<sup>504</sup> Article 15 (1) (a) and Article 13 (3) respectively; however, Article 13(3) caters only for the moral or religious convictions of the parents, and not, for example, for linguistic preferences. The ICESCR contains the same non-discrimination provision as its sister treaty, and the substantive rights contained therein must be read through this filter. Moreover, the Committee on Economic, Cultural and Social Rights has demonstrated genuine concern for the application of the treaty to minorities and indigenous peoples; general information is requested, for example, on the main ethnic, linguistic and religious groups and in regard to substantive provisions, such as Article 6, the right to work, requests information on vulnerable groups. Annex IV to the Report on the Fifth Session of the Committee on Economic, Social and Cultural Rights (1990), *Revised Guidelines regarding the form and content of reports to be submitted by State parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/1991/23. Also, Athanasia S. Åkermark, *Justifications of Minority Protection in International Law*. The Hague: Kluwer, 1997.

perpetuation of a minority or non-state groups' way of life, such as Article 18, guaranteeing the right to freedom of thought, conscience and religion which includes the right to manifest one's religion individually or collectively. Article 22 recognises the right to freedom of association, which guarantees the right of minorities to form societies dedicated to cultural expression or for the protection and promotion of their interests.

However, if non-discrimination provides the first part of any attempt to ensure minority protection, the second must be that of special measures specific to the needs of non-state groups.<sup>505</sup> A range of human rights treaty provisions apply to minority groups. It is Article 27 ICCPR that provides the backbone of minority rights in international law.<sup>506</sup> It stipulates that "persons belonging to ... ethnic, religious or linguistic minorities ... shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to ... practise their own religion, or to use their own language". It has been described by Thornberry as a hybrid right, which benefits only individuals but yet can only have meaning through collective exercise.<sup>507</sup> Yet the Human Rights Committee (HRC) has been clear that the article does not grant collective rights, and communities are denied *locus standi* to bring complaints under the optional protocol.<sup>508</sup>

In being denied collective interpretation, the substance of Article 27 is virtually indistinguishable from the rights enjoyed by all and thus, as Thornberry implicitly suggests, is rendered largely meaningless as a guarantor of special measures.<sup>509</sup> In addition, the criticisms of the negative language of the provision are well-known.<sup>510</sup> In phrasing Article 27 as denying states the liberty to prevent minority groups from

<sup>505</sup> The minority protection regime is intended to achieve four things: protection of existence, and against non-exclusion, non-discrimination and non-assimilation. Asbjorn Eide, *Commentary to the UN Declaration on the Rights of Persons Belonging to national or Ethnic, Religious and Linguistic Minorities*, E/CN.4/Sub.2/AC.5/2001/2, para. 3.

<sup>506</sup> Thornberry has described Article 27 as "carrying a great burden in international law". P. Thornberry, *International Law and the Rights of Minorities*. Oxford: Clarendon Press, 1991, 135.

<sup>507</sup> Thornberry, *ibid.*, 173.

<sup>508</sup> General Comment No. 23 (50) (art. 27) (Fifteenth Session, 1994); <http://www.ohchr.org/>.

<sup>509</sup> Everyone has the right to freedom of religion and its collective practice under Article 18 ICCPR, the right to freedom of association under Article 22 ICCPR, the freedom to partake of culture under the ICESCR, and the right to be free from discrimination on all three grounds listed in Article 27, under Article 2 in both the ICCPR and ICESCR.

<sup>510</sup> See Thornberry, *International Law and the Rights of Minorities*. The negative language is somewhat made good by insistence on the need for positive measures in General Comment 23, although General Comments do not constitute an authoritative interpretation of the treaty.

practicing their own culture, religion or language together, it explicitly does not impose any positive obligations to assist or to recognise the identity of any group.<sup>511</sup> Thus, while Article 27 guarantees a right to identity, it is a passive, individual right. This approach, in providing an individual right to identity, fails to grasp the importance of group culture to individual identity: the protection of individuals of minority groups requires protection of *their* identity, not the abstract right to an identity.<sup>512</sup> Where recognition is the process of mutually seeking and acknowledging a group or individual in all their uniqueness, recognition cannot be the right to *an* identity in its generic form. A right to identity, if such a right can be understood to exist within the meaning of Article 27, cannot thus be understood as providing recognition to minority groups.

The weaknesses of Article 27 – its individual nature and passivity – could be improved by a proactive Human Rights Committee. However, the HRC, despite some optimistic interpretations of recent HRC case-law, has not shown itself willing to construe the terms of Article 27 generously nor to provide minorities with concrete rights to participate in public life or the ability to take decisions vitally affecting their own interests where those interests conflict with the majority's interest. Article 27 explicitly does not include any mention of the right of a minority group to effective and fair participation in public decision-making and, more specifically, in decisions that vitally affect its way of life. The HRC has addressed the issue of participation in a General Comment, however, and concluded that Article 27 "may" require authorities to take positive measures to ensure the participation of minority groups in the exercise of their cultural rights.<sup>513</sup>

Attempts to gain greater access to public decision-making and to gain control over important decisions fundamentally affecting their way of life have seen minority groups turn rather to Article 25. These attempts have not met with great success.

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<sup>511</sup> The finding in *J.G.A. Diergaardt et al. v. Namibia* that the confiscation by the state of all property collectively owned by the community and thus of the means to a collective economic livelihood and the economic, social and cultural identity that that underpinned did not constitute a breach of Article 27 illustrates the weakness of the right to identity contained therein. *J.G.A. Diergaardt et al. v. Namibia*, 25 July 2000, HRC Communication, no. 760/1997, CCPR/C/69/D/760/1997.

<sup>512</sup> Avishai Margalit and Moshe Halbertal, 'Liberalism and the Right to Culture' (1994) 61 *Social Research* 491.

<sup>513</sup> General Comment 23(50), para. 7. The General Comment, bizarrely, was not addressed to religious and linguistic minorities, although this is irrelevant in the context of this work.

Although willing to recognise the right of an individual member of a minority group to stand for public office<sup>514</sup>, the HRC has been far less willing to stretch the boundaries of Article 25 and consider a right of participation for minority groups. In *Mikmaq Tribal Society v. Canada*, the Human Rights Committee did not find for the Mikmaq tribe following their exclusion from a constitutional conference on the rights of Canadian Indian communities because participation had not been “subjected to unreasonable restrictions.”<sup>515</sup> As representatives of some indigenous peoples were taking part in discussions (notably the Métis, the Inuit, and the Assembly of First Nations principally to represent non-status Indians), it was permissible under the terms of the Covenant for the Canadian government to exclude a group that wished to be included in important discussions about the future of Canadian interaction with indigenous peoples, including the specific treaty relations between the Mikmaq and the state. Following *Mikmaq*, minority groups can be denied the right to be heard on issues which impact fundamentally upon their way of life and hence their identity, as long as similar groups are represented.

Further, the HRC has also not been eager to recognise the desire of some groups for elements of self-governance. Self-governance, as shall be considered in the subsequent chapter, necessarily implies an element of sovereignty, an ability to draw a line in the sand and say ‘no further’. In a decision which goes to the obligation upon a state not to deny the continued existence of a culture, in *Lansman v. Finland* the HRC denied the existence of a right of members of the Sami to decide themselves upon the use of their traditional land, finding instead that a threat to a traditional economic activity, although it falls within the concept of culture as laid down in *Kitok*<sup>516</sup>, requires only consultation by the authorities and does not grant a group the right to veto plans that could have considerable impact upon their way of life.<sup>517</sup> While the HRC appears to have laid down stricter standards of consultation in a later

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<sup>514</sup> See *Ignatane v. Latvia*, 25 July 2001, HRC Communication no. 884/1999, CCPR/C/72/D/884/1999.

<sup>515</sup> *Mikmaq Tribal Society v. Canada* HRC Communication no. 205/ 1986, CCPR/C/43/D/205/1986, para. 6. The Committee apparently did not consider how unreasonable the *Mikmaq* found it to be excluded.

<sup>516</sup> *Kitok v. Sweden*. HRC Communication no. 197/1985, CCPR/C/33/D/197/1985.

<sup>517</sup> *Lansman v. Finland*. HRC Communication no. 511/1992, CCPR/C/57/1/1996. The case concerned the quarrying of stone in the traditional breeding grounds of the reindeer herds upon which the continued existence of the way of life of this group of Sami relied.

communication<sup>518</sup>, the inability of a group to refuse to accept the decision of the authorities where that decision impacts directly upon them renders them unable to effectively manage a common life. This is not of course to suggest that non-state groups should hold veto rights over issues that affect them, or necessarily veto rights at all. It does mean, however, that the state representing the majority cannot possess a veto right either, and that consultation must be conducted from a position of equality for both.

### 6.2.2. The 1992 Declaration

The 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities<sup>519</sup> represents considerable advances on the issue of acknowledgment of the collective identity of a minority group, on representation and control over issues of importance to minorities. The minority rights contained in the Declaration fit, however, as the title indicates, within the San Francisco system of individual rights. This is not surprising, not least because Article 27 was taken as the inspiration for the new document.<sup>520</sup> It is, further, not legally binding and thus has no enforcement mechanism similar to Optional Protocol 1 of the ICCPR, although the fact that it was adopted by consensus in the General Assembly provides it with a certain moral weight. Its non-binding status is one explanation for the positive language of the provisions.

According to Article 1(1) of the Declaration, States are required to (“shall”) “protect the existence and the ... identity of minorities ... and shall encourage conditions for promotion of that identity.” The decision not to emphasize the individual nature of this right could be read as noteworthy, as the familiar phrase “persons belonging to” appears in every other article, as well as in the title. The choice of language is indeed significant according to the accompanying commentary; Article 1 represents a duty of

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<sup>518</sup> The case concerned the impact of the introduction of fishing quotas and an alteration to the pre-existing Maori fishing rights, as agreed in the Treaty of Waitangi (Fisheries Claim) Settlement Act of 1992, upon the traditional Maori way of life, the HRC noted, “the acceptability of measures that affect or interferes with the culturally significant activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures...”. *Mahuika et al. v. New Zealand*, HRC Communication no. 547/1993, CCPR/C/70/D/547/1993, para. 9.5.

<sup>519</sup> 32 *ILM* 911 (1993).

<sup>520</sup> Eide, Commentary to the UN Declaration, para. 3.

the state towards minorities within its territory and these duties are deliberately formulated in part as duties towards a collective. According to the Chairperson of the Working Group on Minorities, “[w]hile only individuals can claim the rights, the State cannot fully implement them without ensuring adequate conditions for the existence and identity of the group as a whole.”<sup>521</sup> Article 1(2) requires legislative measures to achieve this. Moreover, Article 4(4) requires states to take measures, albeit with the caveat “where appropriate”, to encourage knowledge of the history, traditions, language and culture of minority groups within the wider population. Such measures, if carried out, could work to facilitate an understanding that is part of mutual recognition.

An important advance for claims to participation is to be found in Article 2 of the Declaration. Article 2(2) provides the right “to participate *effectively* in cultural, religious, social, economic and public life.”<sup>522</sup> Moreover, Article 2(3) grants minorities the right “to participate effectively in decisions on the national and, where appropriate, regional level”, and the commentary to the Declaration suggests that this implies the need for minority groups to be involved at the initial stages of decision-making and not simply consulted at the final moment of a decision where compromise is unlikely. This provision is somewhat undermined, however, by the sub-clause that follows, “... in a manner not incompatible with national legislation”. This sub-clause notwithstanding, the commentary notes that Article 2 requires effective channels of communication between minorities and Governments, and it requires representation in legislative, administrative and advisory bodies, as well as a general presence in public life. It also encourages a decentralisation of powers to allow for degrees of self-governance.<sup>523</sup>

Other provisions are phrased in less positive language. Article 5 requires that national policies be designed and implemented with “due regard” for the interests of members

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<sup>521</sup> Eide, *ibid.*, para. 14.

<sup>522</sup> My emphasis. The growing understanding that ensuring effective participation in public life is key to a pluralist society is suggested by the drawing up under the auspices of the OSCE of the Lund recommendations on the effective participation of national minorities in public life, which were subsequently adopted by the Working Group on Minorities of the Sub-Commission in 1999 (E/CN.4/Sub.2/1999/21). The Lund recommendations are available at <http://www.osce.org/hcnm/documents/lund.htm>.

<sup>523</sup> Eide, Commentary to the UN Declaration, paras. 42, 44, 46.

of the minority, a statement which could be interpreted as no more than is accorded the majority – the view taken by Eide<sup>524</sup> – but which is therefore arguably lacking in equal recognition. This flavour is repeated in Article 4, in which signatories are exhorted to take measures “to create favourable conditions to enable persons belonging to minorities to express their characteristics...”, and in Article 4(5), states “should consider appropriate measures” to enable participation of minority groups in economic development.

But there is much that is encouraging in the Declaration, and in particular in the commentary that accompanies it. Recognition of the collective identities of non-state groups represents real progress and the participatory rights, if implemented, could go a long way to providing a degree of mutual recognition to non-state groups.

### 6.2.3. Minority Rights as Recognition for Nations

Collective rights sit uneasily within the framework of modern international law. The fear of collective rights is a product of Europe’s recent fascist past and the emphasis on groups, superior and inferior. In the building of the post-war international framework, fascism was countered almost subconsciously by valuing everyone for their individuality.<sup>525</sup> The consequence is that where the Nazis arguably saw only a Jew standing before them and not his humanity, international law, and human rights law in particular, has an equal tendency to refuse to see the Jew.<sup>526</sup>

Notwithstanding the suggestion that a strategy of pursuing Article 25 in conjunction with Article 27 might yield better results for groups demanding greater participation rights<sup>527</sup>, neither Article 25 nor 27 ICCPR provide for collective rights to participate

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<sup>524</sup> Eide, *ibid*.

<sup>525</sup> Guyora Binder, ‘The Case for Self-Determination’, (1993) 29 *Stanford J. Int’l L.* 223.

<sup>526</sup> “...abstract concepts have in the past only too often presented great dangers to the enjoyment by individuals of their human rights and fundamental freedoms... A ‘people’ is no less an abstraction ...; it cannot in reality consist of anything more than the individuals who compose it.” (Sieghart, *The International Law of Human Rights*, 1983, at 368; quoted in van Boven, ‘Human Rights and Rights of Peoples’, (1995) 6 *European Journal of International Law* 461). Sieghart’s concern is typical of the fear that granting rights to groups will give legitimacy to human rights violations of the individual.

<sup>527</sup> Annelies Verstichel, ‘Recent Developments in the UN Human Rights Committee’s Approach to Minorities, with a Focus on Effective Participation’, (2005) 12 *International Journal on Minority and Group Rights* 25. Verstichel notes a growing awareness of the need to focus upon participatory rights for minority and indigenous groups, yet rather optimistically concludes from the decision of the HRC to consider Article 25 (the right to political participation) in light of Article 1 (the right to self-

in the democratic system, and the provisions of the Declaration provide no enforceable rights. Further, the provisions of the Declaration do not allow for groups claiming nationhood to come to the table to re-negotiate the table itself: they provide for (non-enforceable) rights to participate within the structures established by the majority.

The conclusion cannot be other than that both Article 27 and the 1992 Declaration, although they recognise the separate identity of minorities, and in the case of the latter their collective identity, and seek to protect difference, offer only passive recognition within a framework established by the majority. Minority protection provisions are, in general, limited in substance and application, handicapped further by the unwillingness of the most important of the enforcement bodies to take a stronger line against states in advancing the protection of minorities.<sup>528</sup> Further, the minority rights contained in both Article 27 and the Declaration apply only to individual members of a group and are not accessible to the group as a collective entity. That a group has a collective existence and requires recognition as such is an idea that does not sit easily within the existing framework of international human rights law, Article 1 of the Declaration and certain regional instruments notwithstanding.<sup>529</sup> Not only has the assumption that group rights would be taken care of automatically through individual human rights protection not delivered<sup>530</sup>, but the main international minority provision in force fails to recognise group identity as collective, arguably a harm in its own right.

Moreover, recognition if it is to be effective must be active. While individual and minority rights are intended to allow members of minorities to enjoy and participate in their culture in the private realm, they are not intended to allow them to exercise any

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determination) and an individual concurring opinion by one member of the Committee in suggesting that the body should not place undue emphasis on the individual nature of the guarantees provided by Article 25 that these represent notable steps toward guaranteeing participatory rights for minority groups. Both incidents were findings in favour of the state party, however. (*Gillot v. France*, HRC Communication No. 932/2000, CCPR/C/75/D/932/2000, and *J.G.A. Diergaardt et al. v. Namibia*, Communication No. 760/1997, CCPR/C/69/D/760/1997, respectively).

<sup>528</sup> In this regard, see the unnecessarily limited decision of *Ballantyne et al. v. Canada* that determined that English speakers in Quebec were not entitled to invoke the provision as, although a linguistic minority in Quebec, they constituted the linguistic majority in Canada as a whole. 1 IHRR 145 (1994).

<sup>529</sup> Notably, the African (Banjul) Charter on Human and Peoples' Rights, (1982) 21 ILM 58.

<sup>530</sup> See Ian Brownlie, 'The Rights of Peoples in Modern International Law', in J. Crawford (ed.), *The Rights of Peoples*. Oxford: Clarendon Press, 1988.

real control over their lives or to participate in the public life of the wider community on mutual terms. Individual participatory rights cannot be sufficient guarantee of the protection and representation of minority interests, as the will of the majority will of course prevail. The limitations of the minority protection regime entail that an encompassing group cannot ensure the survival of an attribute fundamental to their being *as a group*. There is little place within the regime for non-state national groups as equal participants in discussing and deciding upon matters that affect them, nor a guarantee of a place at the table for more general public discussions, and arguably there will not be until it is acknowledged that what those claiming recognition are seeking is not simply the right to be allowed to continue existing but self-governance. The nature of the rights reviewed suggests that minority groups are not viewed as equal occupiers of a territory, as equal interlocutors in the daily deliberation about the common future of life in that territory. This does not mean that minority rights are not well-meaning, but that they were designed to preserve groups rather than to enable their full participation on the understanding that these groups have something to offer. Recognition requires mutual respect not toleration. This can only be achieved from a position of equality along the lines elaborated in Chapter IV, not from a position in which One or the Other is designated a ‘minority’.

The minority protection regime creates one further obstacle to recognition of a Romani nation. The current human rights regime, although it accepts the existence of considerable numbers of transnational minority groups, places no obligation upon states to co-operate to ensure communication and facilitate group identity across borders. However, even were such a clause to place obligations upon a state existed, it would be unable to incorporate a group as transnational in scale as the Roma.

Ultimately, the minority rights currently on offer in international law provides a non-state nation neither the autonomy that it requires nor the recognition that most groups are actively seeking. While the Declaration does however offer some hope for those nations that exist primarily on the territory of one state, were the Declaration to morph into hard law, the world of the nation-state has traditionally been one in which the winner takes (nearly) all. Nowhere is this more visible than in the interpretation of the principle of self-determination. Where nations seek meaningful recognition, it is not to minority rights but to self-determination to which they turn.

### **6.3. Constituting oneself as a Nation: Self-Determination**

No principle of international law is more contested or controversial – so begin nearly all accounts of the right of self-determination. It is certainly true that short of agreement on the fact that self-determination has forced its way into the lexicon of international law, there is no consensus on whether in the post-colonial world it constitutes *lex lata*, *lex feranda*, or *lex specialis*<sup>531</sup>, although Crawford seems to have been most adroit with the observation that self-determination is *lex obscura*.<sup>532</sup> Brietzke has chosen to label it *lex imperfecta*, although one wonders which legal norm is not.<sup>533</sup> It has been proclaimed a right *erga omnes* and an essential principle of international law, and thus presumably a peremptory norm.<sup>534</sup>

Despite the confusion, when groups claim recognition as a nation, it is the right to self-determination that they have in mind. The statement of an aboriginal officer to the UN Human Rights Commission Working Group sums this up well: “[I]t could be said that at the heart of all the violations of our human rights has been the failure to respect our integrity, and the insistence in speaking for us, defining our needs and controlling our lives. Self determination is the river in which all other rights swim.”<sup>535</sup> The combination of vague legal status and emotive power has made it the claim of choice for embattled groups seeking a voice on the international stage. Despite this, the Romani Movement chose to take on the language of self-determination

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<sup>531</sup> Robin White, ‘Self-Determination: Time for Re-Assessment?’ (1981) 28 *Netherlands International Law Review* 147

<sup>532</sup> James Crawford ‘The Right of Self-Determination in International Law: Its Development and Future’, in P. Alston (ed.), *Peoples’ Rights*. Oxford: Oxford University Press, 2001, 10.

<sup>533</sup> Paul Brietzke, ‘Self-Determination, or Jurisprudential Confusion: Exacerbating Political Conflict’, (1995) 14 *Wisconsin International Law Journal* 69, 85.

<sup>534</sup> *Barcelona Traction, Light and Power Co. Case*, ICJ Reports (1970), 32. The ICJ determined that self-determination constitutes a rights *erga omnes* and proclaimed it an essential principle in *East Timor (Portugal v. Australia)*. All case-law from <http://www.ici-cij.org/> Brownlie, for one, has suggested that self-determination constitutes *jus cogens*. *Principles of Public International Law*, Oxford: Oxford University Press, 1990 (4<sup>th</sup> edition).

<sup>535</sup> Quoted in C. Scott, ‘Indigenous Self-Determination and Decolonization of the International Imagination: A Plea’ (1996) 18 *Human Rights Quarterly* 814, 814. Such an approach has been criticised by Philip Alston (‘Peoples’ Rights: Their Rise and Fall’ in Alston (ed.), *Peoples’ Rights*, 261) as bearing little relation to the historical facts of self-determination. Alston takes issue with the suggestion that without self-determination other human rights have little meaning. While it is certainly the case that the right to self-governance is co-equivalent to human rights, without the freedom of self-government, the individuals of those groups are denied recognition and are reduced to domination regardless of human rights, which is the point that the aboriginal spokesman appears to be making.

surprisingly late in its history.<sup>536</sup> However, self-determination, and its application to non-state groups such as the Roma, is shrouded in confusion.

Much of the uncertainty is understood, at least by lawyers, to arise from the confusion in the popular imagination between the moral/ political principle of self-determination and the legal right, and most legal accounts attempt to separate out the *lex feranda* from the law as it stands. Yet dismissing the political principle of self-determination does little to resolve the difficulty in pinning down a single legal norm of self-determination that can be applied to any situation. It is arguably, however, precisely this search for a single norm, and the corresponding failure to distinguish between rules and principles, that sees accounts of self-determination descend into confusion: if self-determination is simply a rule that applies only to colonial peoples, how does one explain the language of the right, that is, it applies to everyone? If self-determination applies to everyone, how is it that, in practice, it is denied to most? It is thus worth being clear on the legal terminology. The account of self-determination given here relies on Dworkin's famous answer to Hart's conception of law as a system of rules by developing the distinction between legal rules and legal principles in any given system of law.<sup>537</sup> Dworkin grants both equal importance but different functions. Rules, according to Dworkin, apply in an all-or-nothing fashion; they lay down to whom, in what circumstances and how they apply. Principles contain a generally accepted statement that argues in a given direction but does not determine a particular decision; they are observed, according to Dworkin, because the standards of justice or morality require it. Principles can conflict and still be valid; rules cannot conflict and both survive. Principles thus possess an element that rules do not: a relative weighting. Where a rule does not exist or is not fully determinate, courts use a weighing of principles to develop a new rule. This distinction sees principles, according to Crawford, play a general function in translating moral and political rationales into international law. This account thus follows Crawford, Cassese and Knop<sup>538</sup>, among others, in viewing the right to self-determination as both a principle

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<sup>536</sup> The present author is at a loss to explain the reluctance within the Movement until very recently to talk the language of self-determination. For details of the claims, Chapter 2.

<sup>537</sup> Ronald Dworkin, 'Is Law a System of Rules?' and H.L.A. Hart, 'Positivism and the Separation of Law and Morals' in Dworkin (ed.), *The Philosophy of Law*. Oxford: Oxford University Press, 1977.

<sup>538</sup> For a discussion of the distinction between right and principle as it applies to self-determination, see Karen Knop, *Diversity and Self-Determination in International Law*. Cambridge: Cambridge

*and* a set of rules, in which the general principle serves as a guide to interpretation and application of the rule.<sup>539</sup> It is perhaps the only interpretation that allows one to make sense of the legal approach to self-determination. It does not, of course, remove the indeterminacy.<sup>540</sup>

This account, then, views the history of the development of the right to self-determination from the perspective of both principle and the rules which apply in the application and enforcement of that principle. It aims, further, at understanding the relationship of people and territory that self-determination represents in order to understand what the law as it currently stands offers a non-state group such as the Roma.

### **6.3.1. Charting the interpretative history of self-determination**

Most accounts, having acknowledged the controversial area into which they are about to wade, trace the concept of self-determination back to the revolutions of the late eighteenth century and the nationalist movements they generated in their wake. The point at which self-determination became a part of international law is, however, as one might expect, contested. David Harris tells us that self-determination is not to be considered a legal principle until its inclusion in Article 1(2) of the UN Charter, as one of the guiding purposes of the new organisation.<sup>541</sup> According to Oppenheim, however, it should be considered a legal principle only from the time of its appearance as Article 1 in the 1966 twin Covenants on Civil and Political Rights and on

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University Press, 2002, 30-38; Antonio Cassese, *Self-Determination of Peoples*. Cambridge: Cambridge University Press, 1995, 132-3.

<sup>539</sup> Arguably, much of the confusion around self-determination is related to the insistence on viewing self-determination as a right. Thus, the 'right' is viewed here as both a principle and a rule, and not as inherently a trump. See Ronald Dworkin, *Taking Rights Seriously*. Great Britain: Duckworth & Co., 1977, in particular Chapter 7.

<sup>540</sup> While Crawford and Schachter agree that self-determination is both a principle and a right, Crawford views the right as fully determined, whereas Schachter holds that there are few rules and the principle predominates. See discussion in Knop, *Diversity and Self-Determination*, 30-38.

<sup>541</sup> Despite Woodrow Wilson's enthusiastic endorsement at Versailles, self-determination does not appear in the Covenant of the League of Nations (although it might be considered implied in the provisions of Article 22) and the Commission of Jurists formed to consider the claim of the Åland Islanders to self-determination denied that the principle was applicable. Report of the International Commission of Jurists in the *Åland Islands* case, L.N.O.J., Special Suppl. No. 3 (1920). David Harris, *Cases and Materials on International Law*. London: Sweet & Maxwell, 1998 (5<sup>th</sup> edition), 113.

Economic, Cultural and Social Rights.<sup>542</sup> Crawford is rather more circumspect, and provides a window between the 1960 Declaration on the Granting of Independence to Colonial Territories (G.A. Res. 1514) and the 1971 decision by the International Court of Justice to overturn an earlier decision and revoke South Africa's mandate over South West Africa, justified by reference to the right of its inhabitants to self-determination, within which he suggests self-determination became increasingly accepted as a principle of international law.<sup>543</sup>

Regardless of the exact moment at which it established itself as a legal principle, the 1960 Declaration has been crucial in expanding the meaning of self-determination – the text of the UN Charter itself offering few clues – and it is upon this document that the UN's decolonisation policy was based.<sup>544</sup> Article 2 famously provides: “All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>545</sup> Already however there were attempts to limit its application. Article 6 of the Declaration qualifies the right with the condition that, “Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations.” Thus, the 1960 Declaration is normally interpreted to imply that self-determination applies to colonial peoples only within existing colonial boundaries, the principle of *uti possidetis*.<sup>546</sup> Following the 1960 Declaration, there is hardly any dispute that the ‘peoples’ in question include trust territories and non-self-governing

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<sup>542</sup> Sir Robert Jennings & Sir Arthur Watts, *Oppenheim's International Law*. Volume 1: Peace. England: Longman, 1992 (9<sup>th</sup> edition).

<sup>543</sup> Crawford, ‘The Right of Self-Determination in International Law: Its Development and Future’, 16-17.

<sup>544</sup> The Resolution was adopted by 89 votes to none against, with nine abstentions (Australia, Belgium, Dominican Republic, France, Portugal, South Africa, Spain, the UK and the US). Nevertheless, despite the lack of unanimity, the ICJ in 1975 considered self-determination in the colonial context to be a part of customary international law, based in no small part on the 1960 Declaration and the practice it inspired. *Western Sahara Case*, Advisory Opinion, ICJ Reports (1975), para 56.

<sup>545</sup> G.A. Res. 1514 (XV), G.A.O.R., 15<sup>th</sup> Session, Suppl. 16, 66 (1960).

<sup>546</sup> It is worth noting that this was a restrictive interpretation fully endorsed by the Organisation for African Unity (OAU), established in 1963 in no small part to fight the anti-colonialism battle and to promote the right to self-determination of African peoples. The OAU came out strongly against the Biafran claim to self-determination, for example, and strongly supported the Nigerian claim to integrity of its borders. See Steven C. Roach, ‘Minority Rights and an Emergent Right to Autonomy: A Historical and Normative Assessment’ (2004) 11 *International Journal of Minority and Group Rights* 411, 421-424. *Uti possidetis* was declared a general principle of international law by the Badinter Commission in Opinion No. 2, reproduced (1993) 3 *European Journal of International Law* 183-4, although not uncontroversially.

territories as established under the UN Charter and that they were the intended bearers of the right as expressed there.

The 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (G.A. Res. 2625) repeats almost exactly the wording of the earlier document in relation to self-determination, but made a number of crucial and well-known additions. While the 1960 Declaration suggests that the only legitimate outcome of self-determination is “complete independence” (Article 5, G.A. Res. 1514), the Declaration on Friendly Relations, repeating the wording of G.A. Resolution 1541, provides three acceptable outcomes: “The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status determined by a people...”.<sup>547</sup> Self-determination, therefore, is not to be equated with independence, but with the right to choose.

The second much quoted part of the 1970 Declaration concerns a limitation clause similar to that found in Resolution 1514. However, rather than issuing a blanket refusal to allow the dismemberment or interruption of the territorial or political unity of an existing State, the limitation offers protection only to “...States conducting themselves in compliance with the principle of equal rights and self-determination of peoples ... and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.” The inclusion of this clause, as Crawford points out, would have been superfluous if self-determination applied solely to colonies and colonial people.<sup>548</sup> The wording of this clause was clearly chosen with the apartheid regime of South Africa in mind – independent but in the minds of many subject to ‘alien domination’ – but was also concerned with the status of occupied territories following the cessation of military hostilities, as evidenced by the many General Assembly resolutions referring to

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<sup>547</sup> G.A. Res. 2625 (XXV), 1970. Res. 2625 was adopted without a vote. While most former colonies opted for independence, examples of integration with another state include the decision of North Cameroons to join Nigeria; an example of free association could be the Cook Islands and New Zealand. Some dependent territories chose to remain so; for example, Gibraltar with the United Kingdom.

<sup>548</sup> Crawford, ‘The Right of Self-Determination in International Law: Its Development and Future’, 31. The inclusion of this phrase suggests that by 1970 it was already accepted that self-determination was applicable outside the context of salt-water colonialism.

Palestine.<sup>549</sup> Self-determination, at least as a principle, thus appears to have stepped beyond its colonial roots.

The interpretation that self-determination applies beyond the colonial context is supported by Article 1 of the 1966 Covenants, in which Article 1(1) echoes the 1960 Declaration statement that “All peoples have the right to self-determination”. As Crawford notes, ordinary treaty interpretation ensures that it cannot be considered limited to colonial peoples; nor simply to those subject to subjugation or alien domination. There is no attempt to limit the provision thus and the singling out of the peoples of colonial territories in Article 1(3) suggests that the “all peoples” of Article 1(1) is intended to mean just that.<sup>550</sup> There is thus a strong case for suggesting that self-determination is applicable in situations other than those of decolonisation. Indeed, the ICJ ruled in 1995 that self-determination “is one of the essential principles of international law”,<sup>551</sup> suggesting a continuing applicability.

Self-determination may be one of the most essential principles in the international legal lexicon, but to whom does the right apply? Or, when is it a rule? In one of his earlier works, Crawford is clear that the subject of the right to self-determination belongs solely to trust and mandated territories, and territories treated as non self-governing under Chapter XI of the UN Charter. One could also, although Crawford does not, suggest that oppressed peoples as defined by the 1970 Declaration are also rights-bearers.<sup>552</sup> There is on-going debate about whether oppressed minority groups could fall within the terms of the right and thus be entitled to independence, so that where they are prevented from a meaningful exercise of their right to self-determination as part of a larger unit, they become bearers in their own right – the so-

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<sup>549</sup> Just one resolution prior to 2625, the Security Council dealt with the policies of apartheid (2624 (XXV), and three resolutions later, it considered ‘The situation in the Middle East’ (2628 (XXV)), condemning the continuing Israeli occupations in contravention of G.A Res. 242 (1967), suggesting that these issues were very much on the Security Council’s mind.

<sup>550</sup> For more details, Crawford, ‘The Right of Self-Determination in International Law: Its Development and Future’, 27.

<sup>551</sup> *Case concerning East Timor*, ICJ Reports (1995), 102. It is however worth noting that this case, as all the others considered by the ICJ, concerned the situation and status of a former colonial territory. The assertion that self-determination applies outside the colonial context is now also supported by the so-called Helsinki Declaration; although it is not legally binding, it constitutes an important statement of *opinio juris*.

<sup>552</sup> Crawford, *The Creation of States in International Law*. Oxford: Clarendon Press, 1979, 84-118.

called ‘positive’ aspect of the safeguard clause.<sup>553</sup> The Supreme Court of Canada in its advisory opinion concerning the right of Quebec to secede from Canada followed the 1970 Declaration in suggesting a second category of bearers of the right to self-determination.<sup>554</sup> The European Court of Human Rights was less reticent than the Canadian Supreme Court in identifying in *Loizidou v. Turkey* an emerging consensus that self-determination can be used as a means of counteracting certain types of human rights abuse.<sup>555</sup> Most commentators, however, suggest a high threshold of abuse before a group or ‘people’ could be considered ‘internally colonised’ and thus entitled to invoke the provisions of G.A. Resolutions 1541 or 2625.<sup>556</sup> An understanding of Article 1 that views it as incorporating the principle that everyone has the right to self-determination rather than the rule is thus probably the best, although slightly sideways, interpretation.<sup>557</sup> Self-determination as a rule thus applies solely to colonial peoples within colonial boundaries.

Principles, however, are over-lapping, contradictory and clashing. Where self-determination is not a rule, it conflicts with a number of well-established and equally

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<sup>553</sup> Weight has been lent to this theory by the actions of the UN, authorised by Security Council Resolution 688, which saw intervention in Iraq on behalf of the Kurdish population in May 1991 in a clear breach of Iraq’s territorial integrity and political unity. Moreover, the establishment of the so-called ‘safe havens’ by the United States and the UK could constitute further evidence in this direction. In addition, there is considerable evidence that some states encouraged secession from the former Yugoslavia, e.g. by premature recognition. Such examples however suggest that an already existing situation of instability and upheaval may be required to persuade the international community that secession is an option.

<sup>554</sup> The lack of a right to secession for minorities “places no obligation on minority groups to stay part of a unit that maltreats them or in which they feel unrepresented”, according to Higgins. Rosalyn Higgins, *Problems and Processes. International Law and How We Use It*. Oxford: Clarendon Press, 1994, 125. However, elsewhere Higgins has been less accommodating. Indeed, elsewhere Higgins has been clear that those groups that fall under Article 27 ICCPR cannot be peoples within the meaning of Article 1. The terms are, for Higgins, mutually exclusive. Higgins, ‘Postmodern Tribalism and the Right to Secession: Comments’ in C. Brölmann, R. Lefeber and M. Zieck (eds.), *Peoples and Minorities in International Law*. Dordrecht: Martinus Nijhoff, 1993.

<sup>555</sup> *Luizidou v. Turkey*, Judgement of the ECHR, 18 December 1996. See Concurring Opinion of Judge Wildhaber in particular. <http://hudoc.echr.coe.int/>

<sup>556</sup> E.g. White, ‘Self-Determination: Time for Re-Assessment?’. Moreover, several commentators have also noted the possibility that recognition of the different groups within a territory may actually constitute a breach of the safeguard clause in the Declaration on Friendly Relations, which requires states “to represent [...] the whole people belonging to the territory without distinction as to race, creed or colour.”

<sup>557</sup> Crawford, *The Creation of States in International Law*, 101; Knop, *Diversity and Self-Determination*, 34. Cassese, however, appears to disagree, stating that only self-determination applying in a colonial situation is to be considered a general principle of international law and thus the continuing right to self-determination is applicable to those states, and only to those states, that are signatories to either of the 1966 Covenants. Cassese’s opinion would appear to characterise self-determination as a rule, but one that is clear that different bearers have different outcomes. Cassese, *Self-Determination of Peoples*.

much cherished principles, such as those of territorial integrity and of non-intervention. Whilst the principle of non-intervention, as found in Article 2(7) of the UN Charter, is not applicable in situations of colonial oppression<sup>558</sup>, the ordering of international legal principles becomes much less clear outside the certainties of the application of the right to self-determination as a rule in the situation of decolonisation. One winner though appears clear. The principle of territorial integrity effectively trumps that of self-determination; there is no right to secession in international law.<sup>559</sup> The most recent statement of that victory was made by the Canadian Supreme Court in its finding that where a government of a state is representative of the people as a whole, without discrimination, the state “is entitled to the protection under international law of its territorial integrity”.<sup>560</sup>

The principal means by which the principle of self-determination is reconciled with that of territorial integrity – the relative weighting of the principles – is through a restricted interpretation of ‘peoples’, so that it is understood only in terms of the population of an already constituted State. According to Higgins, the references to self-determination in the UN Charter should only be understood as a corollary to Article 2(4) of the UN Charter, as providing the right of a people of a state to be protected from the interference of others in their affairs.<sup>561</sup> She concludes, that faced with the two possibilities that ‘all peoples’ refers either to the entire people of a state or that it implies all distinctive groupings based either on ethnicity, race or perhaps religion, all the relevant state practice and wording of documents stressing the importance of territorial integrity can only mean that ‘peoples’ refer to all the peoples of a given territory and not any part thereof. Thus, the people of France or Japan have the right to self-determination, but not, say, the people of Breton, except in the sense that they are part of the people of the French Republic and entitled to self-determination as part of the wider group. Harris concurs, stating emphatically that,

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<sup>558</sup> See G.A. Res. 2625.

<sup>559</sup> See, Margaret Moore (ed.), *National Self-determination and Secession*. Oxford: Oxford University Press, 1998.

<sup>560</sup> *Reference re Secession of Quebec* [1998] 1 SCR 217, 284 (para. 130). It refused, however, to reach a conclusion on whether this constituted an accepted part of international law.

<sup>561</sup> Higgins, *Problems and Processes*, 112. Higgins holds that the link of self-determination with equal rights in Article 1(2) of the UN Charter can only imply that the right of self-determination belongs to the peoples of states as it is the equal rights of states which are being referred to and not of individuals. Such an interpretation has received strong support from African states keen to safeguard their own borders and develop a sense of nationhood in extremely heterogeneous countries.

“[self-determination] does not extend to claims for independence by minority groups in a non-colonial context.”<sup>562</sup>

In its conflict with the principle of territorial integrity, the principle of self-determination has arguably emerged as (or been reduced to) a continuing entitlement of a people “to freely pursue their economic, social and cultural status”.<sup>563</sup> This is the aspect of self-determination which has come to be known as ‘internal’. This approach has taken inspiration from other provisions in the human rights stable, which guarantees to all the right to choose their government.<sup>564</sup> For as Brownlie has pointed out, if the right of a people is to have any significant meaning at all, it must be separate from the rights of states and constitute a right of a people against their government<sup>565</sup>; thus seeing self-determination in terms of internal governance ostensibly preserves the right as one of ‘peoples’ rather than seeing it become purely absorbed into the defence of state sovereignty. The Human Rights Committee, moreover, has consistently stressed the obligation upon state parties to provide information on the fulfilment of Article 1 in their periodic reports and, perhaps more importantly, states have not contested their duty to do so, although it is to be admitted that they have not always been dutiful in doing so.<sup>566</sup> Adding weight to the assertion that the principle of self-determination finds expression in the ‘internal’ dimension, a number of regional documents, such as the 1975 Final Act of the Conference on Security and Cooperation in Europe (the Helsinki Declaration), explicitly provide for this internal dimension of self-determination.<sup>567</sup> As a counter-balance to the

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<sup>562</sup> Harris, *Cases and Materials*, 113.

<sup>563</sup> Article 1(1) of the 1966 Covenants; <http://www.unhchr.ch/html/intlinst.htm>

<sup>564</sup> For example, Article 21(3) UDHR commanding that “the will of the people shall be the basis of the authority of the government; this will be expressed in periodic and genuine elections which shall be by universal and equal suffrage...” Article 25 ICCPR translates this into a legally binding obligation and right. The seeming duplication of Articles 1 and 25 ICCPR is normally considered resolved by asserting that Article 25 provides the detail of the free choice guaranteed by Article 1 (e.g. see Higgins, *Problems and Processes*, 121). The equating of self-determination and democracy was in fact, according to Hannum, the philosophical underpinning of President Wilson’s understanding of self-determination (Hurst Hannum, ‘Rethinking Self-Determination’, (1993) 34 *Virginia Journal of International Law* 1, 8). See also Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86 *American Journal of International Law* 46. Cassese, however, appears to deny that any such right currently exists, commenting that the ‘consent of the governed’ is held to be “too dangerous for the present fabric of the world community.” Cassese, *Self-Determination of Peoples*, 334).

<sup>565</sup> Brownlie, ‘The Rights of Peoples in Modern International Law’.

<sup>566</sup> See General Comment No. 12, adopted 21<sup>st</sup> session, 1984;

<http://www.ohchr.org/english/bodies/hrc/comments.htm>

<sup>567</sup> 14 *ILM* 1292 (1975); “...all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status...”.

absorption of the principle of self-determination within the human rights orbit, an interpretation of self-determination as not requiring the all-or-nothing of independence has found expression in autonomy arrangements.

### **6.3.2. Self-determination through autonomous regimes**

The apparent opportunity offered by the conception of self-determination as an ongoing right to choose one's own government has given birth to a growing awareness of the role autonomous arrangements might have to play in generating a role for self-determination that strikes a fairer balance between the desire on the part of non-state nations for self-governance and the refusal of states to compromise on territorial integrity. Autonomy has a good claim to be an existing tool in international law for resolving contested territorial claims and has been used by international law on numerous occasions to reconcile the seemingly irreconcilable; an example being the Free City of Danzig (Gdansk) in the inter-bellum period. It is not surprising therefore that autonomy has re-emerged as a plausible pragmatic solution to regional conflict in the post-1990s era.

Governments are awakening to the possibilities a more nuanced approach to self-determination could have in diffusing ethnic conflict. Indicative of movement in this direction is the statement by the then Minister of State at the FCO to the House of Lords in 1993 concerning the position of the UK Government on the status of Tibet; Baroness Chalker declared that, "The Government's view is that all peoples have *a* right to self-determination but that this right can be expressed in several different ways" and, emphasising her point, "We do not believe that independence for Tibet is a realistic proposal."<sup>568</sup> Baroness Chalker's comment finds its inspiration, whether consciously or not, in the 1970 Declaration on Friendly Relations. As the Minister suggests, self-determination has never been solely equated with independence. In a similar vein, the Canadian delegation to the Indigenous Populations' Working Group expressed an understanding of self-determination as being "exercised in a manner which recognizes the inter-relationship between the jurisdiction of the existing state and that of the indigenous community, and where the parameters of jurisdiction are

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<sup>568</sup> *Hansard*, H.L., Vol. 542, col. 5, (1993); emphasis mine.

mutually agreed upon.”<sup>569</sup> Similar statements have been made by other governmental representatives in the context of the Working Group.<sup>570</sup>

The attractions of self-determination as autonomy over the participation rights accorded to minority groups are, from the Canadian government’s statement, clear. Autonomy allows a group to establish themselves as self-constituted, granting them a formal place in the public sphere from which it is possible to establish meaningful control over their own affairs. It can be a means of equality with other nations in that public sphere as the mutual agreement that the Canadian delegation, for example, felt to be necessary in self-determination as autonomy requires the consent of the indigenous people concerned. Autonomy can also enable autonomous groups to provide certain services themselves, such as the growing autonomy of Maori in New Zealand in the fields of health care and education or of devolution in Scotland, which encompasses control over all internal affairs. The development of autonomy as part of self-determination would be exciting for the flexibility it could offer the third type of nations outlined above – those subsumed within an existing state and denied participation on a basis of equality with other groups –, assuming that they had no desire to representation or participation at the international level.

The re-emergence of autonomy has been welcomed by a number of academic commentators, who have advocated such an approach and who view territorial autonomy<sup>571</sup> as a vehicle through which self-determination can regain some of its normative value without necessarily raising the unholy spectre of secession. Wright, for example, has pressed for autonomy as a means of supplementing the inadequate existing rights for minority groups *qua* groups, suggesting a legal basis in an ordinary

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<sup>569</sup> Marantz, Statement of the Observer Delegation of Canada, 5; cited in Knop, *Diversity and Self-Determination*, 257.

<sup>570</sup> Australia’s submission to the Indigenous Populations Working Group presented a ‘post-colonial’ model of self-determination, which consisted in recognising the special position of indigenous peoples, recognising their human rights and ensuring their full participation in the political process. Statement of Mr. Colin Milner on Behalf of the Australia Delegation (Geneva, 24 July 1992); cited in Knop, *ibid.*, 256. It is an argument that the Chair of the Working Group, Erica Daes, appears to have taken up. See Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples, UN Doc. E/CN.4/Sub.2/1993/s6/Add.1 (1993).

<sup>571</sup> Although most commentators talk simply of ‘autonomy’, they are referring mainly to a form of territorial autonomy, whether explicitly stated or not; e.g. see Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination*. Philadelphia: University of Pennsylvania Press, 1996, 463: “Land is the literal and figurative foundation of the state and of every community that aspires to political autonomy”.

interpretation of 'all peoples'.<sup>572</sup> Hannum, taking note of the arrival of autonomy in the field of conflict resolution, has suggested that a new norm of international law has already been created from the intersection of sovereignty, self-determination and human rights, guaranteeing minority groups and indigenous peoples the right to autonomy and to meaningful control over their own affairs, what he has termed 'less-than-sovereign self-determination'.<sup>573</sup> While Hannum's claim that a new norm has crystallised seems unrealistic, the use of autonomy as an interpretation of self-determination is nonetheless emerging.

Such autonomy need not be territorial, despite most commentators' assumption that it would necessarily be so. Non-territorial autonomy also has a history of conflict resolution, enabling mixed communities to inhabit the same space while allowing them the right to self-governance over many issues of importance to them. The Ottoman *millet* system is the best known example of non-territorial autonomy, but it is not the only one, as the preceding chapter sought to highlight.<sup>574</sup> Further, contemporary examples of non-territorial autonomy, by which membership is determined by the personality principle rather than existence on a given territory, exist: the Maori in New Zealand or the Sami in Scandinavia.<sup>575</sup> Such examples are notable, however, as exceptions. Autonomy models as considered by international lawyers remain overwhelming territorial.

An expansion of the terms of self-determination to include a right to autonomy, both territorial and non-territorial, could be of real benefit to non-state nations in particular in seeking meaningful control over their own affairs. It may be all that they require, for an independent state is a very costly business and autonomous nations might well prefer to play off state fears for their territorial integrity with demands for greater levels of resources from central government. It is worth sounding a note of caution,

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<sup>572</sup> Wright appears to base her proposal of autonomy as a solution on the 'equal rights of peoples' proclaimed in Article 1(2) of the UN Charter; although, Higgins, as noted above, has rejected such a possibility of 'peoples' taking its ordinary meaning in this context. Jane Wright, 'Minority Groups, Autonomy, and Self-Determination' (1999) 19 *Oxford Journal of Legal Studies* 605.

<sup>573</sup> Hannum, *Autonomy, Sovereignty, and Self-Determination*, 469.

<sup>574</sup> For further examples, see section 5.2. John Coakley, 'Approaches to the Resolution of Ethnic Conflict: The Strategy of Non-territorial Autonomy' (1994) 15 *International Political Science Review* 297.

<sup>575</sup> See for the Sami approach based on Renner's personality principle, Anne Julie Semb, 'Sami Self-determination in the making?' (2005) 11 *Nations and Nationalism* 531.

however, in that autonomy will not necessarily provide the recognition for which all are arguably searching. Territorial autonomy in particular need not entail active recognition and the inclusion as an equal in societal negotiations. Autonomous communities risk ghettoisation. Moreover, where nations do seek some type of participation at the supra-state level, autonomy as currently conceived will not necessarily bring them this. Conversely, however, in certain cases autonomy might offer recognition that independence does not; a 2 nations- 1 state solution to the Israeli-Palestinian conflict might actually achieve more in terms of recognition for the Palestinian people than their own state, particularly one in which their borders are determined unilaterally by Israel. These concerns to one side, where autonomy is the negotiated outcome between the non-state group concerned and the majority, it contains much potential for the realisation of recognition for certain non-state nations.

Those groups, however, that are truly trans-national and for whom recognition implicitly requires recognition of that, autonomy, even non-territorial autonomy within the borders of one state, cannot provide it. For the fourth type of nations outlined above, autonomy is not seen as an option, not for logical reasons – as the use of the personality principle in constructing Sami self-determination across the borders of the Scandinavian states demonstrates – but for logistical ones. The mainstream understanding that autonomy is necessarily territorial renders it logically impossible for trans-national or dispersed groups. It only seems logical that self-determination and autonomous regimes require territory, however, because of the constitutive role territory is widely understood to play at the international level.

### **6.3.3. Summary**

To summarise the legal position, self-determination is both a principle of customary international law, applying to all peoples where a people is understood solely as the entire population of a given territory, and is a rule, applicable without limitation, but only to those accepted as bearers of that right, namely colonial peoples and possibly those denied self-determination as part of the wider state. Non-state nations unconnected to colonialism, or minority groups, are thus not bearers of the right and do not fall within the definition of a people in the context of the principle. They are hence not entitled to self-determination except as part of the larger population of which they form a constituent part. While there is a possibility that groups within a

state that are oppressed and thus prevented from exercising so-called internal self-determination may have the right to (external) self-determination, and the right to secede, this is not well-established.<sup>576</sup> Romani groups within state boundaries or a transnational Romani entity are not entitled to self-determination, but only individual Roma as citizens of a given state.

While non-state groups claiming nationhood cannot utilise the right to self-determination, one could however begin to build a case that groups claiming nationhood, where that claim is ignored, are being denied internal self-determination. Roma are certainly often excluded from any meaningful participation in the internal self-determination of a state – a consequence of poverty, social marginalisation and chronic discrimination. However, even were this theory to be accepted, secession requires territory and many groups claiming rights of self-determination do not wish for secession but greater rights to autonomy and participation. The Romani nation does not, in any case, possess or desire territory. Nor can the Romani claim to non-territorial nationhood reasonably make use of the emerging right to autonomy, where autonomy is widely understood as requiring the concentrated existence of a group on a defined territory.

#### **6.4. Taking a critical approach to self-determination**

Brownlie has described the core meaning of self-determination as, “the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives”.<sup>577</sup> While this is reflected in the legal status of self-determination as one of the pre-eminent principles of international law, and as a right, seemingly able to out-rank territorial integrity, it is not reflected in the scope. This section will consider why the interpretation of who qualifies for self-determination is so restrictive and widely perceived to be a betrayal of the spirit of self-determination as expressed by Brownlie.

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<sup>576</sup> Cassese provides a sobering account of the limited in-roads self-determination has made on the principles of state sovereignty and non-interference; Cassese, *Self-Determination of Peoples*, 334-335.

<sup>577</sup> Brownlie, ‘The Rights of Peoples in Modern International Law’.

The most obvious reason is that of the fear of the de-stabilising potential of self-determination and the obsession in international law with secession. The second Commission of Jurists in the Åland Islands case famously stated in its report that to concede to minority groups the right to choose their own future and to secede from the larger community would be “to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity.”<sup>578</sup> Eighty years on, this fear remains as powerful as ever. The former UN Secretary General, Dr. Boutros-Ghali, in sounding a note of alarm at the seeming upsurge of nationalist claims in the early 1990s, noted that should every ethnic, religious or linguistic group claim self-determination, “there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve”.<sup>579</sup>

Beyond the fear of destabilisation, the events of the Second World War and the many ethnic conflicts that have scarred the world since has seen nationalism viewed not just with suspicion, but with outright hostility.<sup>580</sup> Appeals to self-determination have been viewed as necessarily ethnically-based, and thus as a form of primitive tribalism, in contrast to the broader more liberally appealing forms of identity which the supposed neutrality of territory can offer.<sup>581</sup> Knop’s analysis of the writings of two of the most eminent international lawyers on the current stage, Thomas Franck and Rosalyn Higgins, brings their fear of a world galloping out of control to the tom-tom beat of

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<sup>578</sup> The Åland Islands Question, *Report presented to the Council of the League by the Commission of Rapporteurs*, League of Nations Doc. B.7.21/68/106 (1921), at 28; cited in Hannum, *Autonomy, Sovereignty, and Self-Determination*, 30. The League Council’s fear entailed refusal to allow self-determination for the Ålands people and limited action to act as a mediator between the Åland Islanders and the Finnish State. Roach, ‘Minority Rights and an Emergent Right to Autonomy: A Historical and Normative Assessment’.

<sup>579</sup> UN Secretary-General Ghali, *Agenda for Peace*, Report to the Security Council, 17<sup>th</sup> June 1992, A/47/277-S/24111, para. 17. Knop has used the fear of pandemonium as an interpretative tool for consideration of writings on self-determination, suggesting that this fear is used to shield self-determination from the accusation of inconsistency. Knop, *Diversity and Self-Determination*, 99-105. Even taking former Secretary-General Ghali’s comment about the dangers of fragmentation into account, the argument that we would be in a terrible mess if the international community actually applied the principle of self-determination fairly is hardly a sound basis for the application of law.

<sup>580</sup> This has been charted by a number of writers in different fields, notably Miller, *On Nationalism*; also Berman, ‘Nationalism “Good” and “Bad”: The Vicissitudes of an Obsession’ (1996) 90 *Proceedings of the American Society of International Law* 214.

<sup>581</sup> For example, Franck, ‘Postmodern Tribalism and the Right to Secession’ in Brölmann, Lefeber and Zieck (eds.) *Peoples and Minorities in International Law*. Franck notably fails to make a distinction between non-violent nationalist movements that choose to work within the legal and political system in which they find themselves, such as the Scottish nationalist movement, and those that resort to armed struggle. See also Chapter 5, *supra*.

nationalist demands clearly into focus. Higgins, for example, although renowned for her Yale-inspired view of international law as process, demands in the context of self-determination the need for legal certainty and a definition of self-determination that sees it reduced to a fixed rule. In so doing, she excludes all groups other than colonial peoples, as anything else is just ‘confused rhetoric’ and an attempt to make self-determination mean all things to all men.<sup>582</sup> Yet as Knop suggests, a determination to establish concrete rules as to who qualifies runs the risk of “de-historiciz[ing] and de-particulariz[ing] identity”.<sup>583</sup> But that perhaps is the point. It is possible to argue that at a fundamentally deep level, lawyers consider their role as being to promote order not chaos, that the possibility that the latter might occur is incompatible with the self-perception of what it is to be a lawyer, particularly an international lawyer.<sup>584</sup>

While the fear of instability is a primary concern for international lawyers, a deeper consideration of self-determination arguably reveals the embeddedness of the territorial impulse in international law, such that it infused the legal understanding of self-determination from the outset. It is rather the perception of self-determination as the ability of a nation or people to choose its own destiny that has obscured much of the consideration of this topic. The emphasis on colonial peoples as the sole recipients of self-determination is noteworthy because the colonies in question corresponded neither to *demos* nor *ethnos* – the original designates of self-determination in eighteenth, nineteenth and early twentieth century political thought.<sup>585</sup> Although it is likely that the common experience of oppression under the imperial yoke created an identity of sorts, this was most likely not at the fore of delegates’ minds in drawing up the UN Charter. Rather it seems likely that the concept of ‘peoples’ was determined at the outset as the people of a given territory. The age of nationalism and the myth of the nation-state overcame neither the fact of the state as the sole subject in

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<sup>582</sup> Higgins, *Problems and Process*, 128.

<sup>583</sup> Knop, *Diversity and Self-Determination*, 67.

<sup>584</sup> David Kennedy, ‘When Renewal Repeats: Thinking Against the Box’ (2000) 32 *New York Journal of International Law and Politics* 335. The importance of the self-understanding of lawyers in determining international law may explain in part the decisions of the Human Rights Committee in relation to minority rights and in particular to their decision that Article 1 of the Covenant is not subject to the individual complaint procedure under the Optional Protocol, thus forcing complainants wishing to allege a violation of their right to self-determination to rely upon Article 25 and 27, thus confirming their status as minorities and not peoples.

<sup>585</sup> The point is Knop’s, *Diversity and Self-Determination*, 55-62.

international law, nor that the state is defined by its borders.<sup>586</sup> The nation was only so much froth on the surface. Thus, wherever it fell for the future of a territory to be decided, it was for the population of that territory to make the decision, not a nation fulfilling a co-determined destiny. The desire for order arguably trumped any notion that de-colonisation was about the liberty of oppressed peoples.<sup>587</sup>

On a similar line of reasoning, Brilmayer has suggested that the right of self-determination be best understood as a form of restorative justice, as a corrective to a wrongful undertaking, in this case the wrongful seizing of territory.<sup>588</sup> It was the territory that was being returned to those who lived in it, regardless of whether they corresponded to contemporary understandings of a people or whether those that lived on the land wished to determine their future together with each other. It would, on this interpretation, be wrong to view the application of self-determination in decolonisation as the right of a people to freely choose their own destiny. Decolonisation was, from this perspective, rather a process of returning stolen property.

Thus an explanation for why colonial peoples were allowed to overcome the territorial imperative is that they were not. The acceptability of self-determination for colonial peoples and the corresponding decision to limit self-determination to them is a consequence of the view of colonies as distinct and separate territorial entities.<sup>589</sup> Decolonization allowed for the exercise of self-determination without raising the spectre of secessionist claims, as long as *uti possidetis* was accepted without question. As Knop notes, despite the statement by Judge Dillard in the *Western Sahara* case that “it is for the people to determine the destiny of the territory and not the territory the destiny of the people”, international law recognises a secessionist claim under the

<sup>586</sup> The principle of *uti possidetis* was well established long before the appearance of the principle of self-determination. E.g. in the Continental Treaty of 1856, in which the countries of Latin America undertook not to recognise any territorial transfers in the region. See Driessen, *A Concept of Nation*, 67-72.

<sup>587</sup> See, in this regard, Castellino’s analysis of the *Western Sahara* case. Interestingly, he also notes that “The ideal of the ‘nation-state’ was meant to be the vehicle that could contain *all* expressions of national identity”, apparently suggesting that in part a belief in the virtue of the nation-state model blinded decision-makers to the incongruence of nations and territory. Joshua Castellino, ‘National Identity & The International Law of Self-Determination: the Stratification of the Western Sahara ‘Self’ in S. Tierney (ed.), *Accommodating National Identity*. The Hague: Kluwer, 2000, 262.

<sup>588</sup> Lea Brilmayer, ‘Secession and Self-Determination: A Territorial Interpretation’, (1991), 16 *Yale Journal of International Law* 177.

<sup>589</sup> See Declaration on Friendly Relations (1970), 5(6): “The territory of a colony or other non-self-governing territory has ... a status separate and distinct from the territory of the State administering it”.

principle of self-determination only where the secessionist claimants have the better territorial claim, a point bourn out in the Court's reasoning of the *Western Sahara* case.<sup>590</sup> Despite the Court's awareness of the dilemma of applying an international law norm designed to accommodate European models of political community to a nomadic Sahara, it nonetheless viewed the Western Sahara as a question of possession of property.<sup>591</sup> The unit of decision was and remains the territory, not the nation(s) that reside(s) upon it.

While Brownlie has suggested that the emphasis on territory is simply the practical manifestation of the meaning of the self-determination, the above has aimed to show that rather, self-determination is better understood not as the right of a people to freely determine its own future but as the normative or moral manifestation of the right of a territory to regain its original borders. By institutionalising self-determination as the right of a territory and not of nations, its revolutionary potential was thwarted and self-determination was co-opted as a pillar of order in the post-war system.

A consequence of the origins of international law in the development of the rise of the state – embodying that symbiotic combination of centralisation of political authority and the development of fixed boundaries – is that territorial integrity, both as a principle of non-intervention and *uti possedetis*, is rooted as the meta-norm of the international order.<sup>592</sup> This is perhaps the only means to understand how the freedom of a nation to determine its own future is itself determined by the imperative that any such decision must respect the indivisibility of a unit of territory. Where the political principle of self-determination belonged to the nation, as national self-determination, the legal principle has arguably never belonged to the nation but has been tied to territory from its very inception. At the heart of the normative stress on territorial integrity is the belief in capacity as the defining element of personality. For, where

<sup>590</sup> Knop, *Diversity and Self-Determination*, 72-3. Cf. with the case of Eritrea: despite its annexation by Ethiopia in breach of the federalism agreement reached at independence, Eritrea had no recourse to self-determination and simply disappeared from the map. For details, Dreissen, *A Concept of Nation*, 112-3.

<sup>591</sup> Castellino, 'National Identity & The International Law of Self-Determination', 276.

<sup>592</sup> For consideration of *uti possidetis* as a general principle of international law, see Malcolm N. Shaw, 'Peoples, Territorialism and Boundaries' (1997) 8 *European Journal of International Law* 478, 494-502; Castellino, *ibid*, 260; and, in particular, Shaw, 'Territory in International Law' (1982) 13 *Netherlands Yearbook of International Law* 61: "Many of the most fundamental principles in international law are predicated upon the concept of territorial exclusivity of the state, and are aimed at protecting it.", 67.

territory is viewed as instrumental in political theory, in international law it is viewed as constitutive.<sup>593</sup> It is with the nature of personality in the international order that Chapter 7 begins.

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<sup>593</sup> Shaw, 'Territory in International Law', 63.

## Chapter 7: Recognition as Self-Determination qua participation

Stories do not belong to eternity. They belong to time. And out of time they grow.

Stories are the secret reservoir of values: change the stories individuals or nations live by and tell themselves, and you change the individuals and nations.<sup>594</sup>

That international law came into being in order to regulate relations between states is well-known. As Kingsbury has pointed out, the first word of book 1 of Grotius's foundational text *De Jure Belli ac Pacis* is *controversiae*, thereby suggesting that the management of disputes is traditionally understood as the prime function of the law of nations.<sup>595</sup> However, international law has also struggled with the reconciliation of the particular and the universal since the earliest attempts to define it.<sup>596</sup> The problem of how to reconcile the normative judgments that law requires in the face of the heterogeneity of social, economic, religious and political life goes to the heart of international law. The means of overcoming such diversity that international law adopted was to focus on function, which became institutionalised as territorial sovereignty. Personality was thus determined by fulfilling the functions of a state. Yet the illusion that by focusing on capacity, international law can remain neutral in the face of deep cultural differences has been comprehensively exposed.<sup>597</sup>

The challenges to the state-centred order that this lack of neutrality has generated have been met with a determination on the part of international law-makers to keep a tight control over access to international law-making. This resolve to keep the perceived threat of chaos at bay sees all entities squeezed into the dichotomy of state/ non-state, in which non-state claims to legitimacy are denied the recognition they seek. The exclusive nature of participation at the international level and the inability of those

<sup>594</sup> Ben Okri, 'The Joys of Story-Telling' in *Birds of Heaven*. London: Phoenix, 1997.

<sup>595</sup> Benedict Kingsbury, 'The International Legal Order' in Peter Cane and Mark Tushnet (eds.), *Oxford Handbook of Legal Studies*. Oxford, Oxford University Press, 2003.

<sup>596</sup> Benedict Kingsbury, 'Confronting Difference: The Puzzling Durability of Gentili's Combination of Pragmatic Pluralism and Normative Judgment' (1998) 92 *American Journal of International Law* 713.

<sup>597</sup> See, for example, from among the considerable 'Newstream' literature, Annelies Riles, 'Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture', (1993) 106 *Harvard Law Review* 723. Riles has concluded that, "International law ... is the creative product of its European cultural context, the codification of European norms, and the best hope for the perpetuation of European supremacy." (733-734). More generally, see Deborah Cass, 'Navigating the Newstream: Recent Critical Scholarship in International Law', (1996) 65 *Nordic Journal of International Law* 341.

affected to have voice in the making of rules that govern them has seen international law widely condemned, famously described as ‘unsociety’.<sup>598</sup>

While rehabilitating international law in the face of such awareness is an on-going and enormous project well beyond the scope of this thesis<sup>599</sup>, a necessary step in reforming it in the wake of the critical challenge is for international law to build itself upon the consent of those that it governs, by which all affected are able to participate in the setting of its rules.<sup>600</sup> The aim of this chapter is not to make a case for cosmopolitan democracy but to attempt to situate claims to legitimacy in the international order in light of the challenges of globalization. Recognition claims are currently hampered by the de-centred nature of the international order. However, the de-centred nature of international space and the erosion of the exclusive Westphalian framework also provide opportunities for persistent claims to be ‘heard’.

Chapters 4 and 5 sought to demonstrate the importance of recognition claims and the claim to original authority inherent in national demands in particular. There is urgency to these claims. Chapter 6 sought to demonstrate that the traditional avenues of international law open for claims to recognition are strictly limited by the place of territorial integrity as a meta-norm of the international order, and are thus of no help for a non-territorial, yet legitimacy-based, claim to recognition. This chapter interrogates the link between territorial control and international personality, and seeks an understanding of personality that gives space for legitimacy-based claims to recognition, without giving way to the promiscuity problem identified in Chapter 4. Self-determination *qua* participation shall be presented as the most appropriate forum for legitimacy-based claims to make their pitch for recognition and the openings for such participation is also considered. Ultimately, it shall be suggested that the very

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<sup>598</sup> Philip Allott, *Eunomia. New order for a new world*. Oxford: Oxford University Press, 1990.

<sup>599</sup> See Martti Koskenniemi, *The Gentle Civiliser of Nations*. Cambridge: Cambridge University Press, 2004. Also, Andreas Paulus, ‘International Law After Postmodernism: Towards Renewal or Decline of International Law? (2001) 14 *Leiden Journal of International Law* 727; and, Outi Korhonen, ‘New International Law: Silence, Defence or Deliverance (1996) 7 *European Journal of International Law* 1.

<sup>600</sup> There is a wealth of literature noting the need for greater democracy/ participation at the international level. E.g. David Held, *Democracy and the Global Order*. Cambridge: Polity Press, 1995; Held, ‘Law of States, Law of Peoples: Three Models of Sovereignty’ (2002) 8 *Legal Theory* 1; D. Archibugi, D. Held and M. Köhler (eds.), *Re-imagining Political Community*. Stanford: Stanford University Press, 1998.

least that is required for claims to legitimacy is the presumptive right to self-determination.

## **7.1. Recognition and Personality in International Law: capacity as territorial control**

It has been suggested that to debate the nature of legal personality is to conduct a non-debate.<sup>601</sup> While on the superficial level international personality can be defined as those that possess rights and duties, attempting to define the nature of international legal personality falls prey to the same ascending/ descending disease as every other structure of international legal argumentation.<sup>602</sup> Thus, Kelsen argued that legal personality was a “thoroughly formal concept”.<sup>603</sup> This is undoubtedly the case; however, while moving away from the concept of personality as a threshold to be overcome is welcome, before doing so, it is worth investigating the state/ non-state dichotomy that continues to underpin understandings of international personality. It will be contested that capacity as territorial control, rather than legitimacy, is the foundation of the means to function fully on the international level and that condemning all non-territorial claims to ‘also-ran’ status does a grave injustice to legitimacy-based claims.

### **7.1.1. International Personality: capacity over legitimacy**

Each legal order sets down its own rules for defining a legal person. In Roman law, legal persons were human beings, separate from legal entities that were bearers of rights and duties; there was no general term category of ‘subject’ that included both persons and entities. The Roman distinction between factual existence and attribution of personality is the classification of personality that international law has arguably followed. In the works of the early authorities on the Law of Nations – de Vitoria,

<sup>601</sup> Jan Klabbers, ‘Presumptive Personality: The European Union in International Law’ in M. Koskenniemi (ed.), *International Law Aspects of the European Union*, The Netherlands: Kluwer Law International, 1998.

<sup>602</sup> Koskenniemi, *From Apology To Utopia. The Structure of International Legal Argument*. Helsinki: Lakimiesliiton Kustannus, 1989, 236-245.

<sup>603</sup> H. Kelsen, *General Theory of Law and State*. Cambridge, M.A.: Harvard University Press, 1946, 250; cited in Klabbers, ‘Presumptive Personality: The European Union in International Law’.

Grotius, Leibniz – international personality belongs solely to organised nations i.e. states.<sup>604</sup> As human beings were natural persons of the Roman legal order, so the nascent states were personified as the natural persons of the Law of Nations. The existence of states was, like that of human beings, factual.<sup>605</sup>

Although historically, a number of non-state and non-territorial entities emerged as natural persons alongside states<sup>606</sup>, with the exception of the Papacy which continues to be recognised as a sovereign power on the basis of territorial sovereignty over the Vatican lands<sup>607</sup>, such actors disappeared as their functions were subsumed by an engorging state. As the state squeezed out all rivals, personality came to be defined not just by function, but by the defining aspect of the state: territorial exclusivity. According to the Arbitrator in the *Island of Palmas* Case, “Sovereignty in relations between States signifies independence. Independence in relation to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.”<sup>608</sup> In this most cited of cases, personality is determined as independence, which is functional capacity in a given territory. Capacity came to be denoted by the effective control of territory; or in the words of Arbitrator Huber “the continuous and peaceful display of territorial sovereignty”. Once intended to provide a neutral frame in which states could co-exist peacefully, the “mission and purpose of international law” became, according to one senior commentator, the delimitation of the exercise of power on a territorial basis.<sup>609</sup>

However, while territory signifies capacity, it is necessary to distinguish two elements to this. The definition of sovereignty at the international level also built upon Roman distinctions, and territory in relation to the state signifies both ownership (*dominium*)

<sup>604</sup> J.H.W. Verzijl, *International Law in Historical Perspective. Volume II*. Leiden: A.W. Sijthoff, 1969, 1-3.

<sup>605</sup> “The birth of a State is generally a purely *historical* event to which, if acknowledged according to general doctrinal requirements and standards to have in fact occurred, international law attaches *a posteriori* certain legal facts.” Verzijl, Volume II, Chapter 3, 63 (italics his).

<sup>606</sup> For example, the Papacy, (Arch-)bishoprics, Church Councils, City Leagues, Chartered Companies and Knightly Orders. See Verzijl, *ibid.*

<sup>607</sup> Whether or not the Holy See, in the person of the Pope, has personality separate from the Vatican is a contested point. R.A. Graham, *Vatican Diplomacy: A Study of Church and State on the International Plane*. Princeton: Princeton University Press, 1959, 15-16.

<sup>608</sup> *Netherlands v. U.S. (Island of Palmas)* (1928), 2 R.I.A.A. 829.

<sup>609</sup> Sir Robert Jennings, *The Acquisition of Territory in International Law* (1963); cited by Malcolm Shaw, ‘Territory in International Law’ (1982) 13 *Netherlands Yearbook of International Law* 61, 73.

and control (*imperium*).<sup>610</sup> It is these two elements that define sovereignty and thus the fullest expression of personality on the international level. Recognition on the international level is thus reserved for entities which muster and maintain effective control of territory.<sup>611</sup>

The belief in classical international law that states, as sovereign, constitute the only natural subjects of the international order saw all other entities designated, as in Roman law, objects; they were not part of the classical international legal order but were subject to its authority for the time that they strayed into its realm.<sup>612</sup> The overarching common use of the term legal personality to incorporate both states and non-state entities – a term seen to be more inclusive than separating entities out into subjects or objects – should not disguise the fact that only states are understood as possessing full personality and all other ‘personality’ in the international order is, following Roman law, conceived of as attributed or derivative.

While the ICJ’s consideration of whether or not the United Nations possessed international personality in the 1949 *Reparations for Injuries* case saw it define a subject as “an entity capable of possessing international rights and duties ... [and having] the capacity to maintain its rights by bringing international claims”<sup>613</sup>, which has since been used to extend the concept of personality to other entities and organisations, its circular verdict arguably did little to dispel the understanding of natural personality that underpins the states’ stranglehold on international law. In coming to its conclusion concerning the ability of the UN to bring a claim for damages against a member state, the Court wove a careful line between the objective theory of factual existence of an organisation and the will-theory that dictates that the personality of an international organisation is determined by the explicit will of the

<sup>610</sup> Vattel, *The Law of Nations or the Principles of Natural Law*, vol. 2 (1758), 84; Grotius, *De Jure Belli ac Pacis*, vol. II, Chapter III, s.4.2.; cited in Shaw, *ibid.*, 74

<sup>611</sup> The one possible exception to this is non-self-governing peoples as defined by Chapter XI of the UN Charter, to whom the right of self-determination applies. This is arguably a consequence, as the previous chapter suggested, of their location within well-defined borders.

<sup>612</sup> Verzijl, *International Law in Historical Perspective. Volume II*, Chapter 3.

<sup>613</sup> *Reparations for Injuries* Advisory Opinion, *ICJ Reports* (1949), 179; <http://www.icj-cij.org/>. This was not, however, the first occasion in which a non-state entity was recognised as possessing international rights and duties. In its Advisory Opinion concerning the *Jurisdiction of the Courts of Danzig*, the PCIJ held that the agreement between Poland and the League of Nations in creating the Free City of Danzig as an independent entity under the authority of the League also created the ability for Danzig officials to enforce their rights under the agreement. PCIJ Advisory Opinion No. 15, Ser. B., 1928.

founder states.<sup>614</sup> According to the Court, the UN “*was intended* to exercise, and enjoy, and *is in fact* exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality *and* the capacity to operate upon an international plane.”<sup>615</sup> The consequence of personality is thus the ability to possess rights and duties and to enforce those rights by bringing claims. However, were the UN to have possessed international legal personality, it would arguably have already enjoyed the ability to enforce its claims. There is thus something inherently circular about the Court’s understanding of personality: the possession of rights and duties indicates personality, but to have personality an entity must already be exercising those rights and duties. This circle is squared where states are concerned by assuming existence in fact i.e. an existence external and prior to the legal order in question. With attributed personality, it is not possible to square the circle without reference to the will of states. Non-state legitimacy claims, therefore, are explicitly denied their claim to original authority. This domination is played out in recognition theory at the international level.

### 7.1.2. Constitutive v. Declarative Recognition

International law possesses two theories of recognition: declarative and constitutive. The declaratory theory of recognition makes explicit the belief that a state is not a creation of international law, as the legal order merely endorses the fact of existence and attaches legal consequences to it. The declaratory theory is endorsed by the Montevideo Convention, although Article 1 of the Convention, read in isolation of subsequent articles, has caused much confusion. As is well known, Article 1 defines a state through the following attributes: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.<sup>616</sup> The capacity to enter into relations with other states clearly requires that existing

<sup>614</sup> The Court sought to maintain the impression of combining the two by considering what the founding states really intended to do in creating the organization, neatly side-stepping the fact that the founders deliberately failed to give the UN explicit international personality. *Reparations for Injuries*, 178-9; Klabbers, ‘Presumptive Personality: The European Union in International Law’, 244-245. Klabbers has suggested that the Court’s presumption that founding states would not have created an organisation with the tasks assigned it unless they also endowed it with international personality determined that it did indeed possess international personality.

<sup>615</sup> *Reparations for Injuries*, 178; *italics mine*.

<sup>616</sup> Montevideo Convention on Rights and Duties of States (1933) (1934) 165 *L.N.T.S.* 19. The Convention is widely understood to be a codification of custom; see, David Harris, *Cases and Materials on International Law*. London: Sweet & Maxwell, 1998 (5<sup>th</sup> edition), 102.

states recognise the new entity as an equal; however, simply because other states do not wish to enter into relations with an emerging state does not deny in theory the capacity of that state – it simply prevents that capacity from coming to fruition. Recognition of one state by another cannot, therefore, be constitutive. Article 3 of the Montevideo Convention is explicit on this point: “The political existence of the state is independent of recognition by the other states”.

Further, the existence of capacity in the absence of recognition is explicitly stated: “Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.” Recognition, as so understood, is purely declaratory, for the position of states as natural entities stems from an authority that lies outside the legal realm; that is, the effective control of territory. However, for all attributed personality, the recognition of states of their possession of rights and duties is constitutive of those rights and duties and thus of their personality. While the declaratory theory fails to acknowledge the inherent role of recognition in the social existence of any entity, the constitutive theory places too much power in the hands of the recognisers where legitimacy-based claims are concerned. Neither theory thus captures the power of the recognition dialectic.

The practice of recognition has never quite lived up to the declaratory theory, however. While recognition is in one sense necessarily declaratory, in that it is an acknowledgment of the capacity of the new entity to fulfil the rights and obligations it claims, it is, on the other hand, always also constitutive, because recognition is, at a simple level, necessary to participate in a legal order.<sup>617</sup> As Oppenheim emphatically stated in his 1905 manual, “A State is and becomes an international person through recognition only and exclusively.”<sup>618</sup> Personality requires an attribution of rights and duties by the legal order. Yet, recognition cannot be merely a verification of the existence of the necessary ‘objective’ criteria of existence. Recognition is also necessarily constitutive of any entity.

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<sup>617</sup> According to Shaw, “recognition in itself constitutes participation in the international legal process”. Malcolm Shaw, *International Law*. Cambridge: Cambridge University Press, 1997 (4<sup>th</sup> edition), 296.

<sup>618</sup> Oppenheim (1<sup>st</sup> ed.1905), Vol. I, 109.

State practice demonstrates that states will act in withholding recognition, despite the formal criteria for statehood being in place, if it is felt that to do so would be to breach an existing international obligation, as was the case with the non-recognition of Rhodesia under white rule and of Manchuria under Japanese occupation.<sup>619</sup> States have shown themselves willing to intervene and recognise the existence of a state that does not yet meet the Montevideo Criteria, such as the ‘early’ recognition of Croatia and Bosnia-Herzegovina, despite the fact that neither at the moment of their recognition had attained an independent defined territory with reasonably secure borders, and Bosnia-Herzegovina, under OSCE control, has still not done so.

Similarly, in response to the break-up of the Soviet Union and Yugoslavia in quick succession, the EC Foreign Ministers drew up guidelines for the recognition of the successor states, in which they explicitly acknowledged that recognition would depend upon ‘the political realities in each case’ and that these, in particular, ‘would take account of the effects on neighbouring countries’.<sup>620</sup> The standards laid down in the EC Guidelines, of democracy, acceptance of appropriate international obligations and commitment in good faith to negotiations, have replaced the traditional criteria of statehood, according to Rich, and it is undoubtedly the case that geo-political interests played a larger determining factor than ‘legal’ considerations concerning capacity.<sup>621</sup>

In practice, thus, it is accepted that recognition by states determines the existence of other entities as a member of the legal order. While the fact of existence may speak of capacities in the abstract, as the ICJ’s Opinion suggested, it is only in exercising those capacities that they become meaningful. A lack of recognition entails a severely restricted ability to exercise capacities. The gap between being an entity possessed of a will to be self-governing and personality itself can only be bridged by recognition, not by capacity and hence not by territory either. Recognition determines the existence and degree of personality. The inability to exercise the capacities associated

<sup>619</sup> Sir Robert Jennings & Sir Arthur Watts, *Oppenheim’s International Law*. Volume 1: Peace. England: Longman, 1992 (9<sup>th</sup> edition), §54.

<sup>620</sup> ‘E.C. Guidelines on the Recognition of the New States in Eastern Europe and the Soviet Union’ (1991) 62 *British Yearbook on International Law* 559; also, Saskia Hille, ‘Mutual Recognition of Croatia and Serbia’ (1995) 6 *European Journal of International Law* 598.

<sup>621</sup> Roland Rich, ‘Recognition of States: The Collapse of Yugoslavia and the Soviet Union’ (1993) 4 *European Journal of International Law* 36.

with a state, as is the case, say, with Chechnya, entails that no such state exists. To assert that recognition is a constitutive factor in establishing personality is, however, to deny the existence of natural persons at the international level, but it also risks failing to acknowledge the special nature of legitimacy-based claims.

That the declaratory theory retains much support amongst international lawyers and in international *opinion juris*, if not in practice, is of course unsurprising.<sup>622</sup> The reason for strong adherence to it is rooted in the structure of international law itself that has as its foundations the belief that states are sovereign. Were states to be subject to the recognition of others, their personality would be contingent and one could not speak of sovereignty. The understanding that states are natural persons to the exclusion of all other political forms arguably stems from the assumption that only states are capable of making claims to legitimacy; this is largely so because territorial exclusivity prevented non-state claims from appealing to the international realm but determined that they must seek their accommodation with the state itself at the domestic level. Thus, while the declaratory theory is thus capable in principle of offering non-state legitimacy-based claims the recognition they seek, it does not do so.

While the resilience of the state should not be under-played<sup>623</sup>, not least because many continue to draw their legitimacy not just from the level of capacity that is derived from the effective control of territory but also from their role as representative of the people who reside within that territory; any acknowledgement that non-state entities can and are making similar, if not stronger, claims to legitimacy entails that the way in which personality and recognition are viewed at the international level requires re-thinking. Neither theory of recognition ultimately deals with the legitimacy of a claim, but notes only whether or not an entity is a state. Any attempt at re-thinking personality should not, however, abandon the understanding that legitimacy-based claims are special.

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<sup>622</sup> The Badinter Commission in Opinion No. 1 held that “the effects of recognition by other states are purely declaratory.” (92 *ILR* 162, 165). According to Oppenheim, the majority of states hold that recognition is purely a matter of political discretion rather than a question of legal process. Oppenheim, ‘Recognition of States and Governments’, §38- §56.

<sup>623</sup> Tierney highlights the continuing normative potential of the control of territory. Stephen Tierney, ‘Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation-State’ (2005) 54 *International Comparative Law Quarterly* 161, 171.

### 7.1.3. The Personality Gap

In addition to failing to register legitimacy-based claims, the construction of international personality, as many have noted<sup>624</sup>, does not take adequate account of the nature of the actors operating in international space. Beyond the long-running dispute as to whether individuals possess personality, it seems beyond question that international organisations such as the European Union and the WTO possess personality, in addition to the UN and its agencies.<sup>625</sup> Further, private entities such as Multi-National Corporations (MNCs) and International Non-Governmental Organisations (INGOs), and even to a certain extent very powerful individuals<sup>626</sup>, have become increasingly influential on the global scene, leading many to wonder whether these non-state possess a degree of legal personality. The rise of these private actors – their increasing influence and power in the functioning of the globalised world – has led numerous voices to call for accountability and transparency i.e. that corporations and INGOs yield to the standards of good governance that the latter have been so important in establishing.<sup>627</sup> Others have emphasised the existence in fact of such entities as actors on the international stage; according to Franck, “What was an anarchic rabble of states has transformed itself into a society in which a variety of participants – not merely states, but also individuals, corporations, churches, regional and global organisations, bureaucrats and courts – now have a voice and are determined to interact.”<sup>628</sup>

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<sup>624</sup> For example, Philip Alston, ‘The Myopia of the Handmaidens: International Lawyers and Globalisation’ (1997) 8 *European Journal of International Law* 435. Janne Nijman, *The Concept of International Legal Personality*. The Hague: T.M.C. Asser Press, 2005.

<sup>625</sup> For legal personality of the EU, see Article I-7 of the Constitutional Treaty and Article B Maastricht Treaty that require the Union to “assert its identity on the international plane”; for an argument that the Union has personality irrespective of explicit endorsement by the Member States, Klabbers, ‘Presumptive Personality: The European Union in International Law’. Also, earlier, R. Frid, ‘The European Economic Community. A Member of a Specialised Agency of the United Nations’ (1993) 4 *European Journal of International Law* 239, noting the admittance of the European Community as a full member of the FAO.

<sup>626</sup> One thinks in this regard of super-wealthy or incredibly high profile individuals with political/humanitarian agendas, such as George Soros or Bill Gates.

<sup>627</sup> For an example of the role of one INGO in putting issues of transparency and corruption on the global map and in acting as “an agent of normative change”, see H. Wang and J.N. Rosenau, ‘Transparency International and Corruption as an Issue of Global Governance’ (2001) 7 *Global Governance* 25.

<sup>628</sup> Thomas Franck, *Fairness in International Law and Institutions*. Oxford: Clarendon Press, 1995, 477.

Although the Court's 1949 Opinion can be interpreted as strongly emphasising the distinction between states, as natural entities, and other types of international person, as tools in the service of whatever states understand the international community to be, a number of international organisations today are no longer willing to accept their authority as derived from states and are claiming the ability to constitute their own authority. The nature of attributed personality has arguably undergone a fundamental change since the Court defined the concept of legal personality in 1949. The proliferation of MNCs, NGOs and other types of actors has rendered the state/ non-state distinction unintelligible. For example, if the categories are determined by the amount of power an entity wields, there is no reason for not including MNCs and a handful of individuals in a category with the poorest of the poor states of the developing world. If it is a qualitative difference that is determinate, how is the failure to include those that lay claim to a similar type of power (or authority) – minority groups, nations – in the same category as states to be explained?

Moreover, the changes taking place since the post-war period involve not simply the influence that non-state actors now possess in determining what law is made, how it is interpreted and whether it is enforced, but a number of actors have stepped beyond the role of lobbying, advising and monitoring and have emerged as self-constituted entities for whom the category of non-state actor is woefully insufficient. These entities are not states (and arguably have no desire to become one) but can no longer be meaningfully placed in the same category as NGOs, for example. The most famous and most discussed of these constitutionalising entities is the European Union<sup>629</sup>; but it is not the only one. The WTO too has made claims that suggest a process of bootstrapping constitutionalisation is underway within the organisation.<sup>630</sup> What is notable

<sup>629</sup> That the European Court of Justice has claimed the supremacy of EU law and that this claim has been accepted by the Member States in practice is well known as core to the European legal order. *Van Gend en Loos* established the doctrine of direct effect (Case 26/62, *NV. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1) laying the terrain for the claim to supremacy (Case 6/64, *Flaminio Costa v. ENEL* [1964] ECR 585). Grainne de Búrca, 'Sovereignty and the supremacy doctrine of the European Court of Justice' in Walker (ed.), *Sovereignty in Transition*. Oxford: Hart, 2003.

<sup>630</sup> The Appellate Body is steadily increasing its competence beyond a simple trade regime into areas such as health (*EC Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R, Reports of the Appellate Body, adopted 13 February 1998, concerning the use of hormones in meat production and the possible effects on human health [otherwise known as the *Hormones case*]) and the environment (*United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of Appellate Body, adopted 6 November 1998, concerning US restrictions on the import of shrimp where harvesting techniques were harmful to the turtle population). Indeed, the

about the nature of the respective legal orders of the EU and the WTO is that both organisations have claimed the ability to determine the boundaries of their own competences, beyond the wishes of the states that founded them. The claims of these organisations should thus be understood as claims to authority above and beyond the wishes of states.<sup>631</sup> The inability of the current understandings of personality to take legitimacy-based claims seriously, and the increasingly obvious discrepancy between the state/ non-state distinction and the reality of actors and the types of claims they are advancing, suggests the need for a re-drawing of the distinction.

## **7.2. Legitimacy v. capacity: a better approach to personality?**

In highlighting the distinction between personality and capacity in its 1949 Opinion, the ICJ opened up the possibility of an alternative conception of personality. It dimmed, however, any light it might have shone on the issue with the circularity of its reasoning and instead avoided addressing the hard questions with its pronouncement of degrees of personality.<sup>632</sup> This distinction shall be picked up on here.

The justification for the privileged position of the state – the essence of its claim to sovereignty – is that states are the best guarantors of the aggregate interests of the individuals that shelter under them, as evidenced by their functional capacity, which itself is determined by their exclusive control of territory. However, where we accept that the state is being challenged both in terms of its capacity to make good on that claim, as well as by groups who dispute that the state is capable of representing their interests, the reasons for such privileging become much less obvious. The traditional dominance of states has occurred precisely because they were able to combine, to the exclusion of all other entities, functionality and legitimacy. It was this that ensured their dominance as political entities rather than any inherent feature of the state itself,

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analysis by Deborah Cass of the *Hormones Case* suggests that the Appellate Body has already taken unto itself what has been dubbed in the European context the power of *Kompetenz-Kompetenz* – a claim to determine the boundaries of its own competence and hence a claim to ultimate ordering power. Cass, ‘The ‘Constitutionalization’ of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade’ (2001) 12 *EJIL* 39, at 63–64. This interpretation has been confirmed in *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, Report of Appellate Body, adopted 6 March 2006.

<sup>631</sup> See, in particular, Neil Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 *Modern Law Review* 317.

<sup>632</sup> The Court suggested the possibility of degrees of international personality according to the nature of functions and rights an entity possesses. *Reparations for Injuries*, 178.

such as its existence in nature. As this exclusive dominance unravels,<sup>633</sup> the distinction between the power of capacity or function and the power that stems from original authority becomes visible. In dividing international actors into the two categories of state and non-state, we blur this distinction.

Claims to personality can be divided instead into those whose claim is based upon a claim to original authority – what are here termed legitimacy-based claims – and those entities that source their claim to personality in the legitimacy generated by efficient fulfilment of their capacity – a capacity-based claim.<sup>634</sup> Thus, although capacity can itself generate a form of legitimacy, it is a qualitatively-different form of legitimacy to that claimed by groups of individuals seeking to make good their claim to self-determination.<sup>635</sup> While a legitimacy-based claim must necessarily possess a sufficient degree of capacity in order to generate the claim itself,<sup>636</sup> and while a severely restricted capacity quotient will restrict any ability to make good on a claim by limiting the ability to take possession of rights and duties, a legitimacy-based claim is of such importance to those that make it that it cannot be denied. However, to grant full personality to a group that it is not capable of bearing it risks rendering the status meaningless and, thus, the recognition sought will be cripplingly devalued. The suggestion is thus not that legitimacy-based claims be given equal status to states regardless of their capacity, but that they be recognised as being of the same *type* of claim as states and that thus they be considered as possessing the presumptive right to self-determination – a point considered in more detail below – in much the same way that the UN Charter views non-self-governing peoples. A state is thus but one type of actor, albeit the most powerful, in the global arena, in which all entities are making

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<sup>633</sup> Whether it is actually unravelling or whether it is rather a myth that is being unravelled is arguably irrelevant, although the present author would opt for the latter. Further, as noted above (note 623), the state's continuing ability to combine these two roles should not be under-stated.

<sup>634</sup> Other schemes have been put forward, notably Harding's suggestion to distinguish between autonomy and representation, with the degree of an entity's legal significance dependent upon the degree of possession of each. While representation refers to the legitimacy of a claim, Harding fails to distinguish between the legitimacy that stems from original authority and that which stems from, in his words, 'accountability by results'. The risk for legitimacy-based claims with limited capacity is that the special nature of their voice continues to be drowned out. Christopher Harding, 'Statist assumptions, normative individualism and new forms of personality: evolving a philosophy of international law for the twenty first century' (2001) 1 *Non-State Actors and International Law* 107.

<sup>635</sup> Although it could be argued that a group claim gains its legitimacy from efficiently fulfilling its capacity of representing the individuals that make up the group, this ignores the nature of the actual claim itself i.e. that it is a political claim to self-determination.

<sup>636</sup> This point was made earlier in chapter 5.

claims to forms of recognition and thus to participation according to their own interests and capacities.

All personality therefore is a combination of functionality and legitimacy, based upon the understanding that each entity possesses both to varying degrees, but, importantly, where the source of legitimacy differs. It is suggested that what is important in considering personality is two factors: firstly, what the entity in question is claiming – the rights and duties it claims to possess, or, the capacity quotient –, and, secondly, the basis upon which they do so – the source of the legitimacy of that claim. The degree of personality an entity possesses should depend upon the relationship of these two elements. The personality of legitimacy-based claims should therefore be considered as determined by a double play of self-constitution and recognition, whereby the degree of personality that recognition results in depends upon both the degree of capacity and the degree of the claim's resonance among those making it.

In this dance, the recognition of different actors varies in degrees of importance. The recognition of the UN General Assembly of a claim to original authority is more important than the denial of that authority by, for example, the United Kingdom standing alone, unless of course the claim is that of Scotland. But recognition is not a single binary action. It is a web of connections any given entity must weave – an on-going dialogue with every other entity.<sup>637</sup> Recognition at the international level is thus, echoing the language of Tully, a multilectic rather than a dialectic.<sup>638</sup>

Claims to personality are thus stronger or weaker than others, always a matter of degree, depending upon the extent to which legitimacy and capacity intersect and the degree to which either are recognised. An actor that combines both legitimacy and capacity has a much stronger claim to inclusion and status than one that has one but not the other. But the source of legitimacy matters. A legitimacy claim by an entity that exists to fulfil a collective functional need is not comparable in this regard to a people exercising their right to collective self-governance. The WTO has a strong claim to functional capacity but lacks a legitimacy which the Palestinian Authority

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<sup>637</sup> Any given entity will not need or be able to generate and maintain a relationship with all other entities, in much the same way that an individual in society does not have a relationship with every other person in that society, but maintains a *potential* relationship with them.

<sup>638</sup> For recognition as multilogue rather than dialogue, see *Strange Multiplicity*.

arguably possesses. The EU may claim considerable legitimacy in terms of its capacity, but its claim to ultimate ordering authority lacks at present the original authority that is vested in communities within EU borders. The process of recognition needs to consider the tasks that an entity fulfils in relation to the needs of individuals over whom a claim is being made, the needs of the international community at large, the ability to discharge the capacity claimed and, of course, the degree of original authority behind any such claim.

There is thus a qualitative difference between entities, but it is not a state/ non-state distinction but a distinction based on the source of legitimacy. Before considering the presumptive right to self-determination in more detail, it is worth examining what the understanding that territory (*dominium*) is not essential for mounting a claim to an *imperium* of degrees does to the conception of sovereignty.

### **7.3. *Claims to original authority: the contingency of sovereignty***

The claim to autonomy at the international level is most clearly recognised by the term sovereignty. The concept of sovereignty in international law owes much, as already suggested, to the combination of the private law concept of property (*dominium*) and the public law notion of indivisible authority (*imperium*).<sup>639</sup> The concept of sovereignty has, then, for international lawyers been necessarily a territorial one. However, the claim to nationhood, as the claim to be self-governing on the international level, is necessarily a claim to ultimate ordering authority, even if the claimants have no means to make good on the claim. If the claim to original authority is no longer understood as exclusive to the state, where exclusive control of territory is no longer viewed as the hallmark of personality, and where we accept that capacity-based entities are also making claims to functional autonomy, how are we to continue to view sovereignty *qua* independence on the international level? Is it possible to separate sovereignty from its territorial connection, to divorce *imperium* from *dominium*, or is sovereignty now redundant?

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<sup>639</sup> See note 610.

### **7.3.1. The nature of the sovereignty dilemma**

Sovereignty at the international level has traditionally been understood as independence, which has been defined as the ability to exercise absolute authority within one's own borders to the exclusion of all others.<sup>640</sup> However, as the state is also widely perceived to be losing many of its traditional functions, the helpfulness of the concept of sovereignty, with its absolute nature, in ordering the international is increasingly questioned.<sup>641</sup> Without providing a detailed overview of the literature, it is suggested that there are two defining elements of the sovereignty debate. The first is that sovereignty belongs to states not on a descriptive basis but normatively.<sup>642</sup> From this viewpoint, sovereignty is inseparable from the state. The second is that, related to the first, sovereignty denotes a territorial exclusivity. It is thus the competition that states face in the exercise of their territorial authority to the exclusion of all others that sees sovereignty, for some, rendered redundant.<sup>643</sup> If the basic facets of sovereignty are, as Loughlin suggests, internal coherence, external independence and supremacy of the law, one must wonder whether sovereignty can continue to serve as a useful ordering concept where the state is facing challenges to its authority internally and externally, both in terms of capacity and legitimacy, and where those challenges imply that the state can no longer be viewed as the supreme law-maker.<sup>644</sup>

### **7.3.2. Sovereignty as speech-act**

The ‘endurance of sovereignty’, according to Werner and De Wilde, is due to its existence as an institutional fact, allowing sovereignty to serve as the bridge between

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<sup>640</sup> *Netherlands v. U.S. (Island of Palmas)* (1928), 2 R.I.A.A. 829.

<sup>641</sup> From the many examples, Theme Panel IV: ‘The End of Sovereignty?’, 88<sup>th</sup> Annual Meeting, (1994) *ASIL Proceedings* 71; Christoph Schreuer, ‘The Waning of the Sovereign State: Towards a New Paradigm for International Law?’ (1993) 4 *European Journal of International Law* 447. There are also many suggestions for transforming sovereignty to make it empirical reality. See Theme Panel I: ‘Theoretical Perspectives on the Transformation of Sovereignty’, 88<sup>th</sup> Annual Meeting, (1994) *ASIL Proceedings* 1; Chayes and Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*. Cambridge, M.A.: Harvard University Press, 1995.

<sup>642</sup> The index of *Oppenheim* (9<sup>th</sup> edition), for example, sees ‘sovereignty’ absent as an entry, instead the entry is for ‘Sovereign states’.

<sup>643</sup> For a list of the charges levelled against sovereignty, see Werner and De Wilde, ‘The Endurance of Sovereignty’ (2001) 7 *European Journal of International Relations* 283; and Neil Walker, ‘Late Sovereignty in the European Union’, in Walker (ed.), *Sovereignty in Transition*. Oxford: Hart, 2003.

<sup>644</sup> Martin Loughlin, ‘Ten Tenets of Sovereignty’, in Walker (ed.), *Sovereignty in Transition*. Oxford: Hart, 2003, 59.

'is' and 'ought' in normative discourse.<sup>645</sup> Thus, as both fact and norm, a claim to sovereignty establishes a relationship between the 'fact' of being independent or of being the ultimate authority and a set of rights and responsibilities. Further, it is the nature of institutional facts, that as long as they are accepted they appear immutable, inevitable, but as soon as the critical mass of belief is no longer present, the edifice collapses revealing the 'fact' as the social construction that it is.

An understanding of sovereignty as institutional fact is the context in which Neil Walker has developed a definition of sovereignty as a discursive vehicle for ultimate ordering power: sovereignty as *claim*.<sup>646</sup> Sovereignty is thus the claim to supreme ordering power, where in the object-language<sup>647</sup> this ordering power is called sovereignty; it might well, however, be called something else, and Walker's term 'late sovereignty' is intended to illustrate that in the current period, the claim is often couched in other terms, such as authority or, in the EU context, supremacy. Claims to ordering power using language other than sovereignty have similar perlocutionary effects to claims of sovereignty but nonetheless, according to Walker, they represent a less hegemonic claim, reflective of our 'frontier' era. It is the claim to ultimate ordering power that is key to a new discourse of sovereignty.

Euan MacDonald has taken Walker's concept and applied Foucault's account of power to considerable effect. According to MacDonald's reading, Foucault conceives of power as "a structure of actions" in which actors act upon the actions of others, and in which power is not located in any particular place nor possessed by any one person.<sup>648</sup> Power is thus relational and, moreover, omnipresent in all human relationships. However, if power is to be defined as action upon the actions of others,

<sup>645</sup> "Institutional facts are 'facts' like the goal scored in a soccer game, the move made in a chess game, etc. All these facts can only be understood on the basis of our knowledge of the rules that constitute and define their existence." Werner and De Wilde, 'The Endurance of Sovereignty', 291.

<sup>646</sup> His definition, in full, is of sovereignty as "the discursive form in which a claim concerning the existence and character of a supreme ordering power for a particular polity is expressed, which supreme ordering power purports to establish and sustain the identity and status of the particular polity *qua* polity and to provide a continuing source and vehicle of ultimate authority for the juridical order of that polity." Walker, 'Late Sovereignty in the European Union', 3.

<sup>647</sup> Neil Walker has used the language of Anthony Giddens' "double hermeneutic" – that there is an internal relationship between what Walker terms 'object- language' and 'meta- language' – to describe the same phenomenon.

<sup>648</sup> MacDonald, 'Foucault and Law', (unpublished paper on file with the author), citing Hindess, *Discourses of Power: from Hobbes to Foucault*. Oxford: Blackwell, 1996, 100. See also Loughlin's second tenet of sovereignty: "political relationships do not derive from property relationships." Loughlin, 'Ten Tenets of Sovereignty', 59, 61, 62.

those others must have the freedom to resist, for without this freedom, action is violence. As MacDonald concludes from this, “[t]his means that, in the ordinary course of events, power relations are ambiguous, unstable, reversible”, noting however in addition that domination within power relations occurs where power proves to be relatively stable, thus reducing the margin of liberty for those being acted upon i.e. it becomes institutionalised. Viewing sovereignty through the lens of Foucault’s discourse of power reveals its inherent subjectivity and highlights that a sovereign claim is only successful to the degree that it is persuasive. MacDonald’s contention that sovereignty and law are inextricably linked, the one unknowable without the other, leads him to conclude that sovereignty is “the collective term for the ensemble of power relations that interact to produce the experience of being bound”.<sup>649</sup>

Walker’s view of sovereignty as claim and MacDonald’s Foucaultian insights lead to a conception of sovereignty as speech-act.<sup>650</sup> But sovereignty is necessarily more than a single moment of speech-act; the claim to sovereignty is also a performance dialogue, in which the person or entity making the claim seeks to persuade two audiences – those over whom the claim is being made, and the outside world – of the ‘fact’ of their authority.<sup>651</sup> For a claim to be persuasive this performance is necessarily a sustained one, the claim being constantly repeated whether verbally or through symbolic actions or via the means by which the claim to sovereignty manifests itself, for example, through the issuing of legislation or the maintenance of an active police

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<sup>649</sup> MacDonald, ‘The Problem with Sovereignty’, (unpublished paper on file with the author).

<sup>650</sup> For the classification of sovereignty as speech-act, Werner and De Wilder, Walker, taken from the original, J. L. Austin, *How To Do Things With Words*. Oxford: Clarendon Press, 1975.

<sup>651</sup> A moving illustration of sovereignty as an on-going speech-act performance is the monologue Shakespeare gave to Richard II as he divests himself of his sovereignty. The speech is remarkable because in seeming to renouncing his claim, he is in fact laying claim to his throne in dramatic fashion by stressing the institutional facts that identify him as King, not least the belief that only the sovereign can renounce his throne:

I give this heavy weight from off my head,  
And this unwieldy sceptre from my hand,  
The pride of kingly sway from out my heart;  
With mine own tears I wash away my balm,  
With mine own hands I give away my crown,  
With mine own tongue deny my sacred state,  
With mine own breath release all duteous rites.  
All pomp and majesty I do forswear;  
My manors, rents, revenues, I forego;  
My acts, decrees, and statutes I deny: .

Richard II (Act 4, Scene 1)

force. In this way sovereignty is exercised rather than possessed; a king that does not play his part as king is king to no-one.

What this highlights is the relational and contingent nature of sovereignty.<sup>652</sup> Yet while sovereignty can only be contingent, there is also a totalising logic at its core. The character of the sovereign claim is precisely that it applies to the exception in no longer applying to it, that it includes what is outside itself.<sup>653</sup> This appears to make impossible legal pluralism or international law. Yet whilst Schmitt was right to note the absolute nature of a sovereign claim, the inherent nature of a claim – what differentiates it from a command – is that it is only ever aspirational, and in the case of the sovereign claim unachievable. While an entity making a claim to ultimate ordering power cannot thus recognise any other such claim, in practice different legal orders co-exist and even co-operate. The ECJ reference procedure is a good example of two legal orders, both claiming supremacy, co-operating to achieve common aims.<sup>654</sup> In practice, therefore, what is revealed is a permanent dialogue between claims to authority in the interaction of governance structures at every level.

Thus although the institutionalisation of a particular claim to supreme authority and the habitual obedience that attends such institutionalisation of a claim makes it appear absolute, and although hegemony is a fundamental essence of the sovereign claim, a claim to sovereignty is only successful because it is received and accepted by those over whom the claim is made. Even Hobbes agreed that “the power of the mighty hath no foundation but in the opinion and belief of the people.”<sup>655</sup> It is the symbolic aspect of sovereignty – the institutional arrangements, the pomp and circumstance – that is largely responsible for its hegemonic aspects. The systemic or structural logic of sovereignty forces claims to be made in the terms of existing claims; so that, the systemic understanding of a claim to sovereignty as an exclusive claim to regulate a specific territory forces *all* claims to be made this way. Thus, whilst it is the nature of

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<sup>652</sup> See also, Tierney, ‘Reframing Sovereignty?’, 162.

<sup>653</sup> Giorgio Agamben, *Homo Sacer. Sovereign Power and Bare Life*. Stanford: Stanford University Press, 1995, 17-18.

<sup>654</sup> Neil Walker, ‘Flexibility within a metaconstitutional frame: reflections on the future of legal authority in Europe’, in G de Búrca and J Scott (eds.), *Constitutional Change in the EU: From Uniformity To Flexibility?* Oxford: Hart Publishing, 2000.

<sup>655</sup> Hobbes, *Behemoth or the Long Parliament* (1682), cited in Loughlin, ‘Ten Tenets of Sovereignty’, 62-3.

an institutional fact that the symbolic and structural elements appear fundamental to it – the claim to absoluteness of the sovereign claim reinforcing the claim itself – understanding sovereignty as relational and contingent sees the actual *content* of the claim to sovereignty become indeterminate. It is defined solely by the claim itself. The ideological or systemic qualities of sovereignty – those features that particularise an individual claim within the power relations of that particular context – are thus separated from the prior epistemic core common to all sovereignty claims. *Dominium* is thus not an inherent element of the sovereign claim, but simply the form of one institutionalisation of it.

Sovereignty, then, is a question of claim, where some claims are stronger than others, and the strength of a claim is its acceptance both by those over whom it is made and by the wider world at large. The speech-act of sovereignty is thus to be seen as taking place within a dialectic both between intimate others (those making the claim and about whom the claim is made) and with the public other (the wider world). The strength of a claim is determined by the degree to which it is recognised as such.

However, if sovereignty is simply the claim to sovereignty, where a claim is made and not recognised, can the claim still be said to be a sovereign one? For Walker, sovereignty is ultimately “about a *plausible and reasonably effective* claim to ultimate authority”.<sup>656</sup> A claim therefore requires a degree of legitimacy to make and capacity to make good on a claim to ultimate ordering authority in order to be understood as a sovereign claim. A claim thus cannot be based purely upon self-identification; to do so would risk rendering the concept meaningless. A speech-act must have a certain conventional effect – we must know it when we see it.<sup>657</sup> Thus, to speak of sovereignty where a claim is not at least plausible would be to risk making any such claim worthless, and thereby render any recognition of autonomy ineffective.

Yet sovereignty as a plausible claim does not resolve the promiscuity/ hegemony dilemma. As suggested above, sovereignty is the claim to autonomy – it can be made by both legitimacy-based claims and capacity-based entities. Sovereignty thus does not necessarily speak to legitimacy in terms of original authority but can be viewed

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<sup>656</sup> Walker, ‘Late Sovereignty in the European Union’, 10, 11-12 (italics mine).

<sup>657</sup> Austin, *How To Do Things With Words*, briefly 8-11.

solely in terms of the capacity, of the performance of authority, of independence.<sup>658</sup> Where sovereignty does speak to the relationship between governed and government, and, externally, between governments, it is also the expression and exercise of public power. Yet, where the exercise of public power and the performance of independence correspond to legitimacy and capacity, it is the constituent power element of sovereignty that precedes normatively the expression of political power. In the language of Walker, sovereignty must be claimed before it can take institutional form. It is thus worth re-stressing the contingency of sovereignty, where sovereignty is understood to be only ever more-or-less successful in its perlocutionary effects. To do otherwise, risks the polar problem of granting too much power to those who would recognise. While this is of little concern for entities making primarily functional claims, such hegemony risks denying legitimacy-based claims.

While the depth of sovereign claim can therefore be judged in terms of performance of autonomy by the extent of functional jurisdiction, the authority of political organs, the extent of judicial independence, by whether or not an entity is capable of imagining and thus constructing an autonomous political community or culture, it is necessary to consider the legitimacy of a sovereign claim from a different perspective.

#### ***7.4. Re-conceptualising self-determination as participation***

While capacity-based claims can make claims to ultimate ordering authority within their sphere of competence, thus asserting their independence from states, and while these entities can gain a degree of legitimacy from the efficient exercise of their capacity, the claim to original authority must nonetheless be viewed as a qualitatively different type of claim. To dispel the myth of exclusivity in the relationship between state and sovereignty and to acknowledge the role of recognition as the constitutive factor in establishing personality risks failing to acknowledge the special nature of legitimacy-based claims; conversely, conceding sovereignty to legitimacy-based claims where there is no or limited means to make good on the claim risks rendering recognition meaningful. It is necessary therefore to steer a course between a

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<sup>658</sup> As Walker stresses, it is important that functional entities be held to account and thus that they be part of constitutional imagining. See Walker, 'The Idea of Constitutional Pluralism'.

hegemonic order in which such claims are automatically misrecognised and promiscuous recognition in which recognition is rendered worthless. It is suggested that self-determination as participation, in which legitimacy-based claims are at the very least recognised as having presumptive claims to sovereignty, offers a means to achieving a recognition dialogue of sorts without conceding too much to the charge of promiscuity.

Self-determination, in mediating claims to original authority, is understood as the gateway to normative participation in international law. What follows is an attempt to work the insight of recognition as necessarily mutual and active through a re-conceptualisation of self-determination as participation.

#### **7.4.1. Re-imagining a ‘people’**

The limitation of a people to that of a people of a whole state or to the official designator of non self-governing people has rendered the principle of self-determination in international law devoid of meaning. To be meaningful, self-determination genuinely needs to apply to everyone and at all times. There are two points that thus need stressing. The first is the most important, and is that human beings not territory should determine normative participation in international law. A people cannot be limited to the ‘people’ of a given state, where a state is defined primarily by the territory it sits upon. The second point is that those making a claim to original authority cannot be dismissed without rendering claimants unfree.

The strict limitations on the right of self-determination place the overwhelming determining power in the hands of the would-be recogniser. Acknowledging the importance of recognition for the well-being of individual members of a group thus requires that a more equitable balance be struck between self-declaration and the reaction to it. The difference in entitlement is not whether one is labelled, or labels oneself, a ‘people’ or a ‘nation’ or a ‘minority’, but the nature of the claim to self-governance being made; so that, the claim must be one to original authority but the content or implications of that claim will be unique to the group concerned. All are entitled to self-determination but the implications of that in practice will vary according to the scope of the claim being made. What is important is that the group is

of real importance to the lives of individuals such that they wish to exercise their political aspirations through it. It is the nature of the claim and not its form that is significant.

Moreover, the claim to original authority need not be exclusive. Rather, self-determination must be open to claims other than those of nations. It has been suggested that the nation is the main vehicle for self-determination claims, but it does not perhaps have to be the only one, although the outcome of recognition will most likely continue to privilege nations for the foreseeable future.<sup>659</sup> What the presumptive right to self-determination would entail in this context for non-national type claims is the right to contest the discourse that privileges nations and to be taken seriously in so doing. What this also means in practice is that individuals would be capable of making multiple claims as part of the many encompassing groups to which we all belong, including multiple national claims. Thus, it would be possible for a Romani individual to put forward claims as part of the Hungarian nation and the Romani nation, for example. This is already possible for those who possess dual or multiple nationalities. It would also be possible that a group, such as the Roma, could make multiple claims, pursuing a claim at the European as well as international level, for example. Why should individual Roma be forced to see themselves as exclusively either European or as a member of a globally-scattered nation? It does not follow, however, that multiple claims will achieve equal recognition in terms of the content of that recognition.

It is obvious from the perspective of recognition that the ‘who’ of self-determination can only be determined by dialectic between a declaration of self-definition and the reaction to that declaration by others. A claim to original authority, so it is suggested, must be recognised, but what form that recognition takes is decided, but never fixed,

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<sup>659</sup> As Connor has observed, the principle of self-determination has made “ethnicity the ultimate standard of political legitimacy.” (Connor, quoted in Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination*. Philadelphia: University of Pennsylvania Press, 1996, 7). Franck has suggested that the monogamous relationship between the individual and their state has given way to a much more textured existence (Franck, ‘Personal Self-Determination: The Next Wave in Constructing Identity’, in A. Anghie & G. Sturgess (eds.), *Legal Visions of the 21<sup>st</sup> Century*. The Hague: Kluwer, 1998). It is ventured that there are as many different ‘essences’ as there are moral standpoints, so that where Aristotle viewed man as a political animal, for others, as Skinner points out, man’s essence may be religious. (Quentin Skinner, ‘A Third Concept of Liberty’, *London Review of Books*, Vol. 24 No. 7, 4 April 2002).

in the process of recognition itself. As judging the legitimacy of a claim where the experience of cultural difference is internal to a culture<sup>660</sup> is inevitably hegemonic, and as the claim to original authority cannot be denied without rendering those making the claim unfree, it is suggested that it is necessary to view any such claim as having a presumptive right to self-determination no matter what form it may take. What this may mean for a group such as the Roma must now be considered.

#### 7.4.2. Self-determination as participation

There is obviously a danger with self-determination in suggesting that all who seek it are entitled to claim of inciting the chaos that international lawyers so fear. Yet before we panic, it is worth considering that self-determination has required limitation because of its territorial implications. Once one separates self-determination from territory, once self-determination is understood as types and degrees of participation rather than the exclusive control of territory, the need to limit its application all but evaporates. The degree to which acknowledging the necessity of recognising legitimacy-based claims constitutes a problem thus depends upon how one conceptualises the content of self-determination.

Many commentators have decided that the best means in which to respond to the decline of self-determination is to detach it from concerns of sovereignty and incorporate it within the human rights protection regime. Hannum contends that a thorough examination of the content of self-determination reveals that developments in human rights norms have subsumed its normative meaning.<sup>661</sup> Similarly, Thomas Franck has reformulated self-determination as the right to democratic governance, whereby he concludes that self-determination in its current phase is “at the core of the democratic entitlement”, but no more than the right to participation in the choice of government in a given pre-determined state.<sup>662</sup> Thus, self-determination would be added to the inadequate protection minority groups are offered, bolstering the twin pillars of equality and non-discrimination which stand at the heart of the human rights

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<sup>660</sup> See Tully, *Strange Multiplicity*, 13; *supra* Chapter 4.

<sup>661</sup> Hannum, ‘Rethinking Self-Determination’ (1993) 34 *Virginia Journal of International Law* 1, 58.

<sup>662</sup> Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86 *American Journal of International Law* 46, 52.

system. In this way, one could consider self-determination as a right of all to effective participation in the political and economic life of society.

Much of the thinking along such lines has been done by those keen to assist indigenous peoples in gaining the recognition they have so long been denied. Anaya, for example, has stressed that self-determination can and must provide indigenous groups with a meaningful level of control over their own affairs.<sup>663</sup> However, the decision to view self-determination as part of the panoply of human rights risks further diminishing its normative force. While systematic human rights abuse over a long period may lead to a strengthening of group identity to the point that the group seeks political autonomy as a nation, the demand for national recognition will arguably outlast human rights abuse. The claim to self-governance is thus not something that fits into the category of rights. Self-determination is the basis of political interaction, not the right to choose one's own government.<sup>664</sup> The core of self-determination is the understanding that human beings are equally entitled to choose their own destiny, not that they have the right to choose any particular government. Ultimately, good governance is no substitute for self-governance. It is also worth noting that the decision to view self-determination as a human right is frequently related to seeing self-determination as a remedy for past injustices.<sup>665</sup> This is an approach, although perhaps intuitive, that is rejected here. Where self-determination is implicitly a claim to recognition, it is not something to be granted dependent upon establishing an historical wrong.

The suggestion is that self-determination should be viewed not through the lens of participation, although that may be the outcome, but from the perspective of freedom. In Chapter 4, it was suggested that misrecognition denied autonomy on the public and personal level, and that these were intertwined. Where self-determination is a claim to recognition of the legitimacy to be self-governing, it is the right to participate in

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<sup>663</sup> "Self-Determination may be understood as a right of cultural groupings to the political institutions necessary to allow them to exist and develop according to their distinctive characteristics." Anaya, 'The Capacity of International Law to Advance Ethnic or Nationality Rights Claims', in Kymlicka, *The Rights of Minority Cultures*. Oxford: Oxford University Press, 1995, 326.

<sup>664</sup> Self-determination is thus not different in different situations, as has been suggested; it is always the right to self-rule, rather it is the means by which self-rule is achieved that varies. See Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 *International Comparative Law Quarterly* 241, 249.

<sup>665</sup> See Anaya, 'The Contours of Self-Determination and Its Implementation', 12-14.

determining the rules and institutions which govern us, where cultures are both equal before the law and equal in determining the law. A consequence of such an understanding of self-determination is that even if all the rights set down as ‘human rights’ were to be realised in our everyday lives, we still may not be free where public recognition of our claim is withheld. By seeing self-determination as intimately tied-in to freedom, in both aspects, it becomes clear that it is not a right to democracy and nor is it subsumed by existing rights.

Crucial in any re-conceptualisation of self-determination as participation via freedom, is the notion that recognition is active and continual. It is not, for example, a seat in the General Assembly or national assembly, a title of status laid down in a human rights treaty or declaration, or the right to positive discrimination, but the continuing right of one’s group to participate as an equal in society with others, where equal means implicitly and explicitly the acknowledgment that this group has something equally as valuable to offer in negotiation. Recognition through self-determination as participation needs to avoid not just the hegemony/ promiscuity problem, but also to mitigate the difficulty of essentialisation in the recognition process, whereby recognition necessarily involves the sense of self of the recogniser.<sup>666</sup> Claims to legitimacy need to be able to contest perceptions of their claim. But a claim to nationhood is also the claim to recognition of the right to be self-governing. It is a claim to participate in the framing of the structures that govern international level as well as to the substantive issues that international law regulates. It is through participation in the process of negotiation about both procedural and substantive questions that one achieves recognition of the presumptive right to self-government.

In a recent article examining the nature of global justice, Nancy Fraser has suggested that challenges to the ‘Keynesian-Westphalian’ frame are changing the grammar in which discussions about justice take place.<sup>667</sup> Beyond the first-order arguments over substance – over material distribution and public recognition – Fraser has suggested that claims to justice are equally as likely to invoke ‘second-order, meta-level’

<sup>666</sup> For example, one could argue that the international community failed to recognise Rhodesia not just because of the Black Rhodesians, but because of the sense of self of the non-recognisers.

<sup>667</sup> Nancy Fraser, ‘Reframing Justice in a Globalizing World’ (2005) 36 *New Left Review* 69. What Fraser terms ‘representation’ as being the necessary political aspect of recognition and redistribution, I term participation, in part because representation appears to imply formality and evokes standards of democratic legitimacy. Fraser, 78-79.

questions.<sup>668</sup> This meta-level is concerned with the ‘who’ and the ‘how’ of the political; for without the ability to contest the right to participate, one cannot contest the substantive issues at all. The outcome is a form of meta-injustice, according to Fraser. This framing of claims to justice as taking place at two levels is helpful in understanding the vast majority of legitimacy-based claims to recognition. The emphasis on capacity, defined as effective control of territory, has insulated the Westphalian model of state sovereignty from other legitimacy-based claims. In order to have their voice heard, in order to achieve recognition, these claimants must press their claim at the meta-level, in which the terms of those who may take part – personality – and the procedural rules in which discussions take place are set.

If a recognition claim such as that to be a non-territorial nation is a meta-level claim, how might the recognition dialectic be played out? It is unlikely that the Roma or similar claims will initially succeed in over-turning the dominant architecture that denies them participation. On the surface, this denies recognition of the legitimacy of their claim. However, as Fraser highlights, challenging the grammar is to simultaneously transform that grammar. By asserting a right to participate in the constitution of the ‘who’, such claims inevitably contest accepted procedures for determining the ‘who’ i.e. the ‘how’. The effect, according to Fraser, is to “shift the burden of argument” onto those on the inside, requiring them to justify their privileged position.<sup>669</sup> Claims at the meta-level thus have a de-stabilising affect, chipping away at the entrenched patterns of power relations that characterise acknowledgments of sovereignty.<sup>670</sup> As Sabel and Simon’s account of destabilisation rights at the domestic level suggests, these rights to “unsettle and open up public institutions” can have the effect of reversing the normal presumption in favour of the status quo by loosening “the mental grip of conventional structures on the capacity to

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<sup>668</sup> See also Franck, *Fairness and International Law in International law and Institutions*. Oxford: Clarendon Press, 1995, for a similar framework within which fairness for all must be achieved, esp. Chapter 1. For Tully’s break-down of the nature of recognition demands, see chapter 4.

<sup>669</sup> Fraser, ‘Reframing Justice in a Globalizing World’, 86, 84.

<sup>670</sup> As Unger noted, introducing the concept of destabilization rights in his 1987 work *False Necessity*, “Destabilization rights protect the citizen’s interest in breaking open the large-scale organizations or the extended areas of social practice that remain closed to the destabilizing effects of ordinary conflict and thereby sustain insulated hierarchies of power and advantage.” Cited in Charles Sabel and William H. Simon, ‘Destabilization Rights: how Public Law Litigation Succeeds’ (2004) 117 *Harvard Law Review* 1015, 1055.

consider alternatives.”<sup>671</sup> Such challenges at the meta-level, therefore, will raise awareness of the claims themselves and motivate new claims to participate in challenging the hegemonic grammar. This process is already underway as we observe multiple and diverse ‘anti-imperial’ struggles, all of which are challenging the hegemonic normative order.<sup>672</sup> Further, a shift in grammar in one context will have ramifications for other situations and claims, loosening the hegemonic grip.

However, this is not enough and a link to formal institutions is arguably necessary. Thus negotiations about the terms of participation may include sovereignty, but the negotiations themselves are not the achievement of sovereignty. Conceiving of self-determination as recognition of claims to original authority through the right to participation in an agonistic process removes the need for distinctions between peoples, nations and ethnic groups; rather all those who claim recognition will be deserving of the perpetual opportunity to negotiate their status and rights with those around them.

Being able to negotiate over the definition of ‘who’ and ‘how’, with the anticipation of an eventual shift, can constitute a play of recognition for a claim such as the Romani nation. It is this that prevents the recognition to be found in these negotiations about the determination of participation from becoming meaningless. Rebuffed today, a claim can be made again tomorrow and the grammar will shift over time.<sup>673</sup> The continuous insistence of indigenous peoples before the UN, ILO, OAS and other international organisations that they constitute peoples in terms of entitlement to self-determination has moved the debate forward, both in terms of the arguments they have made and the resistance they have encountered; that Article 3 of the Draft Declaration contains the right of indigenous peoples to self-determination is another step in this dance and one, that if accepted by states, will mark a significant shift in the grammar, determining their participation both locally, nationally and

<sup>671</sup> Sabel and Simon, *ibid.*, 1075.

<sup>672</sup> See, Balakrishnan Rajagopal, *International Law from Below. Development, Social Movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003; also, Tully, ‘On Law, Democracy and Imperialism’, Twenty-First Annual Public Lecture, Centre for Law and Society, University of Edinburgh, March 10-11, 2005.

<sup>673</sup> This is arguably what is meant by the ‘practices of freedom’. Tully, ‘The Unfreedom of the Moderns in comparison to their ideals of Constitutional Democracy’ (2002) 65 *Modern Law Review* 204, 228.

internationally.<sup>674</sup> A presumptive right to self-determination, therefore, determines that a Romani nation be entitled to contest the terms of its participation.

However, recognition is arguably unlikely to be achieved where disputes over framing remain confined to international civil society.<sup>675</sup> Legitimacy-based claims are already represented to a considerable degree in international civil society in the form of NGOs, but the liberal structure of civil society means that the special nature of their claims receives no distinctive recognition.<sup>676</sup> The recognition that is sought, is sought not just from similarly disempowered entities, but from the ‘masters’ themselves. What are required in developing a genuine recognition dialogue are forums that transcend civil society.

### **7.5. Discursive space in international law**

Various models have been put forward to answer the widely accepted need to extend participation in international law beyond the state-dominated architecture of the Westphalian scheme. Many of these suggestions have stemmed from a cosmopolitan understanding and have sought to extend democracy beyond the state.<sup>677</sup> Without the scope for much detail, it is suggested that these attempts, in their framing of democracy as a ‘meta-political narrative’ with the potential to rise above competing narratives of the good life, are simply hoping to swap democracy with effective control of territory as the pre-ordained meta-norm of the international system. While the cosmopolitan vision is perhaps more attractive than personality as determined by territory, its claim to neutrality with respect to different values is simply liberal proceduralism writ large and thus another form of hegemonic order.<sup>678</sup>

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<sup>674</sup> See S. James Anaya, ‘The Contours of Self-Determination and its Implementation: Implications of Developments Concerning Indigenous Peoples’ in G. Alfredsson and M. Staropoulou (eds.), *Justice Pending: Indigenous Peoples and Other Good Causes*. Dordrecht: Martinus Nijhoff, 2002.

<sup>675</sup> Fraser also makes this point.

<sup>676</sup> See Benedict Kingsbury, ‘First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society’ (2002) 3 *Chicago Journal of International Law* 183, esp. 186-188.

<sup>677</sup> See note 600; also Allan Rosas, ‘State Sovereignty and Human Rights: towards a Global Constitutional Project’, in D. Beetham (ed.), *Politics and Human Rights*. Oxford: Blackwell, 1995.

<sup>678</sup> Indeed, Tully has put forward an almost compelling if bleak view of democracy as necessarily implicated in hegemonic (‘imperial’) relations. Tully, ‘On Law, Democracy and Imperialism’.

Discourses create, contain, reproduce and disseminate the ideas, relationships and theories through which actors understand the world and relate to one another, and, in so doing, “systematically form the object of which they speak”.<sup>679</sup> It is communication about communication.<sup>680</sup> The construction of the meaning of social categories and relationships, identities, objects of knowledge, and conceptual frameworks privilege certain actors at the expense of others.<sup>681</sup> Power is exerted, according to Foucault, in discourse, but the construction of any given discourse can be challenged and discourses altered. Discursive space is envisaged here as the arena in which that can happen on a footing of equality. The remainder of this chapter puts forward two suggestions for conceptualising a discursive space in which a genuine recognition dialogue can be imagined. These two spaces address both the meta-level question of the ‘who’ and the ‘how’ and the substantive questions of the ‘what’.

### **7.5.1. The Indigenous Peoples’ Working Group**

Recognition claims are largely understood to require an institutional context in which the terms of exclusion can be challenged. As suggested in the preceding section, contesting the ‘who’ of any discourse necessarily takes issue and seeks to alter the ‘how’ which frames the discourse’s self-understanding. The Working Group on Indigenous Peoples has provided one of the most interesting institutional discursive spaces in international law.

The Working Group, established in 1982 with the purpose of reviewing developments relating to the protection of rights of indigenous peoples, completed a draft declaration on the rights of indigenous peoples in 1993.<sup>682</sup> Although yet to be adopted by the UN – the Working Group’s precarious position at the edge of the UN human rights system ensures that the declaration has some way to go to gain formal

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<sup>679</sup> Michel Foucault, *Discipline and punish: The birth of the prison*. London: Penguin, 1979, 49.

<sup>680</sup> Habermas, *Between Facts and Norms*, Chapter 8.

<sup>681</sup> Steve Maguire and Cynthia Hardy, ‘The Emergence of New Global Institutions: A Discursive Perspective’ (2006) 27 *International Organizations* 7.

<sup>682</sup> E.-I.A. Daes, ‘Report of the Working Group on Indigenous Populations on its Eleventh Session’, UN Doc. E/CN.4/Sub.2/1993/29 (1993). The draft declaration was adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1994, reprinted in (1995) 34 *ILM* 541. For the Working Group’s mandate, see <http://www.ohchr.org/english/issues/indigenous/groups/wgip.htm>

approval<sup>683</sup> – the draft declaration has been widely hailed as a document of monumental significance. According to Williams, for example, the declaration is “one of the most important encounters occurring on the frontiers of international human rights law”.<sup>684</sup> The reason for such enthusiasm relates in part to the substance of the declaration – for example, to the now infamous inclusion of the right to self-determination – but more importantly to the process by which it was drafted. Thus, that the declaration itself is stalled in the UN system is of less importance than the process by which it was adopted.

In strict contrast to the process leading up to the adoption of ILO Convention 169<sup>685</sup>, indigenous peoples themselves were at the heart of the articulation of and deliberation over their rights.<sup>686</sup> More importantly, these participants brought their own ideas of what participation and deliberation were and were allowed to present themselves and their stories on their own terms.<sup>687</sup> The multitude of discourse forms and the principles of mutual respect and equality between all participants created a discursive space within which indigenous peoples could make their voices heard, *on their terms*, and challenge others’ perceptions of them. This was confirmed by participants themselves, who contrasted the procedures of the Working Group to the formality and tokenism of the ILO negotiations.<sup>688</sup> Whereas the ILO Convention is the product of an organisation that viewed its role as that of standard-setting from the perspective of a disinterested expert, and which was not willing to moderate the rules and regulations of participation to take account of indigenous peoples’ demands, the Chairperson of the Working Group, Erica-Irene Daes, is widely perceived to have been responsible for providing an open and fair forum in which representatives of observer governments, UN agencies, NGOs, individual experts and scholars, came together

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<sup>683</sup> Although approved by the Sub-Commission, the Commission on Human Rights established its own Working Group to draw up a new draft by resolution 49/214 of 23 December 1994, and is still reviewing the draft.

<sup>684</sup> Robert A. Williams, ‘Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World’ (1990) 39 *Duke Law Journal* 660, 700.

<sup>685</sup> For a contrasting analysis of the procedures used to draw up the ILO Convention and the draft declaration, see Karen Knop, *Diversity and Self-Determination in International Law*. Cambridge: Cambridge University Press, 2002, 212-274.

<sup>686</sup> Alongside the governmental representatives, UN agencies, more than one hundred indigenous nations, groups and organisations were represented, totalling over 600 representatives.

<sup>687</sup> The shift from written to oral submissions in order to recognise indigenous forms of participation, for example, has been widely noted. See, Mary Ellen Turpel, ‘Draft Declaration on the Rights of Indigenous Peoples – Commentary’ (1994) 1 *Canadian Native Law Reporter* 50.

<sup>688</sup> Maivân Clech Lâm, ‘Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination’ (1992) 25 *Cornell International Law Journal* 603, 620-621.

with more than a hundred indigenous nations and organisations each to present their own perspective. Although the Working Group was formally composed of five independent experts drawn from the Sub-Commission, Daes shifted the process from one of standard-setting on the basis of existing norms to negotiations between equals, with the Chairperson as mediator. What is interesting is that state representatives followed her in this shift.<sup>689</sup>

What can the experience of the Working Group tell us about the possibilities of discursive space? Firstly, the role of the Chairperson was crucial in determining the nature of the drafting process in the Working Group and she made her authoritative role as mediator one in which she attempted to reconcile competing visions rather than one that, in Knop's phrase, spoke "power to truth instead of truth to power".<sup>690</sup> The importance of leadership is highlighted by the knowledge that the body was established as the Working Group on Indigenous *Populations* in order to close down any debate on indigenous peoples' right to self-determination from the outset. The role of Kilstlaai is not an easy one, but when done well and with courage, it has the potential to create pockets of non-hegemonic space within the system.<sup>691</sup>

Secondly, Daes did not see the purpose of the Working Group as being to achieve a consensus between the competing interests. In a report to the Sub-Commission, Daes stressed that the draft declaration, "was more like a community" that "agreed on many constructive points" but where "on some matters opinions still differed."<sup>692</sup> Knop has argued persuasively that the self-understanding of an institution and its task are critical in determining how a voice is heard.<sup>693</sup> Where the ILO saw itself as a body charged with technical standard-setting, storytelling and 'rights talk' were easily viewed as irrelevant in going beyond existing legal norms. The role of participants in such a setting is to convey facts and the institution must accommodate their concerns in reaching a consensus, but it need not reflect their perspectives. In not seeking a

<sup>689</sup> A number of statements of state delegations to the Working Group, cited in Knop, suggest that Daes' claim was not misplaced, talking as they do of mutual agreement as needing to be the mark of relations between state and indigenous peoples. Knop, *Diversity and Self-Determination*, 212-274.

<sup>690</sup> Knop, *ibid*, 255.

<sup>691</sup> Tully, *Strange Multiplicity*, 18. Although Daes is no longer the Chair, the Working Group continues to follow the ethos she helped to establish.

<sup>692</sup> UN Doc. E/CN.4/Sub.2/1994/SR.29 (1994), 12; cited in Knop, *Diversity and Self-Determination*, 254.

<sup>693</sup> Knop, *ibid*, 212-274, esp. 215-7.

consensus, Daes prevented a closing off of discussion and ensured that the final text drawn up was not viewed by those in power as a definitive interpretation of the negotiations. The drafting of the declaration is rather viewed as a recognition dialogue and one that is understood by all to be on-going.<sup>694</sup> The self-understanding of the task of such a forum is also critical in creating a genuine discursive space.

In the role of Chairperson of the Working Group, Daes' skill and determination turned what was, on one level, a committee of five expert members established to draft a declaration on the rights of indigenous peoples into a discursive forum in which the terms by which one is perceived and the consequences that has for one's participation could be challenged, and in so doing highlighted the potential of discursive space within the U.N. human rights system to challenge the hegemonic understandings of the 'who' and the 'how'.<sup>695</sup> The example of the European Roma Forum suggests that such space is not simply the preserve of the U.N. system.

### **7.5.2. Network Governance and the Opportunity for Discursive Space**

An institutional setting is not however the only means by which it is possible to imagine discursive space at the international or transnational level. The concept of network and of network governance is currently much in vogue among political theorists, European lawyers and international relations scholars, but not, it seems, many international lawyers. The aim here is to suggest how experimental network theory may offer possibilities for recognition dialogue at the transnational level via its focus on practical problem-solving. Where a spotlight focus on recognition risks essentialising and de-contextualising identity – a concern raised in chapter 4 – network regimes are presented as offering an alternative space in which legitimacy-based claims can contest the substantives of the discourse.

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<sup>694</sup> Indeed, despite being a temporarily constituted body, the Working Group is now a full-time permanent institution. See <http://www.ohchr.org>

<sup>695</sup> Alston has noted the flexibility of mandate of most UN Human Rights bodies, suggesting a present capacity for these bodies to make of themselves genuine discursive spaces. Philip Alston, 'Appraising the United Nations Human Rights Regime' in Alston (ed.), *The United Nations and Human Rights*. Oxford: Clarendon Press, 1992, 5.

The concept of network suggests a variable number of participants that differ in a near infinite numbers of ways joined together in a relationship of equality in the pursuit of a particular aim. Network theory has been established as a means of understanding the complex flows and interactions of the phenomena collectively entitled globalisation. Whereas formal institutions were more important in the past for the provision of transaction frameworks and for their mediating role, according to Ladeur, a vital characteristic of globalisation is that it generates “more spontaneously self-generating flexible ways of co-ordination and co-operation”, and these flexible institutions are produced and exist beyond the state. Indeed, these “new forms of ‘relational’ heterarchical co-ordination are generated in a bottom-up, instead of a top-down, approach; they create self-stabilizing networks of inter-relationships” characterised by their dynamism and reflexivity.<sup>696</sup> They generate their own ‘relational rationality’ on the basis of the expectations and constraints they create, as well as via their overlapping with other networks and the sharing of best practice. The network concept thus, according to Ladeur, indicates “the rise of a new logic”, a “new paradigm of ‘relational rationality’”, that breaks down the division between public and private in accepting the potential of heterarchical relationships to self-organise and evolve societal norms that establish a new kind of bindingness that emerges from a logic of its own.<sup>697</sup>

The understanding that these forms of processes are developing around the state, not in opposition to it, and in which the state continues to play a role<sup>698</sup> suggests a complex pattern of overlapping networks that is not a form of multi-level governance, with its implication of hierarchical relationships, but a multi-polar structure of networks operating with different logics.<sup>699</sup> It is not the network format itself that is important here, however, but its potential for reflexivity and the space it provides for discourse.

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<sup>696</sup> Karl-Heinz Ladeur, ‘Globalization and Public Governance – A Contradiction?’ in Ladeur (ed.), *Public Governance in the Age of Globalization*. Aldershot: Ashgate, 2004, 5.

<sup>697</sup> Ladeur, *ibid.*, 6-7, 14. Ladeur gives the example of the ECJ establishing a new logic of direct effect in *Van Gend en Loos*.

<sup>698</sup> For a strong argument that states are changing not disappearing, Saskia Sassen, ‘De-Nationalized State Agendas and Privatized Norm-Making’ in Ladeur, *Public Governance in the Age of Globalization*.

<sup>699</sup> Ladeur, ‘Globalization and Public Governance – A Contradiction?’, 14-15.

One suggestion for harnessing the potential of network governance is democratic experimentalism.<sup>700</sup> Democratic experimentalism, a term developed by Charles Sabel, in collaboration with a number of others, is a form of pragmatic decentralised co-ordination intended to overcome “the destitution of our political possibilities”.<sup>701</sup> Although the original aim of the model was to take private sector techniques for generating innovation and apply them to governance in order to empower local people to develop appropriate solutions together for their local problems, with its reflexive approach and focus on practical problems, this type of model of network governance offers the potential of a different type of transnational participation for legitimacy-based claims – one that allows, through extremely flexible participation, the opportunity to contribute to debate and negotiations on a near infinite range of substantive matters.

The central innovation of this new form of organisation is, in its inventor's words, “the invention of institutions that allow each part of a collaborative whole to reflect deliberately, and in a way accessible to the others, on the aptness of its ends and the organizational means used to prosecute them, even as those common ends are themselves continuously redefined by the cumulative, mutual adjustments of partial purposes, activities, and organizational connections.”<sup>702</sup> Thus, democratic experimentalism is to “combine decentralization, by which local units are able to act on what they know best, and integration through iterated goal setting, by which proposals for improvement … are transformed into concrete projects as alternative solutions are tested and compared.”<sup>703</sup> The diverse capacities and experience of members are pooled and these sub-governmental units are free to set goals and to choose the methods to attain them, making them highly responsive to diverse and changing conditions in locales. Democratic experimentalism is thus local, particular, self-reflexive and open both in make-up and method.

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<sup>700</sup> The opportunity offered by democratic experimentalism to the questioning of defining participation has been identified by Gover and Baird in the context of defining Maori Treaty partners. It is from their work that this paper takes its inspiration. See Kirsty Gover and Natalie Baird, ‘Identifying the Maori Treaty Partner’ (2002) 52 *University of Toronto Law Journal* 39.

<sup>701</sup> Sabel ‘Design, Deliberation and Democracy: On the New Pragmatism of Firms and Public Institutions’, paper presented at EUI, Florence, 15-16 December 1995, 55. Michael Dorf and Charles Sabel, ‘A Constitution of Democratic Experimentalism’ (1998) 98 *Columbia Law Review* 267, 288-289.

<sup>702</sup> Sabel, ‘Design, Deliberation and Democracy’, 4.

<sup>703</sup> *Ibid.*, 49

The process begins with the simplest statement of intention to solve a certain problem. The actual details and understandings of the problem take form as the actors begin to discuss the problem and are constantly redefined as the debate develops. Experimentalism is a continual process of “learning and learning anew through reciprocal modifications of means and ends... to achieve purposes whose very definition is shaped by that process itself”.<sup>704</sup> This ‘learning-by-monitoring’ does not require or presume a uniformity of views nor demands consensus as the outcome, allowing for the possibility for different groups to contribute on their own terms and in their own voice. Moreover, solidarity is generated on the back of the mutual learning process. Thus the direct participation of any number of different types of actors in networks of governance debating practical transnational problems produces “workable cooperation by continuously exploring different understandings of means and ends.”<sup>705</sup>

The constant reflexivity of the process of experimentalism suggests that this form of network governance offers real possibilities in terms of accepting the radical contingency of recognition elaborated in chapter 4. Although problem-focused, a link can be made between the “reciprocal determination of means and ends”<sup>706</sup>, in Dorf and Sabel’s words, and the Arendtian concept of identity. Experimentalism, according to Dorf and Sabel, sees the ambiguity of means and ends as rendering the intelligibility of our own ideas and our ability to act upon them dependent upon the reaction and interpretation of others; thus, “[t]he collaborative investigation of differences in response to doubt is ... central to self- and mutual understanding.”<sup>707</sup> The attractiveness of experimentalism for considerations of recognition is that it does not appear to require mutual recognition at the outset, but that it is in the involvement in discussing ends and means in response to common problems that recognition is generated and constantly altering in response to the changing identity of participants. Experimentalism is thus appealing precisely because it does not focus on recognition concerns but on practical problem solving, in which recognition’s continuous movement is incorporated within the ‘rolling self-interpretation’ of

<sup>704</sup> ‘Design, Deliberation and Democracy’, 4, 31.

<sup>705</sup> Dorf and Sabel, ‘A Constitution of Democratic Experimentalism’, 314.

<sup>706</sup> Dorf and Sabel, *ibid.*, 284.

<sup>707</sup> *Ibid.*, 285.

experimentalism.<sup>708</sup> The fear of some that establishing categories for recognition inevitably changes conditions within and amongst groups is arguably mitigated by an understanding of identity as inevitably a process of acknowledgment, response and adaptation, on both sides.<sup>709</sup>

Further, experimentalism self-consciously opens up possibilities for wide participation; indeed, reconnecting large numbers of citizens with the political system is one of the understood aims of the theory. Moreover, Sabel explicitly understands experimentalism as combining freedom of expression, the defining liberty of the moderns, with participation, the defining, liberty of the ancients; experimentalism works through the interaction of the two.<sup>710</sup> Participants are understood as gaining new skills by sharing in knowledge and experience, which in itself is a means of increasing self-esteem. However, whilst aware of the importance of open participation as a good in itself, the purpose of experimentalism is not recognition *per se* and the theory thus appears most vague at one of its most interesting junctures.<sup>711</sup> There are two standards of participation: the first, “all those affected” is clear but begs the question of who decides which those groups are<sup>712</sup>; the second, and not necessarily compatible barrier, follows the analogy with the competitive world of economics, and is that of utility.<sup>713</sup> That experimentalism is not concerned with participation purely for recognition’s sake bears clear risks. Network governance presupposes, according to Ladeur, “the creativity of the self-organizing potential” of society.<sup>714</sup> Moreover, networks are, like any space, sites of power and, particularly in the absence of

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<sup>708</sup> Dorf and Sabel, *ibid.*, 308.

<sup>709</sup> See Benedict Kingsbury, ‘The Applicability of the International Legal Concept of ‘Indigenous Peoples’ in Asia’ in Joanne R. Bauer & Daniel A. Bell, *The East Asian Challenge for Human Rights*. Cambridge, Cambridge University Press, 1999. Moreover, “it seems difficult to design network-type processes and markets in ways that will not intensify the erosion of conventional identity-markers.” Benedict Kingsbury and Helen Hershkoff, ‘Crisis, Community, and Courts in Network Governance: A Response to Liebmann and Sabel’s Approach to Reform of Public Education’ (2003) 28 *N.Y.U. Rev. of Law and Social Change* 319, 323.

<sup>710</sup> Sabel, ‘Design, Deliberation and Democracy’, 55.

<sup>711</sup> Sabel and his collaborators appear to have given little detailed thought to the matter of defining the bounds of participation; when giving an example to which democratic experimentalism might be applied – that of educational reform – he notes that consultation will be with “all those affected by potential measures”, without considering that, in the field of education, that could reasonably include the whole of society. *Ibid.*, 51.

<sup>712</sup> It also runs a risk that participation becomes ineffective. For a sobering account of the costs of public deliberation, see Jim Rossi, ‘Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decision-Making’ (1997) 92 *Northwestern University Law Review* 173.

<sup>713</sup> The chief fear of the network is engaging with an incompetent or unreliable partner. Dorf and Sabel, ‘A Constitution of Democratic Experimentalism’, 309.

<sup>714</sup> Ladeur, ‘Globalization and Public Governance – A Contradiction?’, 19.

guarantees of certain rights, also sites of exclusion and inequality.<sup>715</sup> In all this flexibility and creativity, as Kingsbury and Hirschoff have sought to flag<sup>716</sup>, what becomes of the weak and vulnerable?

The criterion of utility is affected by the level of resources that a partner can muster. However, the understanding that input comes in many forms – such as the offering of an alternative vocabulary – should ensure that participants are not defined solely by the material resources they can offer. Although on these terms the principle of utility would not have offered participation rights to the Mikmaq in the case considered in chapter 6, the principle of ‘all those affected’ would have seen them included. The two principles need therefore to be taken as stand-alone principles, each capable of providing participation; an entity or claim would not need to satisfy both criteria. Such an interpretation of the criteria would then correspond to capacity and legitimacy, whereby capacity-based claims would need to satisfy the utility requirement, even where the petition stems originally from the claim to be affected, and legitimacy-based claims would be able to claim participation solely on the grounds of being affected by the problem at issue. This is not to suggest, however, that such claims have little to offer.

Where existing members of a network determine that a claim to be affected by the problem at hand is not sufficient for membership, participation, in Sabel’s model, is to be monitored by the courts, before which networks must present a convincing account of the reasons for a complainant’s exclusion. Judicial oversight may offer a degree of protection where it is as open as possible to reasons for inclusion, and where it is particularly sensitive to the claim of inclusion of encompassing groups and the diverse ways in which claims are presented. In such a model, the courts will become sites of contestation of second-order participation. While this may read as more than a little utopian, there is no perfect answer to the question of how to ensure the equal participation of the less powerful, but nonetheless the openness and reflexivity of the network format appears to offer a better platform for the vulnerable than most.

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<sup>715</sup> Benedict Kingsbury, ‘Sovereignty and Inequality’ (1998) 9 *European Journal of International Law* 599. Also, Stephen Toope, ‘Emerging Patterns of Governance and International Law’ in G. Kreijen (ed.), *State Sovereignty and International Governance*. Oxford: Oxford University Press, 2002.

<sup>716</sup> Kingsbury and Hirschoff, ‘Crisis, Community, and Courts in Network Governance’; a response to James S. Liebman and Charles F. Sabel, ‘A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform’ (2003) 28 *NYU Rev. of L. and Soc. Change* 183.

An example of what such a network might look like at the transnational level is provided by the Mediterranean Action Plan, a regime for marine pollution control in the Mediterranean Sea. Networks necessarily span state boundaries largely because of the trans-boundary ‘globalization of risk’<sup>717</sup>, and the environment is thus an obvious area in which networks will emerge. A study of the Plan has suggested that its success in gaining state compliance has been due to its epistemic community of experts who have developed a co-ordinated system of convergent policy-making, which has had a transformative effect on state behaviour.<sup>718</sup> This network community could be opened up to include all groups affected by the environmental protection measures developed, and provide a forum in which legitimacy-based groups could participate in the setting of norms and, where necessary, contest the discourse itself. As the example suggests, in being transnational, such network forums will not necessarily transcend the particular and the determination of those affected will not necessarily be beyond the bounds of the ability of discursive space to cope.

Indeed, Romani organisations or bodies concerned with Romani issues under the auspices of international organisations participate already to a certain extent in forms of network governance. For example, the OSCE Contact Point for Roma and Sinti Issues and the UNHCR have created a network with local and national authorities, Romani organisations, both local and transnational, as well as other interested international actors, to consider long-term solutions to the problem of Romani refugees caused by ethnic conflict and tension in south eastern Europe.<sup>719</sup> The presence of a large Romani voice ensures not only that any solutions are acceptable to these representatives but that the understanding of the problem itself can be challenged – a point of particular importance in the area of asylum and return. Similarly, the World Bank’s partnerships with local Romani organisations, such as the Pakiv Fund, which supplies small grants to generate employment in Romani communities, see Romani organisations involved in the Bank’s informal networks

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<sup>717</sup> Lawrence M. Friedman, ‘Frontiers: National and Transnational Order’ in Ladeur (ed.), *Public Governance in the Age of Globalization*, 39-41.

<sup>718</sup> Peter M. Hass, ‘Do Regimes Matter? Epistemic Communities and Mediterranean pollution control’ (1989) 43 *International Organisation* 377.

<sup>719</sup> For further information, see the Contact Point’s website: <http://www.osce.org/odihr/18148.html>

concerning the wider development discourse.<sup>720</sup> Here, the Romani voice can offer their experience in on-going debates about the modification of understandings about how and what assistance should be offered to help groups out of poverty, as well as influence the terms of the debate itself. Participation in these networks not only allows Roma a degree of control over their lives, but inclusion and respect for the experience they can offer can make a significant contribution towards the realisation of positive recognition.

### 7.5.3. Summary

The international legal realm is, so it is widely feared, fragmenting.<sup>721</sup> International regimes and institutions, international law-making, are no longer the sole preserve of the state. The changing nature of governance, from the centrality of polis to multiple poleis, over-lapping and inter-connected, from inter-state law to global law, offer new opportunities to address the exclusion of non-state legitimacy-based claims to recognition.

The Romani claim has been understood here as a challenge to misrecognition of Roma and to their characterisation as a minority, but also as a demand to be able to contribute and participate in substantive discussions that affect them; as both a claim to original authority and as a demand for recognition that they have something to offer, a point worth making. This section has sought to suggest that legitimacy-based claims can operate at both the substantive and the procedural levels and are not confined to making their claims to participate at one or the other. Indeed, it is important that claims should not be excluded from either negotiations about original authority or the practical negotiations of living together. Where claims in ‘high negotiations’ about participation are rebuffed, claims can gain forms of recognition from participation in ‘lower-down’ negotiations about development plans or social stability, for example. In viewing contestation as occurring across a mix of ‘high’ and

<sup>720</sup> For details of partnerships and general involvement in Romani development, <http://www.worldbank.org/eca/roma/about.htm>

<sup>721</sup> The ILC established a Working Group on this question in 2002; for documents and reports of this group, [http://untreaty.un.org/ilc/guide/1\\_9.htm](http://untreaty.un.org/ilc/guide/1_9.htm). Also, Martti Koskenniemi and Päivi Leino, ‘Fragmentation of International Law? Postmodern Anxieties’, (2002) 15 *Leiden Journal of International Law* 553; Martti Koskenniemi, ‘Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought’, paper given at Harvard Law School, 5 March 2005; Andreas Fischer-Lescano and Gunther Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 *Michigan Journal of International Law* 999; Toope, ‘Emerging Patterns of Governance and International Law’.

'low' sites, recognition claims can include both dignity concerns as well as the expression of practical identity.

## **7.6. Summary: International Law as both hegemonic narrative and discursive space**

Tully has recently suggested that international law is a co-opting narrative that pulls in counter-imperial claims and forces them to speak the imperial narrative.<sup>722</sup> In this, and in singling out self-determination as one of the main mechanisms by which this is achieved, as this thesis has sought to illustrate, he is correct. However, international law also contains pockets of space in which counter-hegemonic claims can make their case on a more equal footing. As a number of accounts have sought to stress, under the dual pressures of globalisation and internal critique, international law is making a discursive turn.<sup>723</sup>

The starting point for any re-conceptualisation of recognition as participation in international law is an acknowledgement of the shifting sands of law itself. The Critical Legal Studies movement has shown the law to be indeterminate, and in so doing has shown that the law cannot be a neutral ground in which the differing moral and political strands of society, or international society, can meet on an equal footing.<sup>724</sup> To represent law as knowledge rather than judgement is to deny the choices that have to be made and that are made. Law is, rather, a mechanism for legitimating configurations of power and of articulating hidden normative commitments.

One answer, according to Singer, is law as conversation.<sup>725</sup> The importance of this metaphor is that while it does not resolve uncertainty, it requires that we must take

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<sup>722</sup> Tully, 'On Law, Democracy and Imperialism'.

<sup>723</sup> Schieder, 'Pragmatism as a Path towards a Discursive and Open Theory of International Law' (2000) 11 *European Journal of International Law* 663; Julie Brunnée, and Stephen Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000-2001) 39 *Columbia Journal of Transnational Law* 19. Also see Franck, *Fairness in International Law*, 477: "much of the attempt at interaction is discursive: an interlocutionary process of exhortation, expiation, explanation, and exposition".

<sup>724</sup> For a good summary of CLS thought, Joseph Singer, 'The Player and the Cards: Nihilism and Legal Theory' (1984) 94 *Yale Law Journal* 1.

<sup>725</sup> Singer, *ibid.*, 51-2.

responsibility for what we do and for the choices we make. The acceptance that our beliefs can never be ‘right’ does not mean that we hold them any less fiercely. Acknowledging that the law can never be neutral is a first step in taking responsibility for ourselves and for our choices.<sup>726</sup> Moreover, law as conversation can also be empowering. The metaphor of conversation suggests that participation can be open, temporary or committed, and that the law is a whole of a multitude of different conversations, with different participants, discussing together a particular topic in a particular context, both of which will develop over time and in the course of the conversation. Views can change, plans of action be formulated and re-formulated, successes assessed and plans revised and improved, all in a series of conversations that, like those recognition dialogues with those dearest to us, never stop.

Recognising that law is incapable of offering a transcendental basis on which to discuss our opposing viewpoints means acknowledging that people must be considered free and equal. Thus, whereas, as Koskenniemi has convincingly argued, the structure of international law necessitates contestation by appeal to hegemonic claims<sup>727</sup>, there are benefits to playing the game. Claims of law, as opposed to claims of interest or privilege, constitute the claimants as members of the legal community that is also necessarily a political community. Claims of law at the international level, as a conversation of equals, require all to make the argument rather than to appeal directly to power, allowing the weak to make their bid for inclusion.

Further, law as conversation acknowledges that all knowledge and actions are the result of interaction with others: human beings do not *have* ideas, they *form* them. To understand international law as a perpetual discourse of creative problem-solving in which the questions of the ‘who’, the ‘how’ and the ‘what’ are always implicated is not to give up on the concept of law as binding; it is rather to recognise that binding

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<sup>726</sup> In *Philosophy and the Mirror of Nature*, Rorty refers to Sartre’s assertion that, in Rorty’s words, “the urge to find such necessities is the urge to be rid of one’s freedom to erect yet another alternative theory or vocabulary. Thus, the edifying philosopher ... is treated as a ‘relativist’, one who lacks moral seriousness, because he does not join in the common human hope that the burden of choice will pass away.” (emphasis mine) Princeton: Princeton University Press, 1979, 376.

<sup>727</sup> Martti Koskenniemi, ‘International Law and Hegemony: A Reconfiguration’ (2004) 17 *Cambridge Review of International Affairs* 197; for his earlier argument, *From Apology to Utopia*, 422–457.

obligation stems from identification with norms, not with any special characteristic of a legal norm itself. The validity of a norm is the ongoing process of its validation.<sup>728</sup> Discourse stimulates and maintains identification through inclusion and reflexivity. However, any discourse has to be open to challenge otherwise it simply becomes a tool of the hegemonic power of the moment. Frug noted in his classic text, "The alternative to 'foundations' is not 'chaos' but the joint reconstruction of social life";<sup>729</sup> or as Singer has put it, "[w]hen we give up the idea that the legal system has a ... 'rational basis', we are not left with nothing. We are left with ourselves, and we are not nothing."<sup>730</sup> It is only an opportunity, however, if we insist on making the conversation of law a genuine multilogue.

To create an international multilogue is not to insist that all entities are equal in terms of the outcome of participation. It is rather to acknowledge the need to take *all* legitimacy-based recognition claims seriously, no matter the form they take. A first step must be the acknowledgment that the nature of international legal personality explicitly denies legitimacy-based claims. This in itself will necessarily open up discursive space in which recognition claims can be made and contested, re-submitted and re-defined, always striving for the ideal of the recognition dialogue that we will never achieve. The presumptive right to self-determination as participation insists upon the right to keep trying and the obligation of the Other to listen.

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<sup>728</sup> Friedrich V. Kratochwil, *Rules, Norms and Decisions*. Cambridge: Cambridge University Press, 1989.

<sup>729</sup> Gerald Frug, 'The Ideology of Bureaucracy in American Law' (1984) 97 *Harvard Law Review* 1276.

<sup>730</sup> Singer, 'The Player and the Cards', 66.

## Conclusion

Stories can be either bacteria or light: they can infect a system, or illuminate a world.<sup>731</sup>

The Romani claim to non-territorial nationhood was roundly mocked upon its first international appearance in Durban in 2001 by fellow members of the civil society gathered there. Governmental delegations ignored it. The claim's reception since has by and large followed this pattern, either ignored as unrealistic or scornfully dismissed by those keen to insist that it is purely the invention of a Romani elite. This thesis has sought to suggest that the claim, the particularly story of non-territorial nationhood that is being told by the Romani movement about the Romani people, is deserving of neither dismissal nor scorn.

The claim to non-territorial nationhood has been viewed here at the general level as a claim to recognition of an over-arching Romani identity based upon a sense of *romanipé*. It has been argued that recognition, to be genuine, must take a certain form; or, rather, it must not take any particular form, but must be fluid, capable of acknowledging the dynamism of identity and the impact in particular of the ever ongoing recognition dialogue with those around us on our understanding of who we are. Recognition has thus been characterised as participation, where participation takes place on terms of equality and where it acknowledges the impossibility of neutrality of the dominant language of discourse. The ILO negotiations surrounding the drawing up of Convention 169 make clear that participation is not a universal remedy; it depends very much upon the type of participation.

At the specific level of content, the Romani claim, as a claim to nationhood, has been understood as a claim to original authority, as the right to determine themselves what their role shall be. As such, it has been characterised in terms of participation at the international level as a legitimacy-based claim in contrast to the claims being put forward by non-state capacity-based entities. This type of legitimacy has been viewed as qualitatively different from other types of claim – a fact that the suggestion of a presumptive right to self-determination has sought to acknowledge.

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<sup>731</sup> Ben Okri, 'The Joys of Story-Telling' in *Birds of Heaven*. London: Phoenix, 1997.

The claim to non-territorial nationhood has been made consciously within the context of a globalising world in which the conflagration of legitimacy and capacity that the state represents is losing its place as the sole political and legal frame. Moreover, the challenges to the state arising from this proliferation of alternative sites of politics and law are causing the concepts of place and space to be re-thought, so that territory is no longer accepted as the sole defining mark of the political. The nation-state has been a remarkably successful project, but its demand for exclusivity in the relation between people and territory requires that either the people be recast or that the territory be reshaped.<sup>732</sup> The orderliness of territorial borders in the face of the unpredictability of human beings has meant that it has largely been the people that have suffered the necessary re-formulation. The Romani claim acts as a reminder that we do not need to alter either, but rather to separate the exclusive bond between the two. The Romani claim, as a non-territorial nation, pushes back the boundaries of the political, challenging less the state itself than the continuing path-dependency of thinking about the organisation of political space.

Further, the Romani claim has been situated here within a wider world of transformative politics that is seeking to re-claim the international arena from the neo-liberal hegemonic discourse that currently dominates our world. The Romani claim is an innovative part of broader social movements that are challenging what Fraser has termed the ‘maldistribution, misrecognition and misrepresentation’ of the existing framing of international governance.<sup>733</sup> The claim to non-territorial nationhood has thus been understood here as representing a self-conscious challenge to the ‘who’ and the ‘how’ of international participation. The claim to collective self-governance, represented by the principle of self-determination, is not necessarily a tool in the armoury of hegemony where the terms upon which it is claimed are themselves defied.

In addition, despite the vagueness of specific content to the Romani claim in terms of how a non-territorial nation might be manifested, it has been suggested that the

<sup>732</sup> Charles Westin, ‘Temporal and Spatial Aspects of Multiculturality’ in R. Bauböck and J. Randell (eds.), *Blurred Boundaries: Migration, Ethnicity, Citizenship*. Aldershot: Ashgate, 1998, 79.

<sup>733</sup> Fraser, ‘Reframing Justice in a Globalizing World’ (2005) 36 *New Left Review* 69, 84.

Romani claim is well placed to take advantage of the rise of network forms of governance. Sitting outside territorially-defined space, the flexibility of the network format can offer legitimacy-based claims to recognition the opportunity to contest the ‘what’ whilst simultaneously contesting the ‘how’. Via participation in network governance, such claims can challenge maldistribution or contribute to the framing and solving of the common problems we face, from environmental damage control to the defining of health priorities for UN-based programmes, for example.

There are thus a number of good reasons for taking the Romani claim seriously on its own terms. Firstly, both as a claim to recognition, given the acknowledged harm of misrecognition, and, moreover, as a claim to original authority, the legitimacy element of such a claim demands that it be taken seriously. Secondly, the self-understanding of the claim as offering an alternative vision of the organisation of political space is both genuine and plausible in light of the challenges to existing structures and multiplication of sites of governance. Thirdly, there is also something to be gained in taking the Romani claim seriously by those whose ontological security is by and large assured by the dominant discourse. Playing the master comes at a price, and not just to those whose subjugation is necessary to maintain the illusion of domination. Where the masters maintain their position of domination by imposing the full weight of their interdependence upon others, the resistance of the subjugated calls into question the very identity of those who subjugate. The ontological security of the master is intimately connected to the servant, whether he chooses to acknowledge it or not. Further, the inevitable resistance challenges not only the security of being of the dominant, but also the physical peace of all. The international order continues, erroneously, to place the attainment of peace above freedom; but peace is not found in the maintenance of order (nor in the use of military force), but in the inclusion and recognition as equals of all those who ask it. There is arguably greater stability to be found in acknowledging the authority of legitimacy-based claims to recognition as participation than in attempting to keep chaos at bay by immutably fixing territorial borders. Finally, there is an additional benefit to all in taking the Romani claim, and other similar legitimacy-based claims seriously. There is a value in the wide inclusion of as many voices as possible. The fact of living together entails that we face many common challenges – a situation which the prospect of dramatic global climate

change, for example, will only make more urgent. The more alternative vocabularies that are heard, the best chance we will all have of weathering the challenges ahead.

In order to take the Romani claim seriously on its own terms it is necessary to constantly remind ourselves that any system, any discourse, is created and not divined; that there are no immutable givens, such as territorial borders. Law, as a system of power, has a strong tendency towards the hegemonic. In order to avoid any legal system becoming the tool of the powerful, it is necessary to work hard to keep the system open to the challenge of alternative vocabularies. And it is necessary to accept that we will never get recognition right, but it is in the trying that mutual respect is to be found. The Romani claim was presented as a creativity to share. The non-Romani world needs to think about their response to the Romani contribution to the debate.

## **Annex**

Note: The text is reproduced in its original form, with no correction of spelling or syntax.

### **WE, THE ROMA NATION**

Individuals belonging to the Roma Nation call for a representation of their Nation, which does not want to become a State. We ask for being recognized as a Nation, for the sake of Roma and of non-Roma individuals, who share the need to deal with the nowadays new challenges. We, a Nation of which over half a million persons were exterminated in a forgotten Holocaust, a Nation of individuals too often discriminated, marginalized, victim of intolerance and persecutions, we have a dream, and we are engaged in fulfilling it. We are a Nation, we share the same tradition, the same culture, the same origin, the same language; we are a Nation. We have never looked for creating a Roma State. And we do not want a State today, when the new society and the new economy are concretely and progressively crossing-over the importance and the adequacy of the State as the way how individuals organize themselves.

The will to consubstantiate the concept of a Nation and the one of a State has led and is still leading to tragedies and wars, disasters and massacres. The history of the Roma Nation cuts through such a coincidence, which is evidently not anymore adequate to the needs of individuals. We, the Roma Nation, offer to the individuals belonging to the other Nations our adequacy to the new world.

We have a dream, the political concrete dream of the rule of law being the rule for each and everybody, in the frame and thanks to a juridical system able to assure democracy, freedom, liberty to each and everybody, being adequate to the changing world, the changing society, the changing economy. We have a dream, the one of the rule of law being a method, and not a value. A pragmatic, concrete, way how individuals agree on rules, institutions, juridical norms, adequate to the new needs. A transnational Nation as the Roma one needs a transnational rule of law: this is evident; we do believe that such a need is shared by any individual, independently of the Nation he or she belongs to.

We do know that a shy debate regarding the adequacy of the State to the changing needs of the global society—a global society which should not be organized exclusively from above—is involving prominent personalities in Europe and in the entire UN Community.

We are also convinced that the request itself of a representation for the Roma Nation is a great help to find an answer to the crucial question regarding the needed reforms of the existing international institutions and rules. Our dream is therefore of great actuality and it is very concrete. It is what we offer the entire world community. The Roma Nation, each and every individual belonging to it look for and need a world where the international Charters on Human Rights are Laws, are peremptory rules, providing exigible rights. Such a will is a need for the Roma; is it so only for Roma?

We are aware that the main characteristic of the Roma Nation, the one of being a Nation without searching for the establishment of a State, is today a great, adequate resource of freedom and legality for each individual, and of the successfull functioning for the world community.

We have a dream, and we are engaged in the implementation of it: we offer to the humanity a request, the one of having a representation as a Nation, the Nation we are. Giving an answer to such a request would let the entire humanity make a substancial step forward.

We know democracy and freedom to equal the rule of law, which can be assured only through the creation of institutions and juridical rules adequate and constantly adjusted to the necessarily changing needs of individuals.

We are to offer our culture, our tradition, the resource which is in our historic refusal of searching for a state: the most adequate resource of awareness to the nowadays world. That's why we look for a representation, and new ways of representing individuals apart from their belonging to one or to another nation. Nowadays politics is not adequate to the nowadays needs of individuals in a changing world; and to the needs of all those persons still suffering starvation and violations of their fundamental human rights. And we offer, we propose a question, while proposing and offering a path, a concrete, possible, needed path, on which to start walking together.

We, the Roma Nation, have something to share, right by asking for a representation, respect, implementation of the existing International Charter on Human Rights, so that each individual can look at them as at existing, concrete warranties for her or his today and future.

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