

EU Influence on the Citizenship Policies of the Candidate Countries: The Case of the Roma Exclusion in the Czech Republic

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Abstract

Although the persons of Roma ethnicity who were deprived of the Czech citizenship upon the split of the Czech and Slovak Federation by controversial law No. 40/1993 were not in the end left stateless, the Commission can be reproached for not using the influential position it enjoyed in the course of the pre-accession process preceding the fifth enlargement of the European Union (1 May 2004) in order to insist that the Czech Republic alter its ethnically-biased citizenship policy. Although some steps in this direction were taken by the Commission, they fell short of addressing the whole range of discriminatory provisions of this Czech legislation preventing the former Czecho-Slovak citizens of Roma ethnicity from becoming citizens of the Czech Republic. In addition to the overall ineffectiveness of its pre-accession promotion of equal access to Czech citizenship of all permanent residents of the Czech Republic their ethnic origin notwithstanding, the Commission made a controversial decision to treat the exclusion from citizenship which was *de facto* based on ethnicity as a 'civil and political' rights issue, rather than a minority rights issue. This dubious decision, allowed the Commission to distinguish its pre-accession involvement in the reforms in the Czech Republic on the one hand, and in Latvia and Estonia on the other, where the exclusion of ethnic minorities from the access to citizenship was regarded as a key issue pertaining to the protection of minority rights. The ill-articulated position of the Commission is due, this paper suggests, mainly to the limitations on the EU's involvement in the Member States' citizenship domain and *de facto* comes down to the application of different pre-accession standards to different minority groups in the candidate countries. To ensure genuine protection of ethnic minorities in the Member States-to-be, the EU has to alter its approach to the issues of ethnicity-based exclusion from citizenship in the course of the future expansions of the Union.

THE CZECH CITIZENSHIP¹ LAW OF 1993² WAS CONSTRUED IN SUCH A WAY THAT up to 25,000 of former Czechoslovak citizens of Roma ethnicity were either viewed as Slovak, or stateless, notwithstanding their ties with the Czech Republic.³ Despite the ability of

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¹ For the purposes of this paper, citizenship is understood solely as a normative concept, *i.e.* the legal status of a citizen. Other aspects of the concept to be found in the literature, especially those related to the limited possibilities of some groups to *de facto* benefit from their legal status of citizens are omitted for the sake of clarity of the argument presented herein. Given the amount of discrimination the Roma are facing, it is clear that even possessing a formal status of citizens, their actual enjoyment of citizenship rights remains limited.

² Law No. 40/1993 Sb.

³ R. Linde, 'Statelessness and Roma Communities in the Czech Republic: Competing Theories of State Compliance', (2006) 13 *International Journal of Minority & Group Rights*, 342. Earlier assessments spoke about up to 100,000 individuals affected: A.M. Warnke, 'Vagabonds, Tinkers,

the European Union (EU) to influence this situation, the issue was only resolved several years after the adoption of the law.⁴ The role of the EU – an all-powerful reform-promoter in the course of the pre-accession process – in solving this problem appears rather marginal.⁵ Although the citizenship story of the Czech Roma can be considered a tale from the past, it is of acute relevance to the functioning of the contemporary European Union, since it is a clear illustration of a telling failure in the pre-accession policy, which could have been avoided. This story provides a lesson for the EU and could help prevent the repetition of similar situations in the future.

The controversial law was adopted during the same year as the Copenhagen European Council formulated the core of the pre-accession conditionality principle designed to radically change the way enlargements of the European Union were legally regulated.⁶ The Copenhagen criteria did not only focus on the issues related to democracy, the Rule of Law and the transposition of the *acquis communautaire*,⁷ but also made ethnic minority protection one of the key elements of the pre-accession assessment of the candidate countries.⁸ A large array of Copenhagen-related documents has been devised by the Commission and other Community Institutions since 1993, enabling the EU to actively promote its law and its values⁹ among the countries wishing to accede.¹⁰ Those countries complying with the recommendations stated in the Copenhagen criteria and the Copenhagen-related documents were destined to join the EU, while those failing to comply were granted less financial assistance¹¹ and could even leave the pre-accession race as the negotiations could simply be frozen by the EU. As a candidate country back then, the Czech Republic was likely to have difficulties with passing the pre-accession conditionality test without amending its discriminatory citizenship legislation.

Unlike what could have been expected of it, the Commission awarded remarkably little attention to this issue. Citizenship was analysed under the auspices of the civil and political rights assessment as opposed to ethnic minority protection, thus allowing the

and Travellers: Statelessness among the East European Roma', (1999) 7 *Ind. J. Global Legal Stud.*, 358; F. Bertram, 'The Particular Problems of the Roma', (1997) 3 *U.C. Davies J. Int'l L. & Pol'y*, 7.

⁴ The amendment to the law that allowed the majority of affected Roma to get their citizenship restored was passed in 1999: Linde, n 3 above.

⁵ Cf. Linde (n 3 above), who analyses the roles of the states, NGOs and other international organisations in putting pressure on the Czech Republic to amend the law.

⁶ Presidency Conclusions, European Council (Copenhagen, 21, 22 June 1993), *Bull. EC* 6-1993. For analysis see C. Hillion, 'The Copenhagen Criteria and Their Progeny', in C. Hillion, (ed.), *EU Enlargement: A Legal Approach* (Hart, 2004); D. Kochenov, 'Behind the Copenhagen Façade: The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law', (2004) 8(10) *EloP* 1 <<http://www.eiop.or.at/eiop/texte/2004-010.htm>>, accessed 15 September 2007;

⁷ C. Delcourt, 'The *Acquis Communautaire*: Has the Concept Had Its Day?', (2001) 38 *CMLRev.*, 829.

⁸ C. Hillion, 'Enlargement of the European Union – the Discrepancy between Membership Obligations and Accession Conditions as Regards the Protection of Minorities', (2004) 27 *Fordham Int'l L.J.*, 715; G.N. von Toggenburg, 'A Rough Orientation through a Delicate Relationship: The European Union's Endeavours for (Its) Minorities', (2000) 4(16) *EloP*, 1 <<http://eiop.or.at/eiop/texte/2000-016.htm>>, accessed 15 September 2007; D. Kochenov, 'The Summary of Contradictions: The EU's Main Internal and External Approaches to Ethnic Minority Protection Outlined', *Boston College Int'l & Comp. L.Rev.* (forthcoming), draft available at SSRN: <<http://ssrn.com/abstract=931189>>, accessed 15 September 2007.

⁹ Especially those mentioned in Art. 6(1) TEU.

¹⁰ On the analysis of all the types of the pre-accession legal and political documents released and their potential pre-accession effectiveness see D. Kochenov, 'EU Enlargement Law: History and Recent Developments: Treaty – Custom Concubinage?', (2005) 9(6) *EloP*, 1, <<http://eiop.or.at/eiop/texte/2005-006a.htm>>, accessed 15 September 2007.

¹¹ See Council Regulation (EC) 622/98 of 16 March 1998, OJ L 85/1. See also K. Inglis, 'The Pre-accession Strategy and the Accession Partnerships', in A. Ott and K. Inglis (eds.), *Handbook on European Enlargement* (T.M.C. Asser Press, 2002).

Commission to distinguish the Roma citizenship issues from the problem of the statelessness of Russian and Ukrainian minorities ('Russian-speaking' in the Commission's terminology) in the Baltic States of Latvia and Estonia.¹² Consequently, this allowed the Commission to practise differentiated treatment of the candidate countries, which was officially not tolerated in the course of the pre-accession assessment of the Member States-to-be, since, according to the European Council all the candidate countries were 'destined to join the Union *on the basis of the same criteria and [...] on an equal footing*'.¹³

In the end, progress in the resolution of the statelessness issue for the Czech Roma was related to the activities of actors outside the pre-accession framework, such as the OSCE and the UK and Canadian governments. Thus although the Roma deprived of citizenship under the law of 1993 got citizenship rights in the end, this development cannot be viewed as a pre-accession success of the EU and can thus be placed next to the general failure of solving the statelessness problem among the ethnic minorities in the Baltic states of Latvia and Estonia.¹⁴ The system of the pre-accession conditionality instruments aimed at promoting reform in the Czech Republic remained largely unused, presenting this important issue as marginal. Similar problems related to a reluctance to employ the pre-accession conditionality to actively promote non-discrimination and inclusion are likely to arise during the application of the pre-accession conditionality principle to future candidate countries, especially the countries of South-Eastern Europe where large minority populations are present. This particularly concerns the former Yugoslavia coping with the aftermath of a violent ethnic conflict.¹⁵ The Commission should retune its pre-accession approach, to make it work effectively for the benefit of the EU and its citizens alike.

The paper begins by illustrating the pre-accession reform-promotion potential in the field of citizenship regulation, putting it into the context of the Community powers in the field of the regulation of acquisition of nationality in the Member States. Although officially prohibited by Article 17 EC, which makes a clear connection between European citizenship status and the nationality policies of the Member States, disallowing the Union to intervene with the latter, the influence of the EU on the nationality policies of the Member States has been considerable. This is even more the case when pre-accession reform promotion is at issue, since the EU's ability to intervene with the legal systems of the candidate countries is much greater compared with its powers *vis-à-vis* the Member States proper. To present the pitiful position of the Roma in the Czech Republic after the split of the Federation in a larger context, Part 2 of the paper provides a concise account of the history of Roma persecution in Europe. Part 3 discusses the statelessness of the Czech Roma, the provisions of the controversial Czech law and the

¹² On the situation of the Russian speaking minorities in Latvia and Estonia see P. Van Elsuwege, 'Russian-Speaking Minorities in Estonia and Latvia: Problems of Integration at the Threshold of the European Union', [2004] 20 *ECMI WP*, 1; P. Van Elsuwege, 'State Continuity and Its Consequences: The Case of the Baltic States', (2003) 16 *LJIL*, 377; D.J. Smith, 'Minority Rights, Multiculturalism and EU Enlargement: The Case of Estonia', [2003] 1 *JEMIE*, 1; V. Poleštšuk and A. Semjonov, *Report. International seminar 'Minorities and Majorities in Estonia: Problems of Integration at the Threshold of the EU'*, Tallinn, 8, 9 January 1999, <<http://www.lichr.ee/rus/centre/seminari/seminar1999.rtf>>, accessed 15 September 2007; M. Holzapfel, 'Note: The Implications of Human Rights Abuses Currently Occurring in the Baltic States against the Ethnic Russian National Minority', (1995–1996) 2 *Buff. J.Int'l L.*, 1; A.J. Hanneman, 'Independence and Group Rights in the Baltics: A Double Minority Problem', (1995) 35 *Va. J. Int'l L.*, 485.

¹³ Luxembourg European Council (12, 13 December 1997), Presidency Conclusions, para 10 (emphasis added).

¹⁴ D. Kochenov, 'Pre-Accession, Naturalisation, and "Due Regard to Community Law"', (2004) 4(2) *Romanian J. Pol. Sci.*, 71, <<http://ssrn.com/abstract=926851>>, accessed 15 September 2007.

¹⁵ See e.g. A. Petričušić, 'Wind of Change: The Croatian Government's Turn towards a Policy of Ethnic Reconciliation', [2004] 6 *EDAP*, 1, <http://www.eurac.edu/documents/edap/2004_edap06.pdf>, accessed 15 September 2007.

Commission's response to it during the pre-accession assessment of the Czech Republic's compliance with the Copenhagen criteria. A parallel is drawn between the Commission's divergent behaviour in two similar situations: the promotion of inclusive citizenship policies in Estonia and Latvia on the one hand and in the Czech Republic on the other. Finally, having demonstrated the inconsistent behaviour of the Commission in the course of the solution of the statelessness problem in the Baltic States and in the Czech Republic, the conclusion calls for a reinterpretation of the EU's approach to the pre-accession citizenship reform promotion in the countries aspiring to become full Member States of the block.

Citizenship, nationality, pre-accession and the powers of the Union

Citizenship is generally viewed as a 'right to have rights',¹⁶ since its importance for the enjoyment of basic rights is crucial. Scholars, eager to deprive states of the possibility to act arbitrarily in this domain, talk about the right to a nationality under international law.¹⁷ Yet, the 'right to nationality' stated in Article 15 of the Universal Declaration of Human Rights¹⁸ has not found consistent implementation in binding international instruments so far. The European Convention on Human Rights (ECHR)¹⁹ is also silent about such a right.²⁰

What is crucial about citizenship is that, mostly due to its importance for the legal status of every individual, it is generally viewed as a key element of state sovereignty. As a consequence of this, international law allows states themselves to clarify who their citizens are. The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws is unequivocally clear on this issue: 'it is for each State to determine under its own law who are its nationals'.²¹ As a direct consequence of this nationality can only be conferred by national law – international law as it stands today can only hypothetically influence such decision of the Member States,²² not confer nationality on individuals by itself. Even the famous dictum of the Permanent Court of International Justice (PCIJ) in the *Tunis and Morocco Nationality Decrees* case, where the PCIJ clarified that there can come a time in the future, when the role played by international law in the sphere of conferral of citizenship rights will increase,²³ did not alter the reality of national dominance in the citizenship domain. The granting of citizenship by EU Member States is not an exception in this regard. At the same time, however, the Member States' citizenship policies are influenced in certain ways due to their EU membership, making the regulation of this issue by the Member States of the EU considerably different to the regulation taking place in the third countries.

¹⁶ *Trop v. Dulles* 356 U.S. 86, 102 (1958).

¹⁷ J.M.M. Chan, 'The Right to a Nationality as a Human Right: The Current Trend Towards Recognition', (1991) 12 *Hum. Rts. L.J.* 1, 2; Ko Swan Sik, 'Nationaliteit in het Volkenrecht', (1981) 83 *Mededeelingen van de Nederlandsche Vereeniging voor Internationaal Recht*, 1.

¹⁸ However, this provision has been used by the national courts of several States: Chan (1991), 3 & fn. 20. The Inter-American Convention on Human Rights contains a similar provision (Art. 20).

¹⁹ Rome, 4 November 1950, ETS no. 005.

²⁰ See ECt.HR *X. v. Austria* [1972] Appl. No. 5212/71. Numerous examples exist where applicants relied on the ECHR in the cases of loss or refusal to grant nationality. See ECt.HR *Kafkasli v. Turkey* [1995] App. No. 21106/92; ECt.HR *Salahddin Galip v. Greece* [1995] Appl. No. 17309/90.

²¹ L.N. Doc. C 24 M. 13.1931.V., Art. 1. See also Art. 2 of the Convention: 'Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State'.

²² See in this regard Advisory Opinion of the Inter-American Court of Human Rights, *Re Amendments to the Naturalization Provisions of the Constitution of Costa Rica* [1984] OC-4/84.

²³ PCIJ *Tunis and Morocco Nationality Decrees* [1923] PCIJ Ser. B., No. 4, 24.

The powers of the Union in the field of regulation of national citizenship of the Member States are drastically different from the Union's capacity to intervene in the citizenship domain of the candidate countries on the way to full membership.

Citizenship, nationality and full Member States of the Union: slow convergence

De jure the European Union has no powers in the domain of nationality of the Member States and has to accept Member States' nationalities as such. The European citizenship status, which is the only nationality-like legal construction in the European legal order, is purely derivative. Article 17 TEC is clear on this issue:

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

Unlike other key-notions of European law, such as that of a 'worker',²⁴ the European citizenship (through the notion of the 'nationality of a Member State') is largely left within the virtually exclusive domain of the Member States. It means that the Member States themselves decide who their nationals are for Community law purposes, thereby automatically conferring on them European citizenship. Such practice is not without limitations, however. As spelled out by the ECJ in *Micheletti*, any decision of a Member State related to that state's nationality should be taken with 'due regard to community law'.²⁵ At the same time, the Member States are not given any discretion as far as the recognition of the nationality of any other Member State is concerned. Thus in its ruling in *Micheletti* the ECJ refused to accept the 'genuine link'²⁶ rule formulated by the ICJ in the *Nottebohm* case.²⁷ In fact, the whole logic of free movement within the area of freedom, security and justice is antithetical to the 'genuine link' idea, leaving the ECJ no choice in this regard. The ECJ's approach to European citizenship is thus highly formalistic and firmly rooted in the necessity to enjoy formal status as a citizen in order

²⁴ Community law alone can determine the scope of the notion: Case 75/63 *Unger* [1964] ECR 177; Case 61/65 *Vaassen Gobbels (a widow)* [1966] ECR 261; Case 44/65 *Singer* [1965] ECR 965; Case 66/85 *Lawrie-Blum* [1986] ECR 2121, para 17.

²⁵ Case C-369/90 *Mario Vicente Micheletti et al. v. Delegación del Gobierno en Cantabria* [1992] ECR I-4239, para 10, annotated by H.U. Jessurun d'Oliveira, (1993) 30 *CMLRev.*, 623.

²⁶ ICJ *Nottebohm* (1955) ICJ Reports 4. The citizenship of Lichtenstein held by Mr. Nottebohm, who was also a German national, was not recognised by Guatemala, the latter state treating Mr. Nottebohm as a German citizen. The ICJ agreed with such a restrictive vision, ruling that nationality is a 'legal bond having as its basis a social fact of attachment, a genuine connection of experience, interests and sentiments, together with the existence of reciprocal rights and duties'. On the *Nottebohm* case see the literature recommended in A. Bleckmann, 'The Personal Jurisdiction of the European Community', (1980) 17 *CMLRev.*, 467, 477 & fn. 16. For a representative list of international documents regulating citizenship status and the obligations of citizens see K. Rubinstein and D. Adler, 'International Citizenship: The Future of Nationality in a Globalized World', (2000) 7 *Ind. J. Global Legal Stud.*, 519, 525 & fn.32.

²⁷ Early commentators expected that the 'genuine link' rule of the *Nottebohm* case would also be applied in European law, leaving the Member States free not to accept the nationality of all persons coming from other Member States: Bleckmann, n 26 above, 477.

to benefit from citizenship rights: an emphasis is always put on the possession of a formal legal status, which can only be granted by the Member States.²⁸

Notwithstanding the *de jure* powerlessness of the EU in the citizenship domain, recent studies demonstrated with clarity that the freedom enjoyed by the Member States in this field is becoming more and more elusive: the interplay of different nationality rules of the Member States affects each of them in a number of very important respects.²⁹ Even if not acknowledging this openly, EU Member States are certainly influenced by the opinions voiced by other Member States regarding desirable and non-desirable nationality and naturalisation policies.

Ireland is an example of a Member State that changed its strict *jus soli* principle following the peer-pressure of other EU nations.³⁰ The reasons why such pressure comes about are very simple: by conferring nationality on a person, a Member State also makes this person a European citizen, and, by virtue of the latter status, a beneficiary of the Treaty citizenship rights. Given that one of the key rights on the European citizenship list is the right of free movement, which encompasses the rights to move to any Member State of the Union and to reside and take up employment there,³¹ any citizenship policy espoused by any EU Member State has clear bearing on all the EU partners.

While some Member States, like Ireland, opted to follow the recommendations of other Member States, others were quite firm in resisting such influences. Spain, with its recent pardon of illegal immigrants provides an excellent example of the latter approach.³² Whether the Member States want it or not, the process of integration will inevitably result in a certain harmonisation of nationality legislation of all the twenty-seven Member States.³³ This can happen even without an express intervention of the Union, which is not empowered to act in this sphere.³⁴ A strong argument can be made for the exclusive Community regulation of decisions on who the nationals of Member States are for Community law purposes *i.e.* to let the Union itself decide who its own citizens are. Indeed, by requiring the Member States to accept the Community definition of a 'worker', a loophole in Community law remains open as long as they are free to play with the definitions of nationality 'for Community law purposes', rendering the efforts to create a consistent Community definition of a 'worker' futile.³⁵ Dangerously, the whole

²⁸ Besides Case C-369/90 *Micheletti* [1992] ECR I-4239 see also Case C-286/90 *Anklagemgdigheden v. Peter Michael Poulsen et Diva Navigation Corp.* [1992] ECR I-6019 (concerning the nationality of a ship). This argument can also be supported by Case C-200/02 *Chen v. Secretary of State for the Home Department* [2004] ECR I-9925.

²⁹ E.g. K. Rostek and G. Davies, 'The Impact of Union Citizenship on National Citizenship Policies', (2006) 10(5) *EloP*, 1, <http://eiop.or.at/eiop/index.php/eiop/article/view/2006_005a/21>, accessed 15 September 2007.

³⁰ *ibid.*, and the relevant literature cited therein.

³¹ Art. 18 TEC.

³² Rostek & Davies, n 29 above, and the relevant literature cited therein.

³³ As early as in 1983 Evans acknowledged that 'harmonisation of the nationality laws of the Member States may ultimately prove necessary': A. Evans, 'Nationality Law and the Free Movement of Persons in the EEC: With Special Reference to the British Nationality Act 1981', (1982) 2 *YbEL*, 173, 189.

³⁴ According to Art. 5 TEC, the Community can only act 'within the limits of the powers conferred upon it by [the EC Treaty] and of the objectives assigned therein'. Art. 17 TEC is clearly unable to confer on the Community a power to regulate the acquisition of the Member States' nationalities.

³⁵ Jessurun d'Oliveira, n 25 above, 627; see also A. Evans, 'Nationality Law and European Integration', (1991) 16(3) *ELRev.*, 190. An analogy with the Community approach to the definition of the 'workers of the Member States' has oftentimes been applied in the literature to make an argument for a purely Community definition of Member States' nationals for the purposes of Community law and, consequently, European citizens. See e.g. D.F. Edens and S. Patijn, 'The Scope of the EEC System of Free Movement of Workers', (1972) 9 *CMLRev.*, 322, 323.

working of European law becomes, through its scope *ratione personae*, *de facto* dependent on poorly-articulated international customary law on nationality.³⁶

Citizenship, nationality and the candidate countries: Possibilities of Community intervention

In contrast with the general lack of competencies to regulate the domain of nationality of the Member States, the Community is a powerful actor in the field of nationality regulation in the candidate countries preparing for the accession to the EU. Unlike the convergence possibilities apparent from the analysis of the development of nationality legislation in the full Member States, the candidate countries' nationality legislation can legally become subject to Union's intervention in the course of the pre-accession process.³⁷ This is so because the whole pre-accession process is organised around the check of the candidate countries' compliance with the Copenhagen criteria, including, *inter alia*, democracy, the Rule of Law, the protection of human rights and the respect for and the protection of minorities. In other words, the Community could demand of the candidate countries to alter any legislative or administrative act which contradicts the Copenhagen criteria. Since the wording of the Copenhagen criteria is much broader in scope than the *acquis communautaire*, the EU is not restrained by its lack of powers in the citizenship domain apparent from its relation with full Member States.

The fact that the Copenhagen-related documents contain assessments of developments in areas falling outside the *acquis* proves that the EU was not restrained by Article 5 TEC limitations in the course of the pre-accession. This is justified by the interpretation of articles 49 and 6(1) TEU in conjunction with Article 5 EC. Given the broad wording of Article 6(1) EU, it would be logical to presuppose that the standard of democracy, the Rule of Law and human rights contained in the Article is *not per se* confined to the sphere of EU competencies. Moreover, since Article 6(1) TEU is employed as a 'gate-keeper' to the EU – as required by a reference made to it from Article 49 TEU – to ensure that only democratic states respecting human rights join, limiting its reach to the issues covered by the *acquis* would be contrary to its very purpose and would fail to ensure the effective functioning of the EU's enlargement law as envisaged by the framers. In other words, whatever the scope of the *acquis*, in the context of pre-accession, the EU was competent to promote compliance with the Copenhagen criteria as it saw fit, including the area of citizenship and naturalisation requirements.

At least one example of active involvement of the European Union in the citizenship policies of the prospective Member States can be provided. The Commission was very active in dealing with the issue of statelessness among the 'Russian speaking' minorities in Latvia and Estonia. Although generally the Commission's actions are impossible to characterise as a success, as was clearly demonstrated by Hughes,³⁸ positive developments can be recorded in several areas of citizenship regulation in those countries, including, *inter alia*, the removal of 'naturalisation windows' in Latvia, resulting in wider eligibility for naturalisation among the non-citizens belonging to ethnic

³⁶ S. Hall, 'Determining the Scope *ratione personae* of European Citizenship: Customary International Law Prevails for Now', (2001) 28(3) *LIEI*, 355.

³⁷ On the notion of the pre-accession see e.g. a number of Maresceau's works: M. Maresceau, 'Pre-accession', in M. Cremona, (ed.), *The Enlargement of the European Union* (OUP, 2003); M. Maresceau, 'The EU Pre-accession Strategies: A Political and Legal Analysis', in M. Maresceau and E. Lanon (eds.), *The EU's Enlargement and Mediterranean Strategies, A Comparative Analysis* (Palgrave, 2001); M. Maresceau, 'On Association, Partnership, Pre-accession and Accession', in M. Maresceau, (ed.), *Enlarging the European Union: Relations between the EU and Central and Eastern Europe* (Longman, 1997).

³⁸ J. Hughes, '"Exit" in Deeply Divided Societies: Regimes of Discrimination in Estonia and Latvia and the Potential for Russophone Migration', (2005) 43(4) *JCMS*, 739.

minorities, and the reversal of the Latvian policy on the nationality of children born to stateless parents.³⁹ These two examples, illustrating timid successes of the Commission's pre-accession involvement in the field of nationalisation regulation in the candidate countries make it clear that the Union's capacity to intervene with the nationality issues in the candidate countries is incomparably more considerable than its virtually powerless position as far as the regulation of the nationality issues in the Member States is concerned.⁴⁰

To make the regulation of the pre-accession process functional in practice, the Union was in possession of an array of Copenhagen-related documents, allowing it to put pressure on the candidate countries unwilling or unable to perform with a view to achieving the expected results.⁴¹ Of particular relevance for the Czech issue in question are (1) the Commission's Opinion on the Czech Republic's Application for the Membership of the European Union released in 1997, which analysed the overall prospects of the Czech Republic with regard to future EU membership and tackled the main issues viewed by the Commission as in need of reform before Czech accession could take place, (2) Regular Reports on the Czech Republic's progress towards accession released by the Commission on an annual basis beginning in 1998, and (3) the Accession Partnerships with the Czech Republic, adopted by the Council in the form of Decisions, enabling the EU to outline clear objectives for the pre-accession reform going on in the country and to suspend the granting of pre-accession financial assistance if the progress made by the Czech Republic were considered insufficient.⁴²

Before analysing the Commission's involvement in the solution of the Czech Roma citizenship problem, it is reasonable to outline the persecution the Roma in Europe to place the Czech case in the overall context of hostility towards this ethnic group, partly clarifying the inherent motivation of the Czech government to pass the law.

East-European Roma: a brief history of oppression

The history of the Roma can be summarised as 'a story of hate, oppression, and neglect'.⁴³ Their persecution is well documented.⁴⁴ Alongside the researchers, the Commission also saw some of the reasons for the poor contemporary situation of the Roma as caused by the 'accumulation over time of factors that have worsened their living conditions',⁴⁵ although it is unclear how far in back time the Commission was looking.

³⁹ Kochenov, n 14 above.

⁴⁰ The only possibility to intervene left for the Union in such setting is to act on the ECJ's *obiter dictum* in *Micheletti*, demanding the Member States to reverse their citizenship policies which are found to be in breach of Community law.

⁴¹ For analysis see Kochenov, n 10 above.

⁴² All these documents are available from the enlargement web-pages of the Commission: <http://ec.europa.eu/enlargement/archives/enlargement_process/past_enlargements/eu10/czech_republic_en.htm#Overview_of_key_documents_related_to_enlargement>, accessed 15 September 2007.

⁴³ E. Banach, 'The Roma and the Native Americans: Encapsulated Communities within Larger Constitutional Regimes', (2002) 14 *Fla. J. Int'l L.*, 369.

⁴⁴ E.g. B. Alt and S. Folts, *Weeping Violins: The Gypsy Tragedy in Europe* (Thomas Jefferson University Press, 1996); A. Haun, 'The Long Road: The Roma of Eastern and Central Europe and the Freedom of Movement and Right to Choose Residence', (2000) 33 *Geo. Wash. Int'l L. Rev.*, 157, 158, 159; N. Gheorghe, 'Roma-Gypsy Ethnicity in Eastern Europe', (1991) 58(4) *Social Research*, 829; B.A. Fisher, 'No Roads Lead to Rom: The Fate of the Romani People under the Nazis and in Post-War Restitution', (1998) 20 *Whittier L. Rev.*, 94 et seq.; Bertram, n 3 above; I. Hancock, *Pariah Syndrome: An Account of Gypsy Slavery and Persecution* (2nd ed., Karoma, 1987).

⁴⁵ 2001 Bulgarian Report, 23.

Believed to have come from Northern India in the 13th century, the Roma migrated around the whole of Eastern and Western Europe. Initially, they enjoyed immunity as pilgrims and were protected by letters from the Pope, the Holy Roman Emperor and other esteemed religious and political leaders.⁴⁶ Most notably, they were immune from prosecution by the local authorities, since the exclusive power to punish Roma offenders belonged to the Roma 'nobility'.⁴⁷ Unwilling or unable to integrate into the majority societies, the Roma were distinct from the rest of the population of the European continent both culturally and linguistically.

The relative harmony in the relations between the Roma and other Europeans did not last for long. Already in the 14th century Roma were widely persecuted, blamed for disasters and catastrophes, like the Prague fires of 1541,⁴⁸ and enslaved. Two lands of medieval Europe (Moldova and Walachia)⁴⁹ kept Roma as slaves for almost 500 years,⁵⁰ before the abolition in 1855 and 1856 respectively.⁵¹ The legislation entitling citizens 'to kill Roma on sight' was in force throughout medieval Europe sometimes well into the 19th century.⁵²

In the 20th century the history of persecution and repression continued. Symbolising the 'other' for the majority of Europeans, the Roma of some countries found themselves in extremely difficult conditions due to the persecution by the state and prejudice of the majority of the population. Nazi Germany continued the genocide against this ethnic group.⁵³ Roma populations of some CEECs were almost totally wiped out (from 500 thousand to a million were killed).⁵⁴ Notwithstanding the fact that the reasons for persecution of the Jews and the Roma by the Nazi regime were identical, the genocide of the Roma has not received as much attention; the Roma communities did not get any compensation from the German government⁵⁵ and were even said to be persecuted for 'social' rather than for 'racial' reasons.⁵⁶

The Communist regimes continued the suppression of the Roma, although generally, they are reported to have brought a slight improvement to their situation.⁵⁷ Guaranteed work and housing coupled with compulsory education and a strong repression of nationalism⁵⁸ led to some improvements. These improvements were certainly achieved at a cost of deterioration of the unique Roma culture, which came as a consequence of the prohibition of the nomadic way of life for the Roma. Among the outrageous policies aimed at the wider inclusion of the Roma into the societies was the sterilisation of Roma women. This policy largely repeated the Nazi policy of Roma sterilisation applied since 1933(Law on the Genetically Impaired Offspring), Reports suggest that the sterilisation of Roma women without obtaining their voluntary informed consent continued in

⁴⁶ A. Fraser, 'Juridical Autonomy among Fifteenth and Sixteenth Century Gypsies', (1997) 45 *Am. J. Comp. L.*, 294.

⁴⁷ *ibid.*, 293 *et seq.*

⁴⁸ Banach, n 43 above, 372.

⁴⁹ Now the territory of the Moldova Republic and part of Romania.

⁵⁰ As reported by Hancock, already in 1348 the market for trade in Roma slaves existed in Europe: Hancock, n 44 above, 2.

⁵¹ Banach, n 43 above, 368.

⁵² Fisher, n 44 above, 96.

⁵³ See G. Lewy, *The Nazi Persecution of the Gypsies* (OUP, 2000); Fisher, n 44 above.

⁵⁴ Estimates differ greatly: Banach, n 43 above, fn. 92 and Fisher, n 44 above, 103.

⁵⁵ Fisher, n 44 above.

⁵⁶ See Gheorghe, n 44 above. See also Fisher, n 44 above, 93.

⁵⁷ See e.g. Warnke, n 4 above, 344 *et seq.*

⁵⁸ Theoretically, strong repression of nationalism was at the core of the Soviet state model. See e.g. I. Stalin, *Markszizm i natzyonal'no-kolonial'nyj vopros, sbornik statej i rechej* (Partijnoje izdatel'stvo, 1934), *esp.* 192.

Slovakia in the 1990s.⁵⁹ On the other side of the iron curtain, however, the life of the Roma was not much better. Some West-European nations only stopped the implementation of discriminatory policies towards the Roma in the end of the last century. For instance, between 1920 and 1972 Switzerland implemented *Pro Juventute* – a programme, under which children were taken from Roma families. Similar policies, deeming parents ‘unfit’ to raise children only because they were Roma, were implemented in Italy.⁶⁰

Although some scholars try to present it otherwise, arguing that the communist policies were among the causes of the Roma crisis in the CEECs,⁶¹ the overwhelming majority of evidence demonstrates that it is only with the fall of the communist regimes that the situation of the Roma has deteriorated to a level unknown before.⁶² After the abolition of censorship the mass media often took a racist position towards the Roma, the amount of violence against the Roma increased. Discrimination in housing, use of municipal and other services, access to work, coupled with school segregation, and the cases of pogroms, lynching, racist attacks, *de facto* denial of justice, and police violence against the Roma became reality in the CEECs. The prejudice against the Roma in the region is so strong that people, including university staff and civil servants openly state their dislike of the Roma.⁶³

Combating anti-Roma prejudice was one of key issues discussed by the Commission in the Copenhagen Related documents.⁶⁴ Not surprisingly, ‘changing attitude at the local

⁵⁹ Banach, n 43 above, 373. Also Fisher, n 44 above, 99; Center for Reproductive Rights and Poradňa pre občianske a ľudské práva in co-operation with I. Zoon, *Body and Soul: Forced Sterilization and Other Assaults on Roma Reproductive Freedom in Slovakia*, 2003, 100 <http://www.reproductiverights.org/pub_bo_slovakia.html#report>, accessed 15 September 2007.

⁶⁰ Bertram, n 3 above, 6.

⁶¹ J. Šiklová and M. Miklušáková, ‘Law as an Instrument of Discrimination: Denying Citizenship to the Czech Roma’, (1998) 7(2) *EECRev.*, <<http://www.law.nyu.edu/eecr/vol7num2/special/denyingcitizenship.html>>, accessed 15 September 2007.

⁶² Which is also recognised by the Commission in the Regular Reports: e.g. 1998 Hungarian Report, 11. On the influence of the transition to democracy on the situation of the Roma minority see e.g. I. Pogány, ‘Legal, Social and Economic Challenges Facing the Roma of Central and Eastern Europe’, (2004) *Queen’s Papers on Europeanisation*, 1; I. Pogány, ‘Refashioning Rights in Central and Eastern Europe: Some Implications for the Region’s Roma’, (2004) 10(1) *EPL*, 85; P. Vermeersch, ‘Ethnic Mobilisation and the Political Conditionality of European Union Accession: The Case of the Roma in Slovakia’, (2002) 28(1) *J. Ethnic & Migration Stud.*, 1; Z. Barany, *East European Gypsies: Regime Change, Marginality and Ethnopolitics* (CUP, 2001); D. Ringold, *Roma and the Transition in Central and Eastern Europe: Trends and Challenges* (World Bank, 2000); I. Pogány, ‘Accommodating an Emergent National Identity: The Roma of Central and Eastern Europe’, (1999) 6 *Int’l J. Minority & Group Rts.* 439; M.W. Brown, ‘The Effect of Free Trade, Privatisation and Democracy of the Human Rights Conditions for Minorities in Eastern Europe: A Case Study of the Gypsies in the Czech Republic and Hungary’, (1998) 4 *Buff. Hum. Rts. L. Rev.*, 275; I. Tomova, *Tziganite v perioda na prehod* (Mezhdunaroden tzentar po problemite na maltzinstvata i kulturnite vzaimodejstvija, 1995).

⁶³ See Reports issued by the Budapest based European Roma Rights Center, available at <<http://www.errc.org>>, accessed 15 September 2007; Annual World Reports by the Human Rights Watch, available at <<http://www.hrw.org/reports/world/reports>>, accessed 15 September 2007; OSCE HCNM, *Report on the Situation of Roma and Sinti in the OSCE Area* (OSCE, 2000), <<http://www.osce.org/hcmm/documents/reports>>, accessed 15 September 2007. United Nations bodies also acknowledge the poor condition of the Roma in the CEECs. It is mostly clear from the Concluding Observations of the Human Rights Committee regarding the Reports submitted by State parties under Art. 40 CCPR. E.g. UNHRC Concluding Observations: Hungary, 19/04/2002. CCPR/CO/74/HUN, para 7.

⁶⁴ E.g. 2004 Strategy Paper, 11; 1998 Romanian Report.

level remains a challenge'.⁶⁵ These developments are very well documented and, most importantly, acknowledged by the Commission and thus did not pass unnoticed in the context of enlargement.

The Czech Citizenship law of 1993 and the Commission's reaction

The situation for a huge number of Czech Roma was particularly poor because they were not only discriminated against in virtually all spheres of life, but were also deprived of formal status as citizens of the Czech Republic. The Czech citizenship law was criticised by academics as 'entirely unsuitable for the Roma'.⁶⁶ It appeared clear to everyone concerned with Roma rights issues what the law was about: preventing the Roma from getting Czech citizenship in the aftermath of the split of the Czechoslovak Federation. While it is often stated that 'the intent of the citizenship law remains an open question',⁶⁷ it is possible to argue that the intent of the Czech legislator was clearer than some would like to present. Based on the Czech government reports, Šiklová and Miklušáková argue that the authorities were aware of the exclusionary character of the legislation.⁶⁸ Warnke simply states that 'the law was designed to indirectly preclude Roma from becoming citizens'.⁶⁹ In excluding the Roma, the Czech government was also acting in line with the popular sentiment that supported the denial of citizenship for the Roma.⁷⁰

In the Opinion on the Czech Republic's application for membership of the European Union the Commission stated that there was a 'problem of discrimination affecting the Roma, notably through the operation of the citizenship law'.⁷¹ At the same time, the Commission, having recognised the importance of this piece of legislation for the protection of Roma in the Opinion, downgraded the importance of the issue in later Reports, referring to the Roma and other groups of former Czechoslovak citizens in 1998, as 'former Czechoslovak' citizens in 1999 and dropping the assessment of this issue later. At the same time, as scholarly assessments demonstrate, the law primarily targeted the Roma and thus was of primordial importance for minority rights protection.

The general rule of international law does not usually make a link between the acquisition of the citizenship of a successor state and putting certain criteria on such an acquisition.⁷² In the Czech situation,⁷³ however, the personal status of all the citizens of the Federation was more complicated than in some other states, being a combination of two statuses. Based on the Soviet legal principle of internationalism,⁷⁴ *i. e.* the unity of

⁶⁵ 1999 Czech Report, 17.

⁶⁶ Šiklová and Miklušáková, n 61 above. See also M.D. Marden, 'Return to Europe? The Czech Republic and the EU's Influence on Its Treatment of Roma', (2004) 37 *Vand. J. Transnat'l L.*, 1182, 1188; Banach, n 43 above, 377; Warnke, n 4 above, 356–358; V. Dobal, A. Nedomová, M. Pspíšil, A. Sulitka and I. Vejnerová, *Report on the Situation of the Romani Community in the Czech Republic, 1999*, <<http://www.cts.cuni.cz/~dobal/report/index.htm>>, accessed 15 September 2007; Šiklová and Miklušáková, n 61 above.

⁶⁷ Marden, n 66 above, 1189.

⁶⁸ Šiklová and Miklušáková, n 61 above.

⁶⁹ Warnke, n 4 above, 357.

⁷⁰ Haun, n 44 above, 156.

⁷¹ Czech Opinion, 20.

⁷² M.N. Shaw, *International Law* (5th ed., CUP, 2003), 907 *et seq.*; I. Brownlie, *Principles of Public International Law* (6th ed., OUP, 2003), 627 *et seq.*

⁷³ The Czech Republic alongside with Slovakia are successor states to the Czechoslovak Federal Republic (ČSFR), formed after the collapse of the totalitarian regime of the Czechoslovak Socialist Republic (ČSSR). ČSFR was dissolved on 1 January 1993.

⁷⁴ E. g. S.I. Rusinova, 'Zakon o grazhdanstve SSSR', [1980] 1 *Pravovedenije*, 3.

two citizenships: the Federal (Czechoslovak)⁷⁵ one and the national one (Czech or Slovak).⁷⁶

Before the dissolution of the Federation such unity of citizenships was no more than a legal fiction; even more so once it is considered in the light of the principle of equality of citizenships, which prohibited the citizens of Slovakia or Czechia, as parts of the Czechoslovak Federation to have less (or more) rights than the Czechoslovak citizens. As a result of such legal arrangement, a number of citizens of the Czechoslovak Federation *de facto* permanently living in the Czech Republic officially had Slovak national citizenship. The same applied to the Czechs residing in Slovakia.

This legal fiction was of special importance for the Czechoslovak Roma. Since the Roma previously inhabiting the Czech regions were almost totally wiped out by the Holocaust alongside with the Jews of the Protectorate Bohemia and Moravia, right after the war the Czechoslovak authorities, aiming to solve 'a Roma problem', adopted the 'Roma dispersal and transfer scheme',⁷⁷ according to which the Roma from the Slovak regions (which were not part of the *Reichsprotectorat* and thus were less affected by the holocaust) were forcibly relocated to the Czech lands. The goal of the Czech governmental program was the achievement of equal Roma dispersal all over the country to make the percentage of Roma living in one place as low as possible.⁷⁸

At the moment of the Czechoslovak dissolution, the previously fictitious Slovak or Czech citizenship (which even *de jure* could not exist without the Czechoslovak nationality) suddenly gained importance. While a number of Czechs residing in Slovakia got Slovak citizenship by declaration and were allowed to keep their Czech nationality, the newly formed Czech Republic chose a different solution. According to the Czech law, all those who were living in the Czech Republic at the time of the dissolution of the Federation and were not in possession of the (*de facto* fictitious) Czech citizenship alongside their Czechoslovak nationality (which was abolished as of the time of the dissolution of the Federation) had to apply for Czech citizenship and meet three main criteria (Sec. 18 of the Law), including:

1. Permanent residence in the Czech Republic at the time of dissolution of Czechoslovakia;
2. A clean criminal record for the previous five years (regardless of the gravity of the crime);
3. Fluency in the Czech language.

All those who resided in the Czech Republic but were not in possession of Czech citizenship and could not meet these criteria were automatically considered Slovaks. Thus, ironically, the law assigned Slovak nationality to a number of people who, being born in the Czech Republic, might have never been to Slovakia and did not speak any

⁷⁵ Czechoslovak Law No. 165/1968 Sb.

⁷⁶ Czechoslovak Law No. 39/1969 Sb. On this legal construction see Šiklová and Miklušáková, n 61 above.

⁷⁷ Brown, n 62 above, 302.

⁷⁸ OSCE HCNM, n 63 above, 21. The Roma presence in the Czech lands should not be taken uniquely as an evidence of the success of the relocation programme, but as a result of working of a number of other factors, such as the high level of industrial development of the Czech lands (especially compared with Slovakia), and the natural willingness of Roma to migrate. See *inter alia* W. Guy, 'The Czech Lands and Slovakia: Another false dawn?' in W. Guy (ed.), *Between past and future: The Roma of Central and Eastern Europe* (University of Hertfordshire Press, 2001); W. Guy, 'Ways of Looking at Roms: The Case of Czechoslovakia' in F.Rehfish, (ed.), *Gypsies, Tinkers and other Travellers* (Academic Press, 1975); O. Ulč, 'Communist national minority policy: The case of the Gypsies in Czechoslovakia', (1969) 20(4) *Soviet Studies*, 421. I am grateful for this insight to the first J CER reviewer of this paper.

Slovak.⁷⁹ The Commission reported that the Czech government considered such persons 'as Slovak nationals despite their birth or life-long residence on Czech territory'.⁸⁰ All three conditions were discriminatory against the Roma community in the Czech Republic.

The criterion of permanent residence was interpreted by the Czech authorities in a very technical way, the establishment of the fact of such residence being linked to the status of the housing the claimant occupied. This automatically excluded vast numbers of Roma from the possibility to apply for Czech citizenship because their housing was usually considered to be 'temporary'. The clean criminal record requirement basically amounted to a disproportionate punishment of vast numbers of people for the crime committed by imposing a new penalty *ex post facto*.⁸¹ Moreover, considering that the majority of the Roma, excluded from the possibility to work and study because of prejudice and school segregation, had no ability to find suitable employment and, consequently, were overrepresented in the countries prisons, the second citizenship requirement was also a blow to the Roma community. The proficiency in the Czech language was another obstacle for the Roma to get their Czech citizenship. Many Roma (only 0.1% of the group have a university degree), use only Romani languages on a daily basis and are often illiterate in Czech. This illiteracy, however, does not necessarily make them Slovaks. Moreover, it is largely a consequence of the school segregation practices in the Czech Republic, where Roma children unable to speak Czech were often placed in schools for mentally handicapped children – a practice the European Court of Human Rights have short-sightedly refused to condemn.⁸² In other words, all the three requirements contained in the Czech citizenship law constituted obstacles, preventing the Roma from acquiring Czech documents.

The first changes in the citizenship law preceded the release of the Commission's Opinion on the Czech Republic's application for membership of the European Union (1997). Under pressure from numerous critics, the clean criminal record requirement was lifted in 1996. At the same time, given the discriminatory character of the two remaining requirements, there was a wide consensus among the scholars and human rights organisations that this amendment did not do enough to remedy the situation related to Roma statelessness in the Czech Republic. This issue had the potential to gain unprecedented importance in the pre-accession process. However, it did not happen this way.

Discussing the citizenship issue in the Opinion, the Commission only mentioned one area of discrimination out of the three present at that time.⁸³ This mention came under the auspices of the civil and political rights assessment, not minority rights, thus ignoring the core of the problem at issue, *i.e.* the fact that the law in question clearly targeted a particularly vulnerable minority group. Moreover, the same Opinion informed the reader that the law was amended in 1996, thus creating the impression that the problem had

⁷⁹ Šiklová and Miklušáková, n 61 above.

⁸⁰ Czech Opinion, 14.

⁸¹ Dobal *et al.*, n 66 above, para 3.1.2.

⁸² ECt.HR *D.H. et al. v. The Czech Republic* [2006] Appl. No. 57325/00. for discussion see C. Cahn, 'The Elephant in the Room: On Not Tackling Systemic Racial Discrimination at the European Court of Human Rights', [2006] 4 *Eur. Anti-Discrimination L. Rev.*, <http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/06lawrev4_en.pdf>, accessed 15 September 2007. Generally on the ECt.HR case law regarding Roma rights protection see K. Henrard, 'The European Convention on Human Rights and the Protection of the Roma as a Controversial Case of Cultural Diversity', [2004] 5 *EDAP*, 1, <http://www.eurac.edu/documents/edap/2004_edap05.pdf>, accessed 15 September 2007.

⁸³ Czech Opinion, 14.

been solved by the time the Opinion was released.⁸⁴ The international rules of the succession of states, however, which prohibit instances where 'people who have lived continuously in the territory becom[e] aliens or stateless persons',⁸⁵ theoretically offered the Commission a way to return to the assessment of this question in the future. The Commission did not use this possibility, unwilling to make a clear connection between the solution of this problem and the prospects of Czech accession to the EU. Although already in its 1998 Report on the Czech Republic's application for membership of the European Union the Commission returned to the Czech citizenship issue, it did not broaden the scope of its assessment of the exclusionary naturalisation practices, being confined to one area of exclusion. The Commission did not go further than stating that the law did not work properly. At the same time, the inclusion of a broadened scope of persons affected by the law into the Report (the Commission named 'Roma, children in foster homes and persons in mental institutions')⁸⁶ seemed to be regarded as sufficient justification for the continuation of assessment of this issue in the civil and political rights sections of the Reports, without moving it to the minority protection section of the Copenhagen related documents. Moreover, the Commission, appealing to the suggestion of the UNHCR, made a recommendation to broaden the time-span of the period of option, in order to give all those who passed the previous deadline the opportunity to apply for Czech citizenship.⁸⁷ Such an approach can hardly be characterised as constructive, since new deadlines were clearly unable to change the situation with the conditions imposed by the Czech government. The 1999 Report, just as the Commission's Opinion on the Czech Republic's application for membership of the European Union, did not contain any criticism of the law at all, informing the reader that the law was amended and the clean criminal record requirement was dropped.⁸⁸ The Commission did not make any further comments on this issue. It is absolutely unclear how the fact that the clean criminal record requirement was dropped could solve the problems of the groups, negatively affected by the law and outlined in the 1998 Report, especially children in foster homes and people in the mental institutions. The 2000 Report did not provide any new information regarding the Czech citizenship law and all further Reports are silent on this issue. The Commission clearly distanced itself from assessing whether the amendment passed in 1999 was actually functional and whether it could *de facto* guarantee the citizenship status to all those excluded from it by the controversial law. While the amendment proved workable,⁸⁹ the question 'why the change occurred?' is not easy to answer.⁹⁰ What is absolutely clear, however, is that the EU and the Commission acting as the motor of the pre-accession process were not among the main promoters of change. Given the importance of the issue and the number of tools at the Commission's disposal it is truly embarrassing that the Commission shied away from playing a leading role in the promotion of reform in this sphere.

The issue of Czech citizenship for the Roma was never included among the priorities of the APs with the Czech Republic. This is a sign of its marginal importance for the success of the pre-accession and of the absence of Union pressure on the Czech Republic, since only the non-compliance of a candidate country with the reform priorities included in an Accession Partnership could formally allow the Commission to take definitive steps in

⁸⁴ *ibid.*

⁸⁵ *ibid.*

⁸⁶ 1998 Czech Report, 10.

⁸⁷ No reference was made, for example to the Human Rights Watch, recommending granting citizenship automatically to all the former citizens of Czechoslovakia residing in the Czech Republic.

⁸⁸ 1999 Czech Report, 15. The Minority Rights section of the Report also contains a positive assessment of the amendment.

⁸⁹ Linde, n 3 above, 343.

⁹⁰ *ibid.*

the light of Article 4 of the Regulation 622/98 aimed at pushing the candidate country towards compliance with the Copenhagen criteria.

The fact that the law was changed at all can be primarily attributed to the actions of Canada and the UK⁹¹ and not the European Commission. Receiving considerable numbers of Roma refugees, these countries pressured the Czech government to effectively change the situation with Roma rights protection. Canada introduced visas for Czech citizens to deal with the mass inflow of Roma asylum-seekers. When the Czech government acted, it was responding to such actions.⁹²

The Commission certainly did not use the potential the pre-accession strategy possessed to solve this problem. First of all, it did not recognise the complexity of the problem, focusing on one minor issue and, secondly, it downgraded a largely minority rights problem (discrimination targeting one ethnic group), appealing to the generally negative effects of the law for 'former Czechoslovak citizens', which allowed the Commission not to deal with the problem among the issues of minority protection at all.

It can be suggested that the Commission did not deal with the Czech citizenship law issue in the minority rights sections of the Reports because it was unwilling to allow any parallels to be drawn between its position concerning the Czech citizenship law, where it advocated a change in the grounds of naturalisation, and the position it took *vis-à-vis* Estonian and Latvian citizenship legislation where it *de facto* supported the candidate countries in their exclusionary practices, targeting the malfunctioning of the naturalisation mechanisms, instead of attacking the grounds of granting citizenship, as it did, albeit to a minimal extent, in the Czech case.⁹³ Since such a differentiation is contrary to the principles of the pre-accession reporting and goes against the very essence of the pre-accession conditionality principle, it seems that the Commission was trying to present essentially similar issues in different light, which would justify their inclusion into different sections of the Reports and, consequently, the application to them of different approaches.

Conclusion

From the Commission's pre-accession assessment of the Czech citizenship law the marginality of the citizenship issue in the context of the Czech Republic's progress towards accession is absolutely clear. Unlike, for instance, taking on board the *acquis communautaire*, solving the citizenship issue played only an auxiliary role in the course of the whole duration of Czech preparation for the membership of the Union. The Commission did not only fail to target all the key issues harmful for the naturalisation of the Roma minority in the Czech Republic. More importantly, it failed to pay due attention to the essence of the problem, disregarding the underlying minority protection problems inherent in the discriminatory provisions of the Czech citizenship law. By doing this, the Commission distinguished the issue of the statelessness of the Czech Roma from the issue of the statelessness among the Russian minorities in the Baltic States. This position of the Commission can be explained by two considerations.

The first would suggest that since the Commission could not openly apply different minority protection standards to different minorities in candidate countries finding

⁹¹ Banach, n 43 above, 377.

⁹² E. Sobotka, 'Crusts from the Table: Policy Formation towards the Roma in the Czech Republic and Slovakia', [2001] 2-3 *Roma Rights Quarterly*, <<http://www.errc.org/cikk.php?cikk=1698>>, accessed 15 September 2007. Cf. Linde, n 3 above, *passim*.

⁹³ On the discussion of the Commission's position concerning Estonian and Latvian citizenship legislation see Kochenov, n 14 above.

themselves in a similar situation (which would run counter the very essence of the pre-accession conditionality principle as formulated by the European Council), it was unwilling to regard the Russian statelessness in Latvia and Estonia as similar to the Roma statelessness in the Czech Republic. Very well aware of the principled position taken by the two Baltic states unwilling to acknowledge the necessity of building states on somewhat more inclusive principles that would entail the granting of citizenship rights to the persons belonging to the 'Russian speaking' minorities, the Commission, although actively engaged in the minority rights protection in the Baltics, failed to take an active stand *vis-à-vis* the very grounds of naturalisation used by the two countries and was unwilling to condemn their ethnocentric state models. As a consequence, the whole pre-accession promotion of more inclusive naturalisation in Latvia and Estonia led to almost embarrassing results coming nowhere near the solution of the minority statelessness problem. The total inability of the Commission to solve the statelessness issue was due to the fact that it did not connect the successes in improving the naturalisation rates in Latvia and Estonia with their EU membership prospects. Knowing that they could become full Member States without resolving the outstanding issues of institutionalised discrimination against their ethnic minorities, the two Baltic States did little with respect to the promotion of an inclusive citizenship policy. The Commission, unwilling to push them towards changing their attitude towards discrimination is (together with the EU-15) to blame for this failure of the pre-accession.

Unlike what happened in the Baltic States, the Czech citizenship issue was regarded by the Commission differently. Although equally lacking in success, it principally differed from the Commission's pre-accession activities in Latvia and Estonia, as the Commission started the pre-accession assessment by approving the change in the grounds of naturalisation. By welcoming the removal of the criminal record requirement in 1996 the Commission – albeit unwillingly – actually looked into the core of the problem – something it never did in the context of statelessness in Latvia and Estonia, where it never questioned the underlying rationale of the naturalisation policy. If the approach targeting the core conditions of naturalisation were to be applied to the two Baltic States' naturalisation policies, the discriminatory character of their citizenship laws would be much clearer, making them less attractive candidates for the membership of the European Union. The principal difference in the Commission's approach came down to, on the one hand, silently approving the treatment of the Russian minorities in Latvia and Estonia as unwanted 'foreigners' in need of naturalisation even in cases where they were born and spent the whole of their lives in those states, helping the two Baltic candidate countries to make their naturalisation procedures more functional as opposed to, on the other hand, active involvement in condemning some naturalisation grounds in place in the Czech Republic that made more difficult, if not impossible, the acquisition of citizenship by the members of minority groups who were often born and spent their whole lives in the Czech Republic. Targeting the conduct of naturalisation in the Baltic States is very different from targeting the *grounds* of naturalisation in the Czech Republic. To justify this difference in approach one of the issues had to be assessed as part of the civil and political rights sections of the Copenhagen-related documents, not as part of minority protection proper.

In the end the Commission's pre-accession involvement in the issues of naturalisation both in the Czech case and in the case of the two Baltic countries is difficult to characterise as successful. Such an outcome can also be partly explained by the Community's general lack of powers in the nationality domain. Although a certain fusion of nationality legislation in the Member States can be recorded, the direct influence of the Union in this process is marginal and is mostly related to the prohibition for the Member States to act in disregard of Community law, as outlined by the ECJ in *Micheletti*. In such a setting, the Member States were eager to guard their sovereign rights in the domain of nationality regulation and reluctant to allow the Commission too much

freedom in this field – even in the course of the pre-accession, where *de jure* it was not restrained by any competence limitations whatsoever, theoretically able to solve any statelessness problem effectively by making use of the legal and political tools of pre-accession conditionality.

The fact that the principle of the pre-accession conditionality has so far not been effectively applied to solve the outstanding issues of statelessness among minorities does not mean, however, that the potential for it to be applied in this way is absent. In the course of the preparation for future expansions, the EU is likely to face a number of minority protection issues where its intervention will be necessary in order not to repeat the mistakes of the past. The Community should not shy away from actually solving minority protection problems instead of simply discussing some of them in the context of the pre-accession process.

To ensure genuine protection of ethnic minorities in prospective Member States the EU has to alter its approach to the issues of ethnicity-based exclusion from citizenship in the course of future expansions of the Union.
