The Recognition Gap:
Why Labels Matter in Human Rights Protection

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One way to understand human rights is as guarantors of certain broad principles of justice, principles that are then codified in specific norms and laws. Much discussion about the protection of human rights centers on whether these laws are adequately specified and implemented to ensure that the principles of justice in question are enjoyed by all. When they are not, what is commonly called a ‘protection gap’ arises. A human rights ‘protection gap’ is a space in which protections for one or more human rights, or classes of rights, are absent, inadequate, inapplicable, or under-enforced, leaving the rights holder susceptible to the very sort of injuries against which human rights laws are meant to protect. To the extent that human rights laws are meant as expressions of our most fundamental principles of justice, we must be relentless in our efforts to identify and close this protection gap wherever possible. Doing so,

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2 This chapter is about legal human rights and leaves aside the broader categories of ‘moral’ or ‘natural’ rights. Here and elsewhere I use the term ‘law’ broadly, to refer to international conventions, treaties, covenants, and, in some cases, declarations or articles therein that have attained the force of law as a result of having been interpreted as expressions of international customary law. These are the instruments that are meant to be the impetus, and set standards, for domestic human rights legislation.
however, requires a more nuanced understanding of the protection gap, one that breaks it down into its several constituent forms.

In this chapter, I will first address what are commonly called the ‘implementation’ and ‘normative’ gaps, the kinds of failures of justice that most have in mind when referring to a ‘human rights protection gap’. Then, I will propose and explore what I call the ‘recognition gap’ by examining some particularities regarding the situation of ethnocultural minorities (including indigenous peoples) under international law, especially in Europe. I aim to demonstrate that the degree to which—and ways in which—different ethnic minority and indigenous groups are protected in international human rights law is not necessarily in direct response to their particular vulnerabilities, that is, to the challenges they face in enjoying the principles of justice that the international human rights system demands be upheld for every human being. Rather, their protection is heavily dependent upon the label that the government under which they live has applied to them. That is, certain specialized forms of protection are predicated upon the highly politicized practice of categorizing different ‘types’ of minorities and applying those different protections accordingly, through recognition as, for example, national minorities or indigenous peoples. This practice gives rise to a sort of legal typology of minorities with the result that different groups with very similar vulnerabilities may be protected differently by the same law.

The failure of justice captured by the recognition gap is of an altogether different nature than the more commonly acknowledged gaps. It interposes the politics of recognition between the principles of justice in which human rights laws are grounded and the application of existing human rights laws to some of society’s most vulnerable groups. The recognition gap is one problem of protection that has yet to be clearly articulated in the literature and yet, as I will aim
to demonstrate, at risk of falling into it are many members of Europe’s largest, poorest, and fastest-growing minority: the Roma.³

Protection Gaps

The idea of a ‘protection gap’ has been with us for decades. It began to show up in the 1980s with respect to workers’ rights to safe labor conditions (Kasperson and Lundblad 1982). Then following the massive humanitarian crises of the 1990s it took off in discussions of the particular vulnerabilities of displaced persons and persons affected by conflict (Guest and Bouchet-Saulnier 1997, Clarance 1997, Türk and Dowd 2014). It was not until well into the 21st century that we began to see the term applied to other areas of human rights. The idea has been much elaborated since, although the conversation in both the practice and scholarly communities remains largely focused on displaced and stateless persons and irregular migrants. While the term is used with some frequency in discussions of other sorts of human rights (for example see Haglund and Stryker (2015) and AWID (2015)), there is little emphasis on understanding the source and nature of the protection gap itself outside of its application to migrants’ rights. But invoking the general idea of a protection gap is only helpful insofar as it alerts us to a problem. The diagnosis of a generic ‘gap’ does not help us to identify its sources or seek solutions. However, we can break the general idea down into several specific kinds of protection gaps. Scholars and practitioners have lately offered us at least a half a dozen terms in an effort to distinguish between them.

The most commonly discussed problem is what is often referred to as an ‘implementation gap’. Michael Freeman argues that ‘the dominant human-rights problem in the contemporary

³ The ‘Roma’ are a diverse people. There is controversy over the term but I follow convention by including under this umbrella Roma, Sinti, Ashkali and others. Most official estimates put Europe’s Roma population at around 10-12 million, but many estimates are much higher.
world is the gap between human-rights ideals and law, on the one hand, and the reality of gross human-rights violations, on the other’ (Freeman 2011, 158). This kind of gap arises where international laws and norms exist to address the vulnerabilities of certain groups, but those laws are not enforced or the norms are not implemented in domestic policies and legislation. Some refer to this same problem as a ‘compliance gap’ (Hafner-Burton and Tsutsui 2005), while still others use descriptive phrases such as ‘the gap between international human rights principles and practices’ (Clark 2001, 4) or between ‘de jure and de facto’ protection (Landman 2005, 34). This appears to be the kind of gap that dominates the academic literature and many advocacy efforts and is the kind of failure of justice that most have in mind when referring to a ‘human rights protection gap’. David P. Forsythe describes this as ‘the enormous gap between legal theory and political behavior, as public authorities both endorsed human rights standards and systematically violated – or failed to correct violations of – the newly emerging norms’ (Forsythe 2012, 6).

This type of gap is generated by lack of political will, inadequate resources for enforcement, poverty, and other forms of structural injustice. But some other types of protection gaps arise because of the way the human rights system itself is structured and has evolved.

The international human rights system rests on a complex and interlocking web of courts, supervisory bodies, and multilateral treaties going back to the League of Nations a century ago. This international legal framework complements legal protections at the national and sub-national level. A ‘normative gap’ arises as a result of this structure, dependent as it is at the international level on treaty making. It arises when no legal human rights standards exist to address the vulnerability or harmful practice in question. A ‘normative gap exists where persistent acts and circumstances depriving a person or people of their dignity are not provided for in existing human rights law’ (Murphy 2012, 2). To put this problem in another way,
imagine a group with a certain set of vulnerabilities. In some cases, a variety of protections exist that pertain to this group, but they don’t address some of their particular vulnerabilities. This gap arises because the broadly-stated, highly inclusive nature of most human rights laws is not finely tuned enough to the very particular vulnerabilities that certain groups might face. This is so even if the threats they confront are common, serious, and remediable (in Henry Shue’s terms). Examples include persons with disabilities, older persons, and lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons.

Another problem of protection, one that is even less acknowledged, is what I call the ‘recognition gap’. We might again imagine a group with this same set of vulnerabilities. Imagine now that protections (legal norms) do exist to address this set of vulnerabilities, but they do not apply to this group. This can happen either 1) when a group (especially a large and diverse one comprised of many sub-groups: ‘national minorities’, for example, or ‘indigenous peoples’) that is the target of a particular set of protections is defined by the state in a way that excludes certain groups that share those same vulnerabilities, or 2) when a group seems to fall well within the commonly understood definition of the target population, but the government under which the group lives does not recognize it as part of this target population. It is as if the international human rights system (in the first case), or government body (in the second), is saying: ‘You experience these vulnerabilities, and we have a list of rules here that is supposed to help reduce those vulnerabilities and protect your dignity, but we do not think that the label fits you quite right, so these laws do not apply to you’. This amounts to a denial of what Hannah Arendt famously calls ‘the right to have rights’. This is fundamentally a structural (legal) problem, although sometimes it is one of interpretation of the law.
The only reference I have found in the literature to anything like the recognition gap is in a 2006 report by the International Council on Human Rights Policy. The authors call it an ‘application gap’, a term that is helpful in understanding the critical idea that norms exist but are not applied to particular, similar cases. ‘An “application gap” exists when an international instrument applies to a specific situation or a category of people, but does not apply to similar cases.’” (International Council on Human Rights Policy 2006, 8) The authors go on to illustrate this gap with respect to the problem of forced disappearance, but the report says little more about the origin or nature of this particular type of gap. The problem, however, is considerably more complex – and political – than the term ‘application’ suggests. The recognition gap, at least with respect to minority groups, arises in part from the current system of categorizing different ‘types’ of minorities, formally recognizing certain groups as falling within the specified category (sometimes irrespective of what the group members themselves might think), and applying different protections accordingly. It receives considerably less attention than the implementation gap, or even than the normative gap.

The recognition gap, however, is different in important ways from both the implementation and normative gaps. Here is an example: a group very much in today’s media is the Rohingya of Burma (Myanmar), a Muslim minority rendered officially stateless by government decree, whom Amnesty International has called ‘the most persecuted refugees in the world’ (Hamling 2014). With no official recognition as an ethnic group, and a 1982 ‘Citizenship Law’ that rendered them stateless, ‘their rights to study, work, travel, marry, practise their religion and access health services are severely restricted.’ (Amnesty International 2015) However, having been officially denied citizenship of their home country (and all others), the Rohingya do fall under the 1954 UN Convention on the Reduction of Statelessness. And when
they flee Burma and find their way to their neighbors’ shores, they fall under the 1951 Refugee Convention. The countries to which they are fleeing have been reluctant to honor their obligations under international law (an implementation gap), but the laws are there (there is no normative gap) and there is little disagreement about whether the Rohingya count as stateless persons and/or refugees (there is no recognition gap). This example is complicated by the fact that Thailand and Malaysia, two major destination countries for the Rohingya, are not signatories to the Refugee Convention, which some would say make this a case of a normative gap. But Türk and Dowd point out that much of the contents of the Convention including, crucially for the Rohingya, the principle of non-refoulement, have gained the status of international customary law. They instead call this an ‘application gap’, in reference to the ‘less than universal application’ of the Convention. (Türk and Dowd 2014)

There is a larger nether-category of individuals, however, who share many of the same vulnerabilities as the Rohingya, but do not fall neatly under the either of these Conventions. As Carol A. Batchelor points out, there are some who can technically be classified neither as a refugee nor as a stateless person, and thus fall into a gap between the international standards targeting both of these, but nevertheless be without ‘the usual attributes of an effective nationality’ (Batchelor 1995, 12). What she is describing is, precisely, the recognition gap. Her examples include the Jews under the laws of the Third Reich and ‘boat people’ in transit through Hong Kong (Batchelor 1995, 232, 233). But the reach of the recognition gap goes far beyond the effectively stateless. The recognition gap can affect groups of people who are very similar to, but lack recognition as, nationals (citizens) of a particular state, or national minorities, or indigenous persons, or refugees, thus falling outside the international standards relevant for these
groups. In section 3 I will discuss the distinction between several ‘types’ of minorities and the implications of this system of classification for the protection and promotion of human rights.

Before I move to this legal ‘typology’ of minorities, however, let me return to the question of distinguishing between the recognition gap and other types of gaps. First, the recognition gap is not just another expression of the implementation gap. The duty-bearer in question will point out that the seemingly relevant existing norms do not apply to the group in question, thus no derogation of duty has occurred; there is nothing to implement. So is the recognition gap not then just another form of the normative gap? Is it not the case that if a group is lacking protection in the form of international human rights treaties, then we can say that that lack of relevant (or sufficient) norms is enough to diagnose a normative gap and get on with agitating to draft one? No. It is true that normative and recognition gaps often come together, as in the example of lesbian, say, bisexual, transgender and intersex (LGBTI) persons in many countries. There is currently no international convention on the rights of LGBTI persons (a normative gap), but there are also many states that deny the existence of such persons on their territories in the first place. Mayor Anatoly Pakhomov of Sochi, Russia, home to the 2014 Winter Olympics, famously told the BBC's Panorama program: ‘We do not have [LGBTI persons] in our city’ (CBS/Reuters 2014). In September 2007, Iranian President Mahmoud Ahmadinejad was met with a mix of laughter and scorn when he told a crowd at Columbia University ‘In Iran we don't have homosexuals like in your country’ (Mail 2007). This statement is at odds, of course, with the Iranian penal code, under which homosexuality between men is punishable with death.

Not recognizing the existence of LGBTI persons means not recognizing their vulnerability as a minority or crimes against them as hate crimes, for example. It often means
not taking a stand when their rights are violated. No official recognition as a minority with ‘particular disadvantages’ (to borrow Kymlicka’s term for ethnocultural groups), means no legal recourse when those vulnerabilities are exploited, even if norms already exist to protect those same vulnerabilities (for example, discrimination in employment) in others (Kymlicka 1992, 141). This is a recognition gap. As Navi Pillay, former UN High Commissioner for Human Rights, makes explicit in her 2011 annual report, recognition is important, *inter alia*, in order for states to enact comprehensive anti-discrimination laws, to investigate all killings or violent crimes against sexual or gender minorities and prosecute such targeted crimes, to update asylum laws to accept sexual orientation and gender identity as targets of persecution, and to prevent the *refoulement* of LGBTI persons fleeing such persecution (Office of the High Commissioner for Human Rights 2011). In addition to opening the door for the drafting of new laws (and thus closing important normative gaps), such recognition will allow LGBTI persons to bring claims under *existing* anti-discrimination and anti-hate laws. Political recognition is powerful.

Such considerations apply also to other groups in need of political recognition, such as ethnocultural minorities, many of whom also suffer at the intersection of a normative gap and a recognition gap (to say nothing of egregious implementation failures). The European Roma are one such group. There is no International Convention on the Rights of Roma, Gypsies, and Travellers, nor are they *recognized* as ‘national minorities’ by some of the states in which they live, complicating their access to protection under the European Framework Convention for National Minorities (FCNM), an important international standard that offers some much needed protections but that remains out of reach for Roma individuals and groups in some states. It is to the case of European minorities that I now turn.
A ‘Typology’ of Minorities

‘Minorities’ in Europe are typically divided into one of two large, politically-charged categories: immigrants and long-standing ‘homeland minorities’ (Kymlicka 2007). The degree to which – and ways in which – different minority groups are protected is heavily dependent upon the label that the government under which they live has applied to them. This fact is one reason why indigenous status is often sought by minority groups and sometimes denied by governments. European governments are in varying stages of experimenting with multicultural policies, that is, policies ‘designed to provide some level of public recognition, support or accommodation to non-dominant ethnocultural groups’ (Kymlicka 2007, 16). But as these are applied to different ‘types’ of minorities, some are protected differently than others by the same laws and policies.

European governments and human rights organizations have largely concentrated their protection efforts on non-immigrant groups sometimes referred to as ‘homeland minorities’, ‘groups that have been historically settled within a particular part of a country for a long period of time, and as a result of that historic settlement have come to see that part of the country as their historic “homeland”’ (Kymlicka 2007, 176). Accommodations for these homeland minorities fall into two legal-political trends: policies aimed at ‘indigenous peoples’ (who are generally agreed to not exist in most European states under the common understanding of the term but whose protections are the most robust under international law) and ‘national minorities’.

The ‘homeland minorities’ commonly called ‘indigenous’ or ‘first nation’ peoples are typically characterized by a distinctive cultural heritage and language; deep, historic, and sometimes spiritual, attachment to land (often but not always on which they are currently residing); small numbers relative to the dominant cultural group; self-identification as an
indigenous people; and frequently also the experience of marginalization and extreme vulnerability, including agency vulnerability⁴. (Cultural Survival 2015) These groups are usually understood to be those who were the subjects of colonization, especially in the New World from the fifteenth to the early twentieth centuries. As such, their claims in the international system are framed as ones of justice, identity, territory, and self-determination and the rights they have won carry the strongest forms of protection. This has led some states to resist recognizing their indigenous peoples as such, or at least as indigenous in the sense intended by the two main international standards, the 2007 United Nations Declaration on the Rights of Indigenous Peoples and the earlier International Labor Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries (commonly, ‘ILO 169’). Russia and Indonesia are just two of the many countries whose policies of recognition (which groups, if any, the state deems ‘indigenous’) come into direct conflict with indigenous advocacy groups within the state (International Working Group for Indigenous Affairs (IWGIA) 2015). In Russia, for example, of the more than 180 ‘peoples,’ only 40 are legally recognized as ‘indigenous, small-numbered peoples of the North, Siberia and the Far East.’ The ‘small-number’ limit is 50,000 or fewer members, and Russian law has no word for ‘indigenous’ without the numerical qualification. Larger, and presumably stronger or more politically powerful, groups such as the Buryat, Komi and Khakass are too large to ‘count’ as indigenous peoples. An example of a recognized indigenous people in Russia is the Sámi, who also reside in Scandinavia.

The category of ‘national minorities,’ the other common ‘homeland minority’ classification besides ‘indigenous peoples,’ encompasses Europe’s territorially-concentrated national sub-groups and cross-border irredentist groups. These have received weaker forms of

⁴ See Kosko 2013 for an introduction and discussion of the concept of agency vulnerability.
minority rights protection than the first group (Kymlicka 2007, 2011). They often frame their claims as ones of identity and nationhood and, sometimes (though rarely accepted), self-determination. To complicate matters, it is ultimately up to governments to decide whether or not a given ethnocultural group constitutes a ‘national minority.’ This decision has very real consequences for social policy. Examples of recognized national minorities in Europe are the Frisians in Kingdom of the Netherlands, all of the Celtic peoples of the United Kingdom (but not the arguably pre-Celtic Irish Travellers), and Albanians in the Republic of Macedonia.

The third recognized, but most weakly protected, category of minorities is immigrants. Though internationally accepted definitions are few and vague, immigrants are generally understood to be foreign-born individuals residing (legally or not) within a ‘host’ state, not ‘national minorities,’ whose protections are much more clear, having been codified for specific historical reasons. This group is typically sub-divided into refugees and those economic, social, and otherwise non-asylum-seeking migrants we typically refer to simply as ‘immigrants’. The former is a very limited category the membership in which is defined clearly by law and determined by asylum officers in host countries. The immigrant minority group is relevant to a discussion of multiculturalism and minority rights insofar as they might constitute a large ethnocultural sub-group within a state, but as noted there are few and weak international standards for protecting them as such (unless, as stated, they are legal refugees, but then the applicable law is a reflection of their vulnerability as displaced persons and not of their status as a distinct cultural group). Here, I do not engage the question of migrants (or their children, born elsewhere or in the destination country), as they are generally recognized as requiring very different sorts of protections – and for different reasons – than the other two ‘homeland minority’ groups named above. (Nevertheless, as communities of migrants establish themselves in number
and longevity, distinctions – and rights claims – will increasingly blur. Already, the current refugee crisis in Europe is playing a profound role in challenging the presumed firewall between these two types of migrants, with possibly game-changing consequences for both.)

Distinguishing between indigenous peoples and national minorities is confusing, highly political, and complicated by a perverse incentive structure that encourages any minority group seeking stronger cultural protections to recast itself as indigenous. Governments, by contrast, have an incentive to limit the class of ‘indigenous peoples’ as much as possible, lest they have to accept greater autonomy, more substantial subsidies, and more stringent restrictions on land and resource use in areas occupied by the group. Thus, there is a danger that the category to which a given group belongs – and thus the cultural, security, and subsistence protections it receives – are often decided as much by political considerations as by actual vulnerabilities. This is the crux of the problem, and a chief source of the recognition gap. According to Kymlicka:

International law treats the distinction between indigenous peoples and national minorities as a categorical one, with enormous implications for the legal rights each type of group can claim. In the post-colonial world, however, any attempt to distinguish indigenous people from national minorities on the basis of their relative levels of vulnerability or exclusion can only track differences of degree, not the difference in kind implied by international law. The attempt to preserve such a sharp distinction is not only morally and conceptually unstable, it is also, I suspect, politically unstable. (Kymlicka 2007, 283-4)

For example, the Sámi, an Arctic people who traditionally made their livelihoods through reindeer herding, have been recognized by the Russian Federation as among the ‘numerically small’ groups subject to special protections (nevermind whether these are enforced in practice,
an implementation gap), but the Izhma Komi, or Izvatas, another fairly small Arctic group that has traditionally survived through reindeer herding, has received no such recognition and are considered, generically, an ethnic group. In another example, the Irish Travellers are legally recognized by the government of the United Kingdom as an ‘ethnic minority’, something akin to a national minority, but not territorially concentrated and without the clear protections as would be found in the Framework Convention for the Protection of National Minorities, leaving it up to the UK government to decide what rights such a status confers, while the Irish, Scots, Welsh, and now also Cornish are recognized ‘national minorities’. In a third example, the Roma, also not territorially concentrated, are nevertheless explicitly recognized as ‘national minorities’ by some European governments (Sweden and Macedonia) but not by others, meaning that the Framework Convention may protect the Roma in only some countries, an issue on which I elaborate below.

Despite these broad categories of ‘minorities’ – or more likely as a result of their vagueness – a substantial protection gap remains. This gap is manifested in all three of the forms I identify above. First, existing laws frequently go ignored, and violations unpunished, an implementation gap. Second, there remain gaps in the international legal norms: treaties not yet drafted or specific rights not yet promulgated, a normative gap. And third, there remain some groups whose particular vulnerabilities make them candidates for certain kinds of protections, but the rights are formulated in such a way – or the target groups defined in such a way – that the rights do not explicitly ‘apply’ to those groups, thus leaving them unprotected by those laws and policies. Put another way, the governments under which they reside fail to recognize them as the ‘type’ of minority that would warrant protection under a particular protection regime. This is a recognition gap. A highly visible case, the position of the Roma in international law offers a useful illustration of this problem of protection.
The Case of the European Roma

Falling into a nether-category in the minority typology is Europe’s largest and poorest minority: the Roma, more commonly (and pejoratively) known as ‘Gypsies’. The Roma are the most visible case of a group that does not seem to fall neatly into any one category, though ‘ethnic minority’ seems to be the best fit. International law has not clearly weighed in on this topic and it has been left to states to determine the applicability of various treaties to their different minority groups, with the result that Roma are treated differently (with regard to the scope of the law) in different states. There are about 10-12 million Roma in Europe alone, at a minimum equal to the population of Hungary. By most accounts, they began arriving in Europe from India in large numbers as early as a millennium ago, and have been present nearly everywhere in Europe for centuries. Many Roma have immigrated in recent years as part of the wave of Eastern Europeans heading to Western Europe, but the vast majority have not. Yet, they are frequently considered foreigners in ‘their own’ countries, that is, where they live and enjoy citizenship. Such a view has terrible implications for their well-being and freedom. Immigrants, in any standard sense of the term, they are not.

Are they indigenous, then? Kymlicka (2007, 2011) argues that the UN has singled out indigenous peoples – for whom a clear definition is not given in any treaty or legal document (see Office of the High Commissioner for Human Rights 2010, Section I) – as separate from other minorities in part because of their extraordinary vulnerability and powerlessness, and the general urgency of their situation. The Roma clearly fit these criteria, and some have argued that the best way to protect the cultural autonomy and reduce the vulnerability of Roma individuals might be through a recognition of indigenous status akin to the one accorded the Sámi people in Finland’s constitution. Indeed, Kymlicka (2011) notes that Roma leaders, as well as leaders of
Afro-Latino, Palestinian, Chechen, Kurdish, Dalit, and Tibetan rights movements have all begun to consider recasting their claims as ones of embattled indigenous peoples rather than oppressed minorities. They would be following the lead of the Ahwaz, an Arabic-speaking minority in Iran, who have stopped sending their leaders to the UN Working Group on Minorities in favor of the UN Working Group on Indigenous People. But the term ‘indigenous people’, as used by the UN, also implies that they have been colonized in their homeland – until recently almost always understood as in the ‘New World’ – by distant peoples; the Roma obviously have not been. In any case, it would be an uphill battle to gain acceptance for the idea that Roma in, say, Ukraine or France are ‘indigenous’ as the term is popularly understood, especially given the xenophobic perception of Roma as ‘foreigners’ in many countries.

This leaves the other ‘homeland minority’ candidate group: national minorities. Are Roma candidates for recognition as national minorities in Europe? Coming back to the problem that got us on this taxonomic journey in the first place, the European Framework Convention for the Protection of National Minorities does not define ‘national minority,’ leaving it to the states themselves to determine the scope of the relevant law. Many states included their own definitions in their reservations upon accession to the treaty. For example:

The Republic of Estonia understands the term ‘national minorities’, which is not defined in the Framework Convention for the Protection of National Minorities, as follows: [they] are considered as ‘national minority’ those citizens of Estonia who reside on the territory of Estonia; maintain longstanding, firm and lasting ties with Estonia; are distinct from Estonians on the basis of their ethnic, cultural, religious or linguistic characteristics; are motivated by a concern to preserve together their
cultural traditions, their religion or their language, which constitute the basis of
t heir common identity. (Council of Europe 1995)

Such a definition seems to include Romani citizens, and Estonia’s reservation does not explicitly
exclude them or name only a few groups to which the treaty does apply, although it has been
criticized for restricting FCNM protections to *citizens*. As it turns out, though, the Roma do not
fit the definition of ‘national minorities’ applied by certain other states, since they are not
residing on an historical ‘home’ territory nor are they territorially concentrated or bound.
Austria, for example, applies the FCNM to those groups that ‘live and traditionally have had
their home in parts of the territory of the Republic of Austria’ (Council of Europe 1995). Other
states do not offer a definition, or they refer to a domestic legal code, leaving it up to internal and
often ad hoc policy decisions to determine whether the state’s treaty obligations pertain to the
Roma. No states *explicitly* exclude Roma, but some seem to exclude members of this group by
way of specifying which *other* groups the Convention will apply to. For example, The Kingdom
of the Netherlands says only that it ‘will apply the Framework Convention to the Frisians’ (and it
is probably not a coincidence that The Netherlands explicitly labeled them as national minorities
at a time when some Frisian activists have begun to refer to themselves as indigenous). (Onsman
2004) Other states go out of their way to include the Roma; still others deny the existence of any
‘national minorities’ whatsoever on their territory and assert that their ratification of the
Framework Convention is meant as an act of solidarity with other, more diverse, states.

Then where does that leave the Roma? The existing typology for ethnocultural groups –
established as the Council of Europe, the EU, and other international bodies attempted to
formulate standards for their protection and on which domestic governments rely in their own
policy-making – seems to need refining (or abandoning). That the world’s only legally binding
human rights treaty aimed explicitly at protecting ethnic minorities should allow states to
circumscribe the target population in a way that can leave out Europe’s largest single ethnic
minority group is a serious lacuna, not only because this group suffers from the worst forms of
human rights abuses Europe has seen since the Balkan Wars and the most degrading poverty on
the continent, but also because it is such a clear example of the pressing need for governments to
recognize the link between human development and human rights (including the contested
categories of ‘minority’ and ‘group rights’), a link whose importance supposedly played a key
role in instigating the development of existing indigenous and minority protection regimes and
domestic multiculturalist policies in the first place. There is some progress where the Roma are
concerned, as more and more their exclusion from the historical and diplomatic use of the term
‘national minorities’ (as sub-state groups) is being contested (Kymlicka 2007, 203), but the
recognition gap they face in many states remains a troubling example of the inadequacy of the
current European system that puts classification before protection rather than treating
classification and protection simultaneously or dialectically, with each being relevant for the
other.

While the Roma may be the largest and most visible case, other European groups also fall
into the recognition gap. The Pomak (a Bulgarian-speaking Muslim minority) and longstanding
ethnic Macedonians in Bulgaria are two examples. Although both groups consider themselves a
distinct people, the Bulgarian Government claims that members of both groups are in fact ethnic
Bulgarians, stripping them of the recognition necessary for them to claim minority protections
under domestic law or through the FCNM (Human Rights Council 2011). In many places,
linguistic minorities are denied language protections and are subject to cultural and linguistic
assimilation because their governments do not recognize them as an ethnic minority. For
example, it was not until 2014, nearly a decade after the entry into force of the European Framework Convention, that the Government of the United Kingdom recognized the Cornish people as a national minority, affording them the protections already enjoyed by other UK Celtic peoples: the Scots, Welsh and Irish (Milmo 2014). In these cases, as with the Roma in certain places, groups that need and would otherwise be covered by existing (binding) treaties such as the European Framework Convention for the Protection of National Minorities are denied certain rights because, it is argued, those laws don't apply to them. They are not recognized as legitimate rights-holders within the context of that particular treaty. Labels matter.

While determining which category various ethnocultural groups in Europe and elsewhere belong to is difficult, it is necessary so long as different categories of peoples are understood to possess different rights and be in need of different protections for their cultures as well as their individual members. This reality illuminates a discrepancy between how lists of human rights have evolved and how those rights might be justified. On the one hand, the international human rights protection regime is structured to protect minorities that fall into certain categories. Groups get different kinds of protection depending on the group into which they fall. These categories, as we have seen, are ill-defined and left to considerable interpretation on the part of states (sometimes, it is fair to say, for good reason). Moreover, the specific rights to which members of different categories can lay claim differ. These differences, however, have more to do with the political evolution of the regime than the particular vulnerabilities of the groups. It is not obvious, for example, that the Navajo in the United States are more culturally vulnerable than the Cornish in the UK (though in human development terms their needs are undeniably greater). However the rights that the Navajo are understood to possess are far more powerful

\[^5\] See Kymlicka 2007 for an excellent discussion of the evolution and political bases of these regimes.
than those the Cornish are understood to possess. I am not denying that indigenous groups have unique vulnerabilities and therefore have unique claims: they undoubtedly do. My point here is simply that the dividing line between different types of minorities is vague and often highly politicized, and the recognized claims of each group (which may or may not map precisely onto their justifiable claims) are even more so. This problem is exacerbated for groups that, unlike the Navajo (an indigenous people), or the Cornish (a national minority), do not seem to fall neatly into any established, legally recognized category (the Roma, for example), or do seem to fall into one of these categories but are not so recognized by their government (for example the Pomak in Bulgaria).

Thus, I argue that the international (minority) human rights protection regime is out of step with an understanding of human rights as responses to historic and contemporary vulnerabilities, aimed at protecting the dignity of all, an understanding like the one James W. Nickel proposes. Nickel (2007) makes a compelling case for both minority and group rights that rests not on one’s identification with a certain category of minority group but rather on the existence of a certain need that is not met or cannot be met by existing rights. He makes a case for protections against non-standard (but still common, serious and remediable) threats, a significant re-thinking of the kinds of rights that make good candidates for legal protection. A typology of rights that responds to vulnerability and need as well as to historical protection gaps – as Nickel (2007), Shue (1996) and others persuasively argue human rights should do – does not correspond neatly to the international typology of vulnerable ethnocultural groups as it is currently divided (with respect to indigenous peoples and national minorities, with significant overlaps and gaps). The result is a protection gap that is manifested in several forms. Many human rights scholars, including Nickel and Shue, make strong cases for basing protection upon
lived vulnerabilities and suffering. Sometimes this means elaborating new norms targeted at under-protected groups. But such an approach tends towards elaborate, top-down typologizing of human beings and of the human experience, an exercise that Nickel and others recognize will never result in perfect coverage. Yet the type of protection gap that results most directly from this slippery system of classification is also the one that has not been clearly articulated and explored: the recognition gap.

Conclusions

Once the United Nations, the Council of Europe, the African Union, and other international and multilateral organizations chose to move beyond their core ‘universal’ human rights declarations and treaties, they did so – perhaps quite naturally – by focusing their instruments of protection on particular groups of people: minorities of varying kinds, indigenous peoples, women, children, persons with disabilities, and so on. That is, the international community has in many cases tried to close the protection gap by identifying more kinds of minorities with more specific vulnerabilities, and writing up more declarations and treaties. But perhaps the process, if not the approach itself, needs to be re-thought. Despite these advancements, acute vulnerabilities remain as these regimes, while specialized, still fail to account for the particular disadvantages of certain groups. Moreover, and crucially, for a person to claim such protections, she must be recognized by her state authorities as the appropriate ‘type’ of minority. Otherwise, the rules will not apply to her. In all of these cases, labels matter.

The existence of the recognition gap points to a need to refine, or perhaps retire, the existing typology of ethnocultural groups. At the same time, there is a clear tension between the need to reduce as much as possible all forms of serious vulnerability, while not allowing the

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6 See the Office of the High Commissioner for Human Rights 2010, Section III, for an exhaustive list of minority rights protection mechanisms in international human rights law. See also Nickel 2007, Chapter 10, Minority Rights.
human rights system to become overly fragmented and unwieldy. Indeterminate proliferation, generating ‘an impractically and implausibly long list’ (Shue 1996, 29), does not really seem to be the answer. Already, ‘[p]erhaps lists of human rights have gotten too long’ (Nickel 2007, 96). Even those theorists who do not advocate for an ultra-minimalist handful of legal rights stop well short of calling for open-ended treaty proliferation.7 Drawing up of new international standards is no small task. It is complicated, expensive, and extremely time consuming. And there is no guarantee that the time, money, and effort invested will be rewarded with a new treaty.

Furthermore, while more nimbly targeted, fine-grained international human rights instruments offer the promise of pulling many groups from the normative gap, they also come with the risk of widening the recognition gap. The more narrowly-drawn the target population, the easier it is for authorities to pick and choose who will be recognized as rights-holders under the new treaty.

Perhaps a bottom-up exploration of the recognition gap, conducted through case studies and with the involvement of groups such as the Roma and Pomak peoples in Europe, or other groups elsewhere, can help identify needed protections in terms broad enough to encompass more groups but without losing the specificity necessary to ensure that the protections do their job. But how do we reach a balance between the universality to which the human rights system aspires and the specificity that it requires? Is there a ‘sweet spot’ in which a working typology of minority groups is no longer grossly inadequate and increasingly unstable? Is such a typology necessary, or even desirable, for human rights law and policy to function properly? Can revising or abolishing it help address the politics of recognition that have generated such a legal typology in the first place?

7 See Kymlicka 2011 for a helpful discussion with respect to the indigenous-minority divide; see Nickel 2007, Chapter 6, for a broader treatment of ‘The List Question;’ see also International Council on Human Rights Policy 2006 for a discussion of pros and cons of resolving protection gaps through hard law (ie, norm proliferation) versus other, soft law mechanisms. See Rawls 1999 for an example of an ultra-minimalist view (and list) of human rights.
Beginning to answer these questions will take us far beyond the space I have here, but unpacking the protection gap from which they spring is crucial for anyone seeking to reduce and eliminate the vulnerabilities that threaten so many ethnocultural minorities (and others). Many parts of this general protection gap have been identified elsewhere, and one of these, the implementation gap, plays a significant role in the continued marginalization, suffering, and disempowerment of many. Another, the normative gap, receives justified attention for calling out the ways in which existing human rights norms remain blind to many threats. But a third, which I am calling the ‘recognition gap’, also traps individuals and groups for whom protections do in fact exist, but either (1) their lack of recognition by their own governments precludes them from benefiting from those protections or accessing those recourses to justice, or (2) the target group recognized by the existing norms is so narrowly drawn as to miss covering analogous groups that share these vulnerabilities. As long as it is left to states to confer political recognition based on top-down labeling decisions, rather than on bottom-up self-identification and acknowledgment of specific lived vulnerabilities, then even our existing international human rights norms will offer uneven protection at best to society’s most vulnerable ethnocultural groups.
Bibliography


