



**UNIVERSITY OF TRENTO - Italy**  
**School of International Studies**

PhD Programme in International Studies

**THE LEGAL STATUS OF ROMA IN EUROPE:  
BETWEEN NATIONAL MINORITY AND TRANSNATIONAL PEOPLE**

PhD Dissertation

*Sara Memo*

Academic Year 2011-2012

Supervisor: prof. Jens Woelk

Advisor: prof. André Liebich



## Abstract

Recent estimates from the Council of Europe (CoE), rates Romani presence in Europe around 10-12 million individuals. In an imaginary Europe without geo-political borders, these estimates raise Romani population to the 9<sup>th</sup> most populous community, immediately after Belgians.

Notwithstanding their numerical proportion and their historical presence in Europe, both international and national legal instruments designed for minorities are currently unable to comprehensively protect and promote Roma rights. Because of their diffuse and still partially nomadic presence, the existing legal instruments are inappropriate to effectively accommodate Romani needs because they are still ensuing from a Westphalian paradigm which identifies one people in relation with a precise territorial area.

Indeed, these legal instruments either apply to social groups traditionally resident in a country ("old" minorities) or to migrants ("new" minorities) but cannot apply to Roma who on the one hand are traditionally living in Europe (as "old" minorities) and on the other hand are still moving from one country to the other (as "new" minorities).

This study investigates the possibility of identifying a minimum European set of rights for Roma by means of two complementary conceptual frameworks. The first comparatively identifies best legal practices at the national levels, whereas the second, taking into account the specific distinctive features of Roma compared to other groups, proposes the adaptation of international legal instruments designed for indigenous people to Roma as a '*European transnational people*'.

In its comparative part, this study analyzes the legal protection of Roma in terms of, linguistic, social-economic and cultural rights as well as in terms of political representation. The proposal for adapting indigenous peoples' rights draws from the case of Sami in Northern Scandinavia as the only example of a European indigenous people living transnationally in Europe.

The results of this study contribute, both theoretically and practically, to the scientific debate on the protection of non-territorial minorities and of indigenous people in Europe.



## **Preface and acknowledgements**

What is the threshold beyond which the existence of a democratic system is at risk? This question which can be approached by, and answered from, very different perspectives, is challenged in this research from a human and a minority rights perspective.

Although this question has never openly appeared neither in the research questions nor in the analytical hypothesis of this study, it has *tacitly* accompanied my whole academic career. The idea of framing this question in the realm of Roma rights emerged during a first meeting with Jens Woelk, in spring 2010. Some weeks after, I had the opportunity to participate to the three days conference “*La condizione giuridica di Rom e Sinti in Italia*”<sup>1</sup> organized by Paolo Bonetti, Alessandro Simoni and Tommaso Vitale at the University Bicocca of Milan – Italy (16<sup>th</sup>-18<sup>th</sup> June 2010). That conference provided me with the fundamental theoretical framework to formulate my research questions in a multi-disciplinary perspective.

However, my personal interest on Roma rights dates long before the beginning of this PhD Course. After completion of my Bachelor Degree, I collaborated as junior assistant, to a research focused on juvenile justice at the Juvenile Court of Venice. In that context, I “legally met” Roma for the first time in my life. It was precisely while developing that research that I started wondering why Roma were often perceived as social and as legal “foreigners”. Thus, the investigation on the legal status of Roma in Europe was born primarily with the aim of finding an answer to that personal interest.

Although this research focuses on Roma rights, I believe that both its analytical framework and its findings may potentially provide some insight also for the analysis of the status of other non-territorial groups living in Europe. From a broader perspective, this research aims at providing a modest contribution to the debate on the “internationalization of constitutional law” and “constitutionalization of international law” which regards the increasing “cross-pollination” of human and minority rights principles within different legal levels (mostly international, European and domestic levels).

This research would not have been possible without the guidance and the help of several individuals who, in a way or another, contributed and extended their valuable assistance in the preparation and completion of this study. First and foremost my utmost gratitude to prof. Jens Woelk for his supervision and suggestions during the whole research period. I would like to express my appreciation also to prof. André Liebich for his advisorship on chapters 1 and 2

---

<sup>1</sup> The acts of that conference were collected in the two volumes publication P. Bonetti, A. Simoni, T. Vitale, *La condizione giuridica di Rom e Sinti in Italia*, Milano: Giuffrè Editore, 2011.

and for his very accurate comments which strongly enhanced the historical-political framework of Part I.

I would like to gratefully acknowledge also prof. Zoltàn Szanto of Corvinus University of Budapest for having hosted me as visiting researcher in Budapest (April-July 2011). During my research period at Corvinus University, I had the pleasure to interact with prof. Andrew Ryder who provided me with constructive insights and with the first key contacts for my research field.

I am very much indebted with Nadir Redzepi of the Open Society Foundation of Budapest. His willingness to give me his time so generously, a lot of contacts, as well as fruitful insights has extensively contributed to enrich my overall research framework.

Moreover, I would like to acknowledge very much Martin Demirowski of the Open Society Foundation of Brussels for having shared with me his experience on European policies on Roma rights and for having substantially contributed to enhance the analysis of human and minority standards on a concrete level.

Last but not least, I would like to thank all the people that either on their institutional or individual capacity have contributed to share with me their personal perspective on the status of Roma rights in Europe. In particular, I would like to express my great appreciation to: Catherine Stubbe, Daniel Stanislav, David Joyce, Dora Husz, Gabriela Hrabanova, Iulius Rostas, Jenö Kaltenbach, Joost de Laat, Marta Pinto, Martin Kovats, Nele Meyer, Peter Verhaeghe, Pierluigi Brombo and Sophie Kammerer.<sup>2</sup>

---

<sup>2</sup> The views expressed in this dissertation are the sole responsibility of the author and they do not necessarily reflect the views and the opinions of the experts mentioned above.

## **Terminological issues**

The term “Roma” comprehends a cosmos of different groups. In accordance with the terminology proposed in several occasions by the Romani Union, this dissertation uses the term “Roma” as the plural noun form, as well as to name the group as a whole, and “Romani” as the adjective, in line with emerging and converging uses. Even though some groups do not call themselves “Roma”, all Romani speaking groups use the name “Romanes” for their language.

In any case, this choice of terminology should not be understood as an endorsement of approaches aimed at homogenizing Roma groups as “Gypsies” or at eliminating the rich diversity within them. As a consequence of persecution in history, the term *Gypsy*, and several European variants of *Tsigan*, are considered by many to be pejorative. Thus, these terms are used in this research framework *only* when the discriminatory treatment against Roma wants to be emphasized on the linguistic level as well.

In accordance with the Westphalian paradigm, the term “non-territorial” is used with reference to the Romani social feature of diffuse minority lacking a “kin-State” of national belonging. Whereas, the term “trans-national”, whose meaning is close to that of “non-territorial” is used to emphasize – in a holistic perspective – the *fiis rouge* linking many Romani communities “trans-nationally” i.e. beyond national borders.





# Table of Contents

<b>Introduction</b>	<b>1</b>
<b>PART I – THEORETICAL FRAMEWORK AND METHODOLOGICAL CHALLENGES</b>	<b>7</b>
<b>Chapter 1 – Roma in European States</b>	<b>9</b>
1.1. To Europe, in Europe, of Europe? Tracing Roma migrations, movements and settlements in Europe. Historical-political background.	9
1.2. European States, European nations and European nationalities.	15
1.3. Minorities "in" Europe and European minorities? From the domestic to the international recognition of minority rights.	20
1.4. Individual v. Collective Rights.	26
1.5. Territorial and non-territorial minorities.	29
1.6. Roma as a non-territorial minority.	31
<b>Chapter 2 – Roma in European legal systems</b>	<b>37</b>
2.1. A constitutional mapping of Roma recognition in Europe.	37
2.1.1. Non discrimination: the (only) solution?	40
2.2. A definitional mapping of Roma recognition in European legal systems.	44
2.2.1. Constitutive Nationality.	51
2.2.2. National vs. Ethnic Minority?	52
2.2.3. Linguistic Minority.	63
2.2.4. National Cultural Autonomy.	64
2.2.5. Other definitions.	66

2.3. Indigenous People?	70
2.4. Research issues.	74
<b>Chapter 3 – Research challenges in the comparative study of Roma rights in Europe</b>	<b>79</b>
3.1. Questions at stake.	79
3.2. Disciplinary the interdisciplinary: preliminary remarks.	82
3.3. What is to have knowledge of Roma rights? Ontology as a “wall”?	85
3.4. What is this research comparing when analyzing Roma rights? Epistemology as a “spear”?	88
3.5. Which methodology of research? Methodology as a “fan”?	91
3.6. Limits and potentialities.	99
<b>PART II – ROMA RIGHTS COMPARED: STATUS AND CONTENT</b>	<b>101</b>
<b>Chapter 4 – Linguistic Rights</b>	<b>103</b>
4.1. Roma: a linguistic minority?	103
4.2. Romanes: one language or different languages?	104
4.3. Linguistic rights at international level.	107
4.4. Linguistic rights at European level: Organization for Security and Cooperation in Europe, Council of Europe and European Union.	109
4.5. Individual and collective linguistic rights.	116
4.6. Linguistic rights of Roma at domestic level.	117
4.6.1. Linguistic individual rights of Roma.	118
4.6.2. Linguistic rights of Roma “in community with others”.	124
4.6.3. Linguistic collective rights of Roma.	127
4.7. Critical remarks.	133

<b>Chapter 5 – Economic and Social Rights</b>	<b>139</b>
5.1. Economic and social citizenship?	139
5.2. Economic and social rights at international level.	142
5.2.1. Economic and social rights of Roma in international jurisprudence.	147
5.3. Economic and social rights at European level.	149
5.3.1. Council of Europe.	150
5.3.1.1. Education.	151
5.3.1.2. Employment.	157
5.3.1.3. Health.	158
5.3.1.4. Housing.	162
5.3.2. European Union.	171
5.4. Individual and collective economic and social rights.	173
5.5. Economic and social rights at domestic level.	174
5.6. Reinforcing the enjoyment of economic and social rights for Roma at the domestic level: European initiatives.	178
5.7. Critical remarks.	183
<b>Chapter 6 – Cultural Rights</b>	<b>187</b>
6.1. Romani cultural identity.	187
6.2. Cultural rights at international level.	191
6.3. Cultural rights at European level.	193
6.3.1. Organization for Security and Cooperation in Europe.	194
6.3.2. Council of Europe.	196
6.3.2.1. Romani cultural identity in the jurisprudence of the European Court of Human Rights.	198

6.3.3. European Union.	208
6.4. Collective cultural rights: National Cultural Autonomy.	210
6.5. Minimum recognition of Romani cultural identity.	216
6.6. Cultural rights of Roma at domestic level.	219
6.6.1. Cultural rights in a territorial perspective.	220
6.6.2. Cultural rights in a personal perspective.	227
6.7. Critical remarks.	238
<b>Chapter 7 – Political Rights</b>	<b>243</b>
7.1. Participation and representation of Roma in the public sphere in a legal perspective.	243
7.2. Political rights at international level.	246
7.3. Political rights at European level.	247
7.4. Individual and collective political rights.	253
7.5. Political rights of Roma at the domestic level.	254
7.5.1. Co-decision mechanisms.	257
7.5.2. Consultation mechanisms.	258
7.5.3. Coordination mechanisms.	263
7.5.4. Self-government mechanisms.	264
7.5.5. Multi-level political representation.	266
7.6. Critical remarks.	273
<b>PART III - INDIGENOUS AND TRANS-NATIONAL PEOPLE (S) ?</b>	<b>279</b>
<b>Chapter 8 – Sami in Europe</b>	<b>281</b>
8.1. Roma and Sami? Grounds for a legal comparison.	281
8.2. Looking at the experience of Sami.	283

8.3. Sami in Scandinavia.	285
8.4. Sami in Nordic legal systems	287
8.4.1. International recognition of Sami.	289
8.4.2. Domestic legal recognition of Sami.	293
8.4.3. Individual and collective indigenous rights.	296
8.5. Linguistic rights.	297
8.6. Economic and social rights.	304
8.7. Cultural and political rights.	305
8.7.1. Sami cultural identity.	306
8.7.2. Cultural vs. personal autonomy? The role of Sami Parliaments.	306
8.8. Land rights.	312
8.9. Towards a trans-national recognition of Sami: the 2005 Sami Draft Convention.	317
8.10. Learning from the experience of Sami. Critical remarks.	322
<b>Chapter 9 – A European transnational people?</b>	<b>331</b>
9.1. Romani participation in the public sphere. A socio-political perspective.	331
9.1.1. At the origin of representation: first wave of Romani leaders.	333
9.1.2. The development of a Romani representation at the national level: second wave of Romani leaders.	335
9.1.3. Modern forms of Romani representation: third wave of leaders.	337
9.1.4. Seeds of trans-national Romani participation.	341
9.1.5. Political rights of Roma in a transnational perspective.	342
9.1.6. A trans-national Romani movement.	343
9.2. European trans-national representation of Roma Rights.	345
9.2.1. Institutional recognition of Roma as a pan-European minority.	345

<b>9.2.2. European trans-national programs.</b>	<b>346</b>
<b>9.3. Critical remarks.</b>	<b>349</b>
<b>Conclusions - Towards a trans-national recognition and a Roma Framework Convention?</b>	<b>355</b>
<b>References</b>	<b>369</b>
<b>I. Table of statutory legislation</b>	<b>369</b>
International treaties	<b>369</b>
EU legislation	<b>369</b>
Domestic legislation	<b>370</b>
<b>II. Table of recommendations and legal guidance</b>	<b>373</b>
International documents	<b>373</b>
CERD recommendations	<b>373</b>
OSCE recommendations	<b>373</b>
OSCE legal guidance	<b>373</b>
CoE recommendations	<b>374</b>
CoE legal guidance	<b>374</b>
EU legal guidance	<b>375</b>
<b>III. Table of cases</b>	<b>376</b>
International cases	<b>376</b>
European Court of Justice (ECJ)	<b>376</b>
European Court of Human Rights (ECtHR)	<b>374</b>
European Committee of Social Rights (ECSR)	<b>378</b>
<b>IV. Table of international reports</b>	<b>380</b>

Advisory Committee on the Framework Convention for the Protection of National Minority (FCNM)	<b>380</b>
Committee of Experts on the European Charter for Regional or Minority Languages (ECRML)	<b>384</b>
European Commission Against Racism and Intolerance (ECRI)	<b>385</b>
<b>V. Bibliography</b>	<b>386</b>





## Introduction

“This is a situation I had thought Europe would not have to witness again after the Second World War”.<sup>1</sup>

By these words, in September 2010, EU Justice Commissioner Viviane Reding, condemned the French deportation of Roma to Romania and Bulgaria.<sup>2</sup> Because that situation “gave the impression that people are being removed from a Member State of the European Union just because they belong to a certain ethnic minority”,<sup>3</sup> Reding warned France that it would face an official EU “infringement procedure” if it failed to implement directive 2004/38/EC on the free movement of EU citizens and their families in two weeks. On 19<sup>th</sup> October of the same year, France satisfactorily replied to the challenge of the European Commission thus avoiding a potential infringement procedure.<sup>4</sup>

---

<sup>1</sup> V. Reding Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship Statement on the latest developments on the Roma situation Brussels, 14 September 2010 Midday briefing in Press Room. Reference: SPEECH/10/428 Date: 14/09/2010. Available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/428> (last accessed on 20<sup>th</sup> December 2012).

<sup>2</sup> In 2010, the French Government initiated a “repatriation program” for thousands of Roma mostly of Romanian and Bulgarian citizenship who were residing in France. While EU citizenship does not *in abstracto* require these individuals of Romani origin to ask a visa in order to legally enter another European country, French law required them to have a work permit and prove that they have the means to financially support themselves in case they stay for more than three months. According to some Romanian and Bulgarian citizens evicted from France these permits are very difficult to get; most of the time these individuals have no other chances than living illegally. The controversial plan was put in place one month after clashes between police and Roma had taken place in Grenoble and the public discourse started to condemn Roma as “sources of illegal trafficking”, “exploitation of children for begging”, “prostitution and crime”. The UN’s Committee on the Elimination of Racial Discrimination criticized, *inter alia*, the tone of political discourse in France on race issues, stating that racism and xenophobia were undergoing a “significant resurgence” there. For a reconstruction of the French case on Roma deportation see “France sends Roma Gypsies back to Romania” <http://www.bbc.co.uk/news/world-europe-11020429> (last accessed on 20<sup>th</sup> December 2012).

<sup>3</sup> V. Reding, see footnote 1.

<sup>4</sup> According to EU law, the Commission is the institution responsible for ensuring that EU law is correctly applied. In those cases when the Commission observes that a Member State is not complying with EU law, it may decide to refer the case to the European Court of Justice (ECJ). Nonetheless, the Commission may also decide not to start action before the ECJ rather to begin an infringement procedure which as a “pre-litigation” form may give the alleged violator the possibility to correct its behavior before standing trial. In the case of the French repatriation program, the Commission initiated an infringement procedure against France, on the basis of an alleged violation of the freedom of movement. When France submitted plans to amend its legislation as to align it to the freedom of movement standards, the Commission, satisfied with the response, decided to (suspend) the infringement procedure. Nevertheless “some expressed disappointment about the termination of the

While this decision temporarily resolved the affair concerning this case of forced deportation by French authorities, it re-opened once again the debate over the legal status of Roma in Europe. How does the public usually interpret this issue – as a problem of immigration, of public order, of linguistic minority, or of race/ethnicity?<sup>5</sup>

In the realm of “common sense” each aspect contained in this question may have a grain of truth. As we move into scientific debate, one quickly realizes that scholars are unable to provide adequate answers because “the bridges” between *Romani studies* and general culture are still missing.<sup>6</sup> These “bridges” are even weaker when entering the legal field and trying to identify legal categories to address the needs of this social group.

Conceptually, Roma are a non-territorial minority, historically nomadic and traditionally living disperse – or trans-nationally – throughout Europe. These social features make the legal classification of Roma difficult as they contrast with traditional European systems of government.<sup>7</sup> According to classical legal classification, on the one hand Roma can be considered a “traditional minority” since they have been living in Europe for centuries. On the other hand, Roma can be considered “migrants” since a persistent proportion of them still adopt a nomadic life-style. In the lack of an *ad hoc* legal category addressing Roma and their rights from a non-territorial perspective, Romani identity, and consequently Roma rights, are not adequately defined and satisfactorily addressed by the current legal categories. Thus, their factual situation cannot be comprehensively improved at the social level.

---

procedure, asserting that it “sends a mixed signal about the Commission’s commitment to pursuing EU law violations”. T.C. Gunther, "France’s Repatriation of Roma: Violation of Fundamental Freedoms?," *Cornell International Law Journal* 45, no. 1 (2012): 216-17.

<sup>5</sup> O. Marotti, "Verso una legge italiana per il riconoscimento delle minoranze Rom e Sinte? ," in *La condizione giuridica di Rom e Sinti in Italia* ed. P. Bonetti, A. Simoni, and T. Vitale (Milano : Giuffrè Editore, 2010).

<sup>6</sup> A. Simoni, *Stato di diritto e identità Rom* (Torino: L'Harmattan Italia, 2005), 9.

<sup>7</sup> “Historical, traditional, autochthonous minorities” and/or by using the legal tools shaped for “new minority groups stemming from migration” according to Medda Windischer’s categorization. R. Medda-Windischer, *Old and New Minorities: Reconciling Diversity and Cohesion. A Human Rights Model for Minority Integration* (Bozen: EURAC Research, 2009), 40-41.

The aim of this research is twofold: on the one hand it investigates the current legal protection of Roma rights in Europe, on different levels (international, European and domestic); on the other, it explores the possibility of enhancing Roma rights through a differentiated legal framework. Indeed, while looking at Romani trans-national presence in Europe from a purely numerical perspective, one can question whether the legal treatment of Roma as “minority group” is appropriate considering that their estimated numerical presence of 10-12 million people<sup>8</sup> is in the range of a medium size European country.

This research articulates on three parts: the first part sets a theoretical framework in order to explain the current recognition of Roma rights in different legal contexts, such as at international and European legislation as well as at domestic level; the second part analyzes in detail the status and content of Roma rights in Europe; the third part discusses the possible enhancement of Roma rights from a trans-national perspective.

More specifically, Chapter 1 presents from a historical-political perspective the settlement of Roma in Europe and, in parallel, the creation of European “States” and “Nations” after the Peace of Westphalia. The progressive social exclusion of Roma as a non-territorial group “naturally” escaping the post-feudal order and increasingly invested by racial prejudice, led to a parallel legal exclusion of Roma which, as Chapter 2 discusses, still persists nowadays. This legal exclusion, mostly ensuing from the Westphalian territorial conception of State, Nation and population, has particularly invested domestic legal systems, but it has also reverberated on international and European levels. Chapter 3 discusses the different methodological challenges that this research faces at various legal levels (international, European<sup>9</sup> and domestic levels).

---

<sup>8</sup> CoE, "The Situation of Roma in Europe and Relative Activities of the Council of Europe," *AS/Jur* (2008) 29 rev(2008).

<sup>9</sup> The European dimension has to be differentiated as to the different organizations: Organization for the Cooperation and Security in Europe (OSCE), Council of Europe (CoE) and European Union (EU).

The second part (chapters 4 – 7) comparatively analyzes the legal status of Roma in Europe with regard to the dimensions of linguistic rights, economic and social rights, cultural rights and political rights. The first dimension that is analyzed is the linguistic dimension, although Romanes is no longer spoken by all Romani communities living in Europe (as a result of assimilationist policies) it nonetheless represents one of the most significant features on which Romani cultural identity is still found. As Chapter 4 clarifies, language is in fact, the common cultural element that has allowed the historical reconstruction of Romani movements across Europe. At the same time, Romanes represents one of the strongest identity features allowing the trans-national linkage of a great part of Romani communities.

Chapter 5 examines the second dimension of rights: economic and social rights. Indeed, as the OSCE High Commissioner of National Minorities has emphasized, in the lack of minimum conditions guaranteeing human dignity, the full social integration of Roma cannot be achieved.<sup>10</sup> Thus, the full development of Romani cultural identity and the effective enjoyment of other sets of rights can be realized only once their physical integrity, freedom from discrimination, the right to education, freedom from want and equality of opportunities will be effectively ensured. Accordingly, Chapter 5 analyzes the formal and the substantial enjoyment of economic and social rights for Roma in Europe by considering the dimensions of education, employment, housing and healthcare in line with the dimensions of rights identified firstly by the Roma Decade of Inclusion (2005-2015) and subsequently by the EU Roma National Strategies in 2011.<sup>11</sup>

Chapter 6 and Chapter 7 respectively investigate, from a cultural and a political rights perspective, the legal provisions allowing the participation of Roma in the public sphere. Both dimensions of rights entail, in fact, a different “potential” for the participation of Romani

---

<sup>10</sup> OSCE-HCNM, "Report on the Situation of Roma and Sinti in the Osce Area," (OSCE-HCNM 2000), 15. See Section 6.3.1.

<sup>11</sup> See, *infra*, section 5.7.

communities in the domestic public arenas. More specifically, when cultural rights are shaped on a personal rather than on a territorial perspective as in the case of the National Cultural Autonomy (NCA) Model,<sup>12</sup> the participation of Roma to decision-making processes affecting their cultural identity can be tailored to such a strong degree that it can partially overlap with the political rights sphere. Even more so, considering the institutional mechanisms that promote Romani political participation through “indirect channels of influence”, such as consultative commissions, rather than through “direct channels” such as reserved seats in Parliaments and representation through political parties.

After having analyzed the legal status of Roma in Europe, the third part of this research considers the possible enhancement of Roma rights in a trans-national dimension. To this end, Chapter 8 analyzes the case of Sami living in Northern Europe: this comparative study introduces an indigenous rights perspective (related to Europe) and helps to understand how Roma rights can be strengthened in a trans-national dimension. Notwithstanding the intrinsic legal differences of the two social groups (Sami are recognized as indigenous people whereas Roma are considered a national minority) Sami share with Roma a past of strong discrimination and rights denial as well as the identity of a trans-national people.

The “legal practice” developed by Nordic States, as regards legal recognition of Sami and their indigenous rights, is discussed at Chapter 9 also in the light of the increasing recognition of Roma as a “European trans-national people” not only within the Romani trans-national movement but also by European institutions and in legal doctrine. In conclusion, the legal pitfalls and the normative gaps highlighted by the comparative analysis developed in the second part, are recalled in a final discussion. In particular, the last chapter argues in favor of a possible complementary recognition of Romani trans-national identity in Europe – through

---

<sup>12</sup> See, *infra*, section 6.4.

an *ad hoc* framework convention at the level of the Council of Europe – in order to comprehensively address Roma rights from a non-territorial dimension.

# PART I

## THEORETICAL FRAMEWORK AND METHODOLOGICAL CHALLENGES





# Chapter 1

## Roma in European States

**Summary:** **1.1.** To Europe, in Europe, of Europe? Tracing Roma migrations, movements and settlements in Europe. Historical-political background. – **1.2.** European States, European nations and European nationalities. – **1.3.** Minorities "in" Europe and European minorities? From the domestic to the international recognition of minority rights. – **1.4.** Individual v. Collective Rights. – **1.5.** Territorial and non-territorial minorities. – **1.6.** Roma as a non-territorial minority.

### **1.1. To Europe, in Europe, of Europe? Tracing Roma migrations, movements and settlements in Europe. Historical-political background**

*“We can understand history as the memory of people. The shaping of a memory through writing allows the historian to fight against forgetting and collective amnesia. However, the association history/memory makes more sense when referring to the writers of chronologies and to historians. When it comes to modern historian, one must first ask the question of the objectivity of science what is proposed by the historian as a narration. Thus, we are faced with the question of the perspective and of the ideology of the historian”.*<sup>13</sup>

For a long time the history of Roma in Europe has been reconstructed by “hetero-directed” narrations in the lack of autobiographical written sources.<sup>14</sup> These narrations have often

---

<sup>13</sup> S. Carmona, "Memory, History and Rromanipen: Reflection on the Concept of Trace," in *Roma Identity* ed. H. Kyuchuvok, Hancock, I. (Prague NGO Slovo 21, 2010), 91.

<sup>14</sup> An internal perspective on Romani history has been recently provided by Romani historians themselves. However, Romani historiography is still in a “pre-adolescent phase, a key period which requires a questioning of identity and claim”. According to Carmona, for a long time Roma’s lives and narratives have been affected by the so-called “Pygmalion syndrome”: Roma self-construction of themselves reflected the image that the society made of them. See *Ibid.*, 96.

presented a manipulated and distorted image of Roma which still permeates the current representations of Roma in the European public sphere.<sup>15</sup>

The most widely accepted account of Romani history has been provided by linguists, who have demonstrated that Roma<sup>16</sup> share common roots descending from North Indian castes that arrived in Europe between 500 and 1000 A.D.<sup>17</sup> Although there is no link between Roma in Europe and a specific existing nomadic or sedentary group in India, linguists have identified a very close connection between the languages of Romanes with Hindi and Punjabi.<sup>18</sup> The origins and the migrations of Roma have been mostly reconstructed through the language spoken by Roma and by the names used by “non-Roma” (*Gadje* in Romanes) to identify this social group.<sup>19</sup>

It is still unclear whether the first “push” to abandon India was voluntary or a consequence of Persian conquest. Kenrick, however, identifies a first stop of the migration journey in Persia (between 224 and 624 A.D.) and a second stop in the Byzantine Empire (c.900 A.D. – 1454 A.D.).<sup>20</sup> He maintains that Romani migrations were made in different waves<sup>21</sup> and probably by diverse social groups.<sup>22</sup> In line with this historical reconstruction, the term *Gypsy*, which has been negatively connoted the Romani social group, should have derived from the term

---

<sup>15</sup> I. Hancock, "The Struggle for the Control of Identity " *RADOC* (2007).

<sup>16</sup> In *Romanes* “Roma” means “man”. According to Calabrò the etymology of the term can either derive from the Indian

group of musicians and tumblers called “Doms” or from the Sanskrit word “Dom” which means “to sound, to echo”. A.R. Calabrò, *Zingari. Storia Di Un'emergenza Annunciata* (Napoli: Liguori Editore, 2008), 11.

<sup>17</sup> A. Fraser, *Gypsies: From India to the Mediterranean* (Gypsies Research Centre CRDP Midi-Pyrenees Interface Collection Toulouse 1994).

<sup>18</sup> ———, *Gypsies* (Oxford: Blackwell 1992).

<sup>19</sup> L. Piasere, *I Rom d'Europa. Una Storia Moderna* (Roma-Bari: Laterza, 2004).

<sup>20</sup> D. Kenrick, *From India to the Mediterranean: The Migration of Gypsies* (Toulouse: Gypsy Research Centre CRDP Pirenées, 1993).

<sup>21</sup> *Ibid.*, 27.

<sup>22</sup> Kenrick identifies, among the different social groups, the Sindhi, the Zott, the Dom, the Kalé and the Luri, *inter alia*. *Ibid.*, 27-38

“Egyptian” through which non-Roma identified a group of people characterized by the darker colour of their skin and by the typical dresses supposedly of Egyptian origins.<sup>23</sup>

During the first decades of their presence in Western Europe, it seems that Roma themselves had taken advantage of this “supposed Egyptian belonging” as a sort of “cover story” to facilitate their relations with mainstream societies. Roma often presented themselves as noble Egyptians of high ranks in pilgrimage from the Holy Land “doing penitence for their sins”.<sup>24</sup> Through this story they rejected on the one hand, the model of “submission” to the local *Gadje* while on the other, they received economic benefits for their communities.

In other regions of Europe, Roma have also been identified through the names *tsiganes*, *gitanos*, *cigani*, *zingari* all of which derive from the Greek word “*adsincani*” and are often used interchangeably with “*athiganoi*” to recognize the members of a sect convinced of using magic arts in Turkey during the 11<sup>th</sup> century A.D.<sup>25</sup> In the 14<sup>th</sup> and 15<sup>th</sup> centuries, Roma started to be recorded also in Greece. This early moment of coexistence with local non-Roma people, within the Ottoman Empire under Venetian domination, has been defined by Piasere as the first “laboratory of meeting between Roma and *Gadjé*”.<sup>26</sup>

Soon after, the presence of Roma started to be recorded in other regions of Europe. After having spread across the Balkans at the beginning of the 15<sup>th</sup> century, Roma migrated to Germany, Flanders and the Baltic area.<sup>27</sup> It is mostly through “Anti-Gypsy” legislation that their movements across Europe have been traced. This legislation, in fact, started to develop as a response to Roma’s incapacity or unwillingness to adapt their culture to post-feudal

---

<sup>23</sup> H. O’Nions, *Minority Rights Protection in International Law. The Roma People in Europe* (Aldershot & Burlington: Ashgate, 2007), 3-4.

<sup>24</sup> Fraser, *Gypsies*, 53.

<sup>25</sup> Piasere, *I Rom d’Europa. Una Storia Moderna*, 31.

<sup>26</sup> *Ibid.* 32.

<sup>27</sup> J. and Gheorge Liegeois, N., *Roma/Gypsies: A European Minority*, ed. Minority Rights Group International, 95/4 vols. (1995), 7.

Western European mechanisms, mostly hinging on a “commercial economy” under development. As Fraser explains:

The authorities could not come to terms with rootless and masterless men, with no fixed domicile and useless as a workforce: in their eyes that status was itself and aberration, at odds with established order, and had to be put right by coercion and pressure of the [gypsies].<sup>28</sup>

At the same time, these “Anti-Gypsy” laws began to be permeated by strong ethnic biases, since mainstream societies increasingly regarded Roma as “criminals” simply in the light of their social position.<sup>29</sup>

It seems that the development of anti-Gypsy legislation concentrically spread “by contagion” from a first nucleus in Switzerland (1471) and in northern Italy (1493) to the Holy Roman Empire (1498) and to Castille and Aragon (1499). In the following century, the “banning or expulsion legislation” started to expand westward to Portugal (1526) and to Navarre (1538) and northward to Holland (1524), England (1530) and Scotland (1541). It further expanded in northern Europe with Denmark (1536), Norway (1536) and Sweden (1540) legislating in this regard, and Eastward with Moravia (1538), Bohemia (1540) and Poland (1557).<sup>30</sup>

The reconstruction of Romani migration across Europe is at the foundation of another account of Roma “ethnogenesis”. Indeed, against a “native narrative” which postulates a monogenetic and linear account built on “the romance of exoticism and the pathos of deprivation”, stands a “functional or social narrative” of Romani “ethnogenesis”.<sup>31</sup>

Okely, who has proposed this functional-social narrative, maintains that notwithstanding a probable Indian origin, in Europe Roma originated and developed also from other different

---

<sup>28</sup> Fraser, *Gypsies*, 130.

<sup>29</sup> *Ibid.*

<sup>30</sup> Piasere, *I Rom d'Europa. Una Storia Moderna*, 50.

<sup>31</sup> A. Liebich, "Roma Nation? Competing Narratives of Nationhood " *Nationalism and Ethnic Politics* 13, no. 4 (2007).

indigenous groups.<sup>32</sup> According to Liebich, the importance of Okely's historical reconstruction lies on the possible cross-fertilization of cultures in the creation of today's Romani identity. In particular, in Liebich's words, "Okely stresses the need to engage with contemporary identities of Gypsies rather than with an exotic mythical group who may or may not represent an accurate historical reality".<sup>33</sup>

In other words, this narrative on Romani origins identifies the composition of this social group in the same way of life and community of fate rather than in common genetic roots.<sup>34</sup> The idea that a new and different Romani identity has been shaped through some forms of "European contamination" has also been supported by Hancock, one of the most prominent Romani academics. The author argues that "there were no 'Roma' before Anatolia"<sup>35</sup> since both Romani language and Romani cultural identity came into being during that sedentary period under the influence of the Byzantine Greeks.

Before acquiring "identity and language in the West",<sup>36</sup> Roma were a very composite social group. With the successive migrations during the Renaissance, spreading Romani populations along European countries, Roma further diversified into different sub-groups by acquiring influences from the cultures and the languages of the countries where they were living. However, if some differences exist in the various Romani groups in Europe, according to Hancock, these differences should not be overestimated.<sup>37</sup> Indeed, by giving too much emphasis to the differences rather than to the similarities, there might be the risk to lose the

---

<sup>32</sup> J. Okely, *The Traveller - Gypsies* (Cambridge : Cambridge University Press, 1983).

<sup>33</sup> K. Bhopal, Myers, M. , *Insiders, Outsiders and Others Gypsies and Identity* (Hatfield: University of Hertfordshire Press, 2008), 5.

<sup>34</sup> Liebich, "Roma Nation? Competing Narratives of Nationhood ": 3.

<sup>35</sup> I. Hancock, "Roma Today: Issues and Identity " in *Memory, History and Rromanipen: Reflection on the Concept of Trace*, ed. H. Kyuchuvok, Hancock, I. (Prague NGO Slovo 21, 2010), 22.

<sup>36</sup> *Ibid.* 23.

<sup>37</sup> *Ibid.*21.

“holistic perspective” on this social group and to deny the “sense of community” that unites all Roma.<sup>38</sup>

It is especially in the studies of anthropologists, sociologists and historians that the emphasis over differences among Roma have started to develop. Carmona presents the view that this “over emphatization” of Romani differences can be considered as the by-product of a “*divide et impera*” conception aimed at underestimating and trivializing the aspects that unite all the people pertaining to the Romani social group.<sup>39</sup> In order to comprehend the cosmos of “different commonalities” linking the Romani social group, Piasere proposes to use the “polythetic” category i.e. a perspective that at the same time accounts for the heterogeneity and the homogeneity of this social group.<sup>40</sup>

The competing narratives reconstructing Romani origins reflect the epistemological categories identifying Roma in Western Europe *vis-à-vis* Central Eastern Europe. While Western European States appear very close to the first “exotic and primordial” narrative of Romani ethnogenesis, Central and Eastern European States seem to embrace mostly the “functional and social ethnogenesis narrative”. Indeed, in Western Europe the “Romani issue” is still perceived as “a problem of uncontrolled migration by alien nomads” to be solved predominantly by social (and more recently by repressive) measures to prevent further uncontrolled migrations. In Central and Eastern Europe, Roma are “only marginally relevant

---

<sup>38</sup> Carmona, "Memory, History and Rromanipen: Reflection on the Concept of Trace," 96.

<sup>39</sup> At the European level, Roma have been recognized as a “pan-European minority” by different institutions. This definition has been used for the first time at point 27 of the European Parliament Resolution on the situation of Roma in the European Union, 28 April 2005, P6\_TA(2005)015. This idea has been further developed by the EU when establishing the Roma Action Group which examines Community instruments and policies for their impact on Roma. “A call for proposal was launched in 2009 to find another pan-European project on methods through which to integrate Roma into society” in T. Ahmed, "A Critical Appraisal of EU Governance for the Protection of Minority Rights," *International Journal of Minority and Group Rights* 17 no. 1 (2010): 278.

<sup>40</sup> According to anthropologists this kind of category describes a group that cannot be defined on the basis of a single feature but on the combination of a multiplicity of features. Piasere clarifies this concept through the following example: “two brothers can look similar because of their dark hair and they can both look different from a third brother who has blonde hair. The latter looks similar to the first one because of his nose (aquiline) which is different from the second brother. The second brother in turn, resembles to the third one because of their green eyes while the first brother is dark eyed”. Piasere, *I Rom d'Europa. Una Storia Moderna*, 3.

to the nation ethos” hence, they have been recognized as an “ethnic minority” for a longer time.<sup>41</sup>

## **1.2. European States, European nations and European nationalities**

When Roma started to migrate and settle in the European continent, the conception that the autochthonous populations had of themselves, and the parallel representations that they made of Romani communities, created some definitional, social and political boundaries that still permeate the current European Romani discourse. In line with Seriot, a nation cannot be considered to be a natural object, rather a “category” that exists primarily in the name that a community gives to itself or that others give to that community from the outside”.<sup>42</sup> In the case of “Romani nation”, it can be argued that this category started to exist primarily in anti-Gypsy legislation which enshrined *ex negativo* the “national majority names and categories” on which European States were founded themselves since the 15<sup>th</sup> century.<sup>43</sup> This early “negative recognition” of Roma within European domestic legislations, produced a path-dependency effect in the subsequent legislative developments: for centuries the attitude of European legislators towards Roma has in fact been characterized by a strong degree of exclusionism.

In particular, this exclusionist attitude began to accentuate during the Modern era. Conventionally identified with the peace of Westphalia (1648) this historical moment is regarded as the watershed between Medieval Christendom and the Modern World. This event radically subverted the ordering of international relations: from a universal hierarchical order controlled by the idea of universal Empire (and universal church) it created a decentralized

---

<sup>41</sup> Liebich, "Roma Nation? Competing Narratives of Nationhood ". Liebich further explains that this dichotomy differentiating Roma definitions and conceptions has for a long time reflected also in the international institutions. The European Union has “discovered” the term “Roma” (instead of “Gypsies”) just after the 2004 enlargement involving Eastern countries. Whereas the Council of Europe (CoE) already comprising Eastern countries from its foundation, adopted this terminology long before.

<sup>42</sup> P. Seriot, "Ethnos et Demos : la construction discursive de l'identité collective," *Langages et Société* 79(1997): 45-46.

<sup>43</sup> Piasere, *I Rom d'Europa. Una Storia Moderna*, 53.

system of co-equal sovereign States. Within this new order, States become emancipated from the superior power of the Empire and autonomously derived their political legitimacy as sovereign entities.<sup>44</sup> Three main approaches of political theory, ensuing from the Westphalia order, can still be identified in the conceptions of “State” and “nation”.<sup>45</sup>

The first is the “civic” approach and it firstly characterized England and subsequently France. At the time of Westphalia, both powers already detained a central power and an unitary territory, hence they did not need to “build a nation” by further enlarging their territories or by increasingly centralizing their powers. In these contexts, the idea of “nation” was “artificially created” by the political entity, i.e., by the State. The historical-linguistic development of the French language in particular, supports this interpretation. Before the Revolution, French was not a “natural” language rather it was only spoken by the intellectual *élite* administering the country. After the Revolution, French became “the triumph of Reason and of Nation” and, in parallel, an instrumental medium to build the idea of “Nation”.<sup>46</sup>

Since the process of “nation building” ensued *a posteriori* from the process of “State-building”, the idea of “nation” had to be necessarily shaped in a way that was indifferent to diversities, in order to embrace the most inclusive perspective over the people living within that country. Consequently, all persons that were born within national boundaries were (and still are) recognized for their “civic” rather than for their “ethnic” belonging (*jus soli*). Precisely because the identification of the population is built around the idea of “citizenship”, the “legal attitude” ensuing from this conception should have been absolutely neutral towards

---

<sup>44</sup> A. Valery Tishkov, "Forget the `Nation`: Post-Nationalist Understanding of Nationalism," *Ethnic and Racial Studies* 23, no. 4 (2000).

<sup>45</sup> J. Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo stato multinazionale sostenibile?* (Padova: CEDAM, 2008), 10-11.

<sup>46</sup> Seriot, "Ethnos et Demos : La construction discursive de l'identité collective," 41.



different social groups. At the constitutional level, the result of this process can be found on the emphasis on personal freedom (as in England) or on formal equality (as in France).<sup>47</sup>

A second “ethnic” approach developed in those States where the process of national unification was not entirely completed. The development of England and France as “Great Powers” provided in fact, a substantial “push” to the process of unification of smaller territories. In the lack of clear geographical and political boundaries, the national identity in these contexts could only be found within the population and, more specifically, within the common features of those populations: culture and language.<sup>48</sup> Specifically, this has been the case of Germany and, soon after, of Italy and other European regions. In contexts characterized by a large divide between “State” and “Nation”, individuals could not identify themselves with the abstract idea of “citizen” (*citoyen*), as in the nations deriving from the idea of *demos*, rather they could only find their unity in their ethnic-linguistic and cultural belonging.

In Germany, the “*Volk*” became an “unity in its essence” tailored on “romantic” rather than on “social contractual” national conceptions.<sup>49</sup> Indeed, the German romantic idea of nation links culture and language in an indissoluble way. The idea of nation precedes *a priori* the political construction of the State: it is its fundamental philosophical prerequisite. Therefore, the concept of citizenship relies on this cultural-linguistic belonging and can only be directly acquired by birth from one or both national parents (*jus sanguinis*). The legal treatment of

---

<sup>47</sup> Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo stato multinazionale sostenibile?*. 11.

<sup>48</sup> Brubaker refers to these two different approaches of nation/state building as: “nationalizing States” (first approach) and “States seeking nations” (second approach). R. Brubaker, *Nationalism Reframed: Nationhood and the National Question in the New Europe* (Cambridge : Cambridge University Press 1996).

<sup>49</sup> Seriot, “Ethnos et Demos : la construction discursive de l'identité collective,” 43.

differences developing from this conception, can also have in the contemporary framework, a promotional opening that reflect the conception of “nation” created by the dominant *ethnos*.<sup>50</sup>

Finally, a third multinational approach developed from the great multinational empires: the Ottoman Empire, the Habsburg Empire, and the Russian Empire. Although these empires existed in the post-Westphalia Era, their political structure can be considered as “pre-Modern” since they presented the features of a pre-Westphalian political entity. Despite the peculiar features of every different context, each of these empires naturally lacked the ideals of “*demos*” and “*ethnos*” underlying the construction of the Modern State.

Until the First World War, when empires collapsed and a primordial international minority rights discourse began, the diverse social groups living within imperial borders remained “non-State nations”.<sup>51</sup> Nonetheless, within these pre-War imperial frameworks, some degree of legal recognition was provided to minorities, even if the general imperial approach to the recognition of different social groups was assimilationist if not repressive. In the Ottoman Empire for instance, the millet system pacifically regulated the coexistence among different religious groups. The State guaranteed the administration of specific sets of powers to the different religious communities, (such as the institute of marriage or the administration of justice in specific fields through *ad hoc* religious courts) on whom it was normally exercising full authority.<sup>52</sup>

In the Habsburg and in the Russian Empires, the recognition of diversities was more cautiously opened at the beginning of the 20<sup>th</sup> century, probably under the claims of the different national groups. In particular, two Austrian statesmen Karl Renner and Otto Bauer,

---

<sup>50</sup> In Italy for instance, where the majority *ethnos* has found its linking feature mostly in the language, the law on minorities (482/1999) is aimed at protecting and promoting “historical linguistic minorities”.

<sup>51</sup> R. Stavenhagen, *The Ethnic Question. Conflicts, Development, and Human Rights* (Tokio: The United Nations University Press, 1990), 21.

<sup>52</sup> Interestingly enough, the Millet system is still present in some contemporaneous legal orders influenced by the Ottoman Empire such as Israel and Lebanon. See, *inter alia*, G.M. Quer, "Pluralismo e diritti delle minoranze. Il sistema del "Millet" " *Quaderni di diritto e politica ecclesiastica* 18, no. 1 (2010).

started to theorize the idea of national belonging disconnected from the territory of living through the model of national cultural autonomy at the end of the 19<sup>th</sup> century.<sup>53</sup> According to these theorists, national belonging could be thought in terms of “conscious and voluntary choice” that an individual could make once they acquired the age of majority. Following this more liberal view, Jews for instance, could then constitute a “nation” under the Habsburg Empire even if they could not be specifically attributed a limited territorial area. According to Smith, the Habsburg model of national cultural autonomy circulated until arriving to the Russian Empire.<sup>54</sup>

In Russia, the Bolshevik idea of “nation” was to be intended as a stable community, historically constituted by language, territory and culture.<sup>55</sup> Consequently, under this conception (opposite to that embedded within the Habsburg Empire) Jews could not be identified as a “nation”. Although, in the successive socialist period, according to Seriot, Stalin did not believe in the existence of the idea of “nation”, he was instrumentally using a “populist representation” of this term in order to pacifically settle self-determination claims deriving from the different ethnic groups living under the Tsarist supremacy. According to the same author, Stalin was aiming to merge nations (in the sense of *ethnos*) in one nation (in the sense of *demos*) in order to built “a stable nation, in other words an *ethnos*”.<sup>56</sup>

The interesting feature of the Soviet conception of State is the attempt to include in a pre-modern political structure, the nationalistic features belonging to a modern structure. The result is that, even if the terminology does not vary, it became completely “secularized”. After having been deprived of its original meaning, the construction of a “Russian *ethnos*” became

---

<sup>53</sup> Especially Otto Bauer and Karl Renner see E. Nimni, *National Cultural Autonomy and Its Contemporary Critics* (New York: Routledge, 2005).

<sup>54</sup> D.J. Smith, "The revival of cultural autonomy in certain countries of Eastern Europe: were lessons drawn from the Inter-War Period?," in *Science and Technique of Democracy. The Participation of Minorities in Public Life* ed. CoE (Strasbourg: CoE Publishing, 2011).

<sup>55</sup> Seriot, "Ethnos et Demos : la construction discursive de l'identité collective," 43.

<sup>56</sup> Ibid.43.

only functional to the scope of a new assimilation of diversities from one Empire to the other: from the Tsarist to the Soviet.

### **1.3. Minorities "in" Europe and European minorities? From the domestic to the international recognition of minority rights**

The beginning of the history of the legal protection of minorities in Europe is very much connected with the ideas of “boundary” and “fear.” Since the creation of the modern State with the peace of Westphalia, the integrity of the territory has been considered of vital importance for safeguarding external as well as internal attacks.<sup>57</sup> Accordingly, all minorities conceived as social groups holding any form of diversity from the majority (such as religion, language and culture) and creating a sense of solidarity among themselves, were controlled by national dominant groups by means of both physical and cultural barriers. By doing so, the State could protect itself from any internal claim that could potentially lead to public disorder, or even worse, to its dissolution by means of secession.

From the struggles for religious freedom starting in the 17<sup>th</sup> century, the protection of minorities in Europe has been conceived as a territorial solution to conflicts, whereby the ruler of a territory had the power to dictate a certain religion (*cuius regio eius religio*). Subsequently, the protection of diverse groups within European societies has expanded to

---

<sup>57</sup> “The importance of territory in classic international law derives from the fact that the application of Roman law sources in medieval, feudal Europe created the belief that the territory was the object of State’s property”. This conception is still deeply rooted in current political thought since very often “the term sovereignty is used as synonym of territorial sovereignty”. F. Milano, *Unlawful Territorial Situations in International Law*, (Leiden/Boston : Martinus Nijhoff Publishers, 2006), 67.

other cultural and geographical areas<sup>58</sup> and during the 19th century it has become a common feature of European public law.<sup>59</sup>

The period between the Congress of Vienna (1815) and the beginning of the First World War is characterized by the first international treaties which aimed to effectively respond, mostly from a bilateral perspective, to the rise of nationalistic claims.<sup>60</sup> By the end of the First World War, minority protection became an international concern. Yet, the “box” was renewed, but not its “content.” The “minority regime” established by the Versailles Treaty was shaped with the view of stabilizing States’ borders and diffuse conflicts.<sup>61</sup> In this framework, the protection of cultural diversity was certainly not the main goal. Humanitarian concerns about minority protection started to arise, though gradually, only by the end of the Second World War, and have been encapsulated within the human rights discourse.<sup>62</sup>

Nonetheless, the first international binding instruments on human rights protection that aimed to protect individuals from States’ abuses of power were not apt to guarantee an effective protection of minorities. The wording of the provisions was often too general to effectively respond to minorities’ peculiar claims. Additionally, the rights enshrined within international human rights treaties were frequently characterized by an individualistic vocation that could hardly respond to collective needs.<sup>63</sup> Only in the last decades, international and national laws have increasingly developed the idea that diversity cannot be effectively protected in the name

---

<sup>58</sup> The protection of minorities in Europe started to be founded also on nationalist criteria, since the Congress of Vienna of 1815. These criteria, together with religious ones, have been adopted by an increasing number of European States such as Poland (whose religious and linguistic autonomy was granted under the international negotiations of the Congress of Vienna) Serbia, Montenegro (were guaranteed sovereignty under the 1878 Berlin Treaty) and Bulgaria (whose sovereignty received sovereignty in 1902).

<sup>59</sup> L.A. Thio, *Managing the Babel: the International Legal Protection of Minorities in the Twentieth Century* (Leiden/Boston Martinus Nijhoff Publishers 2005), 22.

<sup>60</sup> F. Palermo and J. Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze (2nd Edition)* (Padova: CEDAM, 2011), 85.

<sup>61</sup> *Ibid.*, p.30.

<sup>62</sup> E. Gayin, *The Concept of Minority in International Law: a Critical Study of the Vital Elements* (Rovaniemi University of Lapland 2001).

<sup>63</sup> A.M. Jovanovic, "Are there universal collective rights?," *Human Rights Review* 11, no. 4 (2010): 17-44.

of “equality”<sup>64</sup> but rather through *ad hoc* instruments tailored to fit the peculiar characteristics and the specific needs of each minority group.<sup>65</sup>

Europe has been one of the major contributors to this historical-legal process that led to the progressive sedimentation of human rights values including the promotion of minority rights. Nowadays, a double-layered set of legal instruments focused on human and minority rights coexist in the European territory within the three regional organizations dealing with this subject: (a) the Organization for Security and Cooperation in Europe (OSCE) with 56 member States, (b) the Council of Europe (CoE) with 47 member States and (c) the European Union (EU) with 27 member States.

(a)The OSCE is the largest organization dealing with the protection of human and minority rights in Europe. It is a political organization, based on consensus, characterized by soft-law instruments (recommendations and political statements), which are therefore not legally binding. Especially over the last two decades, the OSCE has undertaken several steps in elaborating international standards focused on minorities.<sup>66</sup> The most notable institution in this realm is the High Commissioner on National Minorities (HCNM). This office monitors the situation of minorities within OSCE States and simultaneously assists States through recommendations and guidelines.<sup>67</sup>

(b)The CoE has made of human rights, democracy and rule of law the cornerstones of its mission. The 1950 European Convention on Human Rights (ECHR) is the paramount instrument that this organization has created to deal with human rights in Europe. The judicial

---

<sup>64</sup> “All human being are born free and equal in dignity and rights”, Art.1, Universal Declaration of Human Rights.

<sup>65</sup> F. Palermo, "Legal Solutions to Complex Societies: The Law of Diversity," in *Human Rights and Diversity: New Challenges for Plural Societies*, ed. E. Dunbar Ruiz Vieyetz, R. (Bilbao: University of Deusto, 2007).

<sup>66</sup> J. Wright, "The Osce and the Protection of Minority Rights," *Human Rights Quarterly* 18, no. 1 (1996).

<sup>67</sup>The Hague Recommendations regarding the Education Rights of National Minorities (1996); the Oslo Recommendations regarding the Linguistic Rights of National Minorities (1998); the Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999); and the Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations & Explanatory Note (2 October 2008).

protection of the rights enshrined in the ECHR is guaranteed by the European Court of Human Rights (ECtHR). Although there is no substantive provision specifically referring to the respect of minorities in the ECHR,<sup>68</sup> the ECtHR has increasingly played a vital role in promoting respect for minority rights, by extensively interpreting the provisions of its institutive treaty.<sup>69</sup>

Moreover, as a result of the Balkan “ethnic” conflicts of the 1990s, the CoE has adopted a more effective strategy to protect the rights of minorities.<sup>70</sup> Firstly, a commission of legal experts was created in order to deal with minorities and to better assist democratization processes in transition areas (Venice Commission).<sup>71</sup> Secondly, two specific instruments were created to protect and promote the rights of minorities: the 1992 European Charter for Regional or Minority Languages (ECRML) and the 1995 Framework Convention on the Rights of Persons Belonging to National Minorities (FCNM).

The protection of minorities is also guaranteed by two additional monitoring bodies in the geo-legal area of the CoE: the European Commission against Racism and Intolerance (ECRI) and the European Committee on Social Rights (ECSR). In particular, ECRI produces both in-country reports and general policy recommendations on racism, xenophobia, anti-Semitism

---

<sup>68</sup> The only provision mentioning minorities is enshrined in Art.14 of ECHR which prohibits discrimination on the ground of association, *inter alia*, with a national minority.

<sup>69</sup> See, *inter alia*, CoE, "Supervision of the Execution of judgements of the European Court of Human Rights," (Strasbourg: Directorate General of Human Rights and Legal Affairs, 2010); R. Medda-Windischer, "The European Court of Human Rights and Minority Rights " *European Integration* 25, no. 3 (2003); R. Sandland, "Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of the Human Rights " *Human Rights Law Review* 8, no. 3 (2008). F. Benoît-Rohmer and H. Klebes, *Le droit du Conseil de l'Europe - vers un espace juridique paneuropéen* (Strasbourg: Editions du Conseil de l'Europe, 2005).

<sup>70</sup> Although the civil conflicts occurred in the Balkans during the 90s are generally defined “ethnic conflicts”, such a definition appears quite reductionist as it is unable to account comprehensively for the complexity of the issue. For the sake of clarity, it can be argued that even if ethnic belonging was one – but not the exclusive – dimension characterizing the conflict, the need for peaceful coexistence among different ethnic populations within the same territory pushed the international community to further developed international minority rights law, after the collapse of the Socialist Republic of Yugoslavia.

<sup>71</sup> The European Commission for Democracy through Law, better known as the Venice Commission, is the Council of Europe's advisory body on constitutional matters. Established in 1990, the commission has played a leading role in the adoption of constitutions that conform to the standards of Europe's constitutional heritage. Initially conceived as a tool for emergency constitutional engineering, the commission has become an internationally recognized independent legal think-tank. See <http://www.venice.coe.int> .

and intolerance by working closely with the civil society.<sup>72</sup> The ECSR is instead specialized in monitoring the conformity in law and in practice of States Parties with the provisions of the European Social Charter.<sup>73</sup> It considers national reports submitted by Member States on a yearly basis, and at the same time, it examines collective complaints from organizations representing groups of citizens who allege a breach of any provisions of the Social Charter.<sup>74</sup>

(c) The EU is the third and smallest organization (in terms of number of Member States) dealing with the respect of human and minority rights in Europe. Even if it has been originally created and organized as a tool for economic integration, the EU has increasingly become concerned with individual human rights and then with minority rights by progressively including them in its mandate. Specifically, the EC/EU legislation is mostly characterized by hard law instruments focusing more on the dimension of non discrimination<sup>75</sup> than on the one of the promotion of minority rights.<sup>76</sup> Until very recently, minority protection was not considered to be part of EU's competences and *acquis*. The notion of “national minorities” started to enter the EU's domain just in the 90s and exclusively with regard to external

---

<sup>72</sup> ECRI was established in 1993 by the first Summit of Heads of State and Government of the member States of the Council of Europe. The decision of its establishment is contained in the Vienna Declaration which the Summit adopted on 9 October 1993. In the framework of its country- by-country monitoring, ECRI examines the situation concerning manifestations of racism and intolerance in each of the Council of Europe Member States. The country-by-country monitoring deals with all member States on an equal footing and takes place in five-year cycles, covering nine/ten countries per year. In the framework of General Policy Recommendations ECRI addresses guidelines which policy-makers are invited to use when drawing up national strategies and policies in various areas (for instance on 24 June 2011 ECRI has adopted a General Policy Recommendation N° 13 on Combating Anti-Gypsyism and Discrimination against Roma). Finally, ECRI performs a strong program of awareness-raising among the general public through cooperation with NGOs, the media, and the youth sector at the national level. See [www.coe.int/ecri](http://www.coe.int/ecri)

<sup>73</sup> The European Social Charter was adopted in 1961 and revised in 1996. It enshrines socio and economic provisions focusing on the areas of housing, health, education, employment, legal and social protection, free movements of persons and non discrimination. See also <http://www.coe.int/T/DGHL/Monitoring/SocialCharter/>

<sup>74</sup> As for collective reports, the ECSR considered a number of reports submitted by NGOs representing minority groups. In the case of Roma, see, *inter alia*, Decision on the merits of 28 June 2011, Centre on Housing Rights and Evictions v. France, Complaint N° 63/2010, which concerns the eviction and expulsion of Roma from their homes from France during the summer of 2010. A more in-depth analysis of the cases involving violations of Roma rights under the ECSR, is discussed at section 5.3.1. For a more comprehensive overview of the complaints involving minority groups see [http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints\\_en.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp)

<sup>75</sup> The Racial Equality Directive (2000/43/EC), the Employment Framework Directive (2000/78/EC) the Council Directive on Family Reunification (2000/86/EC) and the Long-Term resident Directive (2003/109/EC).

<sup>76</sup> When considering minority law all along the three geo-legal spheres, it can be noted that minority legislation is more specific and far-reaching in soft-law instruments than in the hard-law ones (hence in the most external geo-legal spheres than in the most internal ones).



relations in the enlargement policies towards the Eastern part.<sup>77</sup> After 2009, with the entry into force of the Lisbon Treaty, minority protection has acquired binding force.

The European Court of Justice (ECJ) is the judicial body providing institutional redress of individual and community rights. To date, the ECJ has already decided on three cases concerning minority rights, all of which mostly involved linguistic rights issues: the *Mutsch* case<sup>78</sup> of 1985, the *Groener* case<sup>79</sup> of 1989 and the *Bickel/Franz* case<sup>80</sup> of 1998. Additionally, the Lisbon treaty besides extending ECJ's jurisdiction over human and minority rights, has also opened up the opportunity for the EU to enter ECHR as a party, by recognizing legal personality to the organization.<sup>81</sup>

Regardless of this possible future convergence between EU and CoE judicial bodies, should be emphasized that among the three European organizations which include the protection of human and minority rights in their mandates, the EU is the one playing the most crucial role since through its hard-law instruments it can impose a more incisive compliance to international human and minority rights standards to Member States. Yet, over the last decades, the EU benefited more extensively from the work and the experience of the CoE and

---

<sup>77</sup> From the adoption of the “EC – Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union” in 1991 to the Eastern European countries application for membership in 1993, Member States created a framework for EU enlargement (known as “Copenhagen criteria”) where the protection of minorities were firstly mentioned as a requirement to enter the Union.

<sup>78</sup> *Mutsch*, Reference for a preliminary ruling, Case 137/84 [1985] ECR 2681. In this case, the Court holds that the equal treatment of migrants has to be granted also by allowing them to use their language in proceeding before the courts as a way to contribute meaningfully to their integration.

<sup>79</sup> *Groener v. Minister for Education and the City of Dublin*, Case C-379/87 [1989] ECR 3967. In this case, the Court stated that the requirement of bilingualism is reasonable to protect a minority language.

<sup>80</sup> *Bickel/Franz*, Case C-274/96 [1998] ECR I-7637. In this case, the Court ruled that language rights granted by a Member State to its own national must be extended to other EC nationals in judicial as well as in administrative procedures.

<sup>81</sup> Should the EU agree to join the ECHR, the jurisdiction of the two courts, the ECJ and the ECtHR, over the breaches of EU-ECHR human and minority rights need to be more precisely defined in order to avoid potential conflicts between the two *fora*. According to some scholars, the accession of the EU to the ECHR could be thought just as “complementary” to the ECJ, since all EU Member States are already part to the ECHR. Others support the view that by adhering to the ECHR, the EU would certainly strengthen human and minority rights protection within its boundaries because it would adopt the ECHR common standard of protection. Indeed, human and minority rights are not part of ECJ's primary competence, as in the case of the ECtHR, which relies on the compliance to the EU law mostly reflecting economic integration goals. Hence, the adherence to ECHR could potentially ensure more coherence and harmony between the two institutions. On this debate, see, *inter alia*, K. Shoraka, *Human Rights and Minority Rights in the European Union* (Abingdon: Routledge, 2010), 50-51.

OSCE in the legal field of minority rights, since so far, it has not adopted specific legislation on this field.<sup>82</sup>

This intensification of human and minority rights protection has reinforced the view that Europe is the geo-political region that most intensively protects the rights of minorities in the world.<sup>83</sup> Despite these positive legal improvements, its system of protection still presents some serious gaps, characterized by a Westphalian conception which still has roots – both an individual and a collective conception of minority rights – in a territorial basis. As a result, every social group that cannot be exactly comprised within a given territory, such as Roma, cannot fully benefit from the protection guaranteed by these legal instruments.

#### **1.4. Individual v. Collective Rights**

The legal development of minority rights in Europe has developed both through an individual as well as through a collective dimension of rights. Under the League of the Nations, the system of minority rights was based on bilateral treaties which regulated – mostly from a collective dimension – the existence and the rights of *kin-state* groups i.e. of those social groups who had become national minorities after international borders were redefined at end the First World War. When the precarious international equilibrium of the League of the Nations was officially broken through the Third Reich invasion of Poland, Germany brought before the international community the argument that its invasion was justified to protect the alleged violations of the German *kin-state* minority living in neighboring countries.<sup>84</sup>

In order to avoid any possible repetition of *gross* human and minority rights violations occurred during the Second World War, the universal conception of human rights law underlying the foundation of the new collective system of security – the United Nations –

---

<sup>82</sup> On the relationships between EU and CoE and EU and OSCE, especially with the Fundamental Rights Agency (FRA) and the HCNM, see Ibid., 84-89.

<sup>83</sup> M. Nowak, *Introduction to the Human Rights Regime* (Leiden : Martinus Nijhoff Publishers, 2003).

<sup>84</sup> The Sudeten living in the border area of Bohemia, Moravia and Silesia of the former Czechoslovakia State.

openly evaded every explicit reference to the collective enjoyment of minority rights by putting the single individual at the centre of legal and constitutional systems created after this global conflict. Against this background, minority rights were therefore recognized just in terms of individual rights. Interestingly enough, the emphasis over the individual conception of minority rights is still reverberating in the most recent international legal instruments addressing minority rights, which were adopted more than 50 years after the end of the conflict.<sup>85</sup>

Yet, even when shaped on an individual perspective, minority rights should not be understood in “juxtaposition” with human rights but as a sort of specific “derivation” of general human rights law which ensues from the necessity of providing diverse social groups with a different legal treatment in order to comprehensively fulfill the equality principle.<sup>86</sup> At the substantial level, minority rights ensuing from an individual conception are the rights strictly related to individual exercise, such as general non discrimination clauses and the right to existence.

Nonetheless, at the doctrinal level there seems to be increasing agreement about a progressive evolution of minority rights towards a collective dimension as well. In 1976, Dinstein suggested that international law was already mildly recognizing collective rights to minorities at least for those norms which “retain their character as direct human rights”.<sup>87</sup> Under this belief, the author was differentiating between two categories of collective minority rights: the

---

<sup>85</sup> The FCNM, adopted 50 years later, in 1995, for instance, is based upon an individualist conception of minority rights addressing the different legal entitlements by referring to “every person belonging to a national minority” (see, for instance, the phrasing of Art. 3 and Arts. 7, 8 and 9) and by openly omitting every reference to the “collective” benefit of these rights (by limiting itself to the guarantee of most rights also when those are exercised “in community with others”). The ECRML does not openly embrace a collective dimension of rights as well: by limiting its scope to minority languages rather than to linguistic minorities, the international legislator opted for a more neutral solution which left the “individual” or the “collective” implementation of linguistic rights to the domestic legislation of each State Party.

<sup>86</sup> The role that minority right law holds in fulfilling the equality principle has been more extensively clarified by the ECtHR in the case *Thlimmenos v. Greece* (2001) which set, *inter alia*, the precedent according to which different people should be treated differently in order to fulfil of the right to equality on the effective level. See *Thlimmenos v. Greece* (Application No. 34369/97, European Court of Human Rights, decision of 6 April 2000)

<sup>87</sup> Y. Dinstein, "Collective Human Rights of People and Minorities " *International and Comparative Law Quarterly* 25, no. 1 (1976): 102. in Jovanovic, "Are there universal collective rights?" 34.

rights of people (understood as the entire body of the citizens of a State) and the rights of minorities (understood as particular ethno-cultural distinctive groups).

According to Dinstein, the rights of the people had to be identified with the rights to physical existence, to self-determination, and with the use of natural resources, whereas the rights of minorities have to be identified with the right to physical existence and with the right to preserve a separate identity.<sup>88</sup> More recently, Henrard has recognized a further development in the doctrine on the collective dimension of minority rights:

...some authors distinguish in fact between “group rights” (rights of a group as such) and “collective rights” (rights of members of a group, as member) while other make that distinction within the categories of group rights or even within the category of “collective rights”. Others use the concepts “collective rights” and “group rights” interchangeably and still others use the expression “collective rights” for rights attributed to a group in se, etc. ...<sup>89</sup>

Palermo and Woelk have specified that within the dimension of minority “collective rights” there should be drawn a distinction between “collective rights *per se*” and individual rights implying a collective function or exercise. According to the authors, both typologies of rights aim at the protection of the group. Yet, while the first typology of rights directly addresses the group (as the bearer of these rights), the second typology of rights indirectly addresses the group when provisions attribute subjective legal entitlements to the individuals forming that group (permitting a collective dimension through the joint exercise of rights).<sup>90</sup>

Art. 47 of the 2003 Charter on Human and Minority Rights and Civil Liberties regulating the Union between Serbia and Montenegro<sup>91</sup> provides the basis for comprehending this doctrinal categorization on the practical level. In this document, collective rights are explained in terms

---

<sup>88</sup> Jovanovic, " Are there universal collective rights?"; Dinstein, "Collective human rights of people and minorities".

<sup>89</sup> C. Henrard, *Devising an Adequate System of Minority Protection. Individual Human Rights, Minority Rights and the Right to Self-Determination* (The Hague/Boston/London: Martinus Nijhoff Publishers 2000), 153.

<sup>90</sup> Palermo and Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze (2nd Edition)*, 46.

<sup>91</sup> The State Union of Serbia and Montenegro was created on the legacy of the Socialist Republic of Yugoslavia in 2003. This union officially came to an end in 2006 after the declaration of independence of Montenegro. After the dissolution of the Union, Serbia continued to be its legal successor.

of those rights that may imply the participation of minorities in the decision-making process regarding culture, education, and information and the use of the language in accordance with law.<sup>92</sup>

### **1.5. Territorial and non-territorial minorities**

Part of the literature has defined “non-territorial minorities” as “minorities within minorities” since, by definition, these social groups naturally escape the Westphalian territorial model.<sup>93</sup>

In terms of objective and subjective identification criteria, at the theoretical level both minority groups (territorial and non-territorial minorities) share a number of common elements. Broadly speaking, a group of people can be identified as a minority only in relation to a majority group and on the basis of a number of elements: people can belong to a minority because of their gender, of their religion, of their age, etc.<sup>94</sup>

However, at the moment, a general and shared binding definition of “minority” does not exist even within specific international instruments.<sup>95</sup> The concept of “minority” appears in fact very difficult to be crystallized not only because of sociological reasons but mostly because of diplomatic ones.<sup>96</sup> Some widely accepted proposals of the concept of “minority” have so far largely agreed on the objective elements of “numerical inferiority”, “non-dominant position”<sup>97</sup>

---

<sup>92</sup> Palermo and Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze (2nd Edition)*.

<sup>93</sup> Thio, *Managing the Babel: the International Legal Protection of Minorities in the Twentieth Century*, 10.

<sup>94</sup> E. Palici di Suni, *Intorno alle Minoranze* (Torino: Giappichelli 1999), 5.

<sup>95</sup> See also the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic

Minorities and the 1995 Framework Convention for the Protection of National Minorities. G. Gilbert, "The Council of Europe and Minority Rights," *Human Rights Quarterly* 18, no. 1 (1996).

<sup>96</sup> Indeed, whenever a group is internationally recognized as a “minority” it can potentially raise some claims of autonomy on the basis of the principle of self-determination. Thus, States are extremely cautious in binding to a provision that could potentially undermine their territorial integrity. On the debate on the various definitions of minorities see, *inter alia*, J. Packer, "On the Definitions of Minorities," in *The Protection of Ethnic and Linguistic Minorities in Europe*, ed. J. and Myntii Packer, C. (Åbo/Turku Institute for Human Rights, Åbo Akademi University, 1993).

<sup>97</sup> In 1976, Capotorti the Special Rapporteur of the UN SubCommission on the Prevention of Discrimination and Protection of Minorities, proposed the following definition though to be explanatory on Art. 27 of the International Covenant on Civil and Political Rights (ICCPR): ‘A group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directing towards preserving their culture, traditions, religion or language’. at 96

and on “discrimination”<sup>98</sup> *vis-à-vis* the majority of the population. Additionally, these legal proposals have concentrated on some subjective distinctive elements which mostly deal with the way(s) through which minority groups perceive themselves within the population of a State and are concerned to preserve their special features.<sup>99</sup> Subjective elements mostly emphasize the “sense of solidarity”, the “will to survive” and the “self-identification” as a minority group.<sup>100</sup>

More recently, the doctrine has identified two macro-categories of minorities in international law: the so-called “historical, traditional, autochthonous minorities” and the “new minority groups stemming from migration”.<sup>101</sup> These categories explain the concept of minority in terms of State’s sovereignty over one territory and one population. While the first category mostly refers to communities that became minorities as a consequence of a re-drawing of international borders, the second category refers to groups and individuals that leave their original homeland to emigrate to another country; it thus takes the mass-migration of people into account which has become a characteristic feature of the processes of globalization.

While these legal categories (and the legal instruments ensuing from them) can protect and promote minority groups which can be comprised within the territorial scheme, the same legal

---

§ 568. The phrase “in a non-dominant position” was included in order to ensure that non dominant minorities – such as the white minority under the former apartheid system in South Africa – could not avail or abuse the concept of minority rights. See F. and Bowring Deirdre, B. , *Minority and Group Rights in the New Millenium* (The Hague : Martinus Nijhoff Publishers 1999). In 1985, Deschênes “updated” Capotorti’s definition by proposing the following: “A group of citizens of a state, constituting a numerical minority and in a non-dominant position in the state, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law”. J. Deschênes, *Proposal Concerning a Definition of the Term 'Minority'* (U.N. Doc. No. E/CN.4/Sub.2/1985/31.1985).

<sup>98</sup> Wirth an American sociologist, provided another renowned attempt of definition ‘As a group of people who, because of their physical or cultural characteristics, are singled out from others in the society in which they live for differential and unequal treatment, and who therefore regard themselves as objects of collective discrimination. The existence of a minority in a society implies the existence of a corresponding dominant group with higher social status and greater privileges. Minority status carries with it the exclusion from full participation in the life of the society’. L. Wirth, "The Problem of Minority Groups," in *The Science of Man in the World Crisis*, ed. R. Linton (New York : Columbia University Press, 1945).

<sup>99</sup> G. Chaliand, *Minority Peoples in the Age of Nation States* (London : Pluto Press, 1989).

<sup>100</sup> R. Medda-Windischer, *Old and New Minorities: Reconciling Diversity and Cohesion. A Human Rights Model for Minority Integration* (Bozen: EURAC Research, 2009), 60-62.

<sup>101</sup> *Ibid.*, 40-41.

categories are unable to comprehensively identify and to fully protect non-territorial minorities since they fall outside the Westphalian paradigm precisely because of their non-territorial intrinsic feature.

## 1.6. Roma as a non-territorial minority

The situation of Roma has been described as “non-territorial minorities living dispersed in more than one country”.<sup>102</sup> At present, international human and minority rights law has provided just a first recognition to non-territorial groups, especially at the CoE legal level.<sup>103</sup> However, such a recognition is still *in embryo*: a full set of *ad hoc* guarantees to comprehensively address the needs of non-territorial minorities needs in fact to be further developed. Accordingly, the rights of non-territorial groups are still addressed by “classic” international minority law which, as it has been repeatedly emphasized, are still strongly hinging on a territorial categorization (“old” v. “new” minorities).

While Roma are a traditional and historical community living in Europe, the consequences of their non-territorial character is neither comprehensively addressed by the “old minority” legal approach nor by the “new minority” legal approach. On the one hand, Roma can be considered as a “traditional minority” since they have historically been living in Europe also with (an increasing) sedentary stance, while, on the other, they might also be considered as “migrants” since a consistent proportion of them still remain nomadic.<sup>104</sup>

---

<sup>102</sup> R. and Eddison Brett, E., "The Csce Human Dimension on National Minorities. Can National Minorities be considered positively? , " *Helsinki Monitor. Quarterly on Security and Cooperation in Europe* 4, no. 3 (1993): 40.

<sup>103</sup> The ECRML indirectly recognizes non-territorial groups by protecting non-territorial languages at Arts. 1(c), 7.5. and 11.2. Romanes, the language spoken by Roma, has been recognized as one of the non-territorial languages under the ECRML see section 4.3. More recently, at the European level, the CoE has taken another significant step toward the definition of a common understanding of minority protection through the adoption Recommendation 1735 (2006). Specifically, Recommendation 1735 calls upon states to a wider protection of national minorities (which *in abstracto* should also comprehend non-territorial groups) by inviting Member States at Art. 16.4 “... to integrate all its citizens, irrespective of their ethno-cultural background, within a civic and multicultural entity.” Additionally, it should be noted that both the legal opinions expressed by the Advisory Committee of the FCNM and the jurisprudence developed within the ECtHR realm have been recognizing, especially in the last decade, the rights of cultural identity of Roma and their need for “differentiated” protection. See section 2.1.1. for a preliminary consideration of the ECtHR’s jurisprudence to this regard.

<sup>104</sup> ENAR/ERIO, "Debunking Myths & Revealing Truths about the Roma," (Bruxelles: ENAR/ERIO, 2011).

The resulting “legal limbo” in between “old” and “new” minorities has direct consequences also for the legal recognition of Roma and for the rights that every domestic legal system recognizes to this social group. Indeed, Roma are not recognized as a distinctive social group in each and every State belonging to the CoE. Even in States where such recognition is provided (by means of the legal category of “minority” or by means of any other legal category) there persists a situation of ambiguity as regards to the recognition of Roma’s legal status.

As the case of Italy *inter alia* demonstrates, within Romani communities there might coexist people holding also different citizenship statuses: European, non-European, stateless people and even unregistered people who are completely invisible to law.<sup>105</sup> Moreover, a phenomenon of internal asylum-seeking migration has recently developed within Romani communities: they are not (only) seeking asylum when coming to Europe from non-EU countries but also from EU ones.<sup>106</sup>

In line with Bonetti’s thought, the legal status attributed to any social group has to be considered of key importance since besides influencing the recognition of their rights it strongly (and inevitably) influences their coexistence with other social groups as well.<sup>107</sup> By and large, it can be argued that although the legal and political treatment of Roma varies significantly across the European continent, a simplified picture can be “geographically” provided by following the four cardinal directions: East vs. West, North vs. South.

---

<sup>105</sup> On the different legal statuses of Roma see, *inter alia*, G. Perin, "L'applicazione ai Rom e ai Sinti non cittadini delle norme sull'apolidia, sulla protezione internazionale e sulla condizione degli stranieri comunitari ed extracomunitari. ," in *La condizione giuridica di Rom e Sinti in Italia*, ed. P. Bonetti, A. Simoni, and T. Vitale (Milano : Giuffr  Editore 2011).

<sup>106</sup> Especially Eastern European Roma are “internal” European asylum seekers since in their countries of origins they are strongly experiencing poverty and racism. To this regard, see FRA, "The Situation of Roma EU citizens moving to and settling in other EU Member States," ed. Office for Official Publications of the European Communities (Luxembourg 2009). J.P. Jacques, "Les Roms et l'Union Europ enne," in *Les Roms face au Droit en Belgique* ed. J. Fierens (Bruxelles : la Charte, 2012).

<sup>107</sup> P. Bonetti, "I nodi giuridici della condizione di Rom e Sinti in Italia," in *La condizione giuridica di Rom e Sinti in Italia*, ed. P. Bonetti, A. Simoni, and T. Vitale (Milano: Giuffr  Editore, 2011), 20.



When considering the European panorama from a longitudinal perspective (East v. West) it can be maintained that the legal recognition of non-territorial groups in general, and of Roma in particular, can be easier and more frequently found on the Eastern side than on the Western side. Indeed, in Central-Eastern Europe, some newly independent States created after 1989 declared to be nation States with one dominant constituent nation.<sup>108</sup> This declaration required a more extensive recognition of different national groups also at the constitutional level. In Western Europe instead, the recognition of non-territorial groups has historically been less developed than in Eastern Europe, particularly in the case of Roma notwithstanding their more conspicuous presence.<sup>109</sup>

The more inclusive treatment of non-territorial minorities in Eastern European countries appears particularly evident when considering the external citizenship policies. As emphasized by a recent study of the EUDO observatory,

In East Central Europe the largest among the “stateless” minorities are the Roma whose numbers range in the millions but, in most countries official census data do not contain reliable information on their numbers. Officially, external citizenship policies in the East Central European countries treat the Roma as members of linguistic nations in the territory inhabited by the given nations, so that, for instance, Hungarian external citizenship is made available to the Roma of Slovakia or Romania who speak Hungarian and have Hungarian citizens in their ancestry.<sup>110</sup>

In other words, in Central Eastern Europe the protection of non-territorial minorities, Roma included, formally extends even beyond national borders, while in Western Europe the protection granted to Roma appears quite weak even within national borders, given their weaker legal recognition also in terms of minority status.

This different degree of legal recognition of Roma in Eastern Europe *vis-à-vis* Western Europe results from the legacy of the Socialist period. By and large, Socialist governments

---

<sup>108</sup> S. Pogonyi, Kovács, M.M, Körtvélyesi, Z. , "The Politics of External Kin-State Citizenship in East Central Europe," in *EUDO Citizenship Observatory Comparative Reports*, ed. EUDO Citizenship Observatory (Badia Fiesolana: European University Institute, 2010), 6.

<sup>109</sup> Ibid.

<sup>110</sup> Pogonyi, "The Politics of External Kin-State Citizenship in East Central Europe," 8.

made a strong effort to minimize ethnic differences in order to assimilate Roma, through a different degree of cultural repression though. Even if this legacy has *de jure* provided Roma with greater opportunities to be legally recognized (especially in the cultural-political sphere), it has to be nonetheless recalled that, even in Eastern Europe, on a *de facto* level Roma are generally more vulnerable than other social groups.<sup>111</sup>

In contrast to Eastern Europe, in Western Europe Romani communities generally have a very varied historical-cultural background. Many Romani groups have no contact (or very little contact) with each other. This “varied historical legacy” still reverberates in their generally low and non-homogenous domestic legal recognition.<sup>112</sup>

When considering the European panorama from a transversal perspective instead (North vs. South), the different treatment of non-territorial minorities in general and of Roma in particular, besides varying in the light of the different legal recognition, it very much differs in relation to the different welfare systems. As is common knowledge, the concrete implementation of any human rights, minority rights included, may vary more or less extensively according to the welfare measures devised in each and every legal system in order to provide concrete implementation to legal provisions.<sup>113</sup>

In general terms, Northern countries, such as Scandinavian countries, have stronger and more developed welfare systems than Southern countries, such as Mediterranean ones. Northern welfare systems in fact present stronger provisions not only for their citizens or non-territorial minorities but also for “new minority groups”.<sup>114</sup> Hence, they seem to be more open to

---

<sup>111</sup> D. Ringold, M. O. Orenstein, and E. Wilkens, "Roma in an Expanding Europe. Breaking the Poverty Cycle," (Washington, D.C.: World Bank 2005), 8-9.

<sup>112</sup> A more in-depth account on the development of the different Romani historical backgrounds in Eastern and Western Europe is provided at chapter 9.

<sup>113</sup> Especially with regard to those legal provisions that imply “positive obligations” from the State, such as social and economic rights.

<sup>114</sup> A. Bloch and L. Schuster, "Asylum and Welfare: Contemporary Debates," *Critical Social Policy* 22(2002).

provide policy measures aimed at including new social groups even if they cannot be necessarily comprised within the historical/territorial model.

The following chapter provides a more detailed picture regarding the legal treatment of Roma in Europe starting from a case-by-case analysis. However, since the legal treatment of any social group cannot be analyzed outside the legal and political systems of reference, the discussion firstly focuses on a general overview of the “constitutional models” recognizing Roma and subsequently on the legal categorizations identifying Roma in each constitutional model. The basic assumption underlying this discussion is that the legal (and the political) treatment of Roma is strictly connected both to the constitutional system and to the legal category identifying this social group.



## Chapter 2

### Roma in European legal systems

**Summary:** **2.1.** A constitutional mapping of Roma recognition in Europe. – **2.1.1.** Non discrimination: the (only) solution? – **2.2.** A Definitional mapping of Roma recognition in European legal systems . – **2.2.1.** Constitutive Nationality. – **2.2.2.** National v. Ethnic Minority? – **2.2.3.** Linguistic Minority. – **2.2.4.** National Cultural Autonomy. – **2.2.5.** Other definitions. – **2.3.** Indigenous People? – **2.4.** Research issues.

#### 2.1. A constitutional mapping of Roma recognition in Europe

The legal recognition that European constitutional systems have historically provided to Romani communities has been extensively differentiated within the CoE area. A first set of reasons underlying this significant variation in the recognition of Roma legal status in Europe, can be attributed to the socio-political processes of European nation-building.<sup>115</sup> A second set of reasons that can instead explain this variation, regards the legal development of minority rights law both at national and at supra-national levels.<sup>116</sup> Indeed, both levels have demonstrated difficulties in adapting the existing legal categories to the non-territorial features of the Romani community, since European legal frameworks are still based on (Westphalian) territorial conception of minorities.

According to a doctrinal systematization, the constitutional mapping of Roma recognition in Europe can be summarized through four general ideal typical models that have been identified in the comparative analysis of the legal recognition of diversity in Europe: repressive national systems, liberal agnostic systems indifferent to differences, promotional systems and

---

<sup>115</sup> See section 1.2.

<sup>116</sup> See section 1.3.

multinational equal systems.<sup>117</sup> More specifically in the case of Roma, these constitutional approaches have been recently re-modulated on the basis of the status of ratifications of the FCNM.<sup>118</sup>

As seen, the FCNM is the most important legal instrument providing protection to minority rights at the CoE level.<sup>119</sup> Among the 47 States belonging to the CoE, at the moment only eight countries have not explicitly recognized any minority group within their legal systems, Roma included.<sup>120</sup> Among the remaining 39 countries recognizing minorities within their legal systems,<sup>121</sup> four constitutional approaches have been identified in addressing the domestic recognition of Roma minority: exclusionist countries, agnostic countries, mildly promotional countries and highly promotional countries.

“Exclusionist countries” have been identified as those countries excluding Roma from the legal protection of the FCNM, as this social group has not been recognized as a “national minority”. The non recognition of Roma as a “national minority” has been justified – at the ratification stage – in the light of different sets of reasons. Armenia justified its position in the light of the (supposed) lack of interest of Roma to benefit from the FCNM’s provisions; Denmark explained the lack of recognition in the light of a (supposed) full integration of Roma within its society; the Netherlands and Portugal argued that they could not include Roma within the category of “national minority” in the lack of clear territorial features

---

<sup>117</sup> This classification has been proposed by R. Toniatti, "Minoranze e minoranze protette. Modelli costituzionali comparati," in *Cittadinanza e diritti nelle città multiculturali*, ed. T. and Dunne Bonazzi, M. (Bologna: Il Mulino, 1994). And J. Marko, "Equality and Difference: Political and Legal Aspects of Ethnic Group Relations," in *Vienna International Encounter of Some Current Issues Regarding the Situation of National Minorities* ed. F. Matscher (Strasbourg: Arlington, 1997). In F. Palermo and J. Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze (2nd Edition)* (Padova: CEDAM, 2011), 52.

<sup>118</sup> F. Palermo, "Rom e Sinti come minoranza. Profili di diritto italiano e comparato e di diritto internazionale," in *La condizione giuridica di Rom e Sinti in Italia* ed. P. Bonetti, A. Simoni, and T. Vitale (Milano: Giuffrè Editore 2011).

<sup>119</sup> See section 1.3.

<sup>120</sup> Indeed, so far four countries have neither signed nor ratified the FCNM: Andorra, France, Monaco and Turkey. Whereas other four countries have signed the Treaty but not ratified it yet: Belgium, Greece, Iceland and Luxembourg. See [http://www.coe.int/t/dghl/monitoring/minorities/1\\_AtGlance/PDF\\_MapMinorities\\_bil.pdf](http://www.coe.int/t/dghl/monitoring/minorities/1_AtGlance/PDF_MapMinorities_bil.pdf) last update 24/10/2008 (last consulted on 05/04/2012).

<sup>121</sup> Such a recognition can be generally inferred from the ratifications of the FCNM provided by these countries.

identifying this social group; in Cyprus, instead, Roma are not recognized since they are included in the Turkish-Cypriot community which is not recognized in turn.<sup>122</sup>

The doctrine has identified as “agnostic” those legal systems that do not formally recognize Roma as “national minority”, such as Italy and Slovenia. Other countries do not recognize Roma in terms of “national minority” but through other legal definitions (e.g. “ethnic minority”): these have been deemed to be potentially included within this category of “agnostic States”. In some cases, such as in Poland, the variety of legal definitions is merely formal since the distinction between “national” and “ethnic” minorities does not substantially affect the enjoyment of minority rights since both social groups are *de facto* entitled to the same set of rights.<sup>123</sup>

A third group of countries that has recognized Roma as a “national minority” has been defined as “mildly promotional” since it has limited the enjoyment of minority rights to the citizens of the State only. The vast majority of European legal systems can be attributed to this legal ideal-type when addressing the legal recognition of Roma. Germany is the most emblematic example that can be discussed to this regard. In this case, the category of “national minority” has not been extended to Roma who are not German citizens because of the opposition of the “autochthonous” German communities of Roma and Sinti.<sup>124</sup>

Another interesting case that is worth mentioning under the category of “mildly promotional countries” is that of Spain recognizing as “national minority” under the scope of the FCNM only the Spanish Romani social group (*gitanos*). Nonetheless, Spain has not recognized other social groups as “national minority” such as the Catalans or the Basques which have

---

<sup>122</sup> Palermo, “Rom e Sinti come minoranza. Profili di diritto italiano e comparato e di diritto internazionale.” 158-59.

<sup>123</sup> Ibid., 159.

<sup>124</sup> See, *inter alia*, the German reports presented before the Advisory Committee of the FCNM.

historically claimed autonomy because of their alleged belonging to a different social group other than the “Castilian” majority.<sup>125</sup>

The fourth constitutional approach to address the constitutional recognition of Roma has been identified in the group of “highly promotional” States. These countries have recognized all Roma living within their national territories regardless of the citizenship criterion. These are especially the cases of United Kingdom and Ireland which do not formally distinguish between citizens and non-citizens when applying the category of “national minority” under the scope of the FCNM.

Indeed, the United Kingdom has recognized Roma as “national minority” under the judicial interpretation of the *Race Relations Act* of 1976. Ireland has recognized the rights attributed to “national minorities” also to Romani individuals who are not Irish citizens. Although non-Irish citizens can benefit from a wide spectrum of rights they are not entitled to political rights.<sup>126</sup> Sweden is another interesting case that it worth highlighting within the group of “highly promotional countries”. At the moment of ratification, in fact, this country has omitted a detailed specification of the categories of minority groups protected under the FCNM. The practice has shown that Swedish authorities equally apply the set of rights enshrined in the Convention to Swedish citizens as well as to non Swedish-citizens.<sup>127</sup>

### **2.1.1. Non discrimination: the (only) solution?**

The emphasis put above on the different constitutional approaches to minority rights in general and to the rights of Roma in particular, originates from the assumption that the principle of non discrimination, underlying the democratic foundations of every Member State belonging to the CoE, is not *per se* comprehensively sufficient to address minority

---

<sup>125</sup> Palermo, "Rom e Sinti come minoranza. Profili di diritto italiano e comparato e di diritto internazionale." 161.

<sup>126</sup> According to the *Race Relations Act* non-Irish citizens can benefit from cultural and linguistic rights as well as from right to association.

<sup>127</sup> *Ibid.*, 162.



rights. Although the concepts of “equality” and “non discrimination” have for centuries been considered as “related” but “distinct”, only in the 20<sup>th</sup> century have jurists comprehensively acknowledged the necessity of treating different social groups differently in order to fulfill the equality principle on the substantial level as well.<sup>128</sup>

Scholars argue that non discrimination does represent *only* the first step in the protection of minority rights since this principle offers, at the individual level, a minimum degree of protection from the un-equal (and unjustified) legal treatment of a person who can suffer from a limited (or from an inexistent) human rights enjoyment because of his/her belonging to a different social group.<sup>129</sup> However, this principle is not in itself sufficient to ensure the promotion of an “equal treatment” to social groups that are intrinsically distinct from the majority of the population.<sup>130</sup>

The principle of non discrimination does in fact mostly entail a “negative obligation” which implies the State’s abstention from any unjustified intervention that can produce a human rights violation.<sup>131</sup> In the case of minorities, the Venice Commission has clarified that such a general “negative obligation” needs to be accompanied by a “a second level of non discrimination legislation” which concretizes the so-called “positive measures”.<sup>132</sup> These

---

<sup>128</sup> Indeed, the range of human rights were significantly expanded from the 18<sup>th</sup> century notion of “natural rights” to the international system of the 20<sup>th</sup> century.

<sup>129</sup> A classic example that can be brought to clarify this aspect, relates to the full access to economic and social rights by some minority groups (such as women, ethnic or religious minorities) who are discriminated against because of their disadvantaged status especially when trying to access the labour market or the housing market, as well as educational and health care institutions.

<sup>130</sup> A. Eide and O. Tørkel, *Equality and Non-Discrimination*, ed. Publication No.1 (Oslo: Norwegian Institute of Human Rights, 1990).

<sup>131</sup> In human rights theory, this obligation is often correlated to the “obligation to respect” which traditionally consider State’s respect of fundamental human rights (right to life whereby the negative obligation corresponds to the state’s obligation not to kill and right to physical integrity whereby the negative obligation corresponds to the state’s obligation not to torture) and of civil rights (such as the right to vote whereby the negative obligation corresponds to the rights to not arbitrarily exclude anyone from democratic elections). More recently, the notion of “negative obligation” has also developed in reference to economic and social rights whereby the rights to employment, health and education correspond to the State’s obligation not to arbitrarily exclude anyone from the labor market, health care and educational systems.

<sup>132</sup> L. Basta Fleiner, "The Principle of Equality and Non-Discrimination under the Framework Convention for the Protection of National Minorities: also a Tool Fostering the Integration of Migrants' Children in the Field of Education? ," in *Unidem Campus Trieste Seminar "Policies on the protection and social integration of*

measures are to be understood as embodying, besides an “obligation to respect”, also an “obligation to fulfill” and an “obligation to protect” the rights of the minority group in question.<sup>133</sup> More specifically, these measures require States to adopt any legislative, administrative, judicial and practical measures necessary to ensure that the rights for the minority group are implemented to the greatest possible extent on reasonable and objective grounds.<sup>134</sup>

While it is very difficult to say which differences objectively justify a differentiated recognition and a diverse legal treatment of a minority group,<sup>135</sup> an objective justification for activating a distinct set of minority rights is generally considered to be founded when cases of systematic discrimination occur. Systematic discrimination is objectively found whenever the existence of this social group or the effective enjoyment of its fundamental rights is impossible to be guaranteed under general human rights clauses.

This is in fact the general approach that the ECtHR has recently upheld in the case concerning Roma rights by clarifying that “positive measures” are justified in the light of their “vulnerable position as a minority” and in the light of their “different lifestyle both in the relevant regulatory planning framework and in arriving at the decisions in particular cases”.<sup>136</sup>

In the case *D.H. and Others v. Czech Republic*, the Court has clearly stated that

there could be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognizing the special needs of

---

*immigrants and their implementation at the international, national and local level*” Trieste, Italy. 29 June – 2 July 2009, ed. CDL-UDT(2009)002. Engl. only (Strasbourg: Council of Europe 2009).

<sup>133</sup> According to the doctrine the “obligation to protect” theoretically differs from the “obligation to fulfil” inasmuch as it aims to avoid human rights violations by private persons. Practically, the state’s obligation to protect from any human rights violation perpetrated by a private person is quite controversial. See M. Nowak, *Introduction to the Human Rights Regime* (Leiden : Martinus Nijhoff Publishers, 2003).

<sup>134</sup> As the case law of the Human Rights Chambers for Bosnia and Herzegovina has shown, an objective justification for activating a distinct set minority rights can be brought whenever cases of systematic discrimination occurred thus making these rights impossible to be justiciable for the group under general human rights clauses. *Ibid.*, 62.

<sup>135</sup> Since this consideration always depends on the societal values which can change according to the time and place taken in analysis.

<sup>136</sup> *Chapman v. the United Kingdom*, Application No. 27238/95, European Court of Human Rights, decision of 18 January 2001, § 96.

minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.<sup>137</sup>

However, the Court has made a step backward at the moment of identifying the content of “positive obligations” which are deemed to effectively fulfill the non discrimination principle in the case of Roma rights.

Since no “legal solution” can fairly balance the majority decision-making process with minority interests and rights, the ECtHR has once again relied on the application of the doctrine of the fair margin of appreciation. After having enucleated the general principle, the Court has left to each single State its practical implementation in accordance with the specific national values and tradition.<sup>138</sup>

Against this background, the reflection on the application of the general principles enshrined in the “law of diversity”<sup>139</sup> obviously needs to transcend the principle of non discrimination when practically considering the complex case of Roma. The following sections set the theoretical basis to consider the different “solutions” that domestic systems have so far adopted when recognizing Romani distinct cultural identity as a minority group at domestic level. These “solutions” enshrine a different degree of promotion of minority rights according to the constitutional system from which they ensue. In some legal systems a stronger emphasis is put on “negative obligations” whereas in others a stronger emphasis is put on “positive obligations”. The first consideration on the different legal recognition of Roma

---

<sup>137</sup> *D.H. and Others v. Czech Republic*, European Court of Human Rights, Application No. 57325/00, Chamber decision of 7 February 2006 Grand Chamber decision of 13 November 2007, § 181. This case constitutes one of the mile-stones in the recognition of Romani identity and Roma rights in the ECtHR’s case law. This case is repeatedly recalled and discussed from different angles in chapters 4, 5 and 6.

<sup>138</sup> According to the doctrine of the fair margin of appreciation, whenever national governments are convinced that specific national values or traditions are threatened by an extensive application of general human rights standards enshrined within the ECHR, they can restrict such application if this affects the social cohesiveness of the State i.e. if this affects the preservation of democratic public order. The margin of appreciation doctrine allows the ECtHR to take into consideration the fact that the Convention can be interpreted differently in different legal systems in the light of the cultural, historic and philosophical differences belonging to each State Party to the ECHR.

<sup>139</sup> F. Palermo, “Legal Solutions to Complex Societies: The Law of Diversity,” in *Human Rights and Diversity: New Challenges for Plural Societies*, ed. E. Dunbar Ruiz Vieytes, R. (Bilbao: University of Deusto, 2007).

cultural identity can be envisaged in “legal definition” which somehow generally “per-forms” the overall recognition of Roma rights in each and every legal system.<sup>140</sup>

## **2.2. A definitional mapping of Roma recognition in European legal systems**

Chapter 1 has provided an overview of the complexity of Roma migrations, the diffusion of their presence in Europe, the different conceptions of “State” and “nation” and the variety of the legal instruments designed to address minority rights in the Europe. The picture emerging from this brief overview can provide some general references to comprehend the heterogeneity of legal definitions identifying Roma in Europe. Nonetheless, further elements should be considered when trying to understand more in depth the possible reasons underlying the different definitions of Roma: their numerical percentage in every State *vis-à-vis* the overall national population in the light of the political-legal framework.

These two elements often stand in a relationship of mutual complementary, i.e. one is the precondition for the existence of the other.<sup>141</sup> However, this cannot always be considered a general rule since there are cases where the political-legal framework completely disregards the existence of minorities in spite of their numerical presence.<sup>142</sup> For this reason, it appears useful to provide a general picture of the numerical presence of Roma in Europe before entering the “definitional debate”.

---

<sup>140</sup> According to Austin linguistic definitions often per-form (in the etymological sense of form *a priori*) social behaviours . See J.L. Austin, *Philosophical Papers* (London : Oxford University Press, 1970 ).

<sup>141</sup> The most clear example that can be brought to this regard is that of “micro-States” (Andorra, Lichtenstein, Luxembourg, San Marino, Malta and Monaco) where, facing the quasi-total homogeneity of nationals, Roma (as well as other minority groups) do not benefit of any special recognition and consequently of any legal definition.

<sup>142</sup> Especially in “agnostic legal models”, such as in France, “where numbers” seem not “warrant” to paraphrase the general principle regulating the Anglophone “minority” schooling system in Canada. For a more in depth discussion of different constitutional models see section 2.1.

Even if recently a number of studies providing more updated and comprehensive analysis on Romani presence in Europe have developed,<sup>143</sup> a detailed picture of this social group cannot be provided yet. In a number of cases there is a lack of ethnically disaggregated data whereas in others, few Roma identify themselves as belonging to the minority facing the widespread discrimination, including the increasing “anti-Gypsy” racial attacks.<sup>144</sup>

According to the most recent CoE estimates,<sup>145</sup> the Roma presence in Europe numbers around 11 million people i.e. the same amount of people living in a medium size European country.<sup>146</sup> In 2004, Piasere commented some previous CoE estimates (which do not substantially change in this most updated version) through the identification of what he calls “three Gypsy - Europe” i.e. three main geographical areas that can account for a simplified but immediate numerical representation of Roma.<sup>147</sup>

The first “Gypsy-Europe” is the “core area” of the European Romani presence, and it comprises the States belonging to the Carpathian-Balkan area. The States registering the highest number of Romani population are all connected by an “imaginary line” linking almost vertically Slovakia to Macedonia. In these countries, the average rate of Roma is around 9,5 percent of their total population.<sup>148</sup> This “core area” of States rating a high presence of Roma

---

<sup>143</sup> See, *inter alia*, Open Society Foundation, "No Data—No Progress. Country Findings," (New York : Open Society Foundations 2010). FRA and UNDP, "The Situation of Roma in 11 Eu Member States. Survey Results at a Glance," (Luxembourg: European Union Agency for Human Rights, 2012).

<sup>144</sup> See, *inter alia*, CoE, *Human Rights of Roma and Travellers in Europe* (Strasbourg Council of Europe Publishing 2012).

<sup>145</sup> Council of Europe Roma estimates of 14/09/2010 prepared by the Roma and Travellers Division available at [http://www.coe.int/t/dg3/romatravellers/default\\_en.asp](http://www.coe.int/t/dg3/romatravellers/default_en.asp) (last entered on 20/03/2012). These estimates can also be found in *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. An EU Framework for National Roma Integration Strategies up to 2020*, COM(2011) 173 final.

<sup>146</sup> Such as Greece (11.260.402 inhabitants), Belgium (10.750.000 inhabitants), Portugal (10.627.250) and Czech Republic (10.467.542).

<sup>147</sup> L. Piasere, *I Rom d'Europa. Una Storia Moderna* (Roma-Bari: Laterza, 2004), 6-8. The updated percentages are based on the last CoE estimates of 14/09/2010.

<sup>148</sup> The data presented in Piasere's publication of 2004 have been updated according to figures provided by the last CoE data. See the statistics on Romani presence in Europe prepared by the Council of Europe and Travellers Division updated at 14<sup>th</sup> September 2010 available at [http://www.coe.int/t/dg3/romatravellers/default\\_en.asp](http://www.coe.int/t/dg3/romatravellers/default_en.asp) (last accessed on 12<sup>th</sup> January 2013). Romania 8.32%; Bulgaria 10,33%; Hungary 7,05%; Slovakia 9.17%; Serbia, Montenegro and Kosovo (around 12,6% all together), Macedonia 9.95%.

is surrounded by a “ring” of neighbouring countries where Roma average presence is rated around the 2 percent of the total population.<sup>149</sup>

The second “Gypsy-Europe” identified by Piasere comprises the Atlantic Region with Spain as the country with the highest rate of Romani population with the 1,57 percent, followed by Ireland, France and Portugal with the average rate of 0,9 percent of the total population. The peculiarity of this second “Gypsy-Europe” is that all alone it comprises almost 11 percent of the overall Roma population in Europe. Finally, the third “Gypsy-Europe” is characterized by the remaining European countries where the average rate of Roma population is below 1 percent of the total population.<sup>150</sup> Piasere has explained the high percentage of Roma living in the first “Gypsy-Europe”, in the light of the social and their political frameworks that characterized Central and Eastern Europe at the time of the first Romani migrations in that area.

While Western European countries have always had a “totalitarian exclusionist attitude” towards Roma, Eastern Europe countries placed them at the lowest positions in the social stratification but, at the same time, provided them the freedom to live sedentary in the cities or in the countryside, or even remain nomadic, as long as they were regular taxpayers.<sup>151</sup> In the second “Gypsy-Europe”, Spain appears as a “numerical exception” in Western Europe in the light of its historical development of its political institutions. In the post-Westphalian era, it adopted a very peculiar “model of inclusion” of Roma.<sup>152</sup> While a big majority of European countries promoted a “general expulsion” of Roma and, in the worst cases, committed

---

<sup>149</sup> Czech Republic 1,96%; Greece 2,47%; Albania 3,18%; Bosnia and Herzegovina 1,09%; Turkey 3,83%; Croatia 0,78%; Moldova 2,49%; Slovenia 0,42%.

<sup>150</sup> In the case of Russia the average estimates of Roma population is of 825.000 people, even more than in Bulgaria (750.000 people). While in the case of Russia the number of Roma individuals corresponds to the 0,59% of the total population given the extension of the country, in Bulgaria a lower number of people corresponds to the 10,33% of population.

<sup>151</sup> Piasere, *I Rom d'Europa. Una Storia Moderna*, 35.

<sup>152</sup> *Ibid.*54

genocide, Spain allowed the existence of this social group within its territory; however, at a high price: the “ethnocide” i.e. complete cultural assimilation of Roma.

Since the “classic” Western model “regulating” the presence of Roma through expulsion was not leading to any substantial result,<sup>153</sup> the Spanish model was shaped around another strategy: it prohibited Roma from gathering collectively, speaking Romanes, wearing traditional Romani dresses, performing in traditional dances and following a nomadic lifestyle. Moreover, to pursue an implicit “*divide et impera*” policy, Spain also banned Roma from living together in the “Spanish districts” of the most populated cities and towns with less than 200 inhabitants.<sup>154</sup> Even though the “Spanish model” totally annihilated Romani collective cultural identity, it nonetheless provided a very small space for Roma’s individual existence.

The model of cultural assimilation initiated by Spain started to be rapidly exported, during Enlightenment, and was firstly adopted by Maria Theresa of Austria especially in the Hungarian area of the Asburgic Empire where Roma were pushed to a sturdy sedentarization. In the 19<sup>th</sup> century, the model began to be characterized by racist ideologies leading to the highest peak of “ethnocide” during the Second World War with the physical annihilation of Roma through what has been called *baró porrajmós* or the Roma Holocaust.

The development of the three dimensions of “Gypsy Europe” sketched by Piasere can be better understood in light of the various “migration rounds” contributing to the diffusion of Roma in Europe. After the large migration of the Modern Age through which Roma firstly spread across the European continent, a second large wave of migration occurred in the mid-

---

<sup>153</sup> The living strategy adopted by Roma during the Modern Age (and even lately) was based on the creation of settlements in the border regions where the power of nascent States was more fragile. As the borders were rapidly and elastically reconstructing Roma movements could flexibly adapt their presence accordingly. This is the reason why Romani presence in “border regions” was highly dense in some areas particularly characterized by a process of frequent “border-reconstruction”: in the border of Alsace-Lorraine, in the border dividing the Dukedom of Modena from the Papal State, in the North Carpatian area, etc. See *Ibid.*, 63.

<sup>154</sup> *Ibid.*, 54.

19<sup>th</sup> century after the abolition of slavery in Romania. At that time, in fact, a number of Roma left the Romanian region to migrate to other European countries as well as to central Asia and to America.<sup>155</sup>

A third migration wave can be identified during the Balkan wars of the 90s. This migration wave has been defined as the biggest Romani migration from the Balkans in overall European history.<sup>156</sup> A more recent migration, which was not as large as the previous ones, has been determined by the Italian and French xenophobic policies against Roma which evict from their territories non-Italian and non-French Roma by forcing them to return to their home-countries.<sup>157</sup>

These two recent migration waves highlight a further element of complexity enshrined within the various Roma legal definitions which has already been highlighted when discussing the non-territorial features of this social group: within the same “national category” (be it that of national, ethnic, linguistic minority, etc.) there may coexist different legal statuses. This means that in many European States, coexist Romani individuals who are European, non-European, refugees, asylum-seekers, stateless or even unregistered. Hence, when reflecting on different legal definitions and categorizations of Roma it must be borne in mind that a single legal category accounts for a higher complexity of legal statuses which according to Henrard, ensues from the dichotomy of “old” and “new” minorities which filter the enjoyment of minority rights on the basis of citizenship.<sup>158</sup>

The different “migrations rounds” also shed also some light on the linguistic differences existing among the various Romani communities. Language is indeed another key element for

---

<sup>155</sup> Ibid., 64.

<sup>156</sup> Ibid., 66.

<sup>157</sup> H. O'Nions, "Roma Expulsion and Discrimination: the Elephant in Brussels," *European Journal of Migration and Law* 13, no. 4 (2011).

<sup>158</sup> K. Henrard, "The EU, Double Standards and Minority Protection " in *Double Standards Pertaining to Minority Protection*, ed. K. Henrard (Leiden/Boston : Martinus Nijhoff Publishers 2010).



a general understanding of the different Romani definitions.<sup>159</sup> Once again, Piasere identifies three linguistic areas of “Gypsy Europe” that helps to create a simplified picture.

The first linguistic Europe is bigger than the previous “numerical” one comprising all the countries situated at the Eastern side of an imaginary border linking Helsinki to Rome passing through Vienna and Prague. In this area, Roma communities speak (or used to speak) dialects that are intra-understandable since they share the same linguistic roots: these constitute the linguistic core of Romanes. A second linguistic area of “Gypsy Europe” extends on the Western side of this imaginary border: here Romani communities speak linguistic variations of Romanes, having been influenced over centuries by the languages of their “host” countries.<sup>160</sup>

The third area of “linguistic Gypsy Europe” is represented by hetero-defined communities or those assimilated as “Gypsies” who seem to have never spoken any derivation of neo-Indian dialects. Those communities speak languages of local and archaic derivation (or sometimes local minority languages), with very small proportions of Romanes terms. The presence of these different Romani linguistic communities has been registered everywhere in Europe. However, according to official data it seems that these communities are more concentrated in Northern Europe. The Scandinavian peninsula and the Gaelic regions (Ireland and Scotland) are mostly inhabited by *Reisende* and *travelers*, while England and Denmark are “hybrid” regions where the third and the second area of “Linguistic Gypsy Europe” coexist.

In Switzerland and Holland live two communities self-identifying, respectively, as *Jenische*<sup>161</sup> and *woonwagenbewoners*. In South-Eastern Sicily, there live the nomadic community of *Camminanti* or *carchianti* who normally move to Northern Italian regions in spring-

---

<sup>159</sup> Chapter 4 provides a more in-depth discussion of this aspect.

<sup>160</sup> In Italy for instance the Sinti dialects spoken in the North present linguistic variations derived from German territories. Piasere, *I Rom d'Europa. Una Storia Moderna*, 23.

<sup>161</sup> The presence of this community is also registered in France and Germany.

summertime. In the Balkans, a community is known as *rudari* in Romania, and as *bojás* or *beas* in Hungary. They speak a Romanian dialect of the XVIII century and they also live in Bulgaria, Serbia, Russia and - in smaller communities - Italy (after the Balkan wars) and in the United States. According to Piasere, there are often no clear socio-historical data to ascertain the relationships among the “Romanes-speaking” and “non-Romanes speaking” groups. In some cases, a Romani origin can be inferred (as in the case of *Rudari* in Romania) while, in others, it might be argued that the collective identity of some groups has been constructed long before the creation of post-Westphalian States (as the case of Travellers in Ireland).

Yet, according to Piasere, it cannot be argued *a priori* that all groups defined as “Roma” or as “Gypsies” share Indian roots. Indeed, these communities can also be the “social product” of the European process of “stigmatization” of some groups expelled from the modern processes of production that were forced to live at the geographical and social margins of the “majority European identity”.<sup>162</sup> In other words, Piasere seems to share Okely’s perspective on the European “modern social construction” of Roma.

From this short overview, it derives that various “legal definitions” of Roma ensuing from the various European legal systems have to be understood as a historical, social, political and legal process of sedimentation which has stratified *multi-dimensionally* over the centuries of coexistence of Roma and national populations. Nowadays, Roma are legally recognized in 31 European States. The different types of legal definitions entail a wider/smaller entitlement to rights. The analysis of the various legal definitions identifying Roma firstly considers the most promotional legal definitions and it gradually “decreases” towards the consideration of the less promotional ones.

---

<sup>162</sup> Piasere, *I Rom d'Europa. Una Storia Moderna*, 18.

### 2.2.1. Constitutive Nationality

Macedonia is the only country of the CoE recognizing Roma among the constitutive nationalities of the State. As the IV Amendment of the Macedonian Constitution reads,

The citizens of the Republic of Macedonia, the Macedonian people, as well as the citizens who live within its borders and who are part of the Albanian people, Turkish people, Vlach people, Serb people, Roma people, Bosniak people and others, undertaking the responsibility for the present and future of their motherland, aware and grateful to their ancestors for the sacrifices and dedication in their commitments in their endeavors and the struggle for creating an independent and autonomous state of Macedonia and responsible before the future generations for preserving and developing everything of value from the wealthy cultural inheritance and co-habitation in Macedonia, equal in their rights and obligations towards the common good.<sup>163</sup>

According to the estimates of Minority Rights Group, Roma are the least numerous group living in Macedonia (2,66 percentage of population).<sup>164</sup> The “elevation” of a numerical inferior group to the status of “constitutive nationality” of the State has been made possible by the Ohrid Agreement which ended the conflict between Macedonian security forces and armed Albanian extremists in the country.<sup>165</sup> This document has regulated the existence of, and the co-existence with, minority communities which are not the majority of population in Macedonia.<sup>166</sup>

The Ohrid Framework Agreement (OFA) has introduced a form of consociative democracy,<sup>167</sup> whose definition of “community” has been borrowed from the Belgian experience.<sup>168</sup> Persons belonging to the listed communities are entitled to free expression of their identity and to the free use of symbols of their communities. The Macedonian State

---

<sup>163</sup> Amendment adopted by the Assembly of the Republic of Macedonia, on the session held on November 16, 2001.

<sup>164</sup> Macedonians 1,297,981 (64%), Albanians 509,083 (25%), Turks 77,959 (3.9%). <http://www.minorityrights.org> (last entered on 12/05/2011).

<sup>165</sup> On the Ohrid Agreement see U. Brunnbauer, "The Implementation of the Ohrid Agreement: Ethnic Macedonian Resentments," *JEMIE* no. 1 (2002).

<sup>166</sup> S. Škaric, "Ohrid Agreement and Minority Communities in Macedonia " in *Prospects of Multiculturalism in Western Balkan States* ed. G. Bašić (Belgrade Ethnicity Research Center, Friedrich Ebert Stiftung, 2004), 101.

<sup>167</sup> On the consociative democracy of Macedonia, see, *inter alia* F. Goio and I. Marceta, "The Pre-Conditions for Power Sharing, Inter-Ethnic Conflict and Democracy: Macedonia and Bosnia," in *Congresso Nazionale della Società Italiana di Scienza Politica* (Roma: available at <http://www.sisp.it/files/papers/2009/franco-goio-e-irena-marceta-440.pdf>, 2009).

<sup>168</sup> Škaric, "Ohrid Agreement and Minority Communities in Macedonia ", 96.

guarantees the protection of ethnic, cultural, linguistic and religious identity of all communities also at the level of their political participation in the public sphere.

According to the Advisory Committee on the FCNM, in the Republic of Macedonia the protection and promotion of minority rights represents (at least *de jure*) one of the highest examples where international and European standards find application.<sup>169</sup> Yet, if the legal recognition of Roma community at such a promotional level can guarantee a stronger degree of rights entitlements *vis-à-vis* other forms of legal recognition, the discrepancy between “*law in the books*” and “*law in action*”<sup>170</sup> (i.e., between the formal legal recognition and the substantial legal implementation) can be found in this context as well, where the full implementation of human and minority rights for Roma is still underdeveloped.

### **2.2.2. National vs. Ethnic Minority?**

As it has been discussed in section 1.5., a binding and universally shared definition of “minority” is still lacking at the international level. Nevertheless, Henrard has envisaged the formation of a primordial “consensus” in the practice of international supervisory bodies considering the idea of “minority” increasingly unbound from the “citizenship requirement”.<sup>171</sup>

On the one hand, this legal development can be read in terms of specification of the content of minority rights in the broader category of human rights.<sup>172</sup> On the other hand, this legal development, that is increasingly disregarding the “citizenship requirement”, can be read as the gradual approaching between the legal categories of “national” and “ethnic” minorities.

---

<sup>169</sup> See Report submitted by the Former Yugoslav Republic of Macedonia pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR(2003)002 received on 23 September 2003, 3.

<sup>170</sup> On the dichotomy between “law in the books” and “law in action” in highly promotional systems for Romani rights, see M. Dicosola, “Strumenti di protezione giuridica delle comunità Rom negli Stati dell’ex-Jugoslavia,” in *La condizione giuridica di Rom e Sinti in Italia*, ed. P. Bonetti, A. Simoni, and T. Vitale (Milano: Giuffrè Editore 2011), 547.

<sup>171</sup> C. Henrard, *Double Standards Pertaining to Minority Protection* (Leiden/Boston: Martinus Nijhoff Publishers, 2010), 29.

<sup>172</sup> These rights hinge on “the person” rather than on “the citizen”.

In literature, a minority is defined as “national” when its cultural identity is shared with a larger community that forms a national majority in another country (such as the Germans in Denmark, the Hungarians in Romania, etc), i.e. by the presence of a kin-State. A minority is defined as “ethnic” whenever it includes persons belonging to ethnic communities that lack a kin-state or a majority population in another State, but have a distinctive cultural and ethnic identity (the Retro Romanians in the Alps, the Celts or Gaelic speakers in North-Western Europe, the Frisians of the North Sea area, the Catalans in South-Western Europe, etc).<sup>173</sup>

In doctrine, there is still no consensus on the elements identifying the two terms. Some scholars seem to agree on the necessary co-presence of the two elements: a group sharing a common ancestry<sup>174</sup> and, at the same time, sharing the same culture or tradition<sup>175</sup> (which may include a common language or religion)<sup>176</sup> and who are tied together by emotional bonds.<sup>177</sup> People belonging to “ethnic minorities” may also (but not necessarily) share common physical, genetic or biological features which may include racial characteristics.<sup>178</sup> Yet, the category of “ethnic minority” should not be confused with the category of “groups based on race” (which as well share a common ancestry and certain physical features). Indeed, “groups based on race” are not minorities under international law because they lack the element of “independent culture” that binds together an ethnic group.<sup>179</sup>

---

<sup>173</sup> European Commission, "Ethnic Minority and Roma Women in Europe: A Case for Gender Equality?," (Bruxelles: DG Employment, Social Affairs and Equal Opportunities, 2008), 46.

<sup>174</sup> T.W. Pogge, "Group Rights and Ethnicity " in *Ethnicity and Group Rights* ed. W. Kymlicka (New York : NYU Press 1997), 193. G.A. De Vos, "Conflict and Accommodation - the Role of Ethnicity in Social History " in *Ethnic Identity: Creation, Conflict and Accommodation* ed. L. Romanucci-Ros, De Vos, G.A. (Walnut Creek, CA: Altamira Press, 1995), 18.

<sup>175</sup> M. Weber, "What is an Ethnic Group? ," in *The Ethnicity Reader: Nationalism, Multiculturalism and Migration* ed. M. Guibernau and J. Rex (Cambridge: Polity 1997), 18.

<sup>176</sup> De Vos, "Conflict and Accommodation - the Role of Ethnicity in Social History ", 193; Pogge, "Group Rights and Ethnicity ".

<sup>177</sup> P.V. Ramaga, "The Basis of Minority Identity " *Human Rights Quarterly* 14, no. 3 (1992): 409. E. Roossens, *Creating Ethnicity: The Process of Ethnogenesis* (Oxford: Sage, 1989), 12.

<sup>178</sup> De Vos, "Conflict and Accommodation - the Role of Ethnicity in Social History "; Weber, "What is an Ethnic Group? ," 18.

<sup>179</sup> G. Pentassuglia, *Defining "Minority" in International Law: A Critical Appraisal* (Rovaniemi Lapland's University Press 2000), 32.

According to a part of the doctrine, “ethnic minorities” should be understood – at least in international law – as equivalent to “national minorities” given that also in the context of Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and the UN Minorities Declaration, the terms “ethnic” and “national” are thought to have a particularly close meaning.<sup>180</sup> An opposite view supports the argument (already found in literature) that the discriminatory factor between the two categories should be found in the presence of a kin-state (for national minorities) or at least of a national inspiration or a sense of nationhood.<sup>181</sup> Other scholars, eventually regard the term “ethnic” as wider than “national”<sup>182</sup> so that the latter should be intended as comprised by the former.<sup>183</sup>

When looking at the practical application of the “national” and “ethnic” minority categories to Roma, it is especially in the historical circumstances and in the social, cultural and legal frameworks that the differences between the two categories can be understood. The legal definition of “national minority” appears the most recurring in European constitutional systems. One reason for the “widespread diffusion” of this category can be found in the legal-historical reconstruction proposed by Hersant, explaining that “national minority” is the earliest legal category identifying minorities in international law.<sup>184</sup> As a matter of fact, also the most prominent European treaty regulating the rights of minorities, the FCNM, uses the same “national” designation. Accordingly, a possible circulation of the “national minority model” can be hypothesized in a “European diachronic perspective” from the past to the current international legal framework.

---

<sup>180</sup> Ibid., 33.

<sup>181</sup> G. Gilbert, "The Council of Europe and Minority Rights," *Human Rights Quarterly* 18, no. 1 (1996): 160.

<sup>182</sup> C. Henrard, *Devising an Adequate System of Minority Protection. Individual Human Rights, Minority Rights and the Right to Self-Determination* (The Hague/Boston/London: Martinus Nijhoff Publishers 2000), 53. P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press 1991), 160.

<sup>183</sup> Henrard, *Devising an Adequate System of Minority Protection. Individual Human Rights, Minority Rights and the Right to Self-Determination* 55. All the doctrine review regarding the meaning of “ethnic” and “National” minority has been taken from T. Ahmed, *The Impact of Eu Law on Minority Rights* (Oxford and Portland Oregon: Hart Publishing 2011), 21-22.

<sup>184</sup> J. Hersant, "Réflexion sur les catégories du droit international à partir du traité de Lausanne. Minorités ethniques ou catégories normatives ?," *Labyrinthe* 21(2005).

This hypothesis can be partially explained from a “top-down” perspective (from the international level to the national one) which may account for the extensive diffusion of the “national minority” category in the identification of Roma at the national level. The 15 States that are currently using the “national minority” category in Europe can be grouped in four main geographical areas: Balkan area (Croatia, Bosnia-Herzegovina, Serbia and Greece), Central – Eastern European area (Germany, Austria, Romania, Slovakia, Moldova and Ukraine); Baltic area (Latvia and Lithuania) and Scandinavian area (Finland, Norway and Sweden).

In the Balkans, the newly independent legal systems recognize Roma as a “national minority” in different ways. In **Croatia**, Roma are recognized in the preamble of the Constitution as members of one of the 22 national autochthonous minorities entitled to full equality with citizens hold of Croatian nationality. An interesting distinctive element that the Croatian Constitution adds to the “national minority” category (besides the classic ethnic, linguistic, cultural and/or religious characteristics) is the will of individuals self-declaring as members of this group to “preserve these characteristics” (Art.5).

In **Bosnia-Herzegovina**, Roma are also identified as a “national minority” in the Constitution (Art. 3). In this case, the legal category “national minority” is used to distinguish non-constituent groups of Bosnia-Herzegovina from the three constituent groups (Bosniacs, Croats, and Serbs).<sup>185</sup> Indeed, constituent peoples are identified on the basis of their ethnic belonging. Formally members of a “constituent group” and of a “non-constituent national minorities” are entitled to equality.<sup>186</sup> Substantially this is not always the case. Recently, the ECtHR has been approached by two citizens of Bosnia-Herzegovina, respectively of Romani

---

<sup>185</sup> These were the three groups having territorial aspirations and fighting each other during the war; they also concluded the Dayton Peace Agreement ending the war in 1995.

<sup>186</sup> Minorities are also entitled to special rights under the Law on National Minorities of 12<sup>th</sup> April 2003.

and Jewish origin, since they were formally barred to stand for public elections because they do not belong to a “constituent” people.<sup>187</sup>

In **Serbia**, Roma are recognized as a “national minority” under ordinary legislation.<sup>188</sup> The Law on the Protection of Rights and Freedom of National Minorities defines at Art. 2 a “national minority”

.. any group of citizens .. numerically sufficiently representative and .. belonging to a group of residents having a long term and firm bond with the territory of the Federal Republic of Yugoslavia and possessing characteristics such as language, culture, national or ethnic affiliation, origin or confession, differentiating them from the majority of the population and whose members are distinguished by care to collectively nurture their common identity, including their culture, tradition, language or religion.

In opposition to the case of Bosnia-Herzegovina, Serbia is not a multinational system but a promotional system that does not distinguish “national” from “ethnic” belonging by specifying in the same article of the Law on national minorities that,

all groups of citizens termed or determined as nations, national or ethnic communities, national or ethnic groups, nationalities and nationalities .. shall be deemed national minorities for the purpose of this Law.

In **Kosovo**, instead it is still unclear whether the new-born national entity has adopted the same legal definition of Roma (national minority) in force in the State from which it has tried to secede or a different one.<sup>189</sup>

In **Greece**, Roma are only partially recognized as a “national minority”. Greece is, in fact, adopting an agnostic approach that formally does not recognize any minority group within its

---

<sup>187</sup> *Seidjic and Finci v. Bosnia Herzegovina*. Applications No. 27996/06 and 34836/06 of 22<sup>nd</sup> December 2009.

<sup>188</sup> Art. 4 of Law on Protection of Rights and Freedom of National Minorities, Official Gazette of FRY No. 11 of 27<sup>th</sup> February 2002.

<sup>189</sup> In Kosovo the legal status of Roma is not clearly specified. According to the Constitution, Roma are identified as a “community” holding a distinctive linguistic and political rights (Art.5 and Art.148). However, notwithstanding the adoption of the Law on the Promotion and protection of the Rights of Communities and their Members in Kosovo, No. 03/L-047 of 13<sup>th</sup> March 2008 there does not seem to be any official recognition of Roma legal status yet. See also The UNMIK (United Nations Interim Administration Mission in Kosovo) progress report on the implementation of the Framework Convention for the Protection of National Minorities (FCNM) in Kosovo, third edition, received on 13 September 2012.



domestic jurisdiction.<sup>190</sup> However, Muslim Roma of Western Thrace are the only social group recognized as a “national minority”. Such legal recognition derives from a legacy of the Treaty of Lausanne<sup>191</sup> and it does neither formally nor practically mitigate the extreme marginalization that Romani communities generally experience within Greek society.<sup>192</sup>

In Central-Eastern Europe, **Germany** recognizes Roma and Sinti as a “national minority” under the criteria of German citizenship.<sup>193</sup> **Austria** recognizes Roma as a “national minority” from 1993. Although the Romani communities of Austria include a quite heterogeneous population “only the first category of persons holding Austrian citizenship is considered to constitute “the Roma/Gypsy *volksgruppe*”.<sup>194</sup>

In **Romania**, Roma are one of the twenty recognized minorities legally treated as a national minority part of the Romanian people.<sup>195</sup> The Romanian Constitution protects the rights of minorities through a legal approach that recognizes the right to identity of minorities (Art.6) as requiring positive measures in order to ensure the equal treatment of the identity

---

<sup>190</sup> As seen in section 2.1. although Greece has signed the FCNM in 1997 it has not ratified it yet.

<sup>191</sup> As a non-territorial group Roma of Western Thrace had been granted full Greek citizenship by virtue of their inclusion in the non-exchangeable Muslim population after Lausanne Treaty. In contrast with the legal treatment of other kin population of Greece (whose citizenship rights were recognized long after the end of WWII), Roma were granted under the Lausanne Treaty “official” recognition. Romani communities living in the territorial area covered by the Lausanne Treaty have historically represented a distinct group *vis-à-vis* other Romani communities living in Greece. They in fact distinguish themselves according to religious and linguistic features. Romanes is generally spoken only by Muslim Roma (who also speak Turkish), whereas the other Romani communities living in Greece are generally professing Christian religion and speak Greek. European Parliament, "Measures to Promote the Situation of Roma EU Citizens in the European Union. Country Reports," ed. Citizens' Rights and Constitutional Affairs Policy Department (Bruxelles : European Parliament, 2011), 143.

<sup>192</sup> Indeed, the status of Muslim Roma of Western Thrace is practically the same of other Romani communities living in Greece and holding a citizenship status. They are legally identified as a ‘socially vulnerable group’ (‘κοινωνικά ευπαθής ομάδα του πληθυσμού’) and they are the subject –along with other such groups – of ‘measures and actions of positive discrimination’ (‘μέτρα και δράσεις θετικής διάκρισης’). Their rights are covered by the framework of human and civic rights as the rest of the Greek population. This also covers access to employment, housing, education, health and welfare. However, in practice, their access to these benefits is anything but guaranteed. *Ibid.*, 145.

<sup>193</sup> Declaration contained in a letter from the Permanent Representative of Germany, dated 11<sup>th</sup> May 1995, handed to the Secretary General at the time of signature, on 11<sup>th</sup> May 1995 - Or. Ger./Engl. - and renewed in the instrument of ratification, deposited on 10<sup>th</sup> September 1997 - Or. Ger./Engl.

<sup>194</sup> Romani communities living in Austria comprehend the descendants of Roma who have lived for generations in the country, immigrants or descendants of immigrants who came to Austria in the last decades and, more recently, refugees and asylum-seekers from Central and Eastern Europe. See ECRI the second Report on Austria adopted on 16<sup>th</sup> June 2000 §30.

<sup>195</sup> S. Tanasescu, "Minoranza Rom nell'ordinamento rumeno" in *La condizione giuridica di Rom e Sinti in Italia*, ed. P. Bonetti, A. Simoni, and T. Vitale (Milano: Giuffrè Editore, 2011), 510.

affirmation.<sup>196</sup> Hence, in Romania each minority is – at least formally – recognized to be entitled with full access of rights, including a seat in the Parliament.<sup>197</sup>

In Slovakia<sup>198</sup> and Moldova,<sup>199</sup> Roma are recognized as a “national minority” under the scope of the FCNM. While, in **Slovakia**, the recognition of the rights of Roma minority is based more on policies than on legal entitlements,<sup>200</sup> **Moldova** provides *de jure* Roma with stronger guarantees. The National Minority Act<sup>201</sup> binds to the requirement of citizenship the self-definition as “minority” on the basis of “different ethnic origin” (Art.1). In the Moldovan legal system, minorities can be identified just among those groups holding different “ethnic, cultural and linguistic features” (Art.1). **Ukraine** recognizes Roma among its national minorities as well.<sup>202</sup> The Law guaranteeing minority groups with “national cultural autonomy”<sup>203</sup> defines minorities as “groups of Ukrainian citizens, who are not of Ukrainian nationality, but show feeling of national self-awareness and affinity” (Art.3). This wording appears more open than the previous definitions of a “national minority” and free from “ethnic” references.

In the Baltic States, the rights of national minorities – Roma included – are once again regulated by ordinary legislation. While **Latvia** distinguishes *old* “national” minorities from

---

<sup>196</sup> *Ibid.*, 511.

<sup>197</sup> European Parliament, "Measures to Promote the Situation of Roma EU Citizens in the European Union. Country Reports," 284.

<sup>198</sup> See Report submitted by the Slovak Republic pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/II(2005)001 received on 3<sup>rd</sup> January 2005, 3.

<sup>199</sup> See the Report submitted by the Republic of Moldova pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR(2000)002 received on 29<sup>th</sup> June 2000.

<sup>200</sup> M. Vašečka, "The Aspect of Culture in the Social Inclusion of Ethnic Minorities Evaluation of the Impact of Inclusion Policies under the Open Method of Co-Ordination in the European Union: Assessing the Cultural Policies of Six Member States. Final Report: Slovakia " *ECMI Working Paper # 32* (2006).

<sup>201</sup> Law of the Republic of Moldova on the Rights of Persons Belonging to National Minorities and the Legal Status of their Organizations No. 382-XV, 19<sup>th</sup> July 2001.

<sup>202</sup> Ukraine declared to recognize Roma as a “national minority” in the questionnaire “Legal Situation of the Roma in Europe” of the Parliamentary Assembly of the Council of Europe see Doc. 9397 revised Legal situation of the Roma in Europe Report of the Committee on Legal Affairs and Human Rights (19<sup>th</sup> April 2002).

<sup>203</sup> Art.6 of the Law on National Minorities. No. 2494-12 of June 25<sup>th</sup>, 1992 (Supreme Executive Council, No. 36, Art. 529).

*new* “ethnic” groups on the basis of a more consolidated long-lasting tie with the territory<sup>204</sup>, **Lithuania** seems to use almost interchangeably the legal categories of “national” and “ethnic”. Indeed, while Roma are recognized as a “national minority” their rights are regulated by the Law on Ethnic Minorities.<sup>205</sup> The Preamble of the law in fact specifies that “Within the Republic of Latvia live the Latvian nation, the ancient indigenous nationality, the Livs, as well as other nationalities and ethnic groups”. Yet, the distinctive features distinguishing “nationalities” from “ethnic groups” are not clearly spelled out in this legal document.

In the Scandinavian area, it is interesting to highlight that the recognition of Roma and of Sami indigenous group are both legally enshrined in the category of a “national minority”. In the first periodic report that Norway presented under the FCNM the term “national minorities” has been defined as follows:

In Norway, the term “national minorities” is understood by the Government to mean minorities with a long-term connection with the country. Minority groups must be in the minority and must hold a non-dominant position in society. Furthermore, they must have distinctive ethnic, linguistic, cultural and/or religious characteristics which make them substantially different from the rest of the population of Norway. The persons concerned must also have a common will to maintain and develop their own identity.<sup>206</sup>

Phrased in these terms, it seems that within the “national minority” category Norway, there are no differences between national minorities and indigenous groups, at least under the scope of the FCNM.

As it has been emphasized by Piasere, Scandinavia belongs to the “third Linguistic Gypsy Europe”. This means that in that area, Romani communities have almost entirely lost their original linguistic affiliation to Romanes also in the light of their historical tie with the

---

<sup>204</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities Opinion on Latvia adopted on 9<sup>th</sup> October 2008 (ACFC/OP/I(2008)002) § 24.

<sup>205</sup> Law about the Unrestricted Development and Right to Cultural Autonomy of Latvia's Nationalities and Ethnic Groups adopted on 3<sup>rd</sup> of March 1991 and amended on the 15<sup>th</sup> of June 1994.

<sup>206</sup> Report submitted by Norway pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR(2001)001 received on 2<sup>nd</sup> March 2001 §3.1.

territory. For this reason, the affiliation to the “old” minority legal category appears so strong in Romani communities of Scandinavia that there are deemed to be “closer”, in the legislator’s reasoning, to the category of “indigenous people” than to the category of “new” minority.

In **Norway**, in fact, the category of “national (historical) minorities” specifically refers to “old minorities” whereas the category of “ethnic minorities” refers to “new minorities” i.e. to immigrants.<sup>207</sup> In **Sweden**<sup>208</sup> and **Finland**<sup>209</sup> the legal identification of Roma is very close to that of Norway which recognizes Roma as a “national minority” at the same level of Sami indigenous people.

The second most widespread legal category in Europe to identify Roma is that of “ethnic minority”. It is currently used in six countries, the majority of which are located in the area of Central-Eastern/Balkan Europe. **Poland** recognizes both “national” and “ethnic minority” in its Constitution. Roma are identified as “ethnic minority” under Art.35 through the criteria of the non-identification with “any other nation-state outside Poland” (as in the cases of Karaites, the Łemkos and the Tatars). The rights of both minority groups are further specified through ordinary legislation.<sup>210</sup>

In **Hungary**, Roma are the only acknowledged social group as “ethnic minority”.<sup>211</sup> The former Hungarian Constitutional document recognized Roma as those people who consider

---

<sup>207</sup> European Commission, "Ethnic Minority and Roma Women in Europe: A Case for Gender Equality?," 49.

<sup>208</sup> Sweden has recognized Roma as a “national minority” under the scope of the FCNM. See the Report submitted by Sweden pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR(2001)003 received on 8<sup>th</sup> June 2001, 9. Interestingly enough, Art. 2.4. of the Swedish Constitution which deals with the protection of minorities refers to “ethnic, linguistic and religious minorities” not to national minorities. Therefore, apparently national minorities fall outside the scope of the Swedish Constitution.

<sup>209</sup> Finland recognizes Roma as a “national minority” at Art.17.3 of the Constitution. Report submitted by Finland pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR(1999)003 received on 16<sup>th</sup> February 1999, 3.

<sup>210</sup> Act of 6<sup>th</sup> January 2005 on national and ethnic minorities and on the regional languages. (Dziennik Ustaw No. 17, item. 141, with the amendment of 2005, No. 62, item 550).

<sup>211</sup> European Parliament, "Measures to Promote the Situation of Roma EU Citizens in the European Union. Country Reports," 166.

themselves to be Roma (Art.68). The newly-adopted Constitution (entered into force in January 2012) instead does not contain any detailed specification regarding Romani legal status.<sup>212</sup> Act 77 of 1993 on the Rights of National and Ethnic Minorities further specify the rights of all minority groups in Hungary in compliance with EU legislation. As in the case of Poland, the distinctive element distinguishing “ethnic” from “national” minorities is the lack of kin-state.

In **Montenegro**, according to the Constitution and according to the new Law on Rights and Freedoms of Minorities, Roma do not hold the status of a “national minority” rather that of “ethnic group. Since they are not recognized as having the same “equal status” of Montenegrin citizens and of other “national minorities”, they are not represented in any governmental executive body, being it at the local or at the national levels.<sup>213</sup>

Outside the area of Central-Eastern/Balkans, two countries recognize Roma as “ethnic minority” in Europe: the United Kingdom and Portugal. The United Kingdom recognizes Roma (since 1998) and Travellers (since 2000) as “ethnic minority” under ordinary legislation.<sup>214</sup> Portugal recognizes Roma as an “ethnic group”<sup>215</sup> since the legal system does not recognize national minorities at all.<sup>216</sup> However, **Portugal** does not provide a parallel recognition of targeted legal instruments for Roma as an “ethnic group”: substantially Romani

---

<sup>212</sup> As from the English draft version of April, 25<sup>th</sup> 2011. Art.27 of the new constitution defines minorities in these terms:“(1) Every nationality and ethnic group living in Hungary shall be considered a part of the state forming entity. National and ethnic minorities will have the right to use their own languages, to use their names in their own languages, to foster their culture and to education in their own languages. (2) National and ethnic minorities in Hungary shall have the right to form local and national self-governments”.

<sup>213</sup> M.D. Janković, Čobaj, E.H., "Minorities in Montenegro Legislation and Practice," ed. Youth Initiative for Human Rights (Podgorica: Swedish Helsinki Committee for Human Rights, 2007), 73.

<sup>214</sup> The Race Relations legislation and the Equality legislation (1976, 2000, 2010) provides protection for Gypsies/ Roma, Irish Travellers and Scottish Gypsy Travellers. There is also protection under the 1998 Human Rights Act, in particular sections 8 and 14 under human rights non discrimination clauses. See European Parliament, "Measures to Promote the Situation of Roma EU Citizens in the European Union. Country Reports," 46.

<sup>215</sup> Report submitted by Portugal pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/II(2009)001 received on 14<sup>th</sup> January 2009 § 1.

<sup>216</sup> In the light of its history of extensive colonization Portugal tried to unify the heterogeneity of people living in its Empire through the idea of “Nation” which, as in the case of France, was formed *a posteriori* from the creation of the State. See B. Reiter, "The Perils of Empire: Nationhood and Citizenship in Portugal," *Citizenship Studies* 12, no. 4 (2008).

peoples living in Portugal are recognized – under the equality principle – the same human rights of any other Portuguese citizen, from an individual perspective. In **the Netherlands**, although there is no official recognition of Roma in any legal document, Roma started to be defined as “ethnic minority” since 1983 in the policy formulated by the Dutch Parliament.<sup>217</sup>

The distinction between “national” and “ethnic” minority in the national legal identification of Roma has also led to some “hybrid cases”. In **Czech Republic**, for instance, the two legal statuses coexist: when referring to the descendants of the generations born within the country, Roma are identified as a “national minority”. When referring to “new” groups immigrated especially during the Balkan wars, Roma are identified as “ethnic minority”. Consequently, the Act on the Rights of Members of Ethnic Minorities distinguishes between Roma with Czech citizenship and immigrated Roma with residence permits.<sup>218</sup>

In **Slovenia**, Roma are neither recognized as “national” nor as “ethnic” minority, but through the definition of “Romani community”.<sup>219</sup> This peculiar definition has given rise to a series of concerns from the Advisory Committee on the FCNM, as causing source of legal uncertainty with regard to the meaning of the term “autochthonous”. According to the Committee,

Albeit this problem has been raised already in its first opinion, “the distinction between “autochthonous” and “non-autochthonous” Roma communities is still present in the practice of most of the government bodies responsible for protecting national minorities”<sup>220</sup>

---

<sup>217</sup> V. Guiraudon, Phalet, K., Ter Wal, J., "Monitoring Ethnic Minorities in the Netherlands," *International Social Science Journal* 183(2005): 76.

<sup>218</sup> European Parliament, "Measures to Promote the Situation of Roma EU Citizens in the European Union. Study," ed. Citizens' Rights and Constitutional Affairs Policy Department (Bruxelles: European Parliament, 2011), 45.

<sup>219</sup> The Roma Community Act of April 13<sup>th</sup> 2007, no. 33/07.

<sup>220</sup> This was also the case of Czech Republic, as previously discussed. "Legal Country Study: Slovenia," in *Mimi Project: Practice of Minority Protection in Central Europe Legal-Theoretical Part* (available at <http://www.eurac.edu/en/research/institutes/imr/Projects/ProjectDetails.aspx?pid=4688>), 4.

For this reason, the Advisory Committee has highlighted the potential risk of arbitrary exclusionist or discriminatory practices in respect of some Roma groups living in Slovenia.<sup>221</sup>

### 2.2.3. Linguistic Minority

The process of identification of the distinctive features of “linguistic minorities” can represent – to a certain extent – an easier exercise than the process of identification of the distinctive features characterizing “national” and “ethnic” minorities. According to Ahmed, linguistic as well as religious minorities are objectively recognizable *vis-à-vis* the majority of the population.<sup>222</sup>

By looking at the most important European instrument protecting/promoting linguistic rights, the 1993 ECRML, a possible definition of “linguistic minority” can be implicitly deduced. Art.1 defines a “minority language” as the language “traditionally used” by nationals of that State who form “a group numerically smaller than the rest of the State’s population and is different from the official language of that State”. According to the Charter, a minority language does not include dialects of the official language(s) of the State or the languages of the migrants. Interesting enough, minority languages can have also a “non-territorial feature” (see Art.7.5.).

This means that although the minority language is traditionally used within the territory of the State “it cannot be identified with a particular area there of”. Romanes is recognized by some States as a non-territorial language under the scope of the ECRML.<sup>223</sup> Accordingly, Roma can be defined through the category of “linguistic minority” as well. The only European State opting for this definition is **Albania** which recognizes Roma as a “linguistic minority”

---

<sup>221</sup> Report submitted by Slovenia pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2010)007 received on 28<sup>th</sup> April 2010.

<sup>222</sup> Ahmed, *The Impact of EU Law on Minority Rights* 21.

<sup>223</sup> States recognizing Romanes among the non territorial languages recognized in their countries under the scope of the Language Charter are: Austria, Bosnia and Herzegovina, Czech Republic, Germany, Hungary, Montenegro, the Netherlands, Norway, Poland, Romania, Serbia, Slovakia, Slovenia and Sweden.

together with Vlachs/Aromanians. However, it should be specified that Albania recognizes also national minorities within its territory namely Greeks, Macedonians and Montenegrins.

The distinguishing factor identifying “national” from “linguistic” minorities in Albania can be traceable in the historical tradition of this country. In the first report presented before the FCNM, Albania recognizes

national minorities [as] those minorities which have their own motherlands with which they have common characteristics such: the spiritual constitution, the language, culture, customs and traditions, religious belief, etc. Such minorities are considered the Greek, Macedonian and Montenegrin national minorities. The Roma and Aromanians are recognized and respected as linguistic minorities.<sup>224</sup>

Even if both linguistic and national minorities are recognized under the FCNM in Albania, it seems that in this legal system the use of the category “linguistic minority”, somehow “downgrades” the status of social groups recognized as such by depriving them – *vis-à-vis* national minorities – of the full recognition of their ethnic and cultural dimension as well.<sup>225</sup> Recently, Albania has been increasingly promoting also other dimensions of Roma rights but through political strategies rather than through legal provisions.<sup>226</sup>

#### **2.2.4. National Cultural Autonomy**

National Cultural Autonomy (NCA) is a model proposed in 1899 by Renner and Bauer in order to find a pacific solution to deal with nationalist claims which were leading the Austrian-Hungarian Empire to collapse. The NCA somehow “revolutionized” the way through which minority claims and rights were managed up to that moment, by shifting the

---

<sup>224</sup> Report submitted by Albania pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR(2001)005 received on 26<sup>th</sup> July 2001, 11.

<sup>225</sup> Yet, for the sake of clarity it should be specified that the use of the category “linguistic minority” does belong only to the Albanian case. Indeed in other cases, such as in Italy, the legal definition “linguistic minority” is the only definition through which minorities are legally (and constitutionally) recognized. Hence in this and other cases, the use of the category “linguistic minority” does not entail any form of political/legal downgrading in the enjoyment of the rights of a specific social group.

<sup>226</sup> In 2003 Albanian government drafted and adopted the National Strategy for the “Improvement of Living Conditions of the Roma Community which addressed five fields: cultural heritage and family , education and training, economy and employment, health and infrastructure, justice and public order”. Albania joined the Roma Decade in 2008 and adapted the National Plan for the Roma with a Decade Action Plan.



design and management of minority rights from a “territorial” to a “personal” conception.

This model can be easily explained through the “religious simile” used by Renner:

Much in the same way Catholics, Protestants and Jews could coexist in the same city .. so members of different national communities could coexist with their own distinctive institutions and national organizations, provided they did not claim territorial exclusivity.<sup>227</sup>

Practically, the application of this model wanted to provide an institutional solution to allow the peacefully coexistence of different “nations” within the same “state”. In other words, this model aimed at guaranteeing the peaceful coexistence of different social groups within the same territory even in the lack of stronger (either political or numerical) territorial ties.

Currently, the legacy of this model can still be found along with territorial autonomy in Russia and in Estonia to identify their respective Romani communities. In **Russia**, Roma are one of the 16 groups to which NCA has been recognized. In the light of the historic reasons discussed in section 1.2., Russia still identifies its minority groups through the category “ethnic”. The ideological interpretation and instrumental application of this model in Russia deprive the definition of “ethnic group” of its substantial meaning, or at least of the meaning attributed by other countries which recognize Roma as a “minority” at a stronger level of protection.

The situation of minority groups (and consequently the application of the NCA model) considerably varies within the different regions of Russia. Osipov clarifies that most of the time, the management of ethnic diversity has a “symbolic status” rather than a practical

---

<sup>227</sup> E. Nimni, *National Cultural Autonomy and its Contemporary Critics* (New York: Routledge, 2005), 10. The circulation of the model and its evolution across European countries is discussed more in depth in chapter 6 (cultural rights). This section concentrates instead on the “definitional dimension” of the model through which Roma are currently identified both in Russia and Estonia.

implementation: NCAs are legally defines as NGOs but substantially they are unable to benefit of that legal status comprehensively.<sup>228</sup>

In **Estonia**, the legal status of Roma is quite unclear. While within this legal system, Roma seem to lack full requirements to be legally recognized as belonging to the category of “national minority”,<sup>229</sup> they seem to fulfill/satisfy instead the legal requirements in order to be included within the definition of NCA.<sup>230</sup> This definition is provided by Art. 1 of the Law on Cultural Autonomy that identifies national minorities as groups residing on the territory of Estonia that maintain a longstanding tie with the territory, that are distinct from Estonians on the basis of their ethnic, cultural, religious, or linguistic characteristics and that are motivated to preserve their distinctive identity.<sup>231</sup> In this light, it might be argued that national systems using NCA to identify Roma attribute a lower status of “group recognition” *vis-à-vis* the various legal categories of “minority”.<sup>232</sup>

### 2.2.5. Other definitions

In other States were Roma are not legally entitled to any general or specific set of rights either as a consequence of the legal definition of “constitutive nationality” or as a “minority”, a legal definition identifying this social group might exist nevertheless. These are the cases of France, Spain and Italy.

---

<sup>228</sup> A. Osipov, "National Cultural Autonomy in Russia: a Case of Symbolic Law," *Review of Central and East European Law* 35, no. 1 (2010).

<sup>229</sup> See ECRI the Fourth Report on Estonia adopted on ECRI the second Report on Austria adopted on 16<sup>th</sup> June 2009, 36.

<sup>230</sup> While Roma meet both the objective and the subjective requirements of the first article of the Cultural Autonomy Act, at the numerical level no updated figures have been found to unquestionably state that Roma are recognized in Estonia through the NCA model. Indeed, according to the report submitted before the FCNM Advisory Committee, in Estonia minority groups other than German, Russian, Swedish and Jewish need to be bigger than 3000 people to be recognized through the NCA model. See Third Report submitted by Estonia pursuant to Article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities submitted on 13<sup>th</sup> April 2010, ACFC/SR/III(2010)006.

<sup>231</sup> National Minorities Cultural Autonomy Act No.71/1001 of October, 26<sup>th</sup> 1993.

<sup>232</sup> Section 6.4. offers a more extensive analysis of the NCA model by providing a more in-depth discussion on its substantial aspects while this section provide just a short insight on the model since its purpose is focusing more on a definitional perspective.

In **France**, as it has been discussed earlier, the State is totally neutral or “agnostic” to the recognition of diversities under the Republican principle of equality (*égalité*) which totally disregards the different origins, race or religion. In this framework, Roma have been firstly identified as “*Gens de voyage*” by Law 18 of the 3<sup>rd</sup> January 1969.<sup>233</sup> This legal category, however, finds its roots in a previous legislative act of 1912 where the legislator identified as “nomads” every person of any nationality circulating across the French territory without any fixed domicile or residence (even if they had personal financial resources or they were practicing any kind of profession).

This historical inheritance, which mainly perceives Roma as “nomads” and which underlies their socio-legal representation in the public sphere (through a “functional” rather than through a “cultural” belonging),<sup>234</sup> is still present nowadays. Indeed, the legal status of “*gens de voyage*”, besides influencing the full exercise of rights (especially civil, political and social rights) for Roma, strongly affects the dimension of their social inclusion.<sup>235</sup> This social legal classification does not allow the full inclusion of Roma as it does not include people having a sedentary lifestyle.<sup>236</sup>

**Spain** (as France) is another country which has drawn inspiration from the Napoleonic codes encompassing an ideal of equality that equals uniformity. Consequently, Spain does not officially recognize any “minority” within its domestic jurisdiction.<sup>237</sup> In this legal

---

<sup>233</sup> “Loi n°69-3 du 3 janvier 1969 relative à l’exercice des activités ambulantes et au régime applicable aux personnes circulant en France sans Domicile ni résidence fixe”, Journal Officiel de la République Française, N. 42, 1969.

<sup>234</sup> This kind of legal and social identification is very close to Okely’s reconstruction of Roma history in Europe. See section 1.1.

<sup>235</sup> C. Le Berre, *Gens de voyage e Rom nel diritto francese* ed. P. Bonetti, A. Simoni, and T. Vitale, La Condizione Giuridica Di Rom E Sinti in Italia (Milano : Giuffrè Editore 2011), 559.

<sup>236</sup> According to a recent Ministry report sedentary Roma are 100.000 out of 240.000 persons belonging to this group. Ibid., 556.

<sup>237</sup> European Parliament, “Measures to Promote the Situation of Roma EU Citizens in the European Union. Country Reports,” 369.

framework, Roma are legally defined as “*Gitanos*”.<sup>238</sup> After having been strongly persecuted and harassed under the Franquist regime, they started to be recognized as citizens entitled to fundamental rights and freedoms with the enactment of the 1978 Constitution. Recently, in Spain Roma started to be entitled also to specific rights (such as political rights through the creation of Romani Councils).<sup>239</sup> Yet, Rey argues that their legal treatment is still constrained by a “deficit of citizenship” i.e. by a partial enjoyment of rights especially in the lack of a comprehensive “anti-discriminatory” legislation which specifically tackles racial discrimination.<sup>240</sup>

In **Italy**, the construction of the ideal of “Nation” has developed, as in Germany, around the common element of language. Hence the identification of ethnic and cultural diversity is still mostly related to linguistic recognition.<sup>241</sup> However, despite their linguistic diversity, Roma are not recognized as a linguistic minority at the national level.<sup>242</sup> However, mild forms of recognition in regional legislation can be found which – to a certain extent – fall between the French and the Spanish models i.e. between an “agnostic-discriminatory” recognition of Roma (mostly hinging on the idea of “nomadic”) and a more “promotional” recognition of Roma (biased however by the “deficit of citizenship”).

Some regions such as Sardinia, Emilia Romagna, Lombardia, Piemonte, Umbria, Liguria and Piemonte still identify Roma through the category “nomadic” or even “gypsy”<sup>243</sup> and, as in

---

<sup>238</sup> Even if Roma have been identified as a “national minority” under the scope of the FCNM (see, *infra*, section 1.4.) according to the CoE Report “Legal Situation of Roma in Europe” (see footnote 144) and according to national legislation, in Spain Roma are not identified as a “national minority” in any legal act.

<sup>239</sup> This aspect is more extensively discussed in chapter 7.

<sup>240</sup> F. Rey, “Propuestas para avanzar en el caso español,” *El Globo Internacional, Política y Integración*, no. 37-38 (2007): 48.

<sup>241</sup> As already the title of the Law on “historical linguistic minorities” makes clear (“*Norme in materia di tutela delle minoranze linguistiche storiche*”); Law 482 of 15<sup>th</sup> December 1999.

<sup>242</sup> As the consequence of a political compromise; the controversy about including Roma has been one of the reasons why the law has been adopted only 50 years after art. 6 Italian Constitution already provided for the protection of – linguistic – minorities.

<sup>243</sup> Legge regionale N. 9/88 Regione Sardegna “Tutela dell’etnia e della cCultura dei nomadi”; legge regionale N. 47/88 Regione Emilia Romagna “Norme per le minoranze nomadi in Emilia-Romagna”; legge regionale N. 77/89 Regione Lombardia “Azione Regionale per la Tutela delle Popolazioni appartenenti alle etnie tradizionalmente nomadi o semi-nomadi”; legge regionale N. 32/90 Regione Umbria “Misure per favorire

the case of France, the rights attached to this category suffer from a biased representation of Roma. Accordingly, these legal categories are unable to comprehensively identify this social group. In the case of Le Marche,<sup>244</sup> the legal definition of Roma and their legal status is merely included in that of “refugees, stateless, and asylum-seekers”.

In Lazio, Veneto, Friuli Venezia Giulia and Toscana, and more recently at the local level of the Autonomous Province of Trento,<sup>245</sup> the legal definition of Roma appears more detached from the socio-legal category “nomadic”. It is not by chance that legal guarantees attributed to this social group are more inclusive in these regional frameworks. In general, at the Italian regional level, as Bonetti emphasizes, the legal treatment of Roma has for a long time pushed the dimension of social inclusion in the background, by regulating the “ambiguous right to nomadism” perhaps with a view of controlling rather than allowing their free circulation.<sup>246</sup>

Especially this last excursus over the legal definitions of Roma other than “minority” or NCA, better accounts for the social performative role that lawyers have historically played in the stigmatization, marginalization and criminalization of particular groups of people identified as “Gypsy” or “nomadic”.<sup>247</sup> This is the reason why it is assumed that the legal definition(s) of Roma in the various European countries strongly influences their legal status. The legal status, in turn, is the precondition for the enjoyment of any sets of rights since rights stem

---

l’inserimento dei nomadi nella società e per la tutela della loro identità e del loro patrimonio culturale”; legge regionale N. 6/92 Regione Liguria (no heading); legge regionale 25/02/1993 Regione Piemonte “Interventi a favore della popolazione zingara”.

<sup>244</sup> Legge regionale N. 3/94 Regione Marche “Interventi a favore degli emigrati, degli immigrati, dei rifugiati, degli apolidi, dei nomadi e delle loro famiglie”.

<sup>245</sup> Legge regionale N. 82/85 Regione Lazio “Norme a favore dei rom”; legge Regionale N. 54/89 Regione Veneto “Interventi a tutela della cultura dei rom e dei sinti”; legge regionale N. 11/88 Regione Friuli Venezia Giulia “Norme a tutela della cultura rom”; legge regionale N. 2/2000 Regione Toscana “Interventi per i popoli rom e sinti”; legge provinciale n. 12 del 29/10/2009 “Misure per favorire l’integrazione dei gruppi sinti e rom residenti in provincia di Trento”.

<sup>246</sup> P. Bonetti, “I nodi giuridici della condizione di Rom e Sinti in Italia,” in *La condizione giuridica di Rom e Sinti in Italia*, ed. P. Bonetti, A. Simoni, and T. Vitale (Milano: Giuffrè Editore, 2011), 88-89.

<sup>247</sup> A. Simoni, “Il “Problema di una gente vagabonda”. Retrospectiva sulla percezione degli “Zingari” nella cultura giuridica italiana ” in *La condizione giuridica di Rom e Sinti in Italia*, ed. P. Bonetti, A. Simoni, and T. Vitale (Milano: Giuffrè Editore 2011), 225.

from the conception of “State” and “nation” underlying each political-legal system and the consequent treatment of ethnic, cultural and linguistic diversities.

### 2.3. Indigenous People?

When approaching the legal definition of Roma in terms of “indigenous people” some preliminary considerations should be developed. The legal definitions of “national minority” and “indigenous people” formally belong to two different branches of international law, hence to two distinctive types of legal categorization.<sup>248</sup> Theoretically, autochthonous minorities and indigenous peoples are not mutually exclusive concepts. In fact, they are linked by a “subtle continuum”.<sup>249</sup>

Practically, this “subtle continuum” implies the opportunity for lawyers to use existing tools for protecting indigenous peoples and adapt them for accommodating the claims of autochthonous minorities. Therefore, it is necessary to identify the common features of autochthonous minorities and indigenous peoples in order to foster a viable adaption of the model(s) so far applied to autochthonous minorities. According to Geschiere, the concept of “autochthonous” groups has shaped the “minority debate” only recently.<sup>250</sup> In fact, whenever referring to human beings, the debate over the natives or historical inhabitants of a certain area, has been characterized for decades by the word “indigenous” without making any formal distinction between “people” and “minority”.

Compared to other continents, Europe has become concerned about indigenous issues within its territory only recently.<sup>251</sup> While the term “indigenous peoples”, in the Western common

---

<sup>248</sup> Indeed, according to international law, “indigenous people” are distinguished from “national minority” in the light of is the “historical tie” that they hold with the land. This historical tie with the land has been identified through the following elements: (1) precedent habitation; (2) historical continuity; (3) attachment to land which entitles – at least theoretically – indigenous people to a “right to land and natural resources” . See Thornberry, *International Law and the Rights of Minorities* 45.

<sup>249</sup> R. Medda-Windischer, *Old and New Minorities: Reconciling Diversity and Cohesion. A Human Rights Model for Minority Integration* (Bozen: EURAC Research, 2009), 40.

<sup>250</sup> P. Geschiere, *Inclusi/Esclusi. Prospettive Africane Sulla Cittadinanza* (Torino: UTET, 2009), 6.

<sup>251</sup> After the foundation of the United Nations Working Group on Indigenous Populations in 1982, the notion of “indigenous people” acquired new vitality by encompassing global dimensions. Conversely, the notion of

sense, usually refers to those ethnic groups living in former colonial territories whose survival can only be guaranteed by means of a special protection, “autochthonous” refers to some important “élites” belonging to Western societies. However, these linguistic distinctions appear more distinct in ideological rather than in epistemological terms, as demonstrated by their very close “etymological kinship”.<sup>252</sup>

The proximity between the two concepts can also be found in the number of common descriptors identifying “minorities” and “indigenous peoples”.<sup>253</sup> This has allowed the “flexible usage” of the FCNM to accommodate the needs of European indigenous people as well.<sup>254</sup> Some commentators have argued that the peculiar feature distinguishing “indigenous peoples” from “minorities” relates to their historical tie with the land.<sup>255</sup> Nonetheless, international indigenous law and legal doctrine have clarified that this territorial tie can be interpreted in a more dynamic way, since it does not necessarily imply the permanent presence of indigenous groups within a certain territory.

---

“autochthony” has remained more circumscribed in some African regions (inspiring violent attempts aim to exclude the “foreigners” particularly in the francophone areas) and in some European countries such as the Flemish part of Belgium and the Netherlands especially with regard to some political debates over multiculturalism and migration issues. *Ibid.*, 4.

<sup>252</sup> Etymologically “autochthonous” and “indigenous” are notions deriving from the Greek tradition and implying similar status. Although the meaning of the concepts cannot be intended as completely overlapping, the distinction between the two terms nowadays can mostly be drawn on the linguistic rather than on the substantial level. “Autochthonous” is composed by two particles (*autos+chthon*) “auto-” in the sense of “of or by yourself” and “chthon” in the sense of “soil, land”. In the classical Greek period, a quite positive implication was attributed to this term: by using it the Athenians could claim their superiority over all the other Greeks by emphasizing the fact that they were the only “autochthonous people” over the Greek area. Furthermore, the feature of “autochthony” explained their natural inclination towards democracy. On the other hand, the word “indigenous” literally means “born within” with the connotation of “born within the house” of the classical Greece. *Ibid.* 4.

<sup>253</sup> As Thornberry argues the proximity of the two concepts can be easily recognized looking at Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe which defines national minorities as a group of persons in a State who: a) reside on the territory of that State and are citizens thereof; b) maintain longstanding firm and lasting ties with that State; c) display distinctive ethnic, cultural, religious or linguistic characteristics; d) are sufficiently representative, although smaller in number than the rest of the population of that State or of region of that State; e) are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion and their language. Thornberry, *International Law and the Rights of Minorities* 4.

<sup>254</sup> This is the case of Sami people living in Finland and in Russia as it emerges from the periodical reports under the Convention. Currently in Europe there is no legal tools specifically focused on the protection of indigenous peoples because, as it has already been discussed, up to now Europe has regarded to indigenous peoples as an ‘extra-European issue’.

<sup>255</sup> This territorial tie has been understood as having a compound nature based on the following elements: (1) precedent habitation; (2) historical continuity; (3) attachment to land. In Thornberry, *International Law and the Rights of Minorities* 45.

Currently, at international law level the only binding instruments guaranteeing indigenous rights have been produced within the ILO Framework.<sup>256</sup> Art. 1 of ILO Convention 107 (1957) identifies, *inter alia*, indigenous peoples as members of tribal or semi-tribal populations.<sup>257</sup> International law recognizes that tribal or semi-tribal people can have nomadic features.<sup>258</sup> Moreover, the subsequent ILO Convention 169 (1989) recently intervening on the same topic, specifies that ancestors of indigenous peoples may have existed also in countries which did not experience conquest or colonization.<sup>259</sup>

Indeed, **Ireland** recognizes through the legal category “indigenous people” the community of “Travellers” which does not comprehend the whole category of Roma generally speaking. Accordingly, as the linguistic analysis of Piasere has shown, Travellers belong to the “third Gypsy Europe” i.e. to that geographical area characterized by social groups hardly speaking Romanes but rather speaking languages of “archaic or local derivation”. Therefore, it might be inferred that Travellers are a peculiar Romani group who, precisely in the light of their “special” features, receive a “special” recognition as “indigenous people”.

---

<sup>256</sup> In 2006, however a non-binding document has been produced in the UN framework: the UN Declaration on the rights of indigenous people. See, footnote 1005 at section 8.10.

<sup>257</sup> This Convention applies to: (a) Members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at less advanced stage than the stage reached by the other sections of the National community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) Members of tribal or semi-tribal populations in independent countries which are regarded as indigenous

on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong.

<sup>258</sup> J. Gilbert, "Nomadic Territories: a Human Rights Approach to Nomadic Peoples' Land Rights," *Human Rights Law Review* 7, no. 4 (2007). Thornberry further specifies that: “It is notable that the Convention 107 (1957) accepts the tribal category as dominant – postulating that, while all indigenous populations are tribal, not all tribal populations are indigenous. Some ‘tribal or semi-tribal’ populations are tribal in independent countries’ are regarded as being at ‘a less advanced stage than the stage reached by other sections of the national community’ with the status regulated by own customs or special laws; others are regarded as indigenous on account of their descent from the population which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization’ and which ‘irrespective of their legal status’ live more in conformity with the institutions at that earlier time. The rights in the Convention apply equally to those regarded as indigenous people and those not regarded”. Thornberry, *International Law and the Rights of Minorities* 43.

<sup>259</sup> Thornberry, *International Law and the Rights of Minorities* 43.



Nevertheless, it seems worthy to consider the argumentation that Ireland brought before the FCNM Advisory Committee to explain the rationale distinguishing “Travellers as indigenous people” from other Romani communities:

In a range of legislative, administrative and institutional provisions, the Government has recognised the special position of Ireland’s Traveller community, in order to protect their rights and improve their situation. While Travellers are not a Gypsy or Roma people, their long shared history, cultural values, language (Cant), customs and traditions make them a self-defined group, and one which is recognisable and distinct. The Traveller community is one whose members, like the Gypsies in other countries, travelled from place to place in pursuit of various different traditional vocations. Despite their nomadic origins and tendencies, the majority of the Traveller community now live in towns and cities. Their culture and way of life, of which nomadism is an important factor, distinguishes the Travellers from the sedentary (settled) population. While Travellers do not constitute a distinct group from the population as a whole in terms of religion, language or race, they are, however, an indigenous minority who have been part of Irish society for centuries. The Government fully accepts the right of Travellers to their cultural identity, regardless of whether they may be described as an ethnic group or national minority. For this reason, particular attention is given in the present report to the measures taken by Ireland aimed at protecting the rights and improving the situation of the Traveller Community. It is also considered that the Irish experience may be of particular interest to the members of the Advisory Committee in the wider context of the protection of the rights of equivalent minority groups elsewhere in Europe.<sup>260</sup>

A couple of final considerations might be drawn at the end of this section. Firstly, it seems that the definition of “Travellers” as “indigenous people” is founded on the “functional/social” perspective identified by Okely. In other words, although Travellers cannot be comprised in the “general group” of Roma because of their supposed unshared “ethno-genetic” belonging, they are nonetheless closely approached to the group of “Roma” because of their nomadic lifestyle which is “like the Gypsies in other countries”.

Secondly, the belonging of Travellers to the category of “indigenous people” is supported by the fact that they hold a “long-lasting tie” with the territory since they have been “part of the Irish society for centuries”. It is interesting to note that there is no specification of their

---

<sup>260</sup> Report submitted by Ireland pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR(2001)006 received on 13<sup>th</sup> November 2001, 15.

“native” or “autochthonous” presence within the Irish territory. Hence, the distinctive features identifying “Travellers” from “Roma” seem to lead to a path of convergence rather than to a path of divergence between the two groups.

This is a crucial element to bear in mind since if, as it has been discussed before, the legal category is the prerequisite to enjoy a certain spectrum of “special” rights, the possible extension of the legal category “indigenous people” to other Romani communities can open up new legal scenarios dealing with larger rights entitlements also on a non-territorial basis.

## 2.4. Research Issues

After having presented a socio-political background on Roma in Europe, a significant part of this chapter has been dedicated to the analysis of the different legal definitions through which CoE Member States have legally recognized Roma within their jurisdictions. Notwithstanding the historical and diffuse presence of Roma in Europe (which generally dates back at least ten centuries), the analysis has shown that at the national level, European countries have not always legally recognized the specific cultural identity of Roma. In cases where such legal recognition has been provided, it has been articulated by means of different legal definitions which “perform” (in the etymological sense of “form *a priori*”)<sup>261</sup> a wider or a narrower enjoyment of human and minority rights for this social group.<sup>262</sup>

The analysis has shown that 30 countries out of 47 of the CoE currently provide a legal definition of Roma. Within this group of recognizing countries, just one defines Roma as “constitutive nationality” of the State.<sup>263</sup> Whereas the vast majority of recognizing countries define Roma as a “minority”. More specifically: fifteen countries define Roma as a “national

---

<sup>261</sup> See Austin’s theory on the performative role of the language in Austin, *Philosophical Papers*

<sup>262</sup> On the importance of the legal terminology to J. Liégeois, *Le Conseil de L’Europe et les Roms: 40 Ans d’Actions* (Strasbourg: CoE Publishing Editions, 2010).

<sup>263</sup> Macedonia

minority”,<sup>264</sup> six countries define Roma as “ethnic minority”,<sup>265</sup> two countries define Roma as a social group standing in between “national/ethnic minority”<sup>266</sup> and one country defines Roma as a “linguistic minority”.<sup>267</sup> Two cases identify Roma through the NCA model<sup>268</sup> and three cases define Roma by means of other legal definitions.<sup>269</sup> Finally, in one country the Romani community of Travellers (and not the entire Romani group) has been defined in terms of “indigenous people”.<sup>270</sup>

As for the other sixteen countries of the CoE, seven of them do not legally define Roma since they legally identify (and define) only the majority groups living within their borders: having an almost homogenous composition of their national population. These are the cases of the European “micro-States” of Andorra, Iceland, Lichtenstein, Luxembourg, Malta, Monaco and San Marino. As for the nine remaining countries, no legal definition of Roma has been found in Armenia, Azerbaijan, Belgium, Bulgaria, Cyprus, Denmark, Georgia, Greece, Switzerland and Turkey.

In this chapter, it has been argued that the diversity of legal definitions does not (only) depend on the numerical proportion of the Romani population *vis-à-vis* the majority of the national population (i.e. on the negotiation power that a Romani community holds in terms of “numerical weight”, to see recognized their group claims) but also on the ideals of “State” and “Nation” that underlie the identification of the majority of the population, and in parallel, of any other social group, Roma included, living within a national territory.

---

<sup>264</sup> Croatia, Bosnia-Herzegovina, Serbia, Germany, Austria, Romania, Slovakia, Moldova, Ukraine, Latvia, Lithuania, Finland, Norway, Sweden and partially Greece (recognizing only the Muslim community of Western Trace).

<sup>265</sup> Poland, Hungary, Montenegro, United Kingdom, Portugal and the Netherlands.

<sup>266</sup> Czech Republic uses both definitions to distinguish between historic Roma (identified in terms of “national minority”) and “new” immigrant Roma (identified in terms of “ethnic minority”). In Slovenia the definition “Romani community” stands in-between the categories of “national” and “ethnic” minorities.

<sup>267</sup> Albania.

<sup>268</sup> Russia and Estonia.

<sup>269</sup> In France Roma are identified as “*Gens de voyage*”, in Spain as “*Gitanos*” and in Italian Roma have been defined at the regional level mostly through the categories of “*Zingari*” (gypsies) or “*Nomadi*” (nomadic).

<sup>270</sup> Ireland.

Yet, the Romani “intrinsic” nature of non-territorial minority has shown to be ineffectively protected under the existing international and national legal instruments since these legal instruments ensue from a Westphalian/territorial conception which commonly circumscribes the protection of human and minority rights to a specific territorial area of reference. Accordingly, the legal categories together with and the legal entitlements enshrined in these minority legal instruments present the same “territorial biases”.

In this context, it may be argued that the most appropriate legal definitions for the non-territorial group of Roma are *in abstracto* the less “territorially connected” such as those of “ethnic minority”, “linguistic minority” and any form of recognition through the NCA model. Nonetheless, in the majority of cases, the States’ practice has shown to follow exactly an opposite direction by privileging the widespread usage of the legal definition “national minority”.

As it has been discussed, the legal category of “national minority” was born at international level at the time of Lausanne Peace Treaty, with the specific aim to protect kin-State minorities, i.e. social groups which hold a “historical territorial tie” with another European State supposed of being their “cultural” motherland. Yet, the international legal doctrine has not already identified a precise timeframe allowing a certain social group to claim the “historical tie” with a territory of reference and consequently its legitimate recognition under the “national minority” category. Therefore, it might be argued that in the case of Roma, there might be some margins to claim such a “historical tie” with the European territory, at least for those European countries where Roma have been historically more bound.<sup>271</sup>

However, the use of the “national minority” legal category in the case of Roma, does not *in abstracto* comprehensively respond to the Romani non-territorial cultural identity, but it can

---

<sup>271</sup> See, for instance the countries of the Carpathian-Balkan area belonging to the “first Gypsy Europe” identified by Piasere, see, *infra* section 2.2.

perhaps provide a more promotional recognition of Romani minority rights than the other non-territorial categories. Indeed, minority groups who are recognized under the “national minority” category, can also benefit from the international protection offered by the FCNM, including the monitoring activity of the Advisory Committee which scrutinizes the implementation of international standards at the domestic level.

The effective protection of minority rights is strongly dependant on the domestic level, which, as discussed in this chapter, may entail a more or less promotional recognition of minority rights according to the constitutional model of reference. In particular, in the majority of constitutional systems such a recognition is closely connected to the requirement of citizenship. This requirement is usually the prerequisite to access the enjoyment of the rights and freedoms enshrined in the constitutional charters and in minority legislation. Yet, in the case of Roma, this citizenship prerequisite plays the ambivalent role of being “rights provider” at the national level and, to a certain extent, “rights depriver” at the European one, since it “entraps” the non-territorial Romani identity within a specific territorial area.

In an imaginary Europe without borders, the estimated presence of Roma rates 10-12 million individuals (which can realistically be also much higher) raising the Romani community to the 7<sup>th</sup>-8<sup>th</sup> most numerous community of Europe. In order to identify a minimum set of rights that could comprehensively tackle Romani cultural identity at the European level, a first reflection should take into account a possible re-definition of Romani group from a European perspective which could *per-form* a minimum European level of minority rights for Roma.

This legal definition should *trans-cend* both national borders and national classifications in order to identify Romani European cultural identity in a *trans-national* perspective. This reflection over a possible European *trans-national* definition of Roma, is also in line with the recent CoE Recommendation 1735 (2006) which has invited States Parties “to stop defining and organizing themselves as exclusively ethnic or exclusively civic states” (Art. 16.4).

This *trans-national* recognition of Roma at the European level can better entail a minimum set of legal guarantees from a non-territorial perspective. To this purpose, some inspiration can perhaps be drawn from the indigenous rights recognized in some European legal systems, where another European *trans-national* people is living: the Sami of Northern Europe. The opportunity to draw a parallel between these two “trans-national groups” and the possible extension of “indigenous guarantees” to Roma is supported also by the (innovative) Irish legal recognition of Travellers as “indigenous people”.

Before starting a reflection on a possible “expansion” of Roma rights on the basis of the indigenous experience, the analysis focuses on the specific sets of rights recognized to Roma at the national level in correlation with the legal definitions identifying this social group. In particular, the following human and minority rights dimensions is thoroughly examined in the following chapters: linguistic rights (chapter 4), social and economic rights (chapter 5), cultural rights (chapter 6) and political rights (chapter 7). After having considered the lessons that can be drawn from the case-study of the Sami (chapter 8) the analysis finally focuses on the discussion on Roma rights in a trans-national perspective (chapter 9).

## Chapter 3

### Research challenges in the comparative study

#### of Roma rights in Europe

**Summary:** **3.1.** Questions at stake – **3.2.** Disciplinary the interdisciplinary: preliminary remarks. – **3.3.** What is to have knowledge of Roma rights? Ontology as a “wall”? – **3.4.** What is this research comparing when analyzing Roma rights? Epistemology as a “spear”? – **3.5.** Which methodology of research? Methodology as a “fan”? – **3.6.** Limits and potentialities.

#### 3.1. Questions at stake

This research investigates the legal status of Roma in Europe from a comparative perspective by analyzing the recognition of Roma rights in each Member State belonging to the CoE area that has legally recognized Roma within its legal system either as a minority group or by means of any other legal definitions.<sup>272</sup> The previous two Chapters have largely argued that the presence of Roma is historically rated – at different numerical degrees though – in the vast

---

<sup>272</sup> As discussed in chapter 2, this study has shown that 30 countries out of 47 of the CoE currently provide a legal definition of Roma. Within this group of recognizing countries, just Macedonia defines Roma as “constitutive nationality” of the State. Whereas the vast majority of recognizing countries define Roma as a “minority”. More specifically, fifteen countries define Roma as a “national minority” (Croatia, Bosnia-Herzegovina, Serbia, Germany, Austria, Romania, Slovakia, Moldova, Ukraine, Latvia, Lithuania, Finland, Norway, Sweden and partially Greece (recognizing only the Muslim community of Western Trace), six countries define Roma as “ethnic minority” (Poland, Hungary, Montenegro, United Kingdom, Portugal and the Netherlands), two countries define Roma as “national/ethnic minority” (Czech Republic and Slovenia) while one country defines Roma as a “linguistic minority” (Albania). The analysis has further highlighted two cases identifying Roma through the NCA model (Russia and Estonia) and three cases defining Roma by mean of other legal definitions (France, Spain and Italy). Finally, in one country, the Romani community of Travellers (and not the entire Romani group) has been defined in terms of “indigenous people” (Ireland).

As for the other seventeen countries of the CoE, seven of them do not legally define Roma since they legally identify (and define) only the majority groups living within their borders: having an almost homogenous composition of their national population. These are the cases of the European “micro-States” of Andorra, Iceland, Lichtenstein, Luxembourg, Malta, Monaco and San Marino. As for the ten remaining countries, no legal definition of Roma has been found in Armenia, Azerbaijan, Belgium, Bulgaria, Cyprus, Denmark, Georgia, Switzerland and Turkey.

majority of countries belonging to the CoE.<sup>273</sup> However, at present international human rights law lacks *ad hoc* guarantees for non-territorial minorities.

Conceptually, as a non-territorial minority, Roma escape the boundaries of the classical classification since, on the one hand, they can be considered a “traditional minority” (“old minority”) since they have been historically living in Europe, while, on the other, they can be considered “migrants” (“new minority”) since a persistent proportion of them remain nomadic.<sup>274</sup> As a result, the domestic level lacks an international legal framework of reference to provide Roma with a clear legal status and a (consequent) comprehensive set of rights. This status of legal uncertainty strongly impacts the overall social inclusion of Roma at social level.<sup>275</sup>

In order to overcome the limitations of conceptualizing Roma by means of different national legal statuses (which, as seen, impact the effective enjoyment of different sets of rights), this study proposes to adopt a complementary approach that conceives Roma in terms of “trans-national people” because of their dispersed but significant presence throughout Europe. This trans-national perspective is undertaken under the conviction that notwithstanding the different peculiarities characterizing the various Romani communities in Europe, these communities are still linked – at different extents though – by a common cultural identity.<sup>276</sup>

According to official estimates, nowadays Europe rates between 10 and 12 million people sharing this common cultural identity which corresponds to that of the population of a

---

<sup>273</sup> See in particular section 2.2.

<sup>274</sup> See, *inter alia*, R. Medda-Windischer, *Old and New Minorities: Reconciling Diversity and Cohesion. A Human Rights Model for Minority Integration* (Bozen: EURAC Research, 2009).

<sup>275</sup> The connection between legal status and social inclusion has already been generally discussed at section 1.6. . In the specific case of Roma, this connection is more extensively analyzed at section 5.1.

<sup>276</sup> On the common Romani cultural identity see section 6.1. On the trans-national perspective towards Roma in Europe see chapter 9 and, *inter alia*, M. Cermel, “Rom e Sinti: cittadini senza patria o popolo Europeo transnazionale?” in *La Condizione Giuridica di Rom e Sinti in Italia*, ed. P. Bonetti, A. Simoni, and T. Vitale (Milano: Giuffr  Editore 2011).



European middle-size country.<sup>277</sup> The ultimate goal of this study is proposing a theoretical reflection on a possible identification of a minimum common set of rights specifically devised at European level for this social group though as a trans-national people that, for the reasons illustrated above, cannot benefit from the current legal guarantees.

To achieve this goal, this study combines a comparative analysis of human and minority rights standards identified both at the international and European levels, together with the best “legal practices” developed by European countries at the domestic level by focusing, in particular, on three main research questions:

- 1) What is the efficacy of international instruments of human and minority rights for Roma in Europe?
- 2) What are the national “best legal practices” for protecting Roma rights?
- 3) Can a minimum common European set of rights be constructed for Roma as “European transnational people”?

The third question is developed by considering the case of another trans-national people living in Europe: Sami of Northern Europe. Although Sami are an indigenous people, the comparison with Roma can be justified on a twofold ground:

- From a sociological perspective, Sami share with Roma a past of social deprivation that for a long time has pushed both groups in a position of “invisibility” and denial of rights in societies where they have been living;

---

<sup>277</sup> Again see section 2.2. for a more in-depth discussion on Roma’s presence in Europe.

- From a legal perspective, the category “indigenous people” has demonstrated to be, both in doctrine and in legal practice, very close to that of “autochthonous minority”.<sup>278</sup>

As a result, the study of parallel and homologous socio-legal experiences is undertaken in order to speculate on the possible enhancement of the legal framework characterizing Roma rights.

Finally, it should be noted that this research is developed from a comparative legal perspective in the field of human rights in general, and of minority (Roma) rights in particular. Although the legal dimension is predominant in the analysis, this topic inevitably implies a strong “interdisciplinary opening” towards other fields of social sciences as well. The purpose of this chapter is thus providing this research with a “methodological guide” in order to “discipline” – to the largest possible extent – the “interdisciplinary” field of human rights and minority (Roma) rights.

The following sections dissect the various parts of the research process by adopting an “external perspective” which usually characterizes more social than legal sciences. This is done in order to systematize (not to solve!) the methodological challenges that this legal comparative research faces. Accordingly, the reflection over the nature of knowledge, the validity of comparison, and research methods does not need to be considered as a mere academic exercise: rather as a rational process which coherently links in a common logical framework ontology, epistemology and methodology of research.

### **3.2. Discipline the interdisciplinary: preliminary remarks**

The Indian parable of the blind men and the elephant has often been used by social scientists as an allegory to approach the study of complex phenomena, such as the process of European

---

<sup>278</sup> See sections 2.3. and section 8.2.

integration<sup>279</sup> and, more recently, empirical legal research.<sup>280</sup> This story (which has different variations) tells about blind men (or men in the dark) who approach for the first time in their lives an elephant. Each of them touches a different part of the animal thus reporting a version of reality that is limited to each different experience. As Nielsen summarizes,

The man who feels the tail reports that the elephant is like a brush, the man who feels the tusks says the elephant is like a spear, the man who touches the side reports that the elephant is like a wall, and the man who feels the ear describes the elephant as resembling a fan.<sup>281</sup>

This little story illustrates simply and clearly the truths and the fallacies that social researchers are continuously facing in their research processes. According to every single perspective, each man (researcher) is correct in his perception and description of the truth. However, the nature of their individual truths is always relative, often opaque and sometimes even inexpressible. In order to understand how reality (the elephant) is really like, a researcher should be ideally able to take a comprehensive view.

While this assumption is important for every discipline of social research, it appears essential for human rights.<sup>282</sup> Indeed, the compound nature of this subject of enquiry<sup>283</sup> has increasingly been addressed by an interdisciplinary approach<sup>284</sup> since, as Forsythe emphasizes, “human rights is by nature an interdisciplinary subject”.<sup>285</sup> This means that the

---

<sup>279</sup> D. J. Puchala, "Of Blind Men, Elephants and International Integration.," *Journal of Common Market Studies* 10, no. 3 (1972).

<sup>280</sup> L.B. Nielsen, "The Need for Multi-Method Approaches in Empirical Legal Research," in *The Oxford Handbook of Empirical Legal Research*, ed. P. Cane, Kritzer, H.M. (Oxford: Oxford University Press, 2010).

<sup>281</sup> *Ibid.*, 952.

<sup>282</sup> All along this chapter the reference to “human rights” should be understood as the general realm which respectively includes the more specific realms of minority and Roma rights as well.

<sup>283</sup> As Cassin clarifies “la matière des droits de l'homme constitue, depuis des siècles et des siècles, bien avant la découverte du télégraphe, du cinéma, de la radio, et de la télévision, un des domaines les plus perméables aux grands courants d'idées, universels ou au moins régionaux, qui traversent la planète par ondes”. M.R. Cassin, "Droits de l'homme et méthode comparative," *Revue internationale de droit comparé* 20, no. 3 (1968): 450.

<sup>284</sup> See, *inter alia*, T. Dunne, Wheeler, N.J. , *Human Rights in Global Politics* (Cambridge : Cambridge University Press, 1999); M.A. Freeman, *Human Rights: An Interdisciplinary Approach* (Cambridge/Malden: Polity Press, 2011); H.J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford : Oxford University Press, 2000).

<sup>285</sup> D.P. Forsythe, "Human Rights Studies: on the Dangers of Legalistic Assumptions " in *Methods of Human Rights Research*, ed. F. Coomans, and Grünfeld, F., and Kamminga, M.T. (Antwerp/Oxford/Portland: Intersentia, 2010), 59.

comprehension, study and research of this subject may entail different approaches belonging to different disciplines.

On the one hand, social sciences have already started a process of scientific reflection on the methodological implications that an interdisciplinary perspective in human rights research implies.<sup>286</sup> On the other hand, legal sciences have not undertaken already a comprehensive process of reflection to this regard since according to Coomans,

Human rights scholars tend to passionately believe that human rights are a good thing...They may forget that human rights standards are the result of compromises concluded by States and may therefore be less than perfect. They may also overlook the fact that the mere adoption of resolutions by international bodies and the mere establishment of new international institutions will not necessarily result in improvement of enjoyment of human rights on the ground.<sup>287</sup>

Another set of reasons that can explain this “methodological underdevelopment” of legal research *vis-à-vis* social research in the human rights field, can be attributed, according to the same author, to the intrinsic nature of the two disciplines in question. In particular, social scientists aim to understand and to explain social phenomena, lawyers instead as “system-builders”, aim to investigate the logical compatibility of their arguments with an existing normative setting.<sup>288</sup>

Indeed, the explanation of social phenomena offered by social scientists is often part of a bigger process of comprehension (*verstehen*) that – in the Weberian understanding – entails a systematic and interpretative process of knowledge of reality from the “outside” which aims at liberating from subjective meanings, or at least, to reduce them at a minimum level. The investigation on the normative setting(s) offered by legal scientists – and especially by

---

<sup>286</sup> T. Landman, "Social Sciences Methods and Human Rights," in *Methods of Human Rights Research*, ed. and Grünfeld Coomans F., F., and Kamminga, M.T. (Antwerp/Oxford/Portland: Intersentia, 2010).

<sup>287</sup> F. Coomans, and Grünfeld, F., and Kamminga, M.T., "A Primer," in *Methods of Human Rights Research*, ed. and Grünfeld Coomans F., F., and Kamminga, M.T. (Antwerp/Oxford/Portland: Intersentia, 2010), 13.

<sup>288</sup> *Ibid.*, 12.

comparative legal research<sup>289</sup> – has instead for a long time been applied mostly in an empirical way, without being accompanied by a parallel process of systematic reflection on its single phases as in the case of social research instead. Mostly based on the personal experience of the researcher, legal comparative method has frequently appeared uncertain or imprecise.

As a result, according to Costantinesco, the number of studies produced in the field of comparative legal research have shaped a *congèrie* of observations, sometimes correct but fragmentary, often conflicting and incoherent, nevertheless always incomplete.<sup>290</sup> The following sections have structured the theoretical thought that has accompanied the different research phases through some questions which synthesize the reflection underlying the theoretical dimensions of ontology, epistemology and methodology.

### **3.3. What is to have knowledge of Roma rights? Ontology as a “wall”?**

According to Samuel, comparative law is currently experiencing a cultural renaissance.<sup>291</sup> In particular, the legal academic debate has started to consider two theoretical dimensions which for a long time have stood in a peripheral position: ontology and epistemology of research. While the first dimension, ontology, relates with one’s understanding of the nature of being (reality), the second dimension, epistemology, deals with one’s understanding of the nature of knowledge. When considering the ontological dimension of this research, the question that needs to be answered therefore is: what is to have knowledge of Roma rights?

Nowadays, human and minority rights are going towards a certain degree of harmonization both in ascending direction (from domestic law to international law) and in descending

---

<sup>289</sup> The comparative perspective has been considered as “the most important research method to evaluate arguments” in human rights research, see J.M. Smits, "Redefining Normative Legal Science: Towards an Argumentative Discipline," in *Methods of Human Rights Research*, ed. F. Coomans, and Grünfeld, F., and Kamminga, M.T. (Antwerp/Oxford/Portland: Intersentia 2010), 52.

<sup>290</sup> L.J. Costantinesco, *Il Metodo Comparativo* (Torino: Giappichelli 2000).3.

<sup>291</sup> G. Samuel, "Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences," in *Epistemology and Methodology of Comparative Law*, ed. M. Van Hoecke (Oxford/Portland/Oregon: Hart Publishing 2004), 35-36.

direction (from international law to domestic law). Within the public law realm, this process has been defined as “the internationalization of constitutional law and the constitutionalization of international law”.<sup>292</sup> However, it is important to remind that this “rapprochement” of law around common human and minority rights principles, is not leading to a complete “unification” of rules i.e. to a “standardization” of norms according to identical common rules, without any State margin.

This is true not only for extra-European legal systems but also for the European one which represents the highest degree of integration in human rights adoption and protection.<sup>293</sup> As Smits reminds us,

It is useful to make clear at the outset that we are far from establishing a ‘methodological *ius commune europaeum*’: the mere fact that there is law at European origin that influences national legal reasoning does not in any way imply that this influence leads to convergence of national legal systems. On the contrary: it is likely that Europeanisation of substantive law rather reinforces differences in legal reasoning instead of eliminating them.<sup>294</sup>

These discrepancies in the national application and implementation of human and minority rights derive from the fact that their meaning and foundation are still contested. Whether they might be considered as the essential foundations of a democratic State or as a “secular religion”<sup>295</sup> the problem is that the foundations of human rights “center on a moral argument that cannot be empirically proven”.<sup>296</sup> As a consequence, the disagreement on the nature of human and minority rights may be either of quite limited proportions, as in the case of European States (whereby the European Court of Human Rights (ECtHR) developed the doctrine of the “margin of appreciation” to precisely leave the States the power to translate

---

<sup>292</sup> F. Palermo, "Internazionalizzazione del diritto costituzionale e costituzionalizzazione del diritto internazionale delle differenze," *European Diversity and Autonomy Papers*, no. 2 (2009).

<sup>293</sup> In the European territory, the protection of human rights is implemented in three “geo-legal spheres”: (a) the European Union (EU) as the most inner level, (b) the Council of Europe (CoE) as the intermediate level, and (c) the Organization for Security and Cooperation in Europe (OSCE) as the most external one. R. Toniatti, "Los derechos del pluralismo cultural en la nueva Europa," *Revista Vasca de Administración Pública* 58, no. 2 (2000).

<sup>294</sup> J.M. Smits, "The Europeanisation of National Legal Systems," in *Epistemology and Methodology of Comparative Law*, ed. M. Van Hoecke (Oxford/Portland/Oregon: Hart Publishing, 2004), 229.

<sup>295</sup> M. Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press 2001).

<sup>296</sup> Forsythe, "Human Rights Studies: On the Dangers of Legalistic Assumptions", 59.

general human rights principles in their specific legal orders) or it can challenge the core essence of human rights.<sup>297</sup>

For these reasons, when the ontological dimension of this research is put into question, it cannot be regarded from a “monolithic perspective” as a “wall”, which eventually sees only “the side” of the “elephant” otherwise it falls in the fallacy of establishing, in Samuel’s words, the “ontologicalisation” of its results.<sup>298</sup> By doing so, comparative law thus becomes an ideological rather than an epistemological discipline.<sup>299</sup> An ontological perspective on the research process which aims to be the most objective as possible (given the limitations of any subjective point of view) should then try to touch the “side of the elephant” in a way that approaches as much as possible its essence: rather than merely looking at the “wall” as a whole, it should concentrate on its “building blocks” as well.<sup>300</sup>

In this light, having knowledge of Roma rights does *not* mean understanding which legal system can better “solve” the social inclusion of Roma in Europe, as if their common experience of discrimination within each and every European country could be solved only through “a solution”.<sup>301</sup> Such an assumption would completely disregard the socio-political differences characterizing the diverse legal traditions together with the socio-historical differences characterizing the various Romani communities living throughout Europe.

---

<sup>297</sup> Especially some developing countries have strongly contested the “universal” idea of human rights by claiming that some rights and rules set at international level are encoded in a cultural context that uses the term “culture” from a Western conception which disregards indigenous traditions and customary practices. One of the main arguments ensuing from this “relativistic” positions on human rights claims “notions of right (and wrong) and moral rules based on them necessarily differ throughout the world because the culture in which they take root and inhere themselves differ”. Steiner and Alston, *International Human Rights in Context: Law, Politics, Morals*, 367.

<sup>298</sup> G. Samuel, "Form, Structure and Content in Comparative Law: Assessing the Links," in *Legal Engineering and Comparative Law/L'ingénierie Juridique Et Le Droit Comparé. Rapports Du Colloque Du 25e Anniversaire De L'institut Suisse De Droit Comparé Du 29 Août 2008 À Lausanne*, ed. E. Cashin Ritaine (Genève/Zurich/Bâle Schulthess, 2009), 42.

<sup>299</sup> Ibid. The author further maintains that “this danger is particularly acute in Europe where jurists function at one and the same time within two legal systems, the national and the European”.

<sup>300</sup> In the etymological meaning “ontology” derives from Greek *on* (gen. *ontos*) “being” (prp of *einon* “to be”) + *-logia* “writing about, study of” (see *-ology*).

<sup>301</sup> Even if Roma suffered from a widespread discrimination all along Europe, this “common problem” cannot necessarily be solved through a “common solution”. Such an assumption would totally disregard the socio-political differences characterizing the diverse legal traditions together with the socio-political differences characterizing the various Romani communities living along Europe.

Having knowledge of Roma rights means instead having knowledge – in a comparative perspective - of the different legislative disciplines encompassing this social group and of the diverse socio-political frameworks from which these legal disciplines ensue. To this purpose, this research firstly builds on the analysis of international and European legal frameworks that, in the light of their paths of harmonization with domestic laws, have provided an international framework for setting international minority rights standards.<sup>302</sup> The implementation of these standards is subsequently analyzed in the light of the different constitutional approaches<sup>303</sup> and in the light of the socio-historical process characterizing the migration of Roma to and within European States.<sup>304</sup>

While Western legal tradition has for a long time conceived societies in terms of “mystical unity” of nation, State, language and culture (*Volksgeist*), this paradigm has currently shown to be unable to comprehensively account for multicultural societies. Hence, having knowledge of Roma rights means put under a process of rethinking and redefinition legal comparative methodology as a whole. Indeed, nowadays more than ever before, law cannot be considered as a neutral discipline but as the by-product of a process of cultural-historical sedimentation which strongly influences both its form and its content.

### **3.4. What is this research comparing when analyzing Roma rights?**

#### **Epistemology as a “spear”?**

In a comparative legal study, the dimension of epistemology raises a need for scientific reflection especially on the object of comparison as well as on the validity of knowledge provided by the comparative study.<sup>305</sup> Even if the object of comparison may apparently seem

---

<sup>302</sup> See in particular section 1.3.

<sup>303</sup> See in particular sections 1.2., 2.1. and 2.2.

<sup>304</sup> See in particular section 1.1.

<sup>305</sup> R. Cotterrell, "Comparatists and Sociology," in *Comparative Legal Studies: Traditions and Transitions*, ed. P. Legrand, Munday, R. (Cambridge : Cambridge University Press, 2003), 132-33.cited in Samuel, "Form, Structure and Content in Comparative Law: Assessing the Links." p. 29.



to be an obvious dimension on which reflect upon,<sup>306</sup> as Samuel clarifies, this dimension entails more profound issues such as: “what is a legal system? What determines law?”. According to the author, both at the practical and at theoretical levels, scientific insights on this epistemological dimension are almost totally lacking.<sup>307</sup>

Yet, if this “deeper” perspective on the epistemological dimension is embedded, the reflection on both the nature of knowledge that comparison can provide and on the validity of such a knowledge may be in need of more in-depth arguments. The purpose of these arguments is comprehending “the *mentalité* of a legal system in the Legrand sense of the term (deep cognitive structures)”<sup>308</sup> through the usage of complimentary perspectives such as history, philosophy, sociology, politics, etc.

This does not mean that in comparative researches legal scholars are supposed to have an encyclopedic knowledge of the social systems that they are considering, rather that they should depart from an unilateral perspective based on an exclusively legal analysis. In human rights research, in fact, epistemology cannot be perceived only as if it were the “spear” of the “elephant”, which as an arrow points reality only through an unidirectional logic (e.g. Western legal tradition vs. indigenous legal tradition) but as result of a plurality of claims, cultures and traditions. As Smits clarifies “existing jurisdictions can .. be considered as *empirical material* of how conflicting normative positions are being reconciled”.<sup>309</sup>

Therefore, the question on the cultural and social foundations of these conflicting normative positions – which encompass but at the same time go beyond the legal sphere – should be considered as an essential part of the epistemological process of human rights research. Indeed, the focus on a mere legal technical level, certainly allows the understanding of the

---

<sup>306</sup> In comparative researches, the *foci* of comparison are in fact generally rules, institutions, case-law, legal-styles, etc.

<sup>307</sup> Samuel, "Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences," 74.

<sup>308</sup> Ibid.74).

<sup>309</sup> Smits, "Redefining Normative Legal Science: Towards an Argumentative Discipline," 52.

“particular” but impedes the momentum for the comprehension of the “universe” standing behind. In other words, by paraphrasing the words of Kisch “as botany cannot be learnt through the mere study of a flower, human rights research cannot rely on mere legal technicalities”.<sup>310</sup>

When applying this epistemological reflection on the comparative study of the legal status of Roma in Europe, the knowledge that legal comparison is providing to this research is the micro-analysis (micro-comparison) of rules, institutions and case-law that have been devised to specifically protect and promote the rights of Roma. However, such a comparison is undertaken in the light of the theoretical reflection developed on the ontological perspective, i.e. in the light of the consciousness of the socio-political frameworks from which rules, institutions and case-law have been shaped.

The study of minority law and the law on the accommodation of differences has been defined – more than other legal realms – as an ongoing “work in progress”. Giving the constant changes of external contexts as well as the continuous variation of internal dynamics of each minority group, in Palermo’s words “all normative solutions and legal instruments need constant rebalancing, and reconsideration”.<sup>311</sup>

Against this background, the epistemological reflection on the legal status of Roma in Europe should embed the dimensions of “pluralism”, “transnationality and comparison” and “mildness”.<sup>312</sup> “Pluralism” in the sense that the micro-comparison on Roma right sat the domestic level should also consider the different degrees of integration and interaction among the different sources of minority law.<sup>313</sup> “Transnationality and comparison” in the sense of

---

<sup>310</sup> “Comme la botanique ne s’apprend pas par l’étude d’une flore, le droit étranger ne s’apprend pas par l’étude d’un vocabulaire juridique”. I. Kisch, “Droit comparé et terminologie juridique,” in *Inchieste di diritto comparato*, ed. M. Rotondi (Padova: CEDAM, 1973), 407.

<sup>311</sup> F. Palermo, “Legal Solutions to Complex Societies: The Law of Diversity,” in *Human Rights and Diversity: New Challenges for Plural Societies*, ed. E. Dunbar Ruiz Vieyetz, R. (Bilbao: University of Deusto, 2007), 67.

<sup>312</sup> *Ibid.*, 70-73.

<sup>313</sup> To this regard, see section 1.3. on three European geo-legal spheres.

considering the circulation of legal models, i.e. the “migration of legal solutions” characterizing the protection/promotion of Roma rights within European legal space. “Mildness” in the sense of considering also the flexibility of legal solutions which do not always and necessarily amounts to binding measures but can also translate in soft-law ones. Accordingly, the validity of knowledge provided by this comparative study has to be understood not as “uniform”, “simple” and “static” rather as “asymmetric”, “complex” and “procedural”.<sup>314</sup>

### **3.5. Which methodology of research? Methodology as a “fan”?**

After having discussed the challenges that this comparative legal study has encountered on the “static” level i.e. the nature of reality (ontology) and the nature of knowledge (epistemology), this section focuses on a more “dynamic” level which deals with the procedure of knowledge-gathering and its intellectual systematization.

In particular, according to Graveson, this process should entail besides the “classic” bi-dimensional analysis of comparative law based on synchronism (same time for different contexts) and/or diachronism (same context for different times) also the consideration over the dimension of “depth”. This dimension refers, in the author’s words, to the comparison of fundamental legal principle with “the day-to-day manifestation of its particular rules”.<sup>315</sup> While this “tri-dimensional” approach has already been an intrinsic part of general human rights research,<sup>316</sup> in comparative legal research applied to the human rights field this

---

<sup>314</sup> The identification of the features characterizing minority law has been borrowed, with some re-adaptation though, from Palermo, “Legal Solutions to Complex Societies: The Law of Diversity,” 80. While the identification of the features which should be understood as *not* characterizing minority law have been identified by the author of this research.

<sup>315</sup> R.H. Graveson, “Methods of Comparative Law in Common Law Systems ” in *Inchieste di diritto comparato*, ed. M. Rotondi (Padova: CEDAM 1973), 301.

<sup>316</sup> For instance of those researches focusing on the effectiveness of human rights standards, the analysis of international and domestic enforcement mechanisms, the compliance with human rights standards by States and non-States actors.

approach should be considered more than as a pure legal method as an interdisciplinary methodology which instead entails a “system of methods”.<sup>317</sup>

So far, the field of legal comparative research has developed around three main approaches which focused either on the form, the structure or the content of comparative law: functionalism, structuralism and hermeneutics.<sup>318</sup> Functionalism aims at studying concepts and rules within a range of factual situations. More specifically, it aims to unveil the diverse measures that different legal systems adopt when facing similar problems. Therefore, functionalists are concerned in understanding the function of a rule in a particular context and the social purposes (function) for which this rule has been adopted. Although the functionalist approach holds a position of dominance in comparative law<sup>319</sup> it has not escaped criticism. Indeed, it has been accused of producing “particularistic” results unrelated to socio-economic and historical circumstances dictating them, and of being too formalistic or “legocentric” (i.e. centered on the formalistic aspect of law).<sup>320</sup>

Structuralism instead analyzes – from a holistic perspective – the mutual relationships existing among the various elements of a legal system. However, most of the time structuralist scholars ignore the context in which law is shaped.<sup>321</sup> Indeed, one of the strongest critiques

---

<sup>317</sup> In line with De Feyter’s argument, “whether human rights safeguards are ‘practical and effective’, cannot be determined on a legal basis only” thus “social science methodology becomes relevant” achieve this purpose. See K. De Feyter, "Treaty Interpretation and Social Sciences," in *Methods of Human Rights Research*, ed. F. Coomans, and Grünfeld, F., and Kamminga, M.T. (Antwerp/Oxford/Portland: Intersentia 2010), 216.

<sup>318</sup> See, *inter alia*, L.J. Costantinesco, *La scienza dei diritti comparati* (Torino: Giapichelli Editore, 2003). Samuel, "Form, Structure and Content in Comparative Law: Assessing the Links."

<sup>319</sup> See K. Zweigert, Kötz, H. , *An Introduction to Comparative Law* (Oxford: Oxford University Press, 1998), 34. The authors deem functionalism as the fundamental methodological principle since “Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfil the same function”.

<sup>320</sup> O. Brand, "Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies," *Brooklyn Journal of International Law* 32, no. 2 (2007): 412-13.

<sup>321</sup>A. Somma, *Temi e problemi di diritto comparato Vol.2. Tecniche e valori nella ricerca comparatistica* (Torino: Giapichelli 2005).

towards the structural approach argues that law cannot be perceived as completely disassociated from the social context where it has been shaped.<sup>322</sup>

Departing from the weaknesses of both functionalism and structuralism highlighted above, Legrand proposes to embrace a hermeneutical approach which instead focuses on “signifiers” rather than “on what they signify”.<sup>323</sup> According to the author this approach adopts a “thick” analysis of reality that considers more in depth the cultural context where “law takes place”.<sup>324</sup> In other words,

The comparatist must be conscious of an important methodological distinction between ‘explaining’ (*erklären*) and ‘understanding’ (*verstehen*), the first being the product of a causal scheme of intelligibility, and underpinning the natural sciences (*Naturwissenschaften*), while the latter forms part of the sciences of the spirit (*Geisteswissenschaften*).<sup>325</sup>

Especially within the common-law legal tradition, this (new) tension towards the *verstehen* of legal science has recently pushed the debate on legal methodology in the direction of opening legal research to more empirical approaches, which take into account qualitative and quantitative perspectives as well. These two methodological perspectives, which have been for a long time an exclusive prerogative of social scientists, rest on different epistemologies in accordance to the different research purposes.<sup>326</sup> Nevertheless, the methods of enquiry used by social scientists represent an important complementary contribution to the field of comparative legal studies.

Qualitative research can be particularly useful for examining whether or not a specific social phenomenon exists, and if so, the nature of that phenomenon. Unlike quantitative studies,

---

<sup>322</sup> Ibid.

<sup>323</sup> Samuel, "Form, Structure and Content in Comparative Law: Assessing the Links."32),

<sup>324</sup> See also M. Ancel, "Quelques considérations sur les buts et les méthodes de la recherche juridique comparative," in *Inchieste di diritto comparato*, ed. M. Rotondi (Padova : CEDAM 1973).

<sup>325</sup> Samuel, "Form, Structure and Content in Comparative Law: Assessing the Links."32).

<sup>326</sup> “Quantitative methods are often associated with deductive reasoning while qualitative methods often rely heavily on inductive reasoning” L. Webley, "Qualitative Approaches to Empirical Legal Research," in *The Oxford Handbook of Empirical Legal Research*, ed. P. Cane, Kritzer, H.M. (Oxford Oxford University Press 2010), 929.

qualitative researches are generally unable to provide generalizable findings. Nonetheless, they can offer an important insight as regard the understanding of problems within a legal system, best practices and effects on policy shifts on law.<sup>327</sup> Quantitative studies instead are seldom used on macro-scale projects to create reliable claims which can be often generalized.<sup>328</sup>

These last progresses in empirical legal methodology demonstrate that a mild attempt towards an interdisciplinary method is already taking place, even in the comparative legal field. While transferring this interdisciplinary experience to the human rights field, it should be reminded that both “classic” approaches (functionalism, structuralism, hermeneutics) and “new” approaches (qualitative and quantitative) to comparative law enshrine some methodological challenges which are endemic to social sciences.

Even though these challenges have mostly been discussed in the realm of constitutional law, these methodological challenges can invest, *mutatis mutandi*, other realms of comparative human rights research as well. According to Law, these methodological challenges mostly relate in particular to the aspects of:

(1) Data inadequacy. Empirical data on constitutions are prone to inadequacy in both quantity and quality. With respect to quantity, the number of cases available for meaningful comparison and analysis may be quite low depending upon the research question...The quality of the data that scholars can hope to employ, meanwhile, is constrained by the sheer difficulty of measuring constitutional<sup>329</sup> phenomena. (2) Causal complexity.. Constitutions are complex phenomena with a host of potential causes and effects that can interact or conflict with one another and evolve overtime in ways that are difficult to

---

<sup>327</sup> Ibid., 948. According to the author qualitative approaches to empirical legal research use the methods of individual and group interviews, third party and participant observation, qualitative document analysis and case studies.

<sup>328</sup> L. Epstein, Martin, A.D. , "Quantitative Approaches to Legal Research," in *Empirical Legal Research*, ed. P. Cane, Kritzer, H.M. (Oxford : Oxford University Press, 2010). According to the author qualitative approaches to empirical legal research often rely on statistical data. The research process is often characterized by three main stages: observable implication (independent variable X is related to Dependant variable Y); operationalization (how the implication can be observed in the real world); measurement (delineation of the values of the variables). Id at 908.

<sup>329</sup> For the purposes of the argument of this paper, the reference to “constitutions” in this extract can be extended interchangeably with any other human rights instrument.

predict. It is a daunting task to identify all of the variables that are relevant to, say, respect for human rights, much less to determine what importance to assign to each of them. The underlying causal mechanisms and chains of causation are also difficult to parse: even if a correlation between two variables reflects a causal relationship, that relationship itself may be attenuated or conditional upon other factors that may be difficult to identify without in-depth examination.<sup>330</sup>

In this light, the combination of a plurality of methods in a study of comparative legal methodology should not be understood as a comprehensive methodology which can exhaustively account for the complexities inherent to social reality in general, and to human/minority rights research in particular. Nevertheless, the knowledge of the potentialities and of the trade-offs enshrined in each research method is a valuable tool that helps comparative legal researchers in controlling (although partially) the basic methodological principles of comparison and case selection (global scale, few-countries or single case studies) while drafting their research designs.

When considering the most appropriate “interdisciplinary methodology” to study the legal status of Roma in Europe, the “fan” of available options that this research could have potentially touched has not been understood as the result of the personal taste of the researcher,<sup>331</sup> rather as a result of a rational choice coherent to research purposes. In line with research questions and theoretical orientations emerged from the dimensions of research ontology and epistemology, the methodology has mostly found on a hermeneutical approach which structured the analysis on a twofold perspective:

---

<sup>330</sup> D.S. Law, "Constitutions," in *The Oxford Handbook of Empirical Legal Research*, ed. P. Cane, Kritzer, H.M. (Oxford: Oxford University Press, 2010), 387.

<sup>331</sup> As Feldbrugge clarifies “When lawyers, as a sideline, indulge in what they consider to be scientific work, their method is usually (and ideally perhaps) take up a subject, read and think about it, try to find out as much as possible about it, and hope vaguely that all this will result in conclusions which are in some way insightful, useful, surprising, etc. The choice of a subject is dictated by personal taste (of the author himself, his editor, etc.), and there are almost no rules concerning research methods, except the one which says that the more legal provisions, cases and other pertinent materials you read, the better the research” F.J.M. Feldbrugge, "Sociological Research Methods and Comparative Law " in *Inchieste di diritto comparato*, ed. M. Rotondi (Padova: CEDAM 1973).

a) as for the perspective of **Roma as a national minority**, the analysis has compared domestic guarantees ensuing from different legal levels within the diverse legal systems (Constitution, ordinary laws and subordinated legal sources at national, regional, local levels of government). The analysis has been conducted by considering:

- At international level: international human and minority rights guarantees enshrined within international human rights law (legal provisions, general comments, international reports) both of general interest to minority rights and of specific interest to Roma rights.

- At European level: European human and minority rights guarantees ensuing from the three European legal regimes (OSCE, CoE and EU) affecting minority rights in general and Roma rights in particular. With specific regard to the legal status of Roma, the analysis has specifically considered:

- at the OSCE level: general principles of minority rights ensuing from meetings, declarations and recommendations together with general principles for the protection/promotion of Roma rights ensuing from thematic and national recommendations developed by the High Commissioner on National Minorities.

- at the CoE level: general principles of minority rights ensuing from European instruments focused on human and minority rights and case-law on Roma rights produced by the European Court of Human Rights (ECtHR) and the European Committee on Social Rights (ECSR). Reports on the status and on the implementation of developed by the European Commission against Racism and Intolerance (ECRI), reports developed by Member States and the Advisory Committee of the Framework Convention on National Minorities (FCNM), reports developed by Member States and the Expert Committee of the European Charter on Regional and Minority Languages (ECRML).

- at the EU level: general principles forming the *acquis communautaire* in the light of the novelties introduced by the Lisbon Treaty; European legislation (especially European Directives) affecting the rights of Roma within the EU legal space and case-law of the



European Court of Justice on minority rights. Recent European Commission political initiatives targeting the inclusion of Roma.<sup>332</sup>

b) As for the perspective of **Roma as a European transnational people**, the research has developed this analytical part, by comparatively considering the homologous experience of Sami people living in Nordic countries. In particular, it examines the legal practices developed by the four legal systems where Sami reside (Sweden, Norway, Finland, and Russia) at different legal levels (Constitution, ordinary laws and subordinated legal sources at national, regional, local levels of government). As in the previous level, the analysis has been conducted by considering:

- At international level: international indigenous law developed especially at the level of the International Labour Organisation and in the United Nations framework.

- At European level: minority rights principles which have recently interpreted as to be also applicable to indigenous people living in Europe. The most relevant European legal regime to this regard is the CoE. Thus, special consideration has been paid also to the reports developed by Members States and the Advisory Committee of the Framework Convention on National Minorities and to reports developed by Member States and the Expert Committee of the European Charter on Regional and Minority Languages (ECRML) as regards to the protection/promotion of Sami rights.

It should be also highlight that, whenever possible, both research levels (“Roma as a national minority” and “Roma as a transnational people”) have been accompanied by a consideration of international and national reports developed in the non-governmental framework. In the final chapter, the data emerged from both comparative tracks have been considered in parallel in order to understand how a minimum common framework for the recognition of Roma rights in Europe can be constructed according to the following rights dimensions:

---

<sup>332</sup> In particular, the analysis has considered the European Framework for National Roma Integration Strategies up to 2020 COM(2011) 173 final setting the foundations for the adoption of European National Strategies at the domestic level. Although European National Roma Strategies are documents of political nature (and not of legal one), their consideration has nonetheless deemed to be interesting since they aim at fostering Roma rights implementation across Europe. The analysis of the National Roma Strategies is developed in chapter 5.

- (National) legal definition of Roma;
- Linguistic rights;
- Economic and social rights;
- Cultural rights;
- (Political) representation in the public sphere;

The analysis has also complemented the comparative legal method with quantitative and qualitative approaches given the intrinsic interdisciplinarity of this research topic. As for quantitative approaches, the research has considered studies and researches ensuing from the realm of statistics and quantitative social analysis accounting for the conditions of Roma in Europe. As for the qualitative approaches, the research has considered studies and researches developed in the realms of anthropology, sociology, history, and politics in order to help the understanding of the legal framework in a “*verstehen*” rather than in a “*erklären*” perspective.

Finally, the “interdisciplinary methodology” used in this research has also aimed to leave some room to an inner Romani perspective, both in the selection of literature sources and in the analysis provided especially at the trans-national level. This has been done in order to epistemologically consider, besides the Western legal tradition, also the so-called “chthonic” tradition which is characterized by the oral transmission of knowledge and which has been generally attributed to indigenous people and other minority communities such as Roma.<sup>333</sup>

By doing so, the analysis wanted to embody, besides the perspectives ensuing from “hetero-recognition” of “social groups” and “legal norms”, also claims and negotiations pertaining to the “self-recognition” of rules, institutions and legal traditions underlying the Roma rights discourse.

---

<sup>333</sup> P.H. Glenn, *Legal Traditions of the World. Sustainable Diversity in Law* (Oxford: Oxford University Press, 2010).

### 3.6. Limits and potentialities

The rationale underlying this “interdisciplinary methodological discussion” can be summarized as follows: in order to build serious theoretical constructs and reliable conceptual abstraction, any comparative legal research on the human rights field needs to be aware of the parts of “reality” (elephant) that remain untouched rather than of the parts of reality that are (partially) touched through the usage of any given methodology. As Samuel again remind us, the process of knowledge in social sciences and humanities can be understood as a series of maps of different scales. In his words,

..A different scale plan will give access to a different aspect of knowledge. Each methodological model will embrace its own reasoning methods, schemes of intelligibility and paradigm orientations and thus the content of social science knowledge cannot be understood divorced from its methodological and epistemological underpinnings.<sup>334</sup>

The exploration of reality undertaken by this research has used a “scale plan” that inevitably enshrines a number of limitations. Among the major limitations, the fact that the researcher is not of Romani ethnic origin should firstly be mentioned. This has produced an understanding of reality that has unavoidably been partial. In particular, the understanding of Roma rights has just partially dealt with the tensions inherent to the current legal framework and with the social exclusion experienced by the Romani group.

Another relevant limitation that needs to be mentioned deals with the high number of case-study that this legal analysis has considered. Ideally, this research should have in fact been developed by a research group so that each case-study could have been developed by a “national expert” who could have direct access to primary (and to comprehensive) sources. Had each case study been developed by a “national expert”, the hermeneutical knowledge of each social framework where the set of legal provisions on Roma rights developed, would have certainly been enriched.

---

<sup>334</sup> Samuel, "Form, Structure and Content in Comparative Law: Assessing the Links."34).

Notwithstanding its strong limitations, this research has aimed to (partially) provide a general picture on the legal status of Roma in Europe which hopefully can become the point of departure of further researches in this realm. In particular, this purpose can potentially be achieved on the basis of the “horizontal perspective” provided in this analysis, which has been privileged in the micro-comparison of the different legal experiences devised for the protection/promotion of Roma rights in Europe.

## PART II

ROMA RIGHTS COMPARED: STATUS AND CONTENT



## Chapter 4

### Linguistic Rights

**Summary:** 4.1. Roma: a linguistic minority? – 4.2. Romanes: one language or different languages? – 4.3. Linguistic rights at international level. – 4.4. Linguistic rights at European level: Organization for Security and Cooperation in Europe, Council of Europe and European Union. – 4.5. Individual and collective linguistic rights. – 4.6. Linguistic rights of Roma at domestic level. – 4.6.1. Linguistic individual rights of Roma.– 4.6.2. Linguistic rights of Roma “in community with others”. – 4.6.3. Linguistic collective rights of Roma. – 4.7. Critical Remarks.

#### 4.1. Roma: a linguistic minority?

The Romani saying “our language is our strength” (*Amari čhib s’amari zob*) highlights the linguistic tie that unifies Romani people and the cultural separation with the non Romani world.<sup>335</sup> Romanes plays a key role in the symbolic construction of Romani cultural identity which, according to Courthiade, can be equivalent to that of the territory for a nation or that of religion for Jews.<sup>336</sup> Traditionally, Roma believed that Romani people who could no longer speak Romanes would have lost their Romani identity. Accordingly, during the first Romani World Congress of 1971, Romanes was recognized as the first foundational element of Romani “transnational political identity”.

Although Romani cultural identity is strongly based on language, Romanes is an important but not the only unifying factor among Roma. In fact some Romani communities, such as those living in Spain and Hungary, have lost their language as a result of repressive legislation

---

<sup>335</sup> I. Hancock, *We Are the Romani People. Ame Sam E Rromane Džene* (Hertfordshire Centre de recherches tsiganes - University of Hertfordshire Press 2002), 139.

<sup>336</sup> M. Courthiade cit. in M. Garo, "La langue Rromani au coeur du processus d'affirmation de la nation Rrom," *Hérodote* 105(2002): 156.

and not by choice.<sup>337</sup> Therefore, according to Gheorghe, a major Romani scholar and activist, language should be understood as one of the main criteria to promote Romani ethnic identity, but not the exclusive one.<sup>338</sup>

In line with Gheorghe's position, this chapter analyzes the promotion of Romani linguistic rights, which are deemed to be *one* facet of the process of promotion of Romani identity. Accordingly, the discussion over the possible attribution of the legal category "linguistic minority" to Roma does not aim to limit the legal treatment of this social group through a mere linguistic legal classification. Rather, the aim is that of considering the potentialities and limitations of the usage of this category in a more holistic perspective.

#### **4.2. Romanes: one language or different languages?**

Until recently, public discussion about, and the scientific study of, Romanes have been affected by the same stereotypes that have jeopardized Romani culture as a whole. Some widespread commonplaces are rooted in non-linguistic debates which lack technical precision since they are intrinsically unable to produce meaningful scientific reflection.<sup>339</sup> One of the major commonplaces supports the view that Roma speak different "gypsy languages". This idea has for a long time echoed in Romani studies as well. Historically, three main linguistic branches have been identified in the study of Romani language(s): *Romani*, *Domari*, and *Lomavren*.

---

<sup>337</sup> Hancock, *We Are the Romani People. Ame Sam E Rromane Džene*, 139.

<sup>338</sup> In Gheorghes's words: "If we promote language as a criterion of identification, we are in the situation that these people are again disprivileged, because many of them have lost their language, while ethnic identity is a little bit more complex than language itself. So we have to think about a complex approach to derivation among language and ethnic identity. And language itself could be easier as a field of policies of implementing schools, education in that language, providing journals, and so on, as a way to reconstruct more complex ethnic identity. So, to come the case of Romanies – or the Gypsies – it is important to see how the language will contribute to promote a complex ethnic identity, and experiments have been done in many countries, including in Romania, to teach this language in schools and to prepare the language to be a means of education" in F. Horn, *Linguistic Rights of Minorities* (Rovaniemi: The Northern Institute for Environmental and Minority Law at the University of Lapland, 1994), 284.

<sup>338</sup> I. Hancock, "Gypsy Languages " *RADOC* (2007).

<sup>339</sup> *Ibid.*



At the end of the 18<sup>th</sup> century, Western scholars firstly identified *Romani* as “the language of the Roma”. Soon after, other two parallel linguistic branches were identified: *Domari* (whose origins were identified mostly in the area of Syria) and *Lomavren* (whose origins were identified mostly in the area of Armenia). According to Hancock,

it was initially assumed that all three were branches of the same original migration out of India, and attempts have made to reconstruct protoforms based upon their combined analysis .. This no longer appears to be the case, at least for *Domari*. There are structural and lexical features of this language that point to a much earlier separation from India than is evident for the other two.<sup>340</sup>

Notwithstanding the variations of Romanes identified by linguists, recent studies have shown that from a structural point of view<sup>341</sup> Romanes can be described as a heterogeneous cluster of varieties with a homogenous core – common morphology and lexicon – without a generally accepted standard.<sup>342</sup> In Romanes, linguists have recognized the same structural linguistic simplicity/complexity of other Indo-European languages. For this reason, according to Halwachs, every “Romanes-speaker” should be considered as belonging to the same linguistic minority, notwithstanding the linguistic variations of Romanes.<sup>343</sup>

More specifically, Romanes has been described as a *diaspora* language, fundamentally oral, functionally limited, subordinate, stateless, and used by pluri-language speakers.<sup>344</sup> The linguistic developments of Romanes are intrinsically connected with the social and nomadic history of its speaking group. Indeed, Romanes has been subjected to different linguistic influences acquired during the centuries of peregrinations in the different political and

---

<sup>340</sup> Ibid. In fact, according to the author “It is also significant that while Romani, Domari and Lomavren each contain Persian-derived lexical adoptions, there is not one such item shared by all three, and Romani and Domari have less than a fifth of them in common. If all three had passed through Persian-speaking territory as one migration before separating, a higher incidence of shared items would be expected.”

<sup>341</sup> For a “structural overview” of Romanes, see *inter alia*, Y. Matras, *Romani a Linguistic Introduction* (Cambridge: Cambridge University Press 2004).

<sup>342</sup> D.W. Halwachs, "Possiamo dire che Roma, Sinti, Calé, ecc. siano un'unica minoranza linguistica?" in *La condizione giuridica di Rom e Sinti in Italia*, ed. P. Bonetti, A. Simoni, and T. Vitale (Milano: Giuffrè Editore, 2011), 131.

<sup>343</sup> Ibid. The same argument is also supported in M. Courthiade, "Who is Afraid of the Rromani Language?," in *Roma in Europe. From Social Exclusion to Active Participation*, ed. P. Theilen (Skopje: Friedrich Elbert Stiftung 2005).

<sup>344</sup> Halwachs, "Possiamo dire che Roma, Sinti, Calé, Ecc. siano un'unica minoranza linguistica? ," 140.

linguistic contexts where Roma have been residing. Romanes has been traditionally transmitted orally and only in the last century the process of written codification started to increasingly develop.<sup>345</sup>

From a functional point of view, the usage of Romanes is mostly circumscribed to the private area since it is almost exclusively used as jargon inside the group for communications related to the private sphere and to the family life.<sup>346</sup> This is also the case of other minority languages spoken by social groups standing in a position of strong subordination *vis-à-vis* the majority of the population. However, in the context of “subordinate minority languages”, Romanes is a very peculiar case since it has suffered from a stronger stigmatization which has significantly limited its usage in the public sphere.

The strong degree of stigmatization that both Roma and Romanes have been suffering, has contributed to reinforcing another common prejudice which considers Romanes as an “inferior language”. Since Romanes has not developed generally accepted norms, its linguistic nature has been considered as underdeveloped and patchy. The prejudice that considers supposed “marginal populations” as characterized by (supposedly) marginal cultures and (supposedly) marginal languages is generally built on commonsensical talk and, in the case, of Romanes it appears even more unfounded.<sup>347</sup> At the European level, the ECRML, *inter alia*, has recognized Romanes as having the same legal status of any other minority language.

---

<sup>345</sup> A recent debate proposes the possible “standardization” of Romanes as a mean to foster recognition as “national minority”. See, *inter alia*, Courthiade, “Who is Afraid of the Rromani Language?” and R. Djuric, “A Standard Rromany Language - a Pre-Condition and Basis for a National and Cultural Identity for the Roma,” in *Roma in Europe. From Social Exclusion to Active Participation*, ed. P. Theilen (Skopje: Friedrich Elbert Stiftung 2005).

<sup>346</sup> In the last years, some European countries have promoted the use of Romanes also in the public sphere. Where such usage has been allowed, Romanes has been used in newspapers or magazines, radio, television and internet.

<sup>347</sup> Halwachs, “Possiamo dire che Roma, Sinti, Calé, ecc. siano un’unica minoranza linguistica? ,” 149.

Indeed, Romanes fully responds to the legal requirements identifying all minority languages under the ECRML.<sup>348</sup>

This brief linguistic and legal excursus shows that Romanes structurally holds the linguistic valency and the legal recognition of all other European minority languages. Accordingly, Roma should be entitled to the same recognition of linguistic rights as any other European linguistic minority. An elaborated and detailed set of linguistic rights already exists in the international human rights and minority rights legislation. After having introduced the corpus of minority linguistic rights at the international and European levels, the following section specifically focuses on the national recognition and implementation of these linguistic provisions for Roma.

### **4.3. Linguistic rights at international level**

Even if in the current state of international law, a specific right to use a minority language does not exist, according to De Varennes there does exist a set of “rights and freedoms that affect[s] the issue of language preferences and use by members of a minority or by the State”.<sup>349</sup> This set of linguistic rights involves both the private and the public spheres and it mostly relates to an individual rather than to a collective dimensions of rights.<sup>350</sup> Additionally, at the international level, citizens as well as members of national minorities are *de jure* entitled to enjoy this set of linguistic rights.<sup>351</sup>

---

<sup>348</sup> The ECRML defines as a "regional or minority language" a language that is: “traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population; and different from the official language(s) of that State” and specifically a “non territorial language” as “a language used by nationals of the State which differ from the language or languages used by the rest of the State's population but which, although traditionally used within the territory of the State, cannot be identified with a particular area thereof ” (Art.1, ECRML).

<sup>349</sup> F. De Varennes, "The Existing Rights of Minorities in International Law " in *Language: A Right and a Resource. Approaching Linguistic Human Rights*, ed. M. Kontra, et al. (Budapest : Central European University Press 1999), 117.

<sup>350</sup> For the debate over individual vs. the collective dimension of minority rights see, *infra*, section 1.4.

<sup>351</sup> Whose implementation at the domestic level is nonetheless necessary in order to be effectively enforceable.

In the private sphere, international linguistic rights mostly hinge on Art.27 of the ICCPR. The international provision enshrines on a general level minority rights<sup>352</sup> and it reads:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

This general provision which, among other rights, guarantees the “freedom of expression” to the members of national minorities, can be practically translated into the rights to speak and write a language in private or in public; correspond and communicate in private, use the language in cultural or musical expression; use names and toponymy in the minority non-official language;<sup>353</sup> display on public posters; commercial signs, etc.; use privately minority script on posters, commercial signs, etc.; broadcast privately in media and publication; organize private educational activities; use the language in the private parts of religious ceremonies; use the language within private groups or organizations; and use the language in political associations or parties.<sup>354</sup>

In the public sphere on the other hand, international linguistic rights are limited to a national margin of discretion that depends upon the national context, the numbers and concentration of the speakers of a minority language, and the national resources that make the practical implementation of linguistic rights a viable option.<sup>355</sup> *In abstracto*, international law recognizes the enjoyment of linguistic rights in the following public contexts: public education, civil ceremonies, names and toponymy, public media and publications, and

---

<sup>352</sup> In general, it can be argued that the ICCPR protects a wider spectrum of minority compared with the FCNM since Art. 27 specifically refers to the broader category of “ethnic, religious or linguistic minorities”.

<sup>353</sup> “While a government cannot ban the private use of topographical terms or place-names in a non-official language, and particularly a minority language, this does not mean the state itself must officially recognize or use these names or designations”. De Varennes, “The Existing Rights of Minorities in International Law ”, 121.

<sup>354</sup> Indeed, “political parties or associations are not part of the administrative structure of the state and may not therefore be prevented from using a minority language, even during elections. Their activities are therefore part of the private domain even if heavily regulated by the state”. Ibid., 126. For a more in-depth discussion of the usage of linguistic rights in the private sphere see ———, “The Existing Rights of Minorities in International Law ”, 118-26.

<sup>355</sup> De Varennes, “The Existing Rights of Minorities in International Law ”, 127.

political representation in official state activities. Practically, a stronger consensus over the national recognition of linguistic rights has been formed in the cases of linguistic rights involved in the legal proceedings such as the right to an interpreter (especially in criminal proceedings) and the right to be promptly informed in a language one understands.<sup>356</sup>

Broadly speaking, the use of minority languages is publicly regulated through the criteria of non discrimination, territorial concentrations, and according to what is understood to be “reasonable”, “appropriate”, and “practicable” in each and every situation under the national “margin of appreciation”.<sup>357</sup> Consequently, although a number of international treaties recognizes the public dimension of linguistic rights in terms of positive obligation from the State, their concrete implementation is still strongly dependent on the national political dimension.

Nonetheless, in the light of the characteristics of Romanes,<sup>358</sup> it can be anticipated that although the whole set of linguistic rights is *in abstracto* applicable to Romani communities as well, linguistic provisions holding a high degree of “territoriality” (such as the use of the minority language in toponymy) are unlikely to find implementation at the national level given the non-territorial nature of Roma.

#### **4.4. Linguistic rights at European level: Organization for Security and Cooperation in Europe, Council of Europe and European Union**

Europe is the geo-political region that most prominently protects linguistic diversity.<sup>359</sup> As previously discussed,<sup>360</sup> the “European architecture” of minority rights is built on the three geo-legal spheres of the OSCE, the CoE, and the EU. As far as the OSCE is concerned, the

---

<sup>356</sup> A number of international decisions confirm the binding nature of these rights. See *Ibid.*, 132-33.

<sup>357</sup> For a more in-depth discussion of the usage of linguistic rights in the public sphere see *Ibid.*, 127-37.

<sup>358</sup> As outlined at section 4.2.

<sup>359</sup> X. Arzoz, *Respecting Linguistic Diversity* (Amsterdam/Philadelphia : John Benjamins Publishing Company 2008).

<sup>360</sup> See section 1.3.

most significant (and early) attempt to create international standards for the protection of linguistic rights for minorities can be found in the 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension. In this context, the participants recognized “the particular problem of Roma (Gypsies)”.<sup>361</sup>

This document does not have binding force, but implies a strong political commitment for the adherent countries.<sup>362</sup> It focuses, *inter alia*, on the linguistic protection in the areas of non discrimination, use of the mother tongue in general and use of the mother tongue in education. The foundational linguistic commitments set at Copenhagen have also been recalled in subsequent OSCE documents<sup>363</sup> and chiefly in the Oslo Recommendations. This soft-law document addresses especially the rights to identity (use of personal names in the minority language), to profess a religion (in the minority language), to create/participate in NGOs/organization (in the minority language), and to expression (in the media, public services, judicial institutions).<sup>364</sup>

In the CoE geo-legal sphere, linguistic rights are protected more specifically by two legal instruments: the FCNM and the ECRML. As previously highlighted, the FCNM provides protection and promotion to minority rights only for those social groups that have been identified by States Parties as “national minorities”. Other social groups that do not benefit from the legal recognition of “national minority” (such as Roma in the legal systems where they are legally defined as “ethnic minorities”, “linguistic minorities”, etc.) fall outside the scope, and hence outside the protection, of the FCNM.

---

<sup>361</sup> Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, point 40.

<sup>362</sup> See, *inter alia*, R. Dunbar, "Minority Rights in International Law " *The International and Comparative Law Quarterly* 50, no. 1 (2001).

<sup>363</sup> OSCE, "Report on the Linguistic Rights of Persons Belonging to National Minorities in the Osce Area," (The Hague: OSCE High Commissioner on National Minorities), 4.

<sup>364</sup> For an analysis of the Oslo Recommendations see, *inter alia*, A. Eide, "The Oslo Recommendations Regarding the Linguistic Rights of National Minorities: An Overview," *International Journal of Minority and Group Rights* 6, no. 3 (1999).

Linguistic rights are protected under the FCNM specifically under Arts 5.1, 9.1 and 10.1. While paragraph 1 of Art. 5 enshrines a general non discrimination provision regarding the protection of the languages of national minorities, Arts. 9 and 10 deal with the freedom of expression. In particular, the freedom of expression is guaranteed in the forms of freedom of opinion, freedom to impart information, non-discriminatory access to media, and the free usage of a minority language in private and in public, orally, and in writing.

Craig describes the protection of minority rights guaranteed for national minorities under the FCNM as “targeted in form but generic in substance”.<sup>365</sup> Nonetheless, particularly in recent years, the monitoring activity of the Advisory Committee has contributed to the enhancement of the rights enshrined in FCNM also as far the linguistic dimension is concerned. In the case of Roma, the Committee has predominantly highlighted the inadequate media broadcasting (especially in the case of Hungary) and the very limited access to education in Romanes (especially in the cases of Croatia and in Slovakia).<sup>366</sup> The CoE has further emphasized, also at the level of official communications, the need to strengthen the protection and the promotion of Romanes especially in the realm of education.<sup>367</sup>

A more specific protection of linguistic rights at the CoE level, is offered by the ECRML. Nonetheless, the ECRML cannot be considered as a legal instrument focusing on the protection of the rights of minorities *tout court*, since its specific scope is limited to minority

---

<sup>365</sup> E. Craig, "The Framework Convention for the Protection of National Minorities and the Development of A "Generic" Approach to the Protection of Minority Rights in Europe?," *International Journal of Minority and Group Rights* 17, no. 2 (2010): 309.

<sup>366</sup> S. Trifunovska, "Monitoring of Linguistic Rights of Minorities under the European Charter and the Framework Convention," in *II Simposi Internacional Mercator: Europa 2004: Un nou marc per a totes les llengües?*

*II Mercator International Symposium: Europe 2004: A new framework for all languages?*, ed. available at <http://www.ciemen.cat/mercator/pdf/simp-trifunovska.pdf> (Tarragona – Catalunya2004).

<sup>367</sup> Notably, in 2000 by the Committee of Ministers of the CoE,<sup>367</sup> and in 2010 by the former CoE human rights Commissioner who expressed his concerned as regards to the restricted usage of Romanes in education “even where there is a significant number of Roma inhabitants” see viewpoint “Language rights of national minorities must be respected – their denial undermines human rights and causes inter-communal tensions” of 25/01/2010 available at [http://www.coe.int/t/commissioner/Viewpoints/100125\\_en.asp](http://www.coe.int/t/commissioner/Viewpoints/100125_en.asp) (last accessed on 17<sup>th</sup> April 2012).

languages (in particular the regional or minority languages of Europe) without directly involving the speakers of minority languages themselves.<sup>368</sup>

As for its content, ECRML has introduced two innovative aspects to the international law panorama. The first refers to the “flexible nature” of this legal instrument: in order to favor a wider acceptance of the ECRML, States have been given the opportunity to choose to be bound only to some parts of the Treaty by selecting some legal provisions through a sort of “legal menu”.<sup>369</sup> This guileful mechanism has been used to overcome the national refusals to ratifying this legal instrument *in toto*.

The second innovative aspect brought by the ECRML is the recognition of the existence of “non-territorial languages” in Europe, which has led to the recognition of Romanes as well.<sup>370</sup> The ECRML has provided the same degree of recognition to territorial as well as to non-territorial languages. Part II specifically enshrines general principles addressing legal protection both for territorial and non territorial languages in terms of recognition of the language as an expression of cultural wealth, resolute action to promote the language in order to safeguard it, provision of forms and means for teaching and studying the language, promotion of transnational exchanges when the same language is used in another State.

As in the case of the FCNM, the ECRLM also establishes a monitoring mechanism, hinging on national periodic reporting to be submitted to a Committee of Experts. After ten years of activity, it seems that this monitoring activity has produced some remarkable improvements in the area of minority languages. In particular, according to Gramstad, the Committee of

---

<sup>368</sup> The same legal *ratio* underlies the most ancient linguistic law on minorities languages in Europe: the 1951 *Loi Deixonne* of France which protects regional languages and is still in force nowadays. See G. Poggeschi, *I Diritti Linguistici. Un'analisi comparata* (Roma: Carocci Editore, 2010), 47.

<sup>369</sup> F. Palermo and J. Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze (2nd Edition)* (Padova: CEDAM, 2011), 104.

<sup>370</sup> Austria, Bosnia and Herzegovina, Czech Republic, Finland, Germany, Hungary, Montenegro, the Netherlands, Poland, Romania, Serbia, Slovenia, Sweden and Ukraine. For the list of declarations made with respect European Charter for Regional or Minority Languages see <http://conventions.coe.int/treaty/Commun/ListeDeclarations.asp?CL=ENG&NT=148&VL=1> (last accessed on 23<sup>rd</sup> December 2012).



Experts has contributed to increase the “understanding in national authorities of the value of regional and minority languages as an integral part of national culture and history”.<sup>371</sup> However, it seems that in the case of Roma, the value of their minority language needs to be further recognized and implemented, especially in the realm of education, as has been repeatedly emphasized in national reports.

Indeed, in certain cases the vague wording of some legal provisions leave the States with a “wider margin” of freedom to implement these provisions in a milder way. This is for instance the case of Art. 7.5., where the vague wording, may lead to a weak implementation that jeopardizes also the whole content of other related rights.<sup>372</sup> In the case of Roma, the Committee of Experts has noticed that although there are some positive examples of States that have provided some promotion to Romanes, a large number of countries still implement quite weakly the provisions enshrined in Part III of the menu. This is precisely the part of the Treaty suffering the highest risk of being jeopardized.<sup>373</sup>

A stronger form of redress to violations of minority rights can be found within the ECtHR although through an individual human rights perspective. Hence, within this legal framework the accommodation of minority rights in general and of linguistic rights in particular, can just reach a minimal level.<sup>374</sup> The case that has mostly involved linguistic rights as far as Roma are concerned, is *D.H. and others v. Czech Republic*.<sup>375</sup> In the ECtHR’s jurisprudence, the

---

<sup>371</sup> S. Gramstad, "The Charter’s Monitoring Mechanism: A Practical Perspective," in *Minority Language Protection in Europe: Into a New Decade*, ed. CoE (Strasbourg : Council of Europe Publishing 2010), 33.

<sup>372</sup> Art. 7.5. states “the nature and scope of the measures to be taken to give effect to this Charter shall be determined in a flexible manner, bearing in mind the needs and wishes, and respecting the traditions and characteristics, of the groups which use the languages concerned”.

<sup>373</sup> S. Oeter, "The Charter’s Monitoring Mechanism: A Practical Perspective," in *Minority Language Protection in Europe: Into a New Decade*, ed. CoE (Strasbourg : Council of Europe Publishing 2010), 191.

<sup>374</sup> C. Henrard, "The European Convention on Human Rights and the Protection of the Roma as a Controversial Case of Cultural Diversity," *European Diversity and Autonomy Papers* 5 (2004).

<sup>375</sup> See Case No. 57325/00 of 7 February 2006. Although this case did not directly involved a violation of linguistic rights, the reasoning followed by the Court in *D.H. and Others* took into analysis (on an indirect foot though) essential linguistic aspects. The Court found a violation of Art.14 (prohibiting discrimination), taken together with Art. 2 of Protocol No. 1 (securing the right to education). This case is considered to be one (if not the leading) case of the ECtHR jurisprudence in the protection of Roma rights. The following chapters further consider this case, from different perspectives according to the different dimensions of rights. Section 5.3.1.1.

Court alleged violation of the principle of non discrimination in the realm of education. In particular, in this case the breach of the non discrimination principle was mostly found in relation to ethnic affiliation, which made impossible for Romani pupils to access the Czech ordinary system of education.

In Czech Republic, the education system was in fact organized on two parallel tracks: ordinary schools for most of the Czech population and special schools for retarded children, to which almost all Roma children were sent. Language demonstrated to play a key role in this case, in particular with regard to the process of selection for the ordinary school system. Since Czech education laws obliged Romani pupils to sit exams to prove their proficiency in the national language (and not in their minority language) in order to be admitted to ordinary schools, the vast majority of Roma pupils were automatically excluded from the ordinary system since they were only speaking Romanes.<sup>376</sup> In this case, the Court found that this differential treatment for Romani pupils had no justification and amounted to discrimination contrary to Article 14, read in conjunction with the Right to Education protected in Article 2 of Protocol 1.

Finally, in Europe a minimum protection of linguistic rights is also articulated in the third geo-legal sphere, that of the EU. At this level, the protection of linguistic rights for minorities appears weaker than at the CoE level, notwithstanding the stronger binding force ensuing from the *acquis*. Although the EU has pledged to respect for the cultural rights and linguistic diversity of its Member States,<sup>377</sup> it seems that the legislation and policies regarding the minority languages do not benefit from any substantial recognition.

---

discusses in particular this case from an economic and social rights perspective (right to education), section 6.3.2.1. analyzes this case from a cultural rights perspective.

<sup>376</sup> M. Lezertúa Rodríguez, "The European Convention on Human Rights and Minority Languages," in *Minority Language Protection in Europe: Into a New Decade* (Strasbourg : Council of Europe Publishing 2010), 24.

<sup>377</sup> For instance, by providing every EU citizen with the right of linguistic choice before its institutions as well as with the right to be granted the publication of any general binding legal proceeding in all official languages. See,

So far the Union law protecting the linguistic rights of persons belonging to minorities has been mostly limited to territorial areas where minorities live and to the thematic areas of education and communication with judicial and administrative authorities.<sup>378</sup> In the case of Roma, in 1993 the Parliamentary Assembly of the European Parliament approved a recommendation on Roma in Europe where it proposed to launch, *inter alia*, a European program for the study of Romanes. In this document, the Parliament made also specific reference to the provisions enshrined in the ECRML which it recommended applying to Roma as well.<sup>379</sup>

At the EU secondary law level, the only legal instrument that can provide some legal ground to protect the linguistic rights of Roma is the EU Racial Equality Directive (2000/43/EC) which can impose a duty on the States to not discriminate, *inter alia*, in education. However, this duty can be intended as guaranteeing the access to mainstream education to Romani pupils<sup>380</sup> which does not necessarily and automatically assure the activation of teaching programs in Romanes.

Thus, this legal excursus on the European recognition of minority linguistic rights has shown that notwithstanding the number of legal instruments concretizing the international protection of this set of rights into a more specific dimension, Romanes is still far from being comprehensively protected in none of the three European geo-legal spheres. Even at the CoE level, where the protection of minority linguistic rights found a more developed articulation and Romanes is recognized as a non-territorial language by the ECRML, the wording of linguistic provisions often appears either too vague or too weak. Accordingly, the overall

---

*inter alia*, N.N. Shuibhne, "The European Union and Minority Language Rights: Respect for Cultural and Linguistic Diversity," *International Journal on Multicultural Societies* 3, no. 2 (2001).

<sup>378</sup> T. Schilling, "Language Rights in the European Union," *German Law Journal* 9, no. 10 (2008): 1239.

<sup>379</sup> M. Danbakli, *On Gypsies: Texts Issued by International Institutions*. (Hatfield : University of Hertfordshire Press., 1994), 108-11. cited in P. Bakker and M. Rokker, "The Political Status of the Romani Language in Europe," *Mercator Working Paper* 3 (2001): 14.

<sup>380</sup> See T. Ahmed, *The Impact of Eu Law on Minority Rights* (Oxford and Portland Oregon: Hart Publishing 2011), 188.

implementation of linguistic provisions for Roma is jeopardized, even in those legal systems that have started to provide public recognition to Romanes.

At the same time, the ECtHR has not developed yet any precedents as regards to a “linguistic case-law” where Romani linguistic claims can be rooted. On the basis of the data emerged in this European legal excursus on minority linguistic rights, the following section analyzes both from an individual and from a collective rights perspective, the implementation of Roma linguistic rights at domestic level.

#### **4.5. Individual and collective linguistic rights**

At the level of comparative law, the doctrine has elaborated different theories and categories to address the individual and collective dimensions of linguistic rights. In this doctrinal debate, Poggeschi identifies three main categories of linguistic rights.<sup>381</sup> The first category mostly hinges on the principle of non discrimination in the use of a minority language. This category interprets the enjoyment of linguistic rights more in a private than in a public dimension and more through an individual than through a collective approach.

The second category of linguistic rights identified by Poggeschi, refers to specific minority rights which are enjoyed by national minorities mostly through a territorial dimension. This category is generally more opened to a public/collective enjoyment of linguistic rights since it comprehends kin-state languages as well as non kin-state languages (as in the cases of Catalan, Basque, Corsican, Sardinian, etc.).<sup>382</sup> These two doctrinal categories of linguistic rights are closely interrelated to each other.<sup>383</sup> Indeed, legal systems characterized by strong

---

<sup>381</sup> G. Poggeschi, "Diritti linguistici dei Rom e dei Sinti " in *La condizione giuridica di Rom e Sinti in Italia*, ed. P. Bonetti, A. Simoni, and T. Vitale (Milano: Giuffr  Editore 2011).

<sup>382</sup>At the practical level, distinction of the first and the second category of linguistic rights can be better understood with regard to the concrete example of the right to education. In legal systems granting linguistic rights of first categories pupils should not be discriminated to attend mainstream schools because of their different linguistic belonging. This does not mean, however, that they should be granted also an education in their minority language as it would be the case of linguistic rights in legal systems belonging to the second linguistic category.

<sup>383</sup> Poggeschi, "Diritti linguistici dei Rom e dei Sinti ", 863.

linguistic guarantees on the private/individual dimensions are likely to develop, in parallel, more specific linguistic provisions guaranteeing (partially or totally) the public/collective dimension as well.

The third category of linguistic rights identified by Poggeschi is generally attributed to “new” minorities, especially to migrants of second generation who have been recognized as citizens of the State.<sup>384</sup> This doctrinal category is still at an embryonic stage, and it addresses linguistic rights through a combination of some private/individual entitlements (deriving from the first category) together with some public/collective entitlements (deriving from the second category).

According to Poggeschi, this third category should be the one that can better guarantee the protection of linguistic rights for Roma. This position is supported by the argument that the flexible nature of this category can better tackle the non-territorial feature of Roma. According to the author, Roma linguistic rights cannot be effectively addressed through the use of the first or of the second categories since they are tailored on the needs of kin-states or territorial minorities. In Europe, however, the general picture of Romani linguistic rights is much more complex than this simplified doctrinal classification. The following section presents a more detailed overview of this picture by practically translating this theoretical categorization in the comparative analysis of Roma linguistic rights.

#### **4.6. Linguistic rights of Roma at domestic level**

According to a recent study, the estimation of Romani population speaking Romanes in Europe generally rates between 80 and 90 percent of people. As discussed in the introductory section of this chapter, there are however countries, where Romanes is practically no longer spoken (such as Portugal zero percent, Spain 0,01 percent and United Kingdom 0,05 percent)

---

<sup>384</sup> Ibid., 864.

or where it is only partially spoken (Czech Republic 50 percent, Hungary 50 percent and Finland 40 percent).<sup>385</sup>

Although there still seems to be a substantial number of Roma, speaking Romanes in Europe, in the area of the CoE just 22 countries i.e. the quasi half of them (out of 47) have recognized linguistic rights for Roma either in their legislation or through ratification of the ECRML. Among these countries, only 14 have additionally recognized Romanes as a non-territorial language under the ECRML. When considering these data in the framework of the general mapping regarding the legal recognition of Roma within European national legal systems drawn in chapter 1, there seems to be a quasi-complete correspondence between the legal identification of Roma as a “minority” and the legal attribution of linguistic rights to this social group. The only two countries escaping this general rule are Portugal and United Kingdom, both of them recognize Roma as an “ethnic minority” but apparently they do not guarantee Roma any type of linguistic rights, for the reasons discussed above.

#### **4.6.1. Linguistic individual rights of Roma**

The vast majority of European countries recognize linguistic rights to Roma on an individual basis which is mostly related to the first category identified by Poggeschi. These are the cases of Croatia, Czech Republic, Norway, Sweden, Finland, Slovakia, Germany and the Netherlands. Nonetheless, there is a group of countries which can be barely attributed even to this first category. This is the case of countries devising linguistic rights to Roma on such a minimum level that they can be more precisely defined as “tolerant” rather than as “promotional”. Specifically, these are the cases of Albania, Italy, Latvia, Lithuania and Ukraine.

**Croatia** is characterized by a highly promotional legislation in the field of linguistic rights which, in terms of content, can be assimilated to the Hungarian legislation. However, in the

---

<sup>385</sup> Bakker and Rokker, "The Political Status of the Romani Language in Europe," 10-11.

case of Roma the recognition of linguistic rights is almost totally ineffective. Indeed, Croatia has recognized Roma as a “national minority” but, when ratifying the ECRML, it has not recognized Romanes as a minority language. A recent opinion on Croatia published by the FCNM Advisory Committee does not mention the implementation of any linguistic provisions for Roma. At the same time, it presents some concerns over the incessant discrimination that Roma face also in the realm of education even after the conclusion of the National Program for Roma.<sup>386</sup>

**Czech Republic** is another country where, as in Croatia, there is a divide between the recognition of linguistic rights to minorities generally speaking and the implementation of linguistic rights in the specific case of Roma. In Czech Republic, only Roma who have been recognized as citizens of the State belong to the category of “national minority”.<sup>387</sup> According to Act 273/2001, national minorities are legally entitled to a substantial set of linguistic rights which is built mostly around an individual – public dimension.

However, notwithstanding the fact that Czech Republic has recognized Romanes also under the ECRML, its implementation of linguistic rights for Roma still appears rather weak especially in the field of education.<sup>388</sup> The importance of the respect/promotion of the linguistic rights of Roma in education has been highlighted both by the CoE Committee of Ministers<sup>389</sup> and the ECRML Committee of Experts.<sup>390</sup> Another field where the Committee of Experts has recommended a more intense use of Romanes is that of media.

---

<sup>386</sup> Advisory Committee on the Framework Convention for the protection of national minorities, Third Opinion on Croatia, adopted on 27<sup>th</sup> May 2010, ACFC/OP/III(2010)005, 10.

<sup>387</sup> As seen in section 2.2.2. in Czech Republic, “new” Roma immigrants have been defined instead through the legal category of “ethnic minority”.

<sup>388</sup> See the reference to the case *D.H. and others vs. Czech Republic* at section 4.4.

<sup>389</sup> Council of Europe Committee of Ministers, Resolution ResCMN(2006)2 on the implementation of the Framework Convention for the Protection of National Minorities by the Czech Republic (Adopted by the Committee of Ministers on 15<sup>th</sup> March 2006 at the 958<sup>th</sup> meeting of the Ministers' Deputies).

<sup>390</sup> European Charter for Regional or Minority Languages, Second periodical report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter, Czech Republic, MIN-LANG/PR (2011) 4 submitted on 19<sup>th</sup> July 2011.

In the case of **Norway**, Roma are also recognized as a “national minority” and Romanes is recognized under the scope of the ECRML and at the level of policy/focused actions. The ECRML Committee of Experts has acknowledged the adoption of an Action Plan to improve Romani conditions in Norway. At the level of linguistic rights, Romanes is still quite under-promoted although, according to the Committee of Experts a scheme has been established for primary and lower secondary schools for students who wish to use Romanes as first language through the cooperation of a Roma association, Romani Kultura.<sup>391</sup>

In **Sweden**, Roma are recognized as a “national minority” and Romanes is protected under the framework of the ECRML. In the recent Language Act 600/2009, Romanes is explicitly recognized as a “national minority language” (section 7). However, although Section 8 of the Act recognizes the protection and promotion of national minority languages as a duty of the State, it does not regulate the use of minority languages in detail. In practice, the use of Romanes is mostly confined to the private sphere although it is also sporadically broadcasted in the media. According to the report of the Committee of Experts, the use of Romanes at the educational level “remains generally unsatisfactory as a means of sustaining language maintenance”.<sup>392</sup>

In **Finland**, Roma are also recognized as a “national minority” but Romanes is not recognized under the scope of application of the ECRML. Under Section 17 of the Constitution, Roma are recognized at the same level of the Sami indigenous group since they are entitled to the “right to maintain and develop their own language and culture”. Language Act 423/2000 minimally mentions linguistic rights for Roma as well. However, the scope of this Act is that of regulating the two official languages of Finland (Finnish and Swedish) rather than the

---

<sup>391</sup> European Charter for Regional or Minority Languages, Fifth periodical report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter, Norway, MIN-LANG/PR (2012) 1 submitted on 5<sup>th</sup> January 2012, 8.

<sup>392</sup> European Charter for Regional or Minority Languages, Sweden presented in accordance with Article 15 of the Charter, fourth Periodical Report submitted on 14<sup>th</sup> September 2010, paragraph 114.



whole minority realm. Consequently, the protection that this legal source guarantees to Roma linguistic rights appears only “marginal”.

Indeed, according to the second paragraph of section 37 of the Act, the activity of reporting on the application of the language legislation does not only deal with Finnish and Swedish “but also with at least Saami, Romani and sign language”. The report of Committee of Experts clarifies that nowadays linguistic rights of Roma are promoted in Finland mainly at the policy level. The current protection of Romanes is so precarious that according to the Committee “if no active measures are taken for the Romani language, it will not be used anymore in Finland within ten years”.<sup>393</sup>

In **Slovakia**, Roma are recognized as a “national minority” and Romanes is recognized under the country’s obligations for the ECRML. The Constitution opens to the possibility to use other languages than the official one in dealing with authorities (Art.6.2.) by specifying that their use “will be regulated by law”. Act 270/1995 has originally opened the possibility to use minority languages only to the media broadcasting and to cultural events (paragraph 5).

In a successive Act (184/1999), Slovakia has further allowed the use of minorities languages in the public sphere from an individual perspective in the relations with the public administration. In the case of Roma, however, the practice has so far shown that the use of Romanes is even more limited than the scope of the Act itself since it is mostly circumscribed to the private sphere. Especially in the field of education, the Committee of Experts has advanced some concerns about the situation of Romani pupils who are suffering from analogous cases of segregation as in Czech Republic.<sup>394</sup>

---

<sup>393</sup> European Charter for Regional or Minority Languages, Fourth monitoring cycle, A. Report of the Committee of Experts on the Charter, B. Recommendation of the Committee of Ministers of the Council of Europe on the application of the Charter by the Finland, ECRML (2012) 1 submitted 14<sup>th</sup> March 2012.

<sup>394</sup> European Charter for Regional or Minority Languages, Fourth monitoring cycle, A. Report of the Committee of Experts on the Charter, B. Recommendation of the Committee of Ministers of the Council of Europe on the application of the Charter by the Slovak Republic, ECRML (2009) 8 submitted 18<sup>th</sup> November 2009.

Finally, the cases of Germany and the Netherlands can be identified as extreme examples of the “norm-and-accommodation”. According to the explanation of Kymlicka and Patten, this approach characterizes legal systems, where linguistic rights do not clearly ensue neither from tolerant nor from promotional approaches, since the level of linguistic recognition is really minimum.<sup>395</sup> In these legal systems, in fact, Romanes has been recognized as a language entitled to the guarantees enshrined in the ECRML. Yet, national legislations have not provided concrete implementation to such a recognition.

In **Germany**, according to the last country report presented before the ECRML, the lack of national institutional bodies to protect and promote the Romani language can be attributed to the fact that the two Romani groups living in Germany (Roma and Sinti) “have sometimes very different ideas about how their ethnic groups and their history should be represented”.<sup>396</sup>

Germany has justified before the Committee of Experts of the ECRML the gaps emerging from the different implementation of the ECRML provisions at the *Länder* level, on the basis of the lack of a shared codification of Romanes which is still under development. Indeed, according to this country there might be different interpretations of the provisions ECRML in accordance with the wishes of the speakers.<sup>397</sup> By and large, linguistic rights of Roma in Germany are therefore promoted in different ways in the various *Länder* and mostly at the policy level. The use of Romanes does mostly involve the private sphere.

In **the Netherlands**, notwithstanding the formal recognition of Romanes under the ECRML as a non-territorial language, any concrete promotion to Roma linguistic rights has not been provided at legal level. According to the Committee of Experts, so far there has been any “direct contact between central government and Roma organizations does exist” which could

---

<sup>395</sup> W. Kymlicka and A. Patten, "Introduction. Language Rights and Political Theory: Context, Issues and Approaches," in *Language Rights and Political Theory* ed. W. Kymlicka and A. Patten (Oxford/New York: Oxford University Press, 2003), 27.

<sup>396</sup> Fourth Report of the Federal Republic of Germany in accordance with Article 15 (1) of the European Charter for Regional or Minority Languages, 2010 § 00112.

<sup>397</sup> *Ibid.*, 50001.

provide some dialogical basis to foster the implementation of linguistic rights for this social group.<sup>398</sup>

Finally, there is a last group of countries that do recognize Romani linguistic rights to an even lower degree as they either did not ratify the ECRML or they did not include Romanes under the national scope of this treaty. These are the cases of Albania, Italy, Latvia, Lithuania and Ukraine. In Albania, notwithstanding the fact that Roma have been recognized as a “linguistic minority”, the recognition of Romanes is almost *de facto* inexistent both in the context of education and in the context of media broadcasting.<sup>399</sup>

In **Italy**, as Chapter 2 has outlined, at the national level Roma have not been recognized as a minority (yet). Instead, at the regional level some linguistic recognition has been provided especially in the legislation regulating the permanence in nomadic camps. Lombardia, Piemonte, Toscana, Le Marche and the Autonomous Province of Trento have in fact recognized linguistic rights to Roma at a very minimum level.<sup>400</sup> Such a recognition has articulated through a legal formulation which reflects the same racial biases enshrined in the definition of this social group (Gypsies, nomads, etc.). In **Latvia, Lithuania and Ukraine**, according to the national reports presented before the FCNM Advisory Committee, although Roma are recognized as a “national minority” the recognition of Romanes stands merely at the political level, in the lack of a “solid” legal background.<sup>401</sup>

---

<sup>398</sup> European Charter for Regional or Minority Languages, Fourth periodical report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter, Netherlands, MIN-LANG/PR (2011) 5, submitted on 15<sup>th</sup> September 2011, § 70.

<sup>399</sup> Report submitted by Albania pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2011)001 received on 10<sup>th</sup> January 2011.

<sup>400</sup> It should be noted that the law of the Autonomous Province of Trento does not formulate the linguistic rights of Roma in the context of nomadic camps as its general scope is favoring the integration of the Romani community living with the territorial area of the Province. The law which was enacted in 2009, aims at surpassing the logic of the “nomadic camps” by favoring the coexistence of Romani community in the so-called “micro-areas” i.e. in territorial parcels that are provided them under a general agreement with the Province.

<sup>401</sup> Advisory Committee on the Framework Convention for the protection of national minorities, Opinion on Latvia, adopted on 9<sup>th</sup> October 2008, ACFC/OP/I(2008)002, § 135.; Second Report submitted by Lithuania pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities, adopted on 3<sup>rd</sup> November 2006 ACFC/SR/II(2006)007; Third Report submitted by Ukraine pursuant to Article

#### 4.6.2. Linguistic rights of Roma “in community with others”

In the cases of Romania, Austria, Serbia, Bosnia-Herzegovina and Slovenia, linguistic rights for Roma are articulated in a way that stands in-between the collective and the individual dimensions. In each of these cases, Roma are defined as “national minority” and Romanes is recognized as a minority language under the ECRML. Within these legal systems Roma linguistic rights are formulated mostly through a territorial perspective. While Austria does not openly address linguistic rights through an individual or a collective dimension, Serbia and Bosnia and Herzegovina formulate linguistic rights in terms of individual rights with a collective opening.

In **Romania**, Roma are recognized as “national minority” and also Romanes is recognized under the scope of the ECRML. The Constitution, recognize minority linguistic rights at Arts. 6, 32 and 127.2. In particular, Art. 32.3 recognizes “the rights of belonging to national minorities to learn their mother tongue, and their right to be educated in this language” and leaves more specific regulation of this provision to the ordinary legislation. Paragraph 5 of the same article recognizes minorities the right to establish educational institutions (including private institutions) to conduct their didactic activity also at their minority linguistic level.

Furthermore, Art.127.2 of the Constitution which provides each citizen belonging to a national minority but not speaking or understanding Romanian with “...the right to take cognizance of all acts and files of the case, to speak before the Court and formulate conclusions, through an interpreter...”. According to international reports, the use Romanes in Romania is mostly promoted at the policy level hinging the territorial-administrative units.<sup>402</sup>

---

25 Paragraph 1 of the Framework Convention for the Protection of National Minorities, ACFC/SR/III(2009)006, received on 7<sup>th</sup> May 2009.

<sup>402</sup> European Parliament, "Measures to Promote the Situation of Roma Eu Citizens in the European Union. Country Reports," ed. Citizens' Rights and Constitutional Affairs Policy Department (Bruxelles : European Parliament, 2011), 32.

This political promotion of the usage of Romanes includes, *inter alia*, education and cultural initiatives.<sup>403</sup>

In **Austria**, the Ethnic Groups Act<sup>404</sup> formulates linguistic rights through a “language perspective”, as in the case of the ECRML. Art.13 for instance, openly refers to minority languages and not to minority groups as it can be read in the wording “the authorities and public offices shall ensure that the language of an ethnic group...”. In terms of content, the Austrian legislation recognizes linguistic rights in terms of the rights to use “the language of the respective linguistic group” especially the areas of topography (Art.12) and relations with public authorities (Arts. 13-14).

In the case of Roma, the recognition of Romanes under the ECRML has provided specific linguistic rights to this social group but only within the territorial area of Burgenland. As emphasized, by a research report on Austria, linguistic rights have been recognized not indiscriminately to all Roma living in Austria but to the “Austrian Roma minority” i.e. to that group holding a historical tie with the Austrian territory.<sup>405</sup>

In particular, linguistic rights of Roma living in Burgenland have started to be enhanced when the University of Graz launched the “Romany Project” dealing with the codification and teaching of Burgenland Romanes, in 1993. The “Romani Project” has been brought forward by the association “[spi:k]” which focuses in particular in the areas of language, identity and culture. As a result of this project, Romanes is currently taught (mostly through private

---

<sup>403</sup> European Charter for Regional or Minority Languages, Initial periodical report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter, Romania, MIN-LANG/PR (2010) 11, submitted on 26 October 2010.

<sup>404</sup> Federal Act adopted on 7<sup>th</sup> July 1976, *Volksgruppengesetz* BGBl. [Federal Law Gazette] 396/1976.

<sup>405</sup> "Legal Country Study: Austria ", in *Mimi Project: Practice of Minority Protection in Central Europe Legal-Theoretical Part.* (available at <http://www.eurac.edu/en/research/institutes/imr/Projects/ProjectDetails.aspx?pid=4688>).

courses) both to pupils and to adults, it has started to be used in some media programs (mostly radio and tv) and it is also used in cultural events concerning the Romani heritage.<sup>406</sup>

In **Serbia**, linguistic rights of Roma are protected under the Law on national minorities.<sup>407</sup> In particular, the law guarantees “to all persons belonging to national minorities” the rights to name (Art. 9), to the private use of mother tongue (Art. 10), to education in mother tongue at different pedagogic levels (Arts. 13-15) and to “impartial information” in the minority language (Art.17). In the second report presented before the FCNM Advisory Committee, Serbia highlighted the fact that Romanes has been used also at the judicial level from the accused to present their defence.<sup>408</sup> Although some positive improvements have recently occurred with the approval of the National Strategy for the improvement of the Rights of Roma (which presents some recommendation to enhance Romani rights on a gender dimension as well),<sup>409</sup> as pointed out by the Committee of Experts of ECRML, the overall implementation of linguistic rights for Roma in Serbia needs to be further reinforced.

In **Bosnia and Herzegovina**, the use of minority languages is regulated by Law 12/2003 whereby Art. 12 recognizes “to each member of a national minority” the free usage of his/her minority language in the private as well as in the public spheres. As in the case of Serbia, also in Bosnia Herzegovina linguistic rights are formulated through an individual perspective with a collective opening. Art.13 specifies that minorities are entitled to use their minority languages within their minority groups and in relations with public authorities, in local names and topography.

---

<sup>406</sup> European Charter for Regional or Minority Languages, Third periodical report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter, Austria, submitted in July 2011.

<sup>407</sup> Law on Protection of Rights and Freedom of National Minorities, adopted on 27<sup>th</sup> February 2002, Official Gazette of FRY No. 11.

<sup>408</sup> Report submitted by Serbia pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/II(2008)001 received on 4<sup>th</sup> March 2008.

<sup>409</sup> European Charter for Regional or Minority Languages, Second periodical report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter, Serbia, MIN-LANG/PR (2010) 7 submitted on 23<sup>rd</sup> September 2010.

Although Bosnia Herzegovina has ratified the ECRML, the Committee of Experts has so far not received any country report from the Bosnian governmental authorities;<sup>410</sup> thus, it is difficult to precisely assess the implementation of such linguistic provisions for Roma on the practical level. According to the Advisory Committee of the FCNM, Romanes is used in the media (television and radio). However, at the level of education, the Committee emphasizes once again, that the implementation of linguistic rights for Roma need to be further fostered.<sup>411</sup>

In **Slovenia**, the protection of Romanes is formally recognized under the ECRML and at Art. 65 of the Constitution which specifies “the status and special rights of the Romany community living in Slovenia shall be regulated by law”. The Roma Community Act<sup>412</sup> thus specifies this general constitutional provision through a “neutral formulation” which stands in between the individual and the collective dimensions. Indeed, exactly as the ECRML, the linguistic provisions enshrined within the Slovenian Roma Act focus on the protection of the language and not of the person or of the group belonging to the linguistic minority. More specifically, Arts. 4.3., 8 and 10.7. refer to the protection of “Roma language and culture”.

#### **4.6.3. Linguistic collective rights of Roma**

In general, the recognition of linguistic rights to Roma is not very promotional in the overall European panorama. Most of the countries recognize linguistic rights to Roma according to the first category identified by Poggeschi. These countries, mostly emphasize the individual rather than the collective dimension of rights, and they recognize the use of Romanes mostly on the private than on the public sphere.

---

<sup>410</sup> According to the official website of the ECRML (<http://www.coe.int/t/dg4/education/minlang/Report/>) the first report was expected to be submitted by Bosnia-Herzegovina on January 1<sup>st</sup> 2012. However, no report has been submitted yet at 29<sup>th</sup> May 2012.

<sup>411</sup> Advisory Committee on the Framework Convention for the protection of national minorities, Second Opinion on Bosnia and Herzegovina, adopted on 27<sup>th</sup> April 2009, ACFC/OP/II(2008)005, § 148 and § 183.

<sup>412</sup> The Roma Community Act of April 13<sup>th</sup> 2007, no. 33/07.

Conversely, in the cases of Macedonia, Montenegro and Hungary there is instead a more promotional opening towards the recognition of linguistic rights for Roma. This type of recognition can be ascribed to the second category identified by Poggeschi which is characterized by a collective/ public promotion of linguistic rights.

In the case of **Macedonia**, where Roma have been recognized as a constitutive nationality of the State, linguistic rights are highly promoted. This country has neither signed nor ratified the ECRML, since the scope of this international instrument follows outside its institutional framework. As a consociative democracy, Macedonia guarantees equal status – at least *de jure* – to every constitutive nationality. Therefore, in this consociative framework, minority languages do not formally exist *in abstracto* because every language spoken by a constitutive nationality can be raised to the status of official language, under the territorial and numerical requirements established by Art. 7.2 of the Constitution, which reads:

In the units of self-government where the majority of inhabitants belong to a nationality, in addition to the Macedonian language and Cyrillic alphabet, their language and alphabet are also in official use, in a manner determined by law.

According to the country report that Macedonia submitted to the Advisory Committee of the FCNM, Romanes (and its alphabet) is currently the third official language in Macedonia, after Macedonian and Albanian.<sup>413</sup>

Notwithstanding the highly promotional degree recognized to Romanes in Macedonia, linguistic rights for Roma have been formulated almost exclusively through an individualistic perspective hinging on a personal principle. The fifth amendment to the Constitution of Macedonia specifies in fact, that linguistic rights are guaranteed to “any citizen” (not to the collectivity of citizens) and these rights find application in the local self-government units

---

<sup>413</sup> See Report submitted by the “Former Yugoslav Republic of Macedonia” pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/II(2006)004 received on 16<sup>th</sup> June 2006, 35.



“where at least 20% of the citizens speak an official language different than the Macedonian”.<sup>414</sup>

This means that linguistic rights are granted to the population living within the local self-government unit and not to the territorial area. In this way, if changes in the numerical composition of the population do occur, linguistic rights may vary accordingly. In other words, the content of rights does not vary, rather the group that can benefit of these rights may vary provided it numerically represents 20 percent of citizens in the local area concerned.

According to the Advisory Committee of the FCNM, the “Strategy for the Roma in the Republic of Macedonia” focuses the development of linguistic policies especially in the priority areas of education for pupils and adults at all pedagogical levels. A particular attention has also been paid to the training of Romani teachers on the use of Romanes in the instruction process.<sup>415</sup> While analyzing some more recent data, the Committee has found that Romanes is currently taught as optional subject (as in the cases of Bosniak and Vlach) whereas other languages (namely Macedonian, Albanian and Serbian) are taught as compulsory subjects.<sup>416</sup>

In **Montenegro**, where Roma are recognized as an “ethnic minority”, Art. 79 of the Constitution specifies that the rights provided to “minority nations” and “other minority national communities” can be exercised “individually or collectively with others”. This article, in particular, recognizes the rights to use a different language from the Montenegrin one (and its related alphabet): in private, public and official use, in education, in names and surnames and names of streets and settlements as well as topographic signs.

---

<sup>414</sup> The Fifth Amendment to the Constitution of Macedonia, adopted by the Assembly of the Republic of Macedonia, on November 16<sup>th</sup>, 2001.

<sup>415</sup> See Report submitted by the “Former Yugoslav Republic of Macedonia” pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/II(2006)004 received on 16<sup>th</sup> June 2006, 35-36.

<sup>416</sup> See Third Report submitted by the “Former Yugoslav Republic of Macedonia” pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2010)002 received on 11<sup>th</sup> March 2010, 32.

In addition, the Montenegrin Law on Minorities<sup>417</sup> further specifies the usage of minority languages. In particular, Arts. 13-16 reinforce the linguistic dimension of the right to education at all pedagogic levels where the teaching in another “minority national language” can be fully delivered, under the condition that the teaching of the official language is nonetheless guaranteed.<sup>418</sup> It is interesting to highlight the fact that the law provides the opportunity to “pupils and students who do not belong to minorities [to] learn the language of the minority they live with.”<sup>419</sup>

Although this provision might be read as a “multicultural opening”, students asking to follow the educational curricula in a minority language are at risk of becoming somehow “ghettoized” since this special linguistic curricula is meant to be taught in “special schools or special classes in regular schools” (Art.13).<sup>420</sup> According to the reports to the European Committees (ECRML and FCNM), at the moment, Romanes seems far from suffering this risk. While the inclusion in the education system of Serbian, Montenegrin, Bosniak/Bosnian has already started since they are the most widespread languages and they share common roots,<sup>421</sup> Romanes instead has not started to be used as an educational language yet. As the Committee of Experts of the ECRML specifically highlights

[Romanes] as a minority language is not taught as a mother tongue in education institutions, due to the fact that it is not standardized and there is no qualified teaching staff that could perform teaching in the Romani language. In addition, according to the Statistical Office of Montenegro - MONSTAT, based on data from October 2008, the Roma population makes 1.6% of the population of Montenegro.<sup>422</sup>

---

<sup>417</sup> “Law on Minorities and Freedoms” adopted on May 10<sup>th</sup> 2006, Official Gazzette of the Republic of Montenegro 31/06.

<sup>418</sup> Art. 15 specifies that the curricula for the purpose of education in a minority language should contain some topics in the fields of history, arts, literature, tradition and culture of a minority.

<sup>419</sup> Art. 13.

<sup>420</sup> In contrast with the ECtHR case law enucleated in *D.H. and Others v. Czech Republic*.

<sup>421</sup> Montenegrin, Bosniak/Bosnian have also been defined as “cognate languages”. See Advisory Committee on the Framework Convention for the protection of national minorities, Opinion on Montenegro, Adopted on 28<sup>th</sup> February 2008, ACFC/OP/I(2008)001, §2.

<sup>422</sup> European Charter for Regional or Minority Languages, Second periodical report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter, Montenegro, submitted on 4<sup>th</sup> April 2011 MIN-LANG MIN-LANG/PR (2011) 2, 18.

Some positive developments have been noticed by the FCNM Committee in the field of media, where Romanes has started to be used especially in radio and television.<sup>423</sup>

As in the case of Montenegro, Hungary as well recognizes Roma as an “ethnic minority” and Romanes under the scope of the ECRML. Although it is acknowledged that Romanes is no longer spoken by the whole Romani population in Hungary, there seem to lack clear and comprehensive data regarding the exact percentage of Roma still speaking Romanes. According to some sources in fact, Romanes (or Beash) is still spoken by the 50 percent of Roma,<sup>424</sup> whereas according to other sources, Romanes is still spoken approximately by a 25 percent of Roma.<sup>425</sup>

As seen in chapter 1, in **Hungary** the rights of minorities are guaranteed by Law 77/1993 which openly recognizes Romanes as a minority language under Art.42. Law 77/1993 provides minorities with a strong set of linguistic rights which mostly hinges on the right to education (Art.13 and Art.43). According to Art. 43, children belonging to a minority may be educated in accordance with their parents or legal guardian “in their mother tongue, ‘biligually’ (in their mother tongue and in Hungarian), or in Hungarian”.

It should be emphasized that Law 77/1993 formulates – especially linguistic rights – through a collective perspective by referring to “minorities” and not to “persons belonging to minorities”. At the same time, this collective perspective presents specific “duties of the State” with regard to the education of minorities in general and of Roma in particular.

---

<sup>423</sup> Yet, the Committee has shown some concerns about the content of the schedule which is focusing primarily on “subject-matter” shows (i.e. shows regarding the tradition, customs and culture of minorities). This may restrict the use of the language only to the cultural dimension without opening its spectrum of usage as a full “mean of communication”.

Advisory Committee on the Framework Convention for the protection of national minorities, Opinion on Montenegro, Adopted on 28 February 2008, ACFC/OP/I(2008)001, §2.

<sup>424</sup> Bakker and Rokker, "The Political Status of the Romani Language in Europe."

<sup>425</sup> European Charter for Regional or Minority Languages, Fifth periodical report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter, Hungary, MIN-LANG/PR (2012) 4 submitted on 5<sup>th</sup> March 2012, 42.

With regard to the education of minorities, Art. 46.2 specifies “it is the duty of the State to train native teachers to provide education in the mother tongue or ‘bilingually’ to minorities”. As regards the education of Roma, Art. 45.2 states that in order “to relieve the disadvantages of the Gypsy minority in the field of education specific educational conditions may be introduced”. In other words, the law identifies in the State the “positive obligation” to eliminate any kind of socio-economic barrier in order to foster minority and Romani education.

Another innovative aspect, introduced by Law 77/1993, relates to the possibility provided to minorities to manage quasi-autonomously the education system. Art. 47 in fact clarifies that

A minority municipal government or a local minority self-government may assume control of an educational institution from another authority only if it can ensure the maintenance of the same standards of education...

As in the case of Macedonia, also the Hungarian system provides some room for minority rights to be enjoyed also from a personal rather than from a mere territorial perspective.

In terms of content, the Hungarian Law on Minorities provides other linguistic rights on the public dimension such as: the right to choose the first names in the minority languages (Art.12), the right to use the minority language in the course of civil or criminal proceedings (Art. 51), the right to use the minority language at the level of the board of representatives of a municipal government (Art. 52) and the right to participate in education and cultural activities in the mother-tongue (Art.13). In general, Hungary entitles everybody to “..freely use his/her mother tongue wherever and whenever s/he wishes to do so” in the private as well as in the public dimension, under the conditions provided by the State (Art.51).

In the case of Roma, Hungary has further strengthened, at least on in its legislation, the set of linguistic rights when the Hungarian Parliament, authorized the Government the extension of its undertakings under Article 2(2) of the Charter to the Romani languages (Romani and

Beash) by virtue of Act XLIII of 2008.<sup>426</sup> These undertakings have extended, among others, the use of mother tongues at different levels of education, in the administration of justice, in the public offices and in the media broadcast (especially in radio and television).

Despite the high promotional perspective entailed by the Hungarian legislation on minority rights in general and on linguistic rights in particular, the practical implementation of linguistic rights has been challenged by the Committee of Experts, especially in the case of Roma. Also in this case, linguistic rights connected with the right to education (at all levels) appear particularly under-implemented. Some progresses, however, have been highlighted in the realms of program broadcasting in Romanes, especially in television.<sup>427</sup>

#### **4.7. Critical remarks**

The analysis developed in this chapter has revealed that throughout Europe, the recognition of Roma linguistic rights generally appears very limited and unstructured. Linguistic studies have shown that Roma linguistic rights can be *in abstracto* addressed to the same linguistic minority, yet neither at the European nor at national levels a clear set of rights specifically addressing the protection/promotion of “Roma as linguistic minority” cannot be envisaged at the moment.

At the European level, the very broad set of linguistic rights identified at the international level (which comprehends both territorial and non-territorial groups and both public and private spheres), has been mostly interpreted from a territorial perspective and through a “weak” and “general” formulation of the public one. Indeed, at the CoE level, where minority legal instruments have mostly developed, a substantial opening to non-territorial languages

---

<sup>426</sup> European Charter for Regional or Minority Languages, Fourth periodical report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter, Hungary, MIN-LANG/PR (2009) 1 submitted on 22<sup>nd</sup> January 2009, 31

<sup>427</sup> European Charter for Regional or Minority Languages, Fifth periodical report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter, Hungary, MIN-LANG/PR (2012) 4 submitted on 5<sup>th</sup> March 2012.

(and consequently to non-territorial groups) has been provided, leading, *inter alia*, to the legal recognition of Romanes as a non-territorial language.

Yet, such a recognition has shown to be quite “weak” to be implemented at the domestic level, since it has been devised in a legal instrument which flexibly leaves Member States a wide margin of implementation. This is true particularly with regard to the provisions which have been more often applied to non-territorial languages (Part III of the Treaty). On these precarious foundations, the recognition of Roma linguistic rights consequently appears to be very low promoted as well.

At the end of chapter 2, a possible correspondence has been hypothesized while considering the national legal definitions of “Roma” in parallel with the sets of rights recognized to this social group. In particular, it has been argued that the legal definition “national minority” offers a wider margin of protection *vis-à-vis* other legal definitions (especially those of “ethnic” and “linguistic” minority). In the case of linguistic rights, however, there does not seem to exist any correspondence between the legal definitions of Roma and the linguistic rights provided. In other words, a stronger/weaker promotion of linguistic rights seems to be an independent variable and not bound by the legal category identifying Roma at the domestic level.

Indeed, not every State identifying Roma as a “national minority” has “automatically” recognized Romanes under the scope of application of the ECRML.<sup>428</sup> At the same time, some States that have identified Roma by means of a legal definition other than “national minority” have instead recognized Romanes under the ECRML.<sup>429</sup>

---

<sup>428</sup> This is the case of Finland, Latvia and Lithuania. In contrast, a number of States have recognized Roma as a “national minority” and Romanes under the ECRML: Austria, Bosnia and Herzegovina, Germany, Norway, Romania, Serbia, Slovakia and Sweden.

<sup>429</sup> These are the cases of Hungary, Montenegro and the Netherlands that have recognized Roma as an “ethnic minority” and of Czech Republic and Slovenia that have recognized Roma as a “national” and/or as an “ethnic” minority. See, *infra* section 2.2.2.

While looking at the recognition of linguistic rights at the national level from the perspective of the hierarchy of legal sources, there does not seem to be either, any significant correlation between the legal source and the level of promotion which can account for the different degree of linguistic protection.<sup>430</sup> Moreover, not even the key to the reading proposed by Piasere regarding the three “Gypsy Linguistic Europe”<sup>431</sup> seems able to account for the different recognition of linguistic rights to which Roma have been entitled in relation to the legal category defining them in each and every European legal system. Against this very incoherent framework, it is impossible to deduct some “general legal patterns” explaining the different recognition of Roma linguistic rights at the national level also in the light of the diverse history of cohabitation within the different national societies.

In the most promotional cases however, the analysis has shown that the recognition of Roma linguistic rights emphasizes more an individual/private enjoyment rather than on a collective/public enjoyment of rights (which can be summarized through the first doctrinal categorization identified by Poggeschi).

However, also in these “promotional” cases, the general trend in the implementation of linguistic provisions for Roma, appears so underdeveloped that this social group can barely be attributed to the status of “linguistic minority”, particularly with regard to the protection of its linguistic rights in education field, as the reports submitted before the Advisory Committee of the FCNM and by the Committee of Experts of the ECRML have highlighted. As a result, although the theoretical basis to found the recognition of Roma linguistic rights in terms of linguistic minority, does not only appear intellectually fascinating but also scientifically viable, the practical implementation of this idea seems to be still very premature.

---

<sup>430</sup> Countries identifying linguistic rights to Roma within their national constitutions are: Finland (Roma are identified as a national minority), Hungary (Roma are identified as ethnic minority), Macedonia (Roma are identified as constitutive nationality), Montenegro (Roma are identified as ethnic minority), Poland (Roma are identified as ethnic minority), Romania (Roma are identified as a national minority) and Serbia (Roma are identified as national minority).

<sup>431</sup> See, *infra*, section 2.2.

In order for this idea to practically concretize, a more accurate recognition both at the European and at the national levels of Roma ethnic and linguistic identity of a non-territorial group can possibly constitute the first “basic ground” to root Roma linguistic rights. Once this minimum legal recognition has been set, the reasoning on the recognition of “Roma as linguistic minority” can effectively start to take place at the level of legal recognition as well. Such reasoning can follow the pathway proposed by Poggeschi which foresees the articulation of Roma linguistic rights on the third doctrinal classification. Within this classification, linguistic rights are promoted in a way which stands in between private/public dimensions and in between public/private approaches.

Indeed, given the heterogeneity of European legal systems and the varied distribution of Roma “Romanes-speaking”, the recognition of Roma linguistic rights at the European level could articulate on just a minimum level of linguistic recognition by foreseeing, for instance, the recognition of Roma non-territorial linguistic group and the parallel recognition of linguistic protection/promotion of Romanes in some public areas (such as education and media). Accordingly, “this minimum core of linguistic provisions” can subsequently be translated at the domestic level on the basis of the national conception of *ethnos* and *demos* underlying each legal system and on the basis of the claims for linguistic recognition advance by the different communities.

The practice has in fact shown that legal systems that have been built on the idea of *ethnos* seem to be more likely to provide future recognition to Romanes, since their political essence has been formed around the same “cultural-linguistic” identity. Hence, at least on a *de jure* level, they are potentially more open to a more promotional recognition of the different linguistic communities living within their territories.<sup>432</sup> On the contrary, legal systems that

---

<sup>432</sup> To this regard, it can be noticed that recently (24/05/2012) in Italy, one of the countries that has been mostly built around the idea of *ethnos* there has been a proposal of amendment of the law ratifying the ECRML in order



have been built around the idea of *demos* and which emphasize a “neutral” view of the citizen, seem more reluctant in recognizing diversity, in general, and consequently linguistic diversity in particular.

At the level of Romani linguistic claims, Germany can be brought as a paradigmatic case whereby notwithstanding the recognition of Romanes under the scope of the ECRML, the parallel implementation of linguistic provisions of ECRML affecting the promotion of Romanes has not been achieved yet. On the one hand, Romanes has still not been comprehensively codified, on the other, its usage in the public/collective sphere has shown to be not “forcibly” imposed by the State if Romani communities (in the case of Germany, Roma and Sinti communities) are not willing to obtain such public recognition (yet).

---

to include Roma among the linguistic minorities recognized in Italy. Indeed, Italy has signed the ECRML but has not ratified it treaty yet.



## Chapter 5

### Economic and Social Rights

**Summary:** 5.1 Economic and social citizenship? – 5.2. Economic and social rights at international level. – 5.2.1. Economic and social rights of Roma in international jurisprudence. – 5.3. Economic and social rights at European level. – 5.3.1. Council of Europe. – 5.3.1.1. Education. – 5.3.1.2. Employment. – 5.3.1.3. Health. – 5.3.1.4. Housing. – 5.3.2. European Union. – 5.4. Individual and collective economic and social rights. – 5.5. Economic and social rights at domestic level. – 5.6. Reinforcing the enjoyment of economic and social rights for Roma at domestic level: European initiatives. – 5.7. Critical remarks.

#### 5.1. Economic and social citizenship?

In a Westphalian conception of State and nation, the requirement of citizenship was at the foundation of any array of rights. In the current legal and political frameworks, the relationship between the “formal entitlement” and the “substantial enjoyment” of rights is instead much more fluidly connected to the requirement of citizenship, particularly in the realm of economic and social rights. Indeed, “formal” citizenship is no longer and not only a necessary condition for “substantive” citizenship.<sup>433</sup> Some democratic national systems have, in fact, extended access to some economic and social rights to legally resident non-citizens as well.<sup>434</sup> Whereas other national systems have restricted, on the substantial level, the access to some economic and social rights to certain groups of citizens which are nonetheless formally entitled to the enjoyment of those rights, at least under the equality principle.

---

<sup>433</sup> R. Brubaker, *Citizenship and Nationhood in France and in Germany* (Cambridge Harvard University Press, 1992), 36-37. In T. Bottomore, "Citizenship and Social Class, Forty Years On " in *Citizenship as Social Class*, ed. T.H. Marshall (London: Pluto Press, 1992), 66.

<sup>434</sup> In the most promotional cases to some rights (particularly some economic and social rights, such as the right to health) can be extended to illegal resident non-citizens as well. This extension of basic rights beyond the citizenship requirement ensues from a natural conception of human rights according to which a person should be entitled to basic human rights, as a human being, not as a citizen of the State.

The “flexible character” of economic and social rights is intrinsic to their own nature. In doctrine, economic and social rights have in fact been defined as “programmatically rights”.<sup>435</sup> In this case, the State did not implement its legislative prerogative by refraining from any unjustified intervention (negative obligation) rather by actively engaging to ensure the implementation of these rights (positive obligation).<sup>436</sup> Art.3.2 of the Italian Constitution provides a forceful insight to clarify the “programmatically” meaning of economic and social rights:

It is the duty of the republic to remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development and the participation of all workers in the political, economic, and social organization of the country.

In other words, the State should take any legislative, administrative, judicial or practical measures necessary to ensure the implementation of these rights to the *greatest* extent,<sup>437</sup> in a way that enables citizens to access national economic and social contexts<sup>438</sup> in a non discriminatory way (obligation to fulfil).<sup>439</sup>

Accordingly, the effective implementation of economic and social rights is more dependent on the financial allocation of national resources *vis-à-vis* other categories of rights. At the same time, in case of violation, economic and social rights are less justiciable than other sets of rights which, for instance, imply a “negative obligation” from the State. *In abstracto* individuals can bring action before any national or international Court whenever any breach of a “negative obligation” occurs (for instance discriminatory treatment in the employment

---

<sup>435</sup> H.J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford: Oxford University Press, 2000), 275. Other categories of rights (especially civil and political rights) can be instead guaranteed by means of a “negative obligation” which requires the State to refrain from any intervention that can potentially bring to their violation.

<sup>436</sup> See, *infra*, section 2.1.1.

<sup>437</sup> Economic and social rights should in fact be progressively realized. As specified by Art. 2(1) of the ICESCR a State Party should ‘undertake steps individually and through international assistance and co-operation ... to the maximum of its available resources with a view to achieving progressively the full realization of the rights recognized in the ... Covenant’.

<sup>438</sup> Such as the labour market, hospitals, medical services, schools, universities and appropriate social institutions.

<sup>439</sup> On the non discrimination principle and the “obligation to fulfil” see, *infra*, section 1.5.

field) but if governments do not engage at all in positive actions even with regard to the most excluded and discriminated groups, judicial action appears very difficult to be initiated.

Indeed, it is extremely hard to precisely determine State's non-compliance to a "positive obligation" which has brought to a violation of human rights.<sup>440</sup> While, in theory, all citizens are formally entitled to the full enjoyment of economic and social rights, in practice citizens belonging to the most excluded social groups are not concretely benefiting from this set of rights, in spite of their citizenship status. This is especially the case of Roma, whose overall and widespread exclusion from the enjoyment economic and social rights in every European State has been defined in literature, as "socio-economic trap".<sup>441</sup>

This "trap" has been represented through a (vicious) cycle that funds its roots on a limited (or on a substantially inexistent) access to the right of education. The insufficient level of education produces lack of skills which in turn brings about a high risk of unemployment, a lack of income and a limited access to social assistance. People living in this precarious socio-economic dimension, easily fall in a condition of indigence which produces their social exclusion. In order to survive, these socially excluded individuals start entering informal

---

<sup>440</sup> According to Nowak: "It takes several factors to define whether actual non-compliance with a positive obligation to fulfill is no longer justifiable and, therefore, constitutes a violation of the human rights in question. These include amongst others: issues of state priority (political program, distribution of existing resources), issues of economic reasonableness (especially with cost-intensive rights such as the rights to a fair trial, education, health, standards must be higher in rich industrialized countries than in the poorest of state; see articles 2(1) and 3 of CESCR), current social developments (e.g. political or economic crises) measures of progressive realization as well as the concrete facts of the individual case. These factors need to be weighed both in advance to assess consequences of planned measures (impact assessment), as well as in retrospect during an objective (ideally a judicial assessment), as well as in retrospect during an objective (ideally a judicial) monitoring and accountability procedure". M. Nowak, *Introduction to the Human Rights Regime* (Leiden: Martinus Nijhoff Publishers, 2003), 50. On the other hand, in cases where economic and social rights can be justiciable, the judicial authority is invested with a wide margin of discretion as it has to intervene in the "free room" left by the legislator which normally implies political choices given the positive obligation intrinsic to the economic and social rights. See B. Pezzini, *La decisione sui diritti sociali. indagine sulla struttura costituzionale dei diritti sociali* (Milano : Giuffr  Editore, 2001), 197.

<sup>441</sup> European Parliament, "Measures to Promote the Situation of Roma EU Citizens in the European Union. Study," ed. Citizens' Rights and Constitutional Affairs Policy Department (Bruxelles : European Parliament, 2011), 41. In the past instead, many European States were completely disregarding the dimension of socio-cultural deprivation underlying the economic and social exclusion of Roma by focusing merely on the dimensions of poverty and unemployment. S. Baldin, "Il Consiglio d'Europa e l'inclusione sociale dei Rom e dei viaggianti," in *Il Mosaico Rom. Specificit  culturali e governance multilivello* ed. S. Baldin and M. Zago (FrancoAngeli: Milano, 2011), 162.

activities which in turn make them increasingly more marginalized by local communities: these individuals start in fact to be perceived as “hostile” precisely on the basis of the informal activities that they perform.

The inter-related chain of circular causation eventually ends where the “trap” begins: in the limited access to the right of education. This chain of economic and social exclusion is not only continuously perpetuated but further exacerbated.<sup>442</sup> Indeed, the limited access to economic and social rights reverberated on an as much limited access to other sets of rights given the relationship of indivisibility and interdependency characterizing all human rights.<sup>443</sup>

According to human rights theory, the development of economic and social rights followed after the evolution of civil and political rights.<sup>444</sup> In other words, the formal entitlement to civil and political rights was considered being the pre-requisite for the effective enjoyment of economic and social rights. When considering the dimension of “substantive citizenship” in the current framework a countertendency seems emerging: the enjoyment of economic and social rights is increasingly becoming the practical prerequisite to fully access any other category of rights. Indeed, citizens who are unable to fully enjoy their social and economic rights because there are constrained in the “socio-economic” trap cannot considered being fully “State-members”.

## **5.2. Economic and social rights at international level**

International law recognizes the wide spectrum of economic and social rights in a number of legal instruments. The paramount treaty devoted to the protection and promotion of this set of rights is the ICESCR. Economic and social rights find protection, although incidentally, in

---

<sup>442</sup> See also D. Ringold, M. O. Orenstein, and E. Wilkens, "Roma in an Expanding Europe. Breaking the Poverty Cycle," (Washington, D.C. : World Bank 2005).

<sup>443</sup> As established at points 4 and 5 of the 1993Vienna Declaration and Program of Action of the World Conference on Human Rights. See, *inter alia*, Nowak, *Introduction to the Human Rights Regime*, 23.

<sup>444</sup> More specifically, in legal theory economic and social rights were identified as “third generation” of rights whereas civil and political rights were respectively identified as “first” and “second” generations of rights N. Bobbio, *L'età dei diritti* (Torino : Einaudi 2005).

other international treaties as well, in particular: in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), in the International Convention on the Elimination of All Forms of Discrimination Against Women (ICEDAW), in the Convention on the Rights of the Child (CRC), in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC), in the International Labour Organization's (ILO) Indigenous and Tribal Peoples Convention (No. 169), and in the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Elimination of Discrimination in Education.

Minorities are entitled, *in abstracto*, to same economic and social rights of any other people but in practice they may have particular difficulties in accessing these rights. Especially provisions connected to the preservation of minority identity do not often find substantial implementation for minority groups (such as the right to education), not only because they require that States demonstrate an active involvement to implement these rights but also because these social groups are more exposed to discrimination based on ethnicity and language.

In order to guarantee more effective access to these social groups that could potentially be more excluded from the substantial enjoyment of economic and social rights, some treaties have formulated these rights by explicitly addressing minorities and indigenous peoples.<sup>445</sup> The practice has shown that these social groups may face particular difficulties in accessing economic and social rights especially in four main areas: education, employment, health and housing.

---

<sup>445</sup> See, *inter alia*, Art. 30 CRC, Art. 27 ICCPR, CERD General Recommendation XXIII on the Rights of Indigenous Peoples, UN doc. CERD/C/51/Misc.13/Rev.4, 1997; CERD General Recommendation XXVII on Discrimination against Roma, UN doc. A/55/18, annex V, 2000. The scope and the application of economic and social rights have further been specified in the General Comments of treaty bodies, in the rulings of regional courts and in the opinions of regional commissions.

As the “socio-economic trap” has revealed, education can in fact play either a “cohesive” or a “divisive” role in regulating the existence of minority groups within the mainstream society. Especially in multicultural societies, education is one of the key medium through which different (minority) cultures can be either annihilated (by means of assimilationist educational policies) or promoted (by means of multicultural educational policies). The ways through which such a right is effectively implemented as to preserve minority cultures very much depends on the domestic level.

At the level of international human and minority rights law, the right to education has been firstly enshrined in the UDHR at Art.26. Soon after, it has been incorporated in several binding international treaties, including the ICERD (Art. 5(e)(v); ICESCR (Arts. 13 and 14); the ICEDAW (Art. 10) the CRC (28 and 29), and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Art. 10). Although there are different ways through which the right to education can find effective implementation, at the international law level some minimum core obligations have been identified with regard to the right to education.

These obligations should be guaranteed to every citizen of the State, minorities included: free access to public and educational institutions and programs on a non-discriminatory basis, primary education for all, adoption and implementation of a national educational strategy which includes provision for secondary, higher and fundamental education, free choice of education without interference from the state or third parties, subject to conformity with minimum educational standards.<sup>446</sup> As Wilson comments “the scope of education rights extends beyond equal access to include the content and means of delivery of education”.<sup>447</sup> In

---

<sup>446</sup> CESCR General Comment No.13, para. 57.

<sup>447</sup> D. Wilson, "Education Rights," in *Economic, Social and Cultural Rights: A Guide for Minorities and Indigenous Peoples* ed. M.E. Salomon (available at [www.minorityrights.org/download.php?id=50](http://www.minorityrights.org/download.php?id=50): *Minority Rights Group 2005*), 55.



other words, the fact that the right to education is assured is not in itself sufficient: it requires multicultural promotional policies for minorities to effectively benefit of this principle.

In the realm of employment, international law regulates the rights of the workers by means of a twofold set of sources: the general protection offered by the United Nations system and the standards adopted by the International Labour Organization (ILO). As for the UN system, the two International Covenants are the points of reference in setting binding principles. The ICESCR provides for a set of rights which includes: the right to work (Art.6), the right to just and favourable conditions of work (Art. 7), freedom of association and the right to establish and join trade unions (Art.8), the right to social security (Art. 9), the right related to family (Art.10)<sup>448</sup> and the rights related to technical and vocational training (Art.13). The ICCPR offers instead a protection especially with regard to trade unions rights (Art.22).

The ILO offers instead some more specific labour standards focused on minority rights and indigenous people rights.<sup>449</sup> Particularly the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and its accompanying Recommendation No. 111 are the main general ILO instruments targeting minority labor rights, whose implementation is monitored by the ILO's main supervisory body: the Committee of Experts on the basis of periodical reports submitted by States Parties. Other ILO instruments can offer an incidental protection to minority rights as they specifically target other categories of workers (such as indigenous people,<sup>450</sup> migrant workers,<sup>451</sup> and child labor<sup>452</sup>).<sup>453</sup>

---

<sup>448</sup> Including the protection of working mothers and prevention of exploitation of children.

<sup>449</sup> The rights provided by the ILO's legal framework to indigenous peoples is more extensively discussed at chapter 8.

<sup>450</sup> See the ILO's Indigenous and Tribal Peoples Convention (No. 169).

<sup>451</sup> See especially the ILO Migration for Employment Convention (Revised), 1949 (No. 97) and the ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)

<sup>452</sup> The ILO Minimum Age Convention, 1973 (No. 138) and the Worst Forms of Child Labour Convention, 1999 (No. 182), provide for the elimination of child labour in respect to *all* persons. Additionally, recommendation No. 146, paragraph 2(c), provides that policies for the elimination of child labour should include the development and progressive extension of social security and family welfare measures.

In the realm of health, the core provision is Art.12 of the ICESCR which requires States Parties to promote the highest attainable standard of health. On this legal formulation, other definitional approaches have built such as those enshrined within Art.24 of the CRC, CEDAW (Art.12), ICERD (Art.5 (e) (iv)), ILO's Indigenous and Tribal Peoples Convention (No. 169) (Art. 25). In General Comment No.14 of the CESCR has clarified some minimum obligations that the States should assure when implementing the right to health.

Of particular importance for minorities and indigenous people are the minimum obligations referred to the accessibility to the right to health. General Comment No. 14 of the CESCR interprets the notion of "health accessibility" as including: the right to seek, receive and impart information and ideas concerning health issues (d) so that health facilities, goods and services are accessible to all in law and in fact (a) including the economic accessibility (c) and the overall accessibility also in suburbs areas such as the rural areas (b).

The CERD committee and the UN Special Rapporteur on the Right to Health monitor at the international level the substantial enjoyment of the right to accessibility to the right to health by minority groups. According to Yamin, in the case of disadvantaged populations, such as minorities and indigenous peoples, the State bears responsibility not only for protecting and promoting the minimum health standards identified by the CESCR but also for eliminating early mortality and greater morbidity considered being a pressing question of social justice.<sup>454</sup>

In the realm of housing, the international protection specifically hinges on two international provisions: Art. 11 (1) of the ICESCR and Art. 14(2)(h) of the CEDAW. Although the international jurisprudence has considered the right to housing as strongly linked to the right

---

<sup>453</sup> L. Sweptson, "Labour Rights," in *Economic, Social and Cultural Rights: A Guide for Minorities and Indigenous Peoples* ed. M.E. Salomon (available at [www.minorityrights.org/download.php?id=50](http://www.minorityrights.org/download.php?id=50): Minority Rights Group 2005).

<sup>454</sup> A.E. Yamin, "Health Rights," in *Economic, Social and Cultural Rights: A Guide for Minorities and Indigenous Peoples* ed. M.E. Salomon (available at [www.minorityrights.org/download.php?id=50](http://www.minorityrights.org/download.php?id=50): Minority Rights Group 2005), 41.

to access land, since often there can be no access to housing without access to land, nowhere it has been explicitly stated that the former “automatically” gives right to the latter.

Practically, the right to housing concretizes on a basic obligation on the State to respect people’s own housing and land resources (for instance by not carrying arbitrary evictions) to promote housing and (where explicitly recognized) land rights, to protect against violations by other non-state actors (such as landlords, property developers and multinationals) to fulfill the rights through public expenditure and regulation.<sup>455</sup> As in the case of health, the international monitoring over the domestic compliance to the international standards in the realm of housing is carried out mostly by the UN Special Rapporteur on Housing.

Notwithstanding this wide set of economic and social rights in international law, Roma, as already discussed, often do not have access to these rights. For this reason, international advocacy groups have used – especially in the last decade –international monitoring mechanisms in order to bring gross violations of economic and social rights suffered by this group before the international arena. At the moment, however, the cases considered by international human rights monitoring bodies mostly focus on the right to existence of this social group and, *only incidentally* on economic and social rights, given the extent of human rights violations suffered by Roma.

### **5.2.1. Economic and social rights of Roma in international jurisprudence**

A first set of cases was brought before the CERD Committee. In *Koptova v. Slovak Republic*,<sup>456</sup> the applicant complained a breach of several articles of the CERD which mostly referred to acts of public discrimination against Roma. Ms. Koptova, the applicant, complained that these discriminatory acts mostly interfere, *inter alia*, with her rights to free

---

<sup>455</sup> I. Byrne, "Housing Rights," in *Economic, Social and Cultural Rights: A Guide for Minorities and Indigenous Peoples* ed. M.E. Salomon (available at [www.minorityrights.org/download.php?id=50](http://www.minorityrights.org/download.php?id=50): Minority Rights Group 2005), 29.

<sup>456</sup> *Koptova v. Slovak Republic* (2000) CERD/C/57/D/13/1998.

movement and residence. Nonetheless, in this case an incidental breach of employment rights can be foreseen since Ms. Koptova started to move precisely because at the end of 1989, the agricultural cooperative where she was working closed and she consequently lost her job. Indeed, insofar as her living quarters at the cooperative were linked to their employment, she was compelled to leave the cooperative. Upon departure, the authorities demolished the stables which she had occupied.

In the examination of the merits, the Committee did not engage with the question of employment (as it was not formally raised in the complaint) but it nonetheless required the State party to take the necessary measures to ensure that practices restricting the freedom of movement and the residence of Roma under its jurisdiction were fully and promptly eliminated (such as the freedom of movement and residence is guaranteed under article 23 of the Constitution of the Slovak Republic).

In *L.R. et al. v. Slovak Republic* (2003),<sup>457</sup> the applicants alleged the violation of some non discrimination provisions within the CERD especially with regard to governmental authorities and public institutions to act in conformity with their obligations. In this case, about 1.800 Roma live in the town of Dobsiná in a very unhealthy environment “with most dwellings comprising thatched huts or houses made of cardboard and without drinking water, toilets or drainage or sewage systems” (§2.1). In 2002, the local mayor prepared a project aimed at securing better life conditions for the Romani community living in the town.

Soon after, the local inhabitants of the town filed a petition in order to stop the housing project for Roma, considered being in the petition “inadaptable citizens” (§2.2.). The highly discriminatory content of the petition opened a strong domestic controversy which concluded before the Constitutional Court. In its decision, the Court did not analyze whether the content of the petition was “lawful”, rather it found that the petition “lawful” in form as it stated that

---

<sup>457</sup> *L.R. et al v. Slovak Republic* (2003) CERD/C/66/D/31/2003.

citizens have the right to petition, regardless of its content. The Committee built on the previous *Koptova* case by stating that racial discrimination has occurred since it amounted to the impairment of the recognition or exercise on an equal basis of the right to housing protected by Art. 5 (c) CERD and by Art. 11 ICESCR.<sup>458</sup>

Another complaint was brought before the CEDAW Committee in 2004 by a Hungarian Romani woman who was sterilized without formally providing her informed consent.<sup>459</sup> The Committee found a breach of Art.12 (non discrimination in healthcare) and of Art.16.1(e) (equality between men and women in accessing information) of the CEDAW and request the State to provide adequate compensation.

This first set of cases considered by international human rights monitoring bodies constitutes a strong ground to root more specific case-law on economic and social rights in the next future. However, as emphasized at section 5.1., economic and social rights are by nature “programmatically rights”, thus even when more specific developments will occur the effective application and the substantial implementation of this set of rights primarily relies on the State’s active engagement. Thus, their implementation will be always strictly connected to the availability of financial resources and to the discretion of the legislator.

### **5.3. Economic and social rights at European level**

At the European level, economic and social rights are mostly enclosed in the geo-legal spheres of the CoE and the EU. Indeed, the mandate of the OSCE does not specifically deal with economic and social rights. As already discussed, this organization was created on the

---

<sup>458</sup> Other cases claiming racial discrimination against Roma have been brought before the CERD Committee. *Lacko v. Slovak Republic* (1998) CERD/C/59/D/11/1998 and *Durmic v. Serbia and Montenegro* (2003) CERD/C/68/D/29/2003. They were cases of racial discrimination against involved which, however, did not involve economic and social rights.

<sup>459</sup> *A.S. v. Hungary* (2004) CEDAW/C/36/D/4/2004.

legacy of the CSCE and thus its mission mostly involves the promotion of human rights more in a cultural-political perspective than in a “purely” economic and social one.<sup>460</sup>

At the level of the CoE, economic and social rights are enshrined in several statutory instruments, although it is through the jurisprudence of the ECSR and the ECtHR that this set of rights has been developed in relation to the needs of Roma. At the level of the EU instead, economic and social rights represents one of the key pillars on which the European integration has been developing. Yet, the current legal framework lacks specific provisions addressing the economic and social rights of minorities in general and of Roma in particular. In order to foster the effective enjoyment of economic and social rights for Romani communities, the EU has recently developed a “Framework for National Roma Integration Strategies up to 2020” which has required Member States to actively promote economic and social measures to better target the European Romani community.

### **5.3.1. Council of Europe**

At the CoE level, the rights to education, employment, health and housing are protected and promoted – to different degrees and extents – within the main CoE treaties: the ECHR, the FCNM, the ECRML and the ESC.<sup>461</sup> Especially in the last two decades, the legal activity of

---

<sup>460</sup> Nonetheless, in some documents the OSCE referred to the economic and social rights area, especially with regard to the right to education and right to employment. In “the Hague Recommendations regarding the education rights of national minorities, and Explanatory Note, 1996” (see in particular the Section dedicated to “The spirit of international instruments), in “the Istanbul Summit Declaration” (see in particular §10) and in “Decision No. 4/03 Tolerance and Non-Discrimination” (see in particular § 10) the OSCE generally referred to the right to education for minority groups. A specific reference to the need to improve the education for Roma in Europe can instead be found in the “Document of the Maastricht Ministerial Council, 2003, Annex to Decision No. 3/03: Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area” (see in particular § 85 and 86). The OSCE considered the right to employment in relation to minorities in “Explanatory Note to The Hague Recommendations Regarding the Education Rights of National Minorities” (see in particular the Section dedicated to “Minority education in vocational schools”) and in “the Lund Recommendations on the Effective Participation of National Minorities, and Explanatory Note, 1999” (see in particular the Section dedicated to Advisory and Consultative Bodies).

<sup>461</sup> In particular, the right of education is protected in the ECHR by Protocol 1 Art.2; in the FCNM at Arts. 6, 12, 13 and 14; in the ECRML at Art.8; in the ESC at Arts. 7.1, 7.3., 10.1, 11.2 and 15.1. The right to employment is indirectly and partially protected by Art. 4 of the ECHR and Art.12 of the ECRML and it is instead directly protected by ESC at Part 1 Paragraphs 20, 24 and 27 and at in Part 2 at Arts. 1, 2, 3 and 4. It is also incidentally protected by Arts. 6,7.2 and 8. The right to health is protected indirectly as a form of restriction to other rights in the ECHR and in the ECRML respectively at Art.8.2,9.2,10.2 and 11.2 and at Art.11.2. The right to health finds instead direct protection by the ESC in Part 1 at Paragraphs 3 and 11, in Part II at Arts.2.4, 3, 7.1, 7.5, 11, 13, 19,

the CoE has focused on Roma in order to further strengthen the enjoyment of this set of rights for this social group as well in the areas of education, employment, health and housing.

### 5.3.1.1. Education

In the realm of education, the Committee of Ministers of the CoE has recently advocated in Rec(2009)4 the “unhindered access to mainstream education at all levels” for Roma according to the same criteria as the majority of the population.<sup>462</sup> In 2010, in the CoE “Strasbourg Declaration on Roma” Member States were also invited to “ensure effective and equal access to the mainstream educational system, including pre-school education, for Roma children and methods to secure attendance, including, for instance, by making use of school assistance and mediators”.<sup>463</sup>

Overall Europe, Romani children face several difficulties with regard to the effective access to education. The school drop-out rate for Romani pupils has in fact generally shown to be disproportionately high *vis-à-vis* mainstream pupils. Indeed, Romani pupils are often excluded from accessing formal schooling and they frequently face segregation and other forms of separation or substandard educational arrangements. In some Romani communities which still preserve patriarchal practices, the access to education for Romani girls is even more difficult to be guaranteed than the access to education of boys, as girls leave school earlier in order to get married.<sup>464</sup>

---

23, in Part 5 at Arts. E and G. The right to housing finds explicit recognition in the ESC in Part 1 at Paragraph 31, in Part 2 at Arts. 15.3, 16, 23 (a), 30 (a) and 31.

<sup>462</sup> The Council of Europe Committee of Ministers Recommendation (2009)4 on the education of Roma and Travellers in Europe. See also Recommendation No R (2000) 4 of the Committee of Ministers to member states on the education of Roma/Gypsy children in Europe.

<sup>463</sup> Council of Europe High Level Meeting on Roma, Strasbourg, 20 October 2010, “The Strasbourg Declaration on Roma”, CM(2010)133 final §33.

<sup>464</sup> To this regard, the Open Society Institute has published a study with specific reference to the case of Romania where it has been highlighted “there is a gender gap in access to formal education between Romani women (among whom, 23 percent has not received any formal education) and Romani men (among whom, 15 percent have not received any formal education). The gap in access to formal education is even more significant between Romani women and women in the general population. At 23 percent, the number of Romani women who have not received any kind of formal education is almost six times higher than among women in the general population (4 percent)”. M. Surdu and L. Surdu, “Broadening the Agenda: The Status of Romani Women in

In the last years, the ECtHR has ruled in three cases with regard to the right to effective access to education for Romani pupils: *D.H. and Others v. Czech Republic*,<sup>465</sup> *Sampanis v. Greece*<sup>466</sup> and *Oršuš v. Croatia*.<sup>467</sup> *D.H. and Others* is the leading case of the ECtHR jurisprudence recognizing for the first time, a violation of Art.14 in connection to Art.2 Protocol 1 of the ECHR.<sup>468</sup> The case involved 18 Romani pupils who were placed in special schools for mentally disabled children, on the basis of the results of psychological tests aimed at measuring children's intellectual capacity. These tests were neither objective nor reliable, as they were devised exclusively for Czech children without being standardized for Romani children who consequently presented both cultural and linguistic disadvantages *vis-à-vis* Czech pupils.

The applicants supported their claim by presenting statistical data which demonstrate that 56% of pupils attending "special schools" in the city of Ostrava were of Romani origin. From the analysis of these data, it derived that a Romani pupil was proportionally likely to attend a "special school" 27 times more than a non-Romani pupil. The data presented in relation to the city of Ostrava were further supported through other studies developed by international organizations. These studies demonstrated that Ostrava was not an isolated case since the same indicators were part of a more generalized trend.

However, since the law that was disciplining the system of "special schools" in Czech Republic was not openly discriminating Romani pupils on the basis of their ethnicity, the Court built its reasoning on the concept of indirect discrimination in order to effectively deal

---

Romania " (New York: Open Society Institute 2006). Cited in CoE, *Human Rights of Roma and Travellers in Europe* (Strasbourg Council of Europe Publishing 2012), 131-32.

<sup>465</sup> *D.H. and Others v. Czech Republic*, Application No. 57325/00, Chamber decision of 7 February 2006 Grand Chamber decision of 13 November 2007. The case has already partly discussed in section 4.4. The case is further recalled in section 6.3.2.1.

<sup>466</sup> *Sampanis v. Greece*, Application No. 32526/05, European Court of Human Rights, decision of 5 September 2008.

<sup>467</sup> *Oršuš v. Croatia*, Application No. 15766/03, European Court of Human Rights Chamber decision of 17 July 2008, Grand Chamber decision of 16 March 2010.

<sup>468</sup> A minimum discussion on this case was anticipated at section 4.4.



with this case. Notwithstanding some previous jurisprudential attempts which were already in line with this new jurisprudential direction,<sup>469</sup> in *D.H.* the Court held for the first time that a breach of the non discrimination principle can occur even in cases where the law is not openly discriminatory but its application amounts to a disadvantage for a particular social group. In the Court's wording "such a situation may amount to "indirect discrimination",<sup>470</sup> which does not necessarily require a discrimination intent".<sup>471</sup>

Building on these premises, the Court found that the Czech practice *de facto* amounted to racial segregation and indirect discrimination since it determined the existence of a double-standard educational system: "ordinary" schools for mainstream pupils and separate special schools for Romani pupils. Indeed, that difference between the two systems was not based on any objective and reasonable justification, therefore, it fully amounted to deprivation of the right to education, as the curriculum followed in special schools was inferior and pupils in special schools were unable to return to primary school or to obtain a secondary education other than in a vocational training centre.<sup>472</sup>

In *Sampanis*, the Court ruled once again on a case of school segregation by finding a violation of Art.13 and Art.14 in connection with Art.2 Protocol 1 of the ECHR.<sup>473</sup> In this case, Romani pupils living in the area of Psari were put in a special school built exclusively for them in the

---

<sup>469</sup> D. Strazzari, "C'è un giudice a Strasburgo! La Corte Europea dei Diritti dell'Uomo e la tutela contro la discriminazione degli appartenenti all'etnia Rom " in *Il Mosaico Rom. Specificità culturali e governance multilivello* ed. S. Baldin and M. Zago (FrancoAngeli : Milano, 2011), 196.

<sup>470</sup> It has been highlighted that the ECtHR restricts the notion of "indirect discrimination" only to those cases "concerning the employment or the provision of services" (such as the educational sphere) where it is not necessary "to prove any discriminatory intent on the part of the relevant authorities" (§194). As regards to other cases that are more strictly connected to other areas, such as civil and political rights, the applicant has instead to prove the "discriminatory intent" of public authorities as to support the "indirect discrimination" claim.

<sup>471</sup> §184.

<sup>472</sup> According to the Court *D.H. and Others* § 196: "a difference in treatment is discriminatory if "it has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality" between the means employed and the aim sought to be realised (see, among many other authorities, *Larkos v. Cyprus* [GC], no. 29515/95, § 29, ECHR 1999-I; and *Stec and Others*, cited above, § 51). Where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible".

<sup>473</sup> The doctrine has repeatedly identified a parallelism in the jurisprudential recognition of discriminated school access for Romani pupils in Europe with the case *Plessy v. Ferguson* (1896) whereby the US Supreme Court proclaimed the famous principle "separate but equal". See, *inter alia*, J. Devroye, "The Case of D.H. And Others V. The Czech Republic," *Northwestern Journal of International Human Rights* 7, no. 1 (2009).

commune of Aspropyrgos. This special school was built in 2007 after that the “special needs” classes for Romani pupils, housed in an annex to the main building, got mysteriously fired. In the case of Aspropyrgos, Romani children were not put in a separate school system as a result of psychological tests, as in the case of Czech Republic, rather as a result of the explicit unwillingness of the mainstream society to accept them in regular schools. In fact, firstly in the year 2004/2005 Romani children were denied the enrolment to regular school by two school directors, and successively in the year 2005/2006 Romani children (that after the intervention of national authorities were eventually achieving the formal enrolment to schools) were denied access to regular schools by non-Roma parents who were strongly protesting against their access to school.

In its decision, the Court based upon *D.H. and Others* by reaffirming once again that racial discrimination takes place whenever the enjoyment of a fundamental right is restricted on the basis of the ethnic origins of a person. Moreover, in this case, the Court considered the right to education for minor pupils and especially for Romani pupils as a “primordial right”.<sup>474</sup> Indeed, by recalling its previous jurisprudence the Court reaffirmed also in this occasion that special consideration on Romani needs and lifestyle should be paid in the light of the widespread vulnerability suffered by this social group, and in the light of the fact that protection of minorities is not only considered a value in the interest of the minority group *per se* but also in the interest of the society as a whole.<sup>475</sup>

In *Oršuš*, the Court found a case of school segregation in Croatia by finding a violation of Art. 6.1 and Art. 14 in connection with Art.2 Protocol 1 of the ECHR. In this case, school segregation involved fourteen Romani pupils of the primary schools of in Orehovica, Podturen and Trnovec who, at times, were put in special classes for Romani pupils and, at times, were attending mixed classes. While the State alleged that pupils of Romani origin

---

<sup>474</sup> § 72.

<sup>475</sup> § 73.

were often grouped together because they usually did not speak Croatian, and thus more exercise and repetitions were needed for them to master the subjects, the applicants claimed instead that the “Roma-only” classes were providing a lower educational level both in volume (about 30 percent of class less) and in scope compared to the officially prescribed curriculum. For this reason, the applicants claimed that the situation described was racially discriminating and it was violating their right to education.

In its decision, the Court recalled the principle of balancing exercise between competing interests that was already used in *D.H. and Others* when trying to assess the best means to address learning difficulties of children lacking proficiency of the language of instruction.<sup>476</sup> In analyzing the schooling arrangements for Romani children, the Court found out that these arrangements were not sufficiently attended by safeguards ensuring sufficient regard to the special needs of Roma. Moreover, the schools were following non-transparent and unclear criteria when placing Romani pupils in separate classes or when transferring them to mixed classes.

In conclusion, although the Court recognized the relevant efforts made by Croatian authorities to ensure that Romani children received schooling, it also found out that there was no adequate safeguards in place which could be capable, in the Court’s words,

of ensuring that a reasonable relationship of proportionality between the means used and the legitimate aim said to be pursued was achieved and maintained. It follows that the placement of the applicants in Roma-only classes at times during their primary education had no objective and reasonable justification.<sup>477</sup>

Yet, according to the dissenting opinions, this case should have been considered substantially different from *D.H and Others*, although dealing with school segregation. In particular, the eight dissenting judges argued that the consideration on indirect discrimination against Roma was not sufficiently supported. While, *in abstracto*, such consideration can be proved without

---

<sup>476</sup> §180.

<sup>477</sup> § 184.

statistical data, in practice it needs to concretely show the adverse impact on the applicants. In this case, the dissenting judges considered the indirect discrimination alleged by the applicants unfounded since even when attending separate classes Romani pupils, in the words of judges, did not “have impeded or undermined their prospects of further education. All those who completed primary school have the same possibilities of reaping the benefits of their education”.<sup>478</sup>

Additionally, the dissenting judges argued, on a more general level, that whenever the ECtHR has been declaring that a certain margin of appreciation has to be left to the States, the Court has been nonetheless attentive in not overstepping its role. This was particularly the case (as in *Oršuš*), where a large number of judges in the Court have expressed their support for the approach promoted by the Croatian Constitutional Court. Otherwise, the risk would be that both the respondent State, or any other State party to the Convention faced with schooling problems in relation to minority groups, would be not effectively able to follow the present judgment. According to the dissenting argumentation, this kind of decisions which “collapse” with Constitutional Court’s tendency, risk instead to produce the counter-effect of depriving the Court’s decision of any concrete effect.<sup>479</sup>

The controversial judicial positions on this case, sheds some light on an issue which is intrinsic to the development of the concept of “indirect discrimination” in the ECtHR jurisprudence: how the alleged discrimination should be proved by the applicant. In *D.H. and Others* the Court, in fact, stated that in those cases concerning the provision of services, the principle of “reverse burden of proof” should be applied in order to prove the alleged indirect discrimination. Yet, both in the ECtHR first jurisprudence on “indirect discrimination” and on the more “matured” British and American jurisprudential experiences, the evaluation of

---

<sup>478</sup> § 11 Joint partly dissenting opinion of Judges Jungwiert, Vajić, Kovler, Gyulumyan, Jaeger, Myjer, Berro-Lefèvre and Vučinić.

<sup>479</sup> § 19, *ibidem*.

statistical evidence aimed at proving the indirect discrimination appears quite problematic.<sup>480</sup> While in *D.H. and Others* and in *Sampanis*, the Court holds that statistical data can be considered as relevant to prove “indirect discrimination” if the impact of the alleged disproportionate measures is higher of 50 percent in relation to the affected group, in *Oršuš* the Court controversially holds “indirect discrimination may be proved without statistical evidence”.<sup>481</sup>

The jurisprudential developments of the ECtHR have shown an emerging legal trend which addresses the rights not only of the individual but also of the social group of belonging through the concept of indirect discrimination as to reinforce the equality principle. However, this jurisprudence should further develop to be sufficiently strong to sort “concrete effects” for Roma, particularly as the dissenting opinion of *Oršuš*’s has hoped for.

### **5.3.1.2. Employment**

As anticipated in the first section of this chapter, the partial or (inexistent) access to the right to education for the majority of Roma makes them fall in the circular causation chain of deprivation called “socio-economic trap” whose direct consequence is the lack of skills to successfully access the labor market. As a consequence of under-education and high discrimination, Roma have often managed to find forms of employment at the margins of economy.

However in the employment area, the CoE has so far not developed any jurisprudence specifically addressing the needs of Roma from a holistic perspective. According to, *inter alia*, the Advisory Committee on the FCNM, some countries have made some efforts to improve the access of Roma to the labor market by either increasing their professional

---

<sup>480</sup> Strazzari, "C'è un giudice a Strasburgo! La Corte Europea dei diritti dell'uomo e la tutela contro la discriminazione degli appartenenti all'etnia Rom ", 198.

<sup>481</sup> “In this connection the Court notes that the measure of placing children in separate classes on the basis of their insufficient command of the Croatian language was applied only in respect of Roma children in several schools in Medimurje County, including the two primary schools attended by the applicants in the present case. Thus, the measure in question clearly represents a difference in treatment”. § 153.

qualifications and competitiveness or by attracting Roma to self-employed projects, or finally by trying to reduce their social exclusion.<sup>482</sup> Yet, a long-term commitment devised from a holistic perspective with the aim of reinforcing coordination among national, regional and local organizations in anti-discrimination perspective, seems far from being achieved in line with principles already enshrined in Rec(2001)17 on the economic and employment situation of Roma/ Gypsy and Travellers in Europe.<sup>483</sup>

### 5.3.1.3. Health

Throughout Europe, the overall life-expectancy of Roma is much shorter than other individuals. This derives not only from the infant mortality rate but also from the general factors precluding Roma from the effective access to healthcare.<sup>484</sup> Additionally, the overall enjoyment of the right to health is seriously jeopardized by the living conditions of the majority of Roma who are often settled in slums where they experience very precarious hygienic conditions.<sup>485</sup>

Indeed, in the CoE Recommendation Rec(2006)10 on better access to health care for Roma and Travellers in Europe, Member States have been requested, *inter alia*, that Roma living in their countries are ensured equal access to health as well as adequate guarantees and resources to guarantee the proper implementation of these rights. States have been further requested to pay special attention to the vulnerable groups of women (especially with regard to sexual and reproductive health) and children (especially with regard to postnatal care) and to train their medical staff to Romani culture and Romani peculiar needs.<sup>486</sup>

---

<sup>482</sup> CoE, *Human Rights of Roma and Travellers in Europe*, 164-65.

<sup>483</sup> Council of Europe, Committee of Ministers, Recommendation Rec(2001)17 on improving the economic and employment situation of Roma/Gypsies and Travellers in Europe.

<sup>484</sup> Ringold, Orenstein, and Wilkens, "Roma in an Expanding Europe. Breaking the Poverty Cycle," 48.

<sup>485</sup> F. Motta and S. Geraci, "L'accesso di Rom e Sinti al diritto e alla tutela della salute," in *La condizione giuridica di Rom e Sinti in Italia*, ed. P. Bonetti, A. Simoni, and T. Vitale (Milano : Giuffr  Editore 2011).

<sup>486</sup> Council of Europe, Committee of Ministers, Recommendation Rec(2006)10 of the Committee of Ministers to member states on better access to health care for Roma and Travellers in Europe.

While the ECHR does not entitle individuals to a specific right to medical treatment, the ECS entails instead an extensive set of rights protecting the health sphere.<sup>487</sup> Although based upon different premises, both the ECtHR and the ECSR Committee have highlighted the persistence of the same legal gaps for the effective enjoyment of economic and social rights of Roma in the healthcare sphere, as already highlighted by the CoE Rec(2006)10.

Even in the lack of a specific legal provision, very recently the ECtHR decided on three cases which, *inter alia*, affected the protection of the right to health, more specifically the protection of reproduction rights in the Slovakia. These cases developed one of the “last frontiers” of the ECtHR’s Roma rights jurisprudence on a path of Roma rights litigations that was already started to be paved by the CEDAW Committee in the case *A.S. v. Hungary*.<sup>488</sup>

In *V.C. v. Slovakia*<sup>489</sup> a Romani woman filed a complaint before the Court since she was sterilized in a public hospital immediately after having given birth to her second child. As a result of her sterilization, the woman was ostracized by her community and dismissed by her husband. The woman cited infertility as one of the reasons of her divorce. However, no full and informed consent was given by the woman before sterilization since she claimed that she signed a form without understanding that the process was irreversible. In its decision, the Court unanimously held that a violation of Art.3 and Art.8 of the Convention occurred.

As for the violation of Art.3, the Court argued that although there was no proof that the medical staff concerned had intended to ill-treat Ms. V.C., they had acted with gross disregard to her right to autonomy and choice as a patient. In relation to the violation of Art.8, the Court

---

<sup>487</sup> The right to health finds instead direct protection by the ESC in Part 1 at Paragraphs 3(healthy working conditions) and 11 (right to enjoy the highest possible standard of health), in Part II at Arts.2.4 (to eliminate risks in inherently dangerous or unhealthy occupations), 3 (right to safe and healthy working conditions), 7.1 (minimum age to admission to employment as to avoid any harm to health), 7.5 (work prohibition for pregnant women), 11 (the right to protection of health), 13 (social care facilities), 19 (The right of migrant workers and their families to protection and assistance), 23 (The right of elderly persons to social protection), and indirectly in Part 5 at Arts. E (non discrimination) and G (restrictions).

<sup>488</sup> See section 5.2.1.

<sup>489</sup> *V.C. v. Slovakia*, Application No. 18968/07, European Court of Human Rights, decision of 8 November 2011.

argued that the applicant's sterilization affected her reproductive health status and had repercussions on various aspects of her private and family life. However, in the light of the ethnic origins of the woman the Court considered that a violation of Art. 14 occurred as well. Indeed, the Court considered only the interference with Art.8 as this issue affected one of Ms. V.C.'s essential bodily functions and entailed numerous adverse consequences for, in particular, her private and family life.<sup>490</sup>

In *N.B. v. Slovakia*<sup>491</sup> a Romani woman was sterilized in a public hospital after having delivered her second child by caesarean section without informed consent. Besides not providing informed consent to the woman who was minor at that time, doctors also failed to ask informed consent from their legal guardians as required by the Slovak law. The Court ruled, in the same way as in *V.C.*, that both, Art. 3 and Art.8, had been violated and that there was no need to separately consider a violation of Art. 14.

In *I.G. and Others v. Slovakia*<sup>492</sup> again three Slovak women of Roma origin, two of whom were minors at the relevant time, claimed that they were involuntarily sterilized in 2000, 1999 and 2002 respectively in a public hospital during childbirth via caesarean section. Building on the previous *V.C.* and *N.B.* cases, the Court argued that sterilization as such was not, in accordance with generally recognised standards, a life-saving medical intervention. Moreover, the Court held that whenever sterilization was carried out without the informed consent of a mentally competent adult, it was incompatible with the requirement of respect for human freedom and dignity. Following the same line of reasoning as in previous cases of *V.C.* and

---

<sup>490</sup> In this case, the Court could not consider the argument of ethnic discrimination towards Ms. V.C. since "the materials before the Court indicate that the practice of sterilisation of women without their prior informed consent affected vulnerable individuals from various ethnic groups". See § 177.

<sup>491</sup> *N.B. v. Slovakia*, Application No. 29518/10, European Court of Human Rights, decision of 12<sup>th</sup> June 2012.

<sup>492</sup> *I.G. and Others v. Slovakia*, Application No. 15966/04, European Court of Human Rights, decision of 13<sup>th</sup> November 2012.



*N.B.*, the Court found a violation of Art.3 and a violation of Art.8 with no need for consideration of Art.14.<sup>493</sup>

The first complaint brought before the ESC deals instead with a breach of health rights in the realm of national insurance legislation in Bulgaria. In *ERRC v. Bulgaria*<sup>494</sup> the European Roma Rights Centre (ERRC)<sup>495</sup> precisely held that Bulgarian legal system of health insurance breaches Art.11 and Art.13 taken alone or in conjunction with Art. E (the right to social and medical assistance) of the European Social Charter since this legislation discriminates Roma (together with other social groups) as it does not adequately address the specific health risks of the Romani communities. At the same time, ERRC alleged discriminatory practices on the part of health care practitioners against Roma to which the government did not actively engage to put an end. In this case, the Committee found both breaches alleged by the applicants funded and ruled against the Bulgarian government both in relation to Art. 11 and to Art. 13.

Yet, in its dissenting opinion, Judge Ciampi was not agreeing on the majority opinion by explaining, *inter alia*, that many Roma cannot exercise the right to state-subsides health insurance because they turn to be not “unable” rather more or less consciously “unwilling” to enter the security scheme. In particular, according to this dissenting opinion, in some cases Roma are frequently not registered or have dropped out of the registers of unemployed persons, while in other cases when they are entitled to social assistance – and therefore also to health insurance – they have often failed to submit applications requesting health insurance and have therefore also been excluded from health insurance (§ 22).

---

<sup>493</sup> § 118.

<sup>494</sup> *ERRC v. Bulgaria*, Complaint No. 46/2007, decision on the Merits 3<sup>rd</sup> December 2008.

<sup>495</sup> The European Roma Rights Centre (ERRC) is an international public interest law organisation working to combat anti-Romani racism and human rights abuse of Roma through strategic litigation, research and policy development, advocacy and human rights education. See [www.errc.org](http://www.errc.org)

In the second complaint, *ERRC v. Bulgaria*<sup>496</sup> an alleged violation of Art.13.1. taken alone or in conjunction with Art.E was claimed. The legal basis to settle the complaint was rooted on the amendments brought to the Bulgarian Social Assistance Act which reduced the temporal limit of social benefits of two-thirds (from 18 to 6 months). Following this reform, Bulgarian Roma (and especially Romani Bulgarian women) were particularly exposed to deprivation of social welfare support, as they were one of the most numerous groups benefiting of social assistance. The Committee unanimously held that a violation of Art.13.1 had occurred and by 8 votes against 6 that it was not necessary to examine whether there has been a violation of Article E.

The dissenting Judges Stangos and Berlogey in fact explained that notwithstanding the fact that, in this judgement, jurisprudential progress has been made by considering the disproportionate impact of an apparently neutral measure, such an impact should have been considered discriminatory exclusively to unemployed people (the beneficiaries of the provisions of social assistance that have been emended) and not on an ethnic ground.

#### **5.3.1.4. Housing**

Discrimination against Roma reflects in their disadvantaged access to adequate housing as well.<sup>497</sup> According to a recent report published by the EU Fundamental Rights Agency and covering only EU Member States, in several countries residential segregation of Roma often appears as a widespread phenomenon and sometimes even as a result of deliberate State policies.<sup>498</sup> This kind of discrimination may take several forms: from the denial to access to

---

<sup>496</sup> *ERRC v. Bulgaria*, Complaint No. 48/2008, decision on the Merits 18<sup>th</sup> February 2009.

<sup>497</sup> As the Fundamental Rights Agency of the EU clearly explains: "Segregated or insecure settlements mean inadequate or interrupted access to schooling; living in segregated sites means fewer opportunities to hear about work or to use public transport to get to work, and there is evidence that having an address in a certain Roma area means that job applications are outright rejected. Inadequate standards of housing lead to poor health and higher incidences of diseases, and segregated sites mean more difficult access to medical facilities. There is also evidence that segregation makes Roma and Travellers more susceptible to violent attacks". FRA, "Housing Conditions of Roma and Travellers in the European Union. Comparative Report," (Luxembourg: Office for Official Publications of the European Communities, 2009), 5.

<sup>498</sup> *Ibid.*

public and private rental housing on an equal footing with others, to the unwillingness to sell housing to Roma, to the preferential treatment of non-Roma in the development of housing infrastructure and to the systematic failure to develop infrastructure in Romani communities.<sup>499</sup> In the worst cases, Roma live in encampments inside or outside the towns and in very precarious housing conditions.<sup>500</sup>

In recent years, at the CoE level, both the ECtHR and the ECSR have focused on effective implementation of the right to housing for European Romani communities particularly with regard to the dimensions of security of tenure and forced evictions. While (as in the case of health) the ECHR does not enshrine any specific provision related to the right to adequate housing, the ECtHR has interpreted Art.8.1 (right to respect for family and private life) as guaranteeing the right to respect for the traditional way of life of a minority.<sup>501</sup> In the first decision that the ECtHR ever held on Roma, *Buckley v. United Kingdom*,<sup>502</sup> the Court considered the case to fall within its jurisdiction as it concerned the applicant's right to respect for "home".

In this case, the British authorities refused to give Ms. Buckley permanent permission to settle with her children in a piece of land possessed by her. That piece of land was part of six neighbouring sites, all occupied by Roma. Permanent permission was given just to one spot, while to the other five – Ms. Buckley's spot included – the request for permanent permission was denied. This denial provided the legal ground for starting enforcement procedures against permanent settlements.

---

<sup>499</sup> CoE, *Human Rights of Roma and Travellers in Europe*, 138.

<sup>500</sup> According to the 2009 FRA Report the most evident cases are those of Bulgaria, Cyprus, Czech Republic, France, Greece, Hungary, Italy, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.

<sup>501</sup> *Chapman v. the United Kingdom*, Application No. 27238/95, European Court of Human Rights, decision of 18<sup>th</sup> January 2001, §71-74.

<sup>502</sup> *Buckley v. United Kingdom*, Application No. 20348/92, European Court of Human Rights, decision of 25<sup>th</sup> September 1996, Reports of Judgments and Decisions 1996-IV, no.16.

In the applicant's case, the Government refused the planning permission on two grounds. Firstly on the basis that adequate and sufficient provisions were provided elsewhere for Roma (although according to the applicant, she could not benefit of alternative accommodation because of fights taking place in that area). Secondly, permission was denied because the planned use of the land was deemed to detract from landscape. Therefore, according to the Government's position, Art.8 could not find application in this case, since Ms. Buckley was not living in a legally established home. The Court held an opposite view in terms of scope of application of Art.8 yet it found unnecessary to decide whether the case also concerned the applicant's private and family life. At the end, the Court held, by six votes to three, that United Kingdom did not violate Art.8.<sup>503</sup>

In the following case, *Chapman v. United Kingdom*<sup>504</sup> the reasoning of the Court built on *Buckley* by explicitly finding that measures affecting Roma living in caravans did not affect only the right to respect for their home in the narrow sense, but also their ability as members of ethnic minorities to live according to their lifestyle.<sup>505</sup> It is interesting to note that, in contrast to *Buckley*, in *Chapman*, the Court also entered the merits of the national authority interference by stating that any interference cannot be justified in circumstances where there are no alternative sites available and there is no other way in which Roma can continue to lead their traditional lifestyle. Moreover, according to the reasoning of the Court, this consideration shall be considered being applicable also to Roma that have abandoned a nomadic lifestyle in order to facilitate, *inter alia*, the education of their children through a more sedentary stance. In spite of these considerations, in its final decision of this case the Court did not find any breach of Art.8.

---

<sup>503</sup> Chapter 6 also discusses the cases *Chapman* and *Buckley* mostly from the perspective of cultural rights.

<sup>504</sup> *Chapman v. the United Kingdom*, Application No. 27238/95, European Court of Human Rights, decision of 18<sup>th</sup> January 2001.

<sup>505</sup> "Measures which affect the applicant's stationing of her caravans have, therefore, a wider impact than on the right to respect for home. They also affect [the] ability to maintain [the] identity as a Gypsy and to lead [the] private and family life in accordance with that tradition". *Chapman v. the United Kingdom*, § 73.

However, the jurisprudential evolution brought by *Chapman* goes further beyond the Court's decision. In *Chapman*, the Court in fact reaffirmed and clarified some general principles that served as legal ground to further developing the dimension of housing in the subsequent Roma jurisprudence. In *Chapman*, the ECtHR has established that the principle of "interference according to the law" must not only be understood as formal legal basis for the interference (for example a statutory discretion), but that law which confers a broad discretion must also give sufficient indication to the scope of the discretion.<sup>506</sup>

Additionally, when the Court was assessing the "proportionality of the interference" with Art.8 it recognizes both in *Buckley* and in *Chapman* that certain factors affects the width of the margin of appreciation, in particular: (1) the nature of the Convention rights in issue; (2) the importance for the individual; (3) the nature of the activities restricted and (4) the nature of the aim by the restrictions. This means that when determining whether the State has remained within its margin of appreciation, the ECtHR has also to consider that the procedural safeguards available to the individual were fair and such as to afford due respect to the interests safeguarded by Art. 8.<sup>507</sup>

In this case, the Court has also reaffirmed the principle of "legitimate aim" according to which the measures pursued by the government in the enforcement of planning controls were in the interest of the economic well being of the country and the preservation of the environment and public health. In other words, the extent of the principle of "legitimate aim"

---

<sup>506</sup> In case the authority is in doubt as to whether a particular power which it intends to exercise gives sufficient discretion to the scope of that discretion, it should ask itself whether the provision in question satisfy the Malone test according to which: "It would be contrary to the rule of the law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference" in *Malone v. the United Kingdom*, Application No. 8691/79, European Court of Human Rights, decision of 2<sup>nd</sup> August 1984 § 68.

<sup>507</sup> *Chapman*, § 93-93 in M. Willers, *Ensuring Access to Rights for Roma and Travellers. The Role of the European Court of Human Rights. A Handbook for Lawyers Defending Roma and Travellers* (Strasbourg : Council of Europe 2009), 32. The general principles identified in relation to the national limitation of the margin of appreciation can possibly become a general doctrine on the (admissible) limitation of rights.

was clarified as it has not been intended by the Court, in the words of the doctrine, as “merely appeasing a vociferous or politically important local population or group which is objecting to the particular development”.<sup>508</sup>

Finally, in *Chapman* the Court has recalled a key principle already enucleated in *Buckley*: the recognition of the vulnerable position of Roma as a minority which needs to be considered especially while analyzing the relevant regulatory planning framework and while formulating any specific decisions with regard to particular cases. To this regard, the Court clarified that the peculiar needs of Roma and their different lifestyle reflects on a positive obligation imposed on States by Art.8 to facilitate the Romani way of life.<sup>509</sup>

Although in the subsequent cases decided immediately after *Chapman*, the Court continued to build its reasoning on analogous premises of *Chapman*'s,<sup>510</sup> in *Connors v. United Kingdom*<sup>511</sup> the Court adopted a new approach which built on the same principles identified in *Chapman* but in a key-to-the reading which considers a stricter margin of appreciation. According to the Court, the margin of appreciation tends to be “narrower” where the right at stake is crucial to the individual's effective enjoyment of intimate key rights.<sup>512</sup>

In this case, Mr. Connors complained that he suffered a violation of Art.8 after he and his family were evicted from a site as a result of termination of his license to occupy the site where they were been living. After having expired all domestic remedies (judicial review before the council), Mr. Connors filed a complaint before the ECtHR. In its decision, the

---

<sup>508</sup> *Ibid.*, 30.

<sup>509</sup> *Ibid.*, 33.

<sup>510</sup> See the cases *Beard v. the United Kingdom*, Application No. 24882/94, European Court of Human Rights decision of 18<sup>th</sup> January 2001; *Coster v. the United Kingdom*, Application No. 24876/94 European Court of Human Rights decision of 18<sup>th</sup> January 2001; *Lee v. the United Kingdom*, Application No. 25289/94 European Court of Human Rights decision of 18<sup>th</sup> January 2001; *Jane Smith v. the United Kingdom*, Application No. 25154/94 European Court of Human Rights decision of 18<sup>th</sup> January 2001. In these cases the Court's decision built on homologous conclusions of *Chapman*'s (no violation of Art.8).

<sup>511</sup> *Connors v. the United Kingdom* Application No.66746/01 European Court of Human Rights decision of 27<sup>th</sup> May 2004.

<sup>512</sup> *Ibid.*, para 82.

Court found a breach of Art. 8 by analyzing Mr. Connors's complaint in the light of the principles of "interference according to the law", "proportionality with the interference", "legitimate aim" and "positive obligation".

In *Connors*, the Court in fact established that the eviction was a serious interference with Art. 8 and it thus required weighty reasons of public interest (interference according to the law). Yet, the Court was not persuaded that there were clear reasons for evicting long-standing occupants from Roma and Travellers sites. In other words, the power to evict without the burden of giving reasons did not explicitly and convincingly shown to respond to any specific goal or to provide any particular benefit to members of Gypsy/Traveller community (proportionality of the interference). Moreover, according to the Court, the reasons underlying the legitimacy of the eviction should have been examined by an independent tribunal. Therefore, the eviction could not be justified on the basis of a "pressing social need" or be said to be proportionate to the legitimate aim pursued (legitimate aim). Finally, in *Connors* the Court recognized that the State violated a positive obligation to facilitate the lifestyle of Roma.

In *Yordanova and Others v. Bulgaria*<sup>513</sup> governmental authorities had planned to evict a Romani community illegally living in the settlement of Batalova Vodenitsa, a municipal area of Sofia. Yet, the removal order – although still in force and enforceable – was temporarily suspended, as a consequence of negotiations between governmental authorities and civil society in order to find an alternative housing solution for Roma. Thus, the Court held that enforcing the removal order would have been a violation of Art. 8.

Indeed, in its reasoning, the Court clarified its position by building, *inter alia* on the *Connors* case : while it was legitimate for authorities to seek to regain possession of land from persons

---

<sup>513</sup> *Yordanova and Others v. Bulgaria* Application No. 25446/06 European Court of Human Rights decision of 24<sup>th</sup> September 2012.

who did not have a right to occupy it,<sup>514</sup> the fact that the applicants and their families had lived for many years in the makeshift houses they or their ancestors built on State or municipal land in Batalova Vodenitsa, made consider the applicants' houses in Batalova Vodenitsa as their "homes" within the meaning of Art.8.

Hence, as the cases *Buckley* and *Chapman*, the Court considered in its legal analysis whether, the governmental decision-making process of eviction, was fair and such as to afford due respect to the interests safeguarded to the individual by Art. 8. Since national authorities, in their decisions ordering and upholding the applicant's eviction, did not provide any explanation or put forward any arguments demonstrating that the applicant's eviction was necessary, the Court concluded that the State's legitimate interest in being able to control its property came second to the applicant's right to respect for his home.

It is interesting to note that in its last jurisprudence also the ECSR stated that access to the right of (adequate) housing should be understood in terms of States' positive obligation.<sup>515</sup> Nonetheless, in contrast to the ECHR, the monitoring activity of the ECSR has built on a wider set of rights specifically dealing with the right to housing.<sup>516</sup>

The first complaints were filed by the ERRC and were formulated mostly in terms of negative obligations from the State Party to the ECSR to non discriminate Roma in their effective enjoyment of the right to housing *vis-à-vis* other citizens. In particular, in *ERRC v. Greece*<sup>517</sup> the ERRC complained before the Committee that Art. 16 (the right of the family to social,

---

<sup>514</sup> §111.

<sup>515</sup> Although building on different legal basis and although the later monitoring activity of the ECSR does not make any direct reference to the earlier jurisprudence of the ECtHR, it seems very improbable that both the ECSR and the ECtHR produce their decisions without being respectively aware of judicial opinion and case-law of each other.

<sup>516</sup> The right to housing finds explicit recognition in the ESC in Part 1 at Paragraph 31 (right to housing), in Part 2 at Arts. 15.3 (The right of persons with disabilities to independence, social integration and participation in the life of the community), 16 (The right of the family to social, legal and economic protection), 23 (a) (The right of elderly persons to social protection), 30 (a) (The right to protection against poverty and social exclusion through effective access to housing) and 31(The right to housing).

<sup>517</sup> *ERRC v. Greece*, Complaint No. 15/2003, decision on the Merits 8<sup>th</sup> December 2004.



legal and economic protection) was breached in the light of the fact that Roma are effectively denied a right to housing both *de jure* in that the legislation discriminates against Roma in housing matters and *de facto* in that Roma are often subjected to force evictions as a consequence of the high degree of discrimination against them. The Committee found Greece in breach of the abovementioned provision. A similar complaint was filed in *ERRC v. Bulgaria*<sup>518</sup> where the Committee found a violation of Art.16 taken into conjunction with Art.E.

In *ERRC v. Italy*<sup>519</sup> a breach of Art.31 together with Art. E (non discrimination) in relation to the effective enjoyment of the right to housing by Roma, in Italy, (the right to housing) was filed. In particular, the ERRC claimed before the ESR that in Italy Roma have no access to accommodation other than camping sites where they live in conditions of segregation. Also in this case, in its final decision, the Committee receives the complaint of the applicant by finding unanimously that the insufficiency and the inadequacy of camping sites constitute a violation of Article 31§ of the European Social Charter taken together with Article E; forced eviction and other sanctions constitute a violation of Article 31.2 of the European Social Charter taken together with Article E; lack of permanent dwellings constitutes a violation of Articles 31§1 and 31§3 of the European Social Charter taken together with Article E.

It is only since 2008, through the case *ERRC v. France*<sup>520</sup> that the right to (adequate) housing was started to be formulated by the applicant also in terms of positive obligation from the State, in particular as a failure from the State to take the necessary steps to improve the living conditions of Romani migrants from other States Parties which was in breach of Art.19.4 (c). The Committee, however, did not find any breach of Art. 19.4 (c) in this case but only for Arts. 16, 30 and 31 which were complained by the applicant together with Art. 19.4 (c) (the

---

<sup>518</sup> *ERRC v. Bulgaria*, Complaint No. 31/2005, decision on the Merits 18<sup>th</sup> October 2006.

<sup>519</sup> *ERRC v. Italy*, Complaint No. 27/2004, decision on the Merits 7<sup>th</sup> December 2005.

<sup>520</sup> *ERRC v. France*, Complaint No. 51/2008, Decision on the Merits 19<sup>th</sup> October 2009.

right of migrant workers and their families to protection and assistance). Yet, *ERRC v. France* set the legal ground for the Committee to consider also, but not exclusively,<sup>521</sup> a breach of Art. 19 in the following cases: *COHRE v. Italy*,<sup>522</sup> *COHRE v. France*<sup>523</sup> and *European Roma and Travellers Forum v. France*.<sup>524</sup>

More recently, in *International Federation of Human Rights (FIDH) v. Belgium*<sup>525</sup> the Committee unanimously decided that the failure to effectively enjoy the right to housing as a result of, *inter alia*, eviction procedures against Roma who are unlawfully settled on land because they have been unable to find a place on an authorized site, constitutes a breach of Art. E read in conjunction with Art. 30. Indeed, the Committee has regarded the right to housing as strongly related to the sphere of domiciliation on which access to several important rights and services (in particular social allowances) depends. Thus, the lack of coordinated housing policies as regards to Roma communities reverberates on their overall condition of poverty and social exclusion.

The activity of both the ECtHR and of the ECSR has increasingly provided some legal ground to set at the level of the CoE non discrimination standards to ensure the access to the right to

---

<sup>521</sup> *ERRC v. Portugal*, Complaint No. 61/2010, Decision on the Merits 30<sup>th</sup> June 2011, In this case the Committee found in fact only violation of Arts. 16, 30 and 31.1.

<sup>522</sup> *COHRE v. Italy*, Complaint No. 58/2009, Decision on the Merits 25<sup>th</sup> June 2010. In particular in this case the Committee found a breach of Art. 19 paragraphs 1,2 and 8 (besides Arts 31.1, 31.2, 31.3, 30 and 16).

<sup>523</sup> *COHRE v. France*, Complaint No. 63/2010, Decision on the Merits 28 June 2011. In particular in this case the Committee found violations of Arts. E in conjunction with Arts 31.2 and 19.8.

<sup>524</sup> *European Roma and Travellers Forum v. France*, Complaint No. 64/2011, Decision on the Merits 24<sup>th</sup> January 2012. In particular in this case the Committee found violations of Arts. E in conjunction with Articles 19.8, 30, 31.1, 2, and 3.

<sup>525</sup> *International Federation of Human Rights (FIDH) v. Belgium*, Complaint No. 62/2010, Decision on the Merits 21<sup>st</sup> March 2012. In this case the Committee found also a breach of Art. E read in conjunction with Art.16 because of the lack of sites for Roma and the State's inadequate efforts to rectify the problem; because of the failure to take sufficient account of the specific circumstances of Roma families when drawing up and implementing planning legislation; because of the situation of Roma families with regard to their eviction from sites on which they have settled illegally and concerning the situation of Roma with regard to domiciliation. FIDH is an International umbrella organization gathering 164 organization working in the human rights field. See [www.fidh.org](http://www.fidh.org)

housing for Roma as required by the recommendations of the CoE Committee of Ministers in relation to the housing conditions of Roma in general<sup>526</sup> and in encampments in particular.<sup>527</sup>

However, further activity is necessary to put effectively into practice a general framework of housing policies, especially to guarantee: the effective enjoyment of the right of people to pursue sedentary or nomadic lifestyles, according to their own free choice by making available necessary conditions in order realize this right; the guarantee of equal access to adequate housing for Roma through appropriate, proactive policies, particularly in the area of affordable housing and service delivery and the possible deterrence of ghettos-creation by prohibiting regional, or local policies or initiatives aimed at ensuring that Roma settle or resettle in inappropriate sites and hazardous areas so that they would no longer lived segregated from the majority of the society.<sup>528</sup>

### **5.3.2. European Union**

Within the EU geo-legal sphere, the definition and the implementation of European policies and activities are undertaken as to promote a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, a high level of education, training and protection of human health.<sup>529</sup> The protection of economic and social rights in the EU geo-legal sphere predominantly hinges on three core Directives: EU Freedom of Movement Directive,<sup>530</sup> EU Racial Equality Directive<sup>531</sup> and EU Employment Directive.<sup>532</sup>

Under these three directives, the promotion of economic and social rights is mostly rooted in a non discrimination perspective which entails a negative obligation to protect the areas of

---

<sup>526</sup> Council of Europe, Committee of Ministers, Recommendation Rec(2005)4 of the Committee of Ministers to member states on improving the housing conditions of Roma and Travellers in Europe.

<sup>527</sup> Council of Europe, Committee of Ministers, Recommendation Rec(2004)14 of the Committee of Ministers to member states on the movement and encampment of Travellers in Europe.

<sup>528</sup> Council of Europe, Committee of Ministers, Recommendation (2005)4 of the Committee of Ministers to member states on improving the housing conditions of Roma and Travellers in Europe.

<sup>529</sup> See Art. 9 of the Lisbon Treaty.

<sup>530</sup> The Freedom of Movement Directive (2004/38/EC).

<sup>531</sup> The Racial Equality Directive (2000/43/EC).

<sup>532</sup> The Employment Framework Directive (2000/78/EC).

employment, welfare systems and access to supply of goods and services.<sup>533</sup> Non discrimination provisions referring to the area of employment are enshrined in each against three European directives. The ECJ has extended the protection of non discrimination in the area of employment as including: access to employment, conditions of employment including dismissals and pay, access to vocational guidance and pay, working and employment organizations.<sup>534</sup>

In the area of access to welfare and forms of social security only the Race Equality Directive provides some forms of protection which can be understood to be also complemented by the Gender Social Security Directive.<sup>535</sup> Yet, the exact meaning of “social protection” and the precise legal area of protection appear unclear, although both the Explanatory Memorandum of the Commission’s proposal for the Racial Equality Directive, as well as the wording of the Directive itself does imply that this should be understood as wider than that of “social security”.

Accordingly, it seems that the areas of application of the Racial Equality Directive overlap with each other so that for instance the scope of the protection from discrimination in the field of healthcare can both include the access to publicly provided healthcare and to insurance

---

<sup>533</sup> This approach is also recalled at Art.10 of the Lisbon Treaty: “In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

<sup>534</sup> As regards to the dimension of “access to employment” in *Meyers v. Adjudication Officer* (Case C-116/94 [1995] ECR I-2131, 13<sup>th</sup> July 1995), the ECJ held that access to employment covers ‘not only the conditions obtaining before an employment relationships comes into being’, but also all those influencing factors that need to be considered before the individual makes a decision of whether or not to accept a job offer. As regards to the “conditions of employment” always in *Meyers* the ECJ held that the Equal Treatment Directive (now replaced by the Gender Equality Directive) would not be considered inapplicable solely because the benefit in question formed part of a social security system. Instead, a wider approach was adopted looking at whether the benefit was given in connection to a working relationship. As regards to the “access to vocational training and guidance” the ECJ adopted a wide definition whereby also the activities that fall do not directly provide for the qualification required of a particular definition should be understood as “vocational training” (see the case *Gravier v. Ville de Liège and Others*, Case 293/83 [1985] ECR 593, 13 February 1985). FRA, "Handbook on European Non-Discrimination Law " in *Publications Office of the European Union* (Luxembourg 2011), 65-68.

<sup>535</sup> Council Directive 79/7/EEC of 19<sup>th</sup> December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

services and the area of education can presumably overlap with that of vocational training.<sup>536</sup> As for the access to supply of goods and services, this area is again mostly protected by the Race Equality Directive which does not offer any definition of housing. Indeed, this directive suggests that the right to housing should be interpreted in the light of international human rights law.<sup>537</sup>

Although in the case of Roma, this anti-discrimination legal framework undoubtedly holds the potential of integrating this social group within the European society, on the practical level this framework still appears, according to Ahmed, “inadequate to ensure a significant contribution to the specific preservation of Roma identity”.<sup>538</sup> Indeed, this framework has shown to be unable to impose a strong legal obligation on Member States to accommodate the nomadic lifestyles of Roma in the economic and social sphere, particularly with regard to the education system or the free movement housing policies.

#### **5.4. Individual and collective economic and social rights**

As repeatedly discussed, *in abstracto* the preservation of a distinct minority identity can be better guaranteed through the recognition of collective rights. Nonetheless, in the sphere of economic and social rights, States have generally been reluctant to recognize this set of rights in a collective dimension, often justifying such a reluctance with financial constraints.<sup>539</sup> Particularly in the employment sphere, however, the formulation of economic and social rights from a collective perspective has shown to be unavoidable to guarantee their inner

---

<sup>536</sup> “Given the intended breadth of the provision, it should be understood that any form of benefit offered by the State whether economic or in kind would be caught within the category of social protection, to the extent that it is not caught by social security. In this sense, it is highly probably that the individual areas of application of the Racial Equality Directive overlap with each other.” FRA, “Handbook on European Non-Discrimination Law”, 70.

<sup>537</sup> In particular, in relation to the right to respect for one’s home enshrined in Art. 7 of the EU Charter of Fundamental Rights and in Art. 8 of the ECHR and the right to adequate housing contained in Art. 11 of the ICCPR see, European Race Equality Directive, Art.3.1 (h).

<sup>538</sup> T. Ahmed, *The Impact of EU Law on Minority Rights* (Oxford and Portland Oregon: Hart Publishing 2011), 193.

<sup>539</sup> Yet, as clarified by the CESCR General Comment No.15 on the Right to Water, UN doc. E/C.12/2002/11, para. 37 “Resource constraints do not relieve states of their obligations to give immediate effect to their *undertaking* to guarantee the Covenant rights, and include ensuring certain core obligations”.

existence in relation to the participation of minority workers and migrant workers in all employment relevant decision-making (see for instance the freedom of association and the recognition of the right to collective bargain).

While no general rule can be inferred in the enunciation of economic and social rights (which can either be tailored from an individual or a collective perspective), it can be argued that especially for minority groups the vast majority of economic and social rights despite being individually or collectively worded, needs to be collectively exercised in order to be fully enjoyable in respect to minority identity.<sup>540</sup> As the case-law of both the ECtHR and the ECSR Committee has shown, the collective exercise of economic and social rights for Roma is particularly needed in the areas of education, employment and health in order to overcome the barriers of the “poverty trap”. Yet, the extent to which such a collective exercise of economic and social rights is effectively possible can only be analyzed, as previously maintained, at the domestic legal level.

## 5.5. Economic and social rights at domestic level

In those CoE Member States legally recognizing Roma, the catalogue of economic and social rights varies both in the extent of formulation and in the target of beneficiaries. As for the extent of formulation, a significant number of countries devise at a very minimum level of economic and social rights within their constitutions, either by including this set of rights within a general non discrimination clause or by comprehending this set of rights in general human rights provisions. This is for instance the case of **United Kingdom** that has incorporated, in 1998, Human Rights Act entered into force in 2000 the whole set of rights enshrined within the ECHR.<sup>541</sup> Other States, such as **Germany** and **Spain**, have enshrined

---

<sup>540</sup> M.E. Salomon, *Economic, Social and Cultural Rights: A Guide for Minorities and Indigenous Peoples* (available at [www.minorityrights.org/download.php?id=50](http://www.minorityrights.org/download.php?id=50): Minority Rights Group 2005), 8.

<sup>541</sup> These are cases where “the formulation of principles is only apparently scanty as it appears full of meanings and references. Often the [economic and social] principles are only mentioned without being extensively

within their constitutions a far richer catalogue of rights, whose beneficiaries are all citizens of the State in the name of the equality principle.<sup>542</sup>

In other legal systems, the recognition of economic and social rights is even more promotional by expressly addressing some economic and social rights to minority groups as well.<sup>543</sup> This is for instance the case of **Austria**, whereby the 1976 Austrian Federal Act has declined to the Ethnic Advisory Boards the competence to represent, *inter alia*, the economic and social interest of ethnic groups, which according to the law, shall be taken into consideration “before issuing legal norms and regarding general planning in the area of public funding affecting the interests of the ethnic groups”.<sup>544</sup>

In other legal systems, the specific translation of the general economic and social provisions into a minority rights perspective explicitly refers to the areas of education, employment and housing by means of different legal extents. This is for instance the case of **Bosnia and Herzegovina** whereby the Law on Minorities specifically refers to education and vocational training (Art.13).<sup>545</sup> The right to education is indeed one of the legal areas which finds a more extensive elaboration with regard to minority economic and social rights.

This right can in fact considered being multi-faceted as it embodies different legal areas: linguistic rights, cultural rights and economic and social rights. Hence, even if this right is often devised especially to protect and promote the linguistic and cultural dimensions of minority rights, the complementary economic and social dimension inevitably appears protected and promoted as well. While, in some cases, the right to education is exclusively

---

formulated because they are the expression of a doctrine and of a constellation of normative statements” Pezzini, *La decisione sui diritti sociali. Indagine sulla struttura costituzionale dei diritti sociali* 10.

<sup>542</sup> This is also the case of Albania, Bulgaria, Finland, the Netherlands, Norway, Portugal, Russia, and Sweden.

<sup>543</sup> As already clarified in Chapters 1 and 2, Macedonia is the only legal system legally recognizing Roma as a constitutive nationality of the State. Hence, it cannot obviously translate the catalogue of economic and social rights at a minority legislation level.

<sup>544</sup> Section II paragraph 3.1.

<sup>545</sup> Bosnia and Herzegovina Law on Minorities of 12<sup>th</sup> April 2003 Bosnia and Herzegovina Official Gazette, 12/03.

articulated on a linguistic dimension,<sup>546</sup> in other cases this right is formulated as to be guaranteed at different didactic levels<sup>547</sup> and through public as well as through self-organized private arrangements.<sup>548</sup> In one case, the financial budget to concretely support the promotion of this right is even secured in law.<sup>549</sup> In some other cases, such as in the **Irish legislation** and the **Italian regional legislation** some mention is also made as regards to the areas of employment and housing in relation to a specific (although at time not exclusive) minority exercise.<sup>550</sup>

In a very limited number of cases, the set of economic and social rights is devised as to either *generally* address the needs of Roma or to *specifically* address the needs of Roma in the areas of education, employment, health and housing. While, in the case of **Montenegro**,<sup>551</sup> a general mention to the economic and social rights of Roma is made, in the case of Slovenia a more specific one can be envisaged. The **Slovenian Roma Community Act**<sup>552</sup> in fact enshrines the State's positive obligation to, *inter alia*, actively engage for the integration of

---

<sup>546</sup> Romania Art.32.4 of the Constitution, Slovakia Art.43.2. (a) of the Constitution.

<sup>547</sup> Croatia Art.11, Hungary Art.43, Moldova and Lithuania Art.2 (Interesting enough, the Lithuanian Law on minorities at Art.3, also foresees the possibility "to train specialists to respond to the needs of particular ethnic cultures in the realm of education"). At the Italian regional level this provision is enshrined in Art.9 of the Regional Law of Umbria (32/90), Art. 8 of the Regional Law of Sardegna (9/88), Art. 10 Toscana (2/2000), Art.13 Regional Law of Friuli Venezia Giulia (11/88). Some Italian regional laws promote also the adult education namely Art.8 Regional Law of Sardegna (9/88), Art.7 of the provincial law of Trento (Law 12/09).

<sup>548</sup> Czech Republic Act on the Rights of Members of National Minorities of 2001 No107/819 Official Gazette 273/2001 Art.11, Moldova Law of the Republic of Moldova on the Rights of Persons Belonging to National Minorities and the Legal Status of their Organizations No.382-XV of 07.19.2001 (Official Gazette of the Republic of Moldova no.107/819 04.09.2001) Art.6.

<sup>549</sup> Serbia Law on Protection of Rights and Freedom of National Minorities, Official Gazette of FRY No. 11 of 27 February 2002. Art.20.

<sup>550</sup> Ireland guarantees the rights to education and employment also but not exclusively to Travellers in different acts, namely: in the Employment Equality Act No.21 of 1998, in the Equal Status Act No.8 of 2000 for Ireland, in the Equal Status Act No. 24 of 2004 and in the Housing (Miscellaneous Provisions) Act No. 9 of 2002. Poland refers to the protection of economic and social rights of minorities through a positive obligation at Art.6.1.2 of Act of 6<sup>th</sup> January 2005 on national and ethnic minorities and on the regional languages. (Dziennik Ustaw No. 17, item. 141, with the amendment of 2005, No. 62, item 550). Ukraine refers to the economic and social rights of minorities at Art.1 Law no. 2494-12 of June 25<sup>th</sup>, 1992. Latvia refers to equal rights of minorities to access work (§3) and develop material conditions of education (§10) in Law about the Unrestricted Development and Right to Cultural Autonomy of Latvia's Nationalities and Ethnic Groups, adopted on March, 19<sup>th</sup> 1991 and amended on June, 6<sup>th</sup> 1994. The Italian regional laws of Lombardia (Art.8 Law 77/89), Veneto (Art.5 Law 54/89), Emilia (Art.10 and 12 Law 47/88) and Liguria (Art. 5 and 6 Law 6/92) also promote to the social integration of Roma in the areas of education and employment.

<sup>551</sup> Art. 7 Law on Minority Rights and Freedoms Law of the Republic of Montenegro, Official Gazette of the RMN, No. 31/06, 51/06, 38/07.

<sup>552</sup> Official Gazette of the Republic of Slovenia, No. 33/07, 13 April 2007.



Roma community members into the system of education, also by means of appropriate scholarship policies (Art.4). Specific reference to the right to education of Roma is also made in a couple of Italian regional laws<sup>553</sup> which foresee the opportunity to include Romani adults in specific educational projects.<sup>554</sup>

Slovenian and Italian regional legislation are again the only two sources specifically intervening on the area of employment (in particularly by mentioning educational training<sup>555</sup> and by promoting traditional Romani working activities).<sup>556</sup> In the area of health, only Italian legislation dedicates a specific mention to the need of Roma for the time being.<sup>557</sup>

In the realm of housing, the legal systems of **Slovenia, Ireland and United Kingdom** provide some specific recognition to the needs of Roma. In each of the three cases, such a recognition requires national and/or local authorities to provide the conditions of spatial planning for Roma settlements.<sup>558</sup> In Ireland, the Housing Travellers Accommodation Act requires as well local authorities to acquire appropriate accommodation by introducing a statutory framework for housing authority loans for caravans or sites for caravans.<sup>559</sup>

The Irish legislation further provides for the establishment of the National Traveller Accommodation Consultative Committee on a statutory basis to advise the Minister on any general aspect of Traveller accommodation.<sup>560</sup> In United Kingdom instead, a Gypsy or a Traveller living on a local authority caravan site does not fully enjoy an effective protection

---

<sup>553</sup> At the Italian regional level this provision is enshrined in Art.9 of the Regional Law of Umbria, Art. 8 of the Regional Law of Sardegna, Art. 10 Toscana, Art.13 Regional Law of Friuli. Art.8 Regional Law of Sardegna, Art.7 of the provincial law of Trento.

<sup>554</sup> Art.8 Regional Law of Sardegna, Art.7 of the Provincial Law of Trento.

<sup>555</sup> Art.4 Roma Community Act of Slovenia, Art. 8 of the Regional Law of Toscana, Art.8 of the Regional Law of Lazio, Art.11 of the Regional Law of Friuli, Art.7 of Liguria

<sup>556</sup> Arts 8-9 Provincial Law of Trento, Art.12 of the Regional Law of Emilia, Art.6 of Liguria

<sup>557</sup> Art.9 Toscana, Art.4 Lombardia, Art.14 Emilia, Art.8 Liguria.

<sup>558</sup> See, Art.5 of the Roma Community Act of Slovenia, letter a) of the Explanatory and Financial Memorandum of Housing Travellers Accommodation Act No.33 of 1998 of Ireland and Sections 7 and 8 of the Caravan Sites Act of 1968 of United Kingdom.

<sup>559</sup> Letter h) of the Explanatory and Financial Memorandum of the Housing Travellers Accommodation Act No.33 of 1998.

<sup>560</sup> Letter e) of the Explanatory and Financial Memorandum of the Housing Travellers Accommodation Act No.33 of 1998.

against eviction provided that he or she has been given four weeks' written notice and a court order has been obtained.<sup>561</sup>

This excursus on economic and social guarantees ensuing from domestic legislation has shown that in the vast majority of cases, national legal systems have addressed this set of rights merely by means of general legal provisions. Thus Roma, and especially Romani EU citizens, are *in abstracto* entitled to enjoy the whole spectrum of economic and social rights. However, their general formulation is, by and large, unable to extend these rights also *de facto* on Roma populations. It is also unable to effectively break the vicious circle of the "poverty trap". The partial (or inexistent) enjoyment of economic and social guarantees by Roma has already emerged in the previous sections. In particular as shown by the increasing number of cases presented before human rights monitoring bodies at the European and at international levels. Moreover, a recent survey edited by the EU Fundamental Rights Agency in collaboration with the United Nations Development Programme (UNDP) has also confirmed this trend.<sup>562</sup>

## **5.6. Reinforcing the effective enjoyment of economic and social rights for Roma at the domestic level: European initiatives**

Following the number (and the extent) of the escalation of highly discriminatory attacks towards Roma that have been occurring in Europe especially in the last three years,<sup>563</sup> the EU has recently intervened to guarantee the overall social inclusion for Roma on a more effective stance by working on the four socio-economic dimensions that have been analyzed along the Chapter: education, employment, housing and health. However, so far, the action of the EU

---

<sup>561</sup> Willers, *Ensuring Access to Rights for Roma and Travellers. The Role of the European Court of Human Rights. A Handbook for Lawyers Defending Roma and Travellers*, 65.

<sup>562</sup> See, *inter alia*, FRA and UNDP, "The Situation of Roma in 11 Eu Member States. Survey Results at a Glance," (Luxembourg: European Union Agency for Human Rights, 2012).

<sup>563</sup> In particular, this need of actively acting for Roma socio-economic inclusion explicitly emerged in September 2010 when EU Justice Commissioner Viviane Reding, condemned the French deportation of Roma and Sinti to Romania. See the Introduction of this dissertation.

has concentrated more on the promotion of policies rather than on the improvement of its legal framework.

The political engagement of the EU in the enhancement of the social inclusion for Roma, already took place by supporting local projects through structural funds.<sup>564</sup> Yet, a more systematic approach to the issue has taken place in 2011 when the European Commission set a Framework for National Roma Integration Strategies up to 2020.<sup>565</sup> Through this framework, the European Commission has aimed at addressing Romani needs by means of a targeted approach with “explicit measures to prevent and compensate for disadvantages they face”.<sup>566</sup> This approach hinges on the idea that positive measures are urgently needed to foster economic and social rights for Roma.

In line with the Racial Equality Directive, the principle of equal treatment embedded in national legal systems does not in fact prevent Member States from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin. The Commission has thus required Member States to adopt National Roma Strategies (NRS) in order to meet the EU targeted goals in the areas of education, employment, health and housing. The EC’s idea of NRS has been borrowed from the Decade of Roma Inclusion (2005-2015) which involved 12 countries, all of which have a significant presence of Roma living in a disadvantaged economic and social position.<sup>567</sup> In line with the Decade’s goals, the NRS as well aim at intervening in the areas of education, employment, health and housing.

---

<sup>564</sup> See to this regard, section 9.2.2.

<sup>565</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. An EU Framework for National Roma Integration Strategies up to 2020. COM(2011) 173 final.

<sup>566</sup> *Ibid.*, 4.

<sup>567</sup> In particular, the idea of the Roma Decade emerged during the Conference "Roma in an Expanding Europe: Challenges for the Future" held in Budapest in 2003.<sup>567</sup> Following this Conference, in 2005 the prime Ministers of the first eight participating governments signed the “Declaration of the Decade of Roma Inclusion” in Sofia where they committed themselves to foster the economic and social conditions of Roma in Europe in partnership with a number of international governmental and non-governmental organizations (such as the World Bank, the Open Society Foundations, the United Nations Development Program, the Council of Europe, the Council of Europe Development Bank, the Contact Point for Roma and Sinti Issues of the Office for Democratic Institutions

For each of the economic and social areas concerned, the 2011 Framework has set some minimum standards to be achieved. In the area of education, Member States are required to ensure that Romani children could have access to quality education and that are not subject to discrimination or segregation, regardless of whether they are adopting a nomadic or sedentary lifestyle. The completion of primary education cycle shall be guaranteed as a minimum standard while the attendance to secondary and tertiary cycles of education shall be strongly recommended to Romani pupils.

In the area of employment, Member States are required to guarantee Romani people with full access to the job market in a non discriminatory way also through access to policies of vocational training, self-employed tools and other initiatives (also personalized) in the public as well as in the private sector.

In the area of healthcare, Member States are required to activate any measure aimed at reducing the gap in the health status between the Roma and the rest of the population, especially with regard to women and children. Finally, in the area of housing Member States are required to promote non discriminatory access to housing, including social housing as to close the gap between the share of Roma with access to housing and to public utilities (such as water, electricity and gas) and that of the rest of the population.

According to the Framework, the NRS should have been submitted by the end of 2011 by including, *inter alia*, the following approaches: sufficient funding from national budgets; strong monitoring methods to evaluate the impact of Roma integration actions; close

---

and Human Rights of the Organisation for Security and Co-operation in Europe, the European Roma Information Office, the European Roma and Traveller Forum, the European Roma Rights Centre, UN-HABITAT, UNHCR, the United Nations Children's Fund (UNICEF) and the World Health Organization (WHO). See <http://www.romadecade.org> . In line with the Decade's goals, the European Roma Strategies as well aim at intervening in the areas of : education, employment, health and housing.

cooperation and continuous dialogue with Roma civil society, regional and local authorities and national contact point for the national Roma integration strategy.<sup>568</sup>

In spring 2012, the Commission assessed the NRS and reported to the European Parliament and to the European Council on the progresses made by EU Member States. After having analyzed the NRS, the Commission highlighted, once again, that the main responsibility in assuring the economic and social integration of Roma relies firstly and foremost on Member States that are called to refine their NRS by “adopting more concrete measures, explicit targets for measurable deliverables, clearly earmarked funding at national level and a sound national monitoring and evaluation system”.<sup>569</sup>

In particular, the Commission asked Member States to continue regular bilateral dialogue both with European Institutions and relevant stakeholders (especially civil society and regional and local authorities), in order to ensure that NRS are coherent with EU laws and policies, to ensure effective use of both national and European funds, to promote and monitor the concrete implementation of the strategies and to fight discrimination convincingly.<sup>570</sup> The Commission has nonetheless identified the progresses made by Member States in the four economic and social areas of intervention guiding the design and implementation of the strategies.<sup>571</sup>

In the area of education, the Commission has identified among the most relevant key elements to be considered to foster the social inclusion of Roma: the introduction of tailor made

---

<sup>568</sup> Ibid., 8-9.

<sup>569</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. National Roma Integration Strategies: a first step in the implementation of the EU Framework COM(2012) 226 final 16-18.

<sup>570</sup> Ibid.

<sup>571</sup> Commission Staff working document accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. National Roma Integration Strategies: a first step in the implementation of the EU Framework SWD(2012) 133 final.

measures,<sup>572</sup> teachers training to multiculturalism,<sup>573</sup> adult education,<sup>574</sup> recognition of lessons from some previous experiences<sup>575</sup>, activation of pilot programs against early school dropout,<sup>576</sup> approach to intercultural education,<sup>577</sup> incentive to improve participation of Roma in higher education,<sup>578</sup> measures focused on the education of young mothers,<sup>579</sup> compilation of textbooks and programs to teach Romanes<sup>580</sup> and training and hiring of Romanes language teachers.<sup>581</sup>

In the area of employment, the Commission has identified among the most relevant key elements to be considered to foster the social inclusion of Roma: the activation of training courses regarding entrepreneurship and management,<sup>582</sup> the appointment of Roma representatives in the employment agencies in regions where there is a predominant percentage of Romani population,<sup>583</sup> the support to local business,<sup>584</sup> the recognition of lessons learnt from previous past experiences,<sup>585</sup> tailored-support measures at the local level,<sup>586</sup> integrated approach to Roma communities<sup>587</sup> and the introduction of special mentors “bridge builders”.<sup>588</sup>

---

<sup>572</sup> See the NRS sent by Austria and United Kingdom. The full text of NRS sent by each EU Member States are available at [www. http://ec.europa.eu/justice/discrimination/roma/national-strategies/index\\_en.htm](http://ec.europa.eu/justice/discrimination/roma/national-strategies/index_en.htm) (last accessed on November, 25<sup>th</sup> 2012). The paragraphs to which the following footnotes refer contain some specific references to the operational advice made by the EC on 21<sup>st</sup> May 2012 while initially assessing the single NRS. A part of this operational advice has been cited in order to provide the reader with a “grasp” on the ways through which economic and social rights can find concrete translation for Roma in Europe. See [http://ec.europa.eu/justice/newsroom/discrimination/news/120523\\_en.htm](http://ec.europa.eu/justice/newsroom/discrimination/news/120523_en.htm) (last accessed on 25<sup>th</sup> November 2012).

<sup>573</sup> Bulgaria.

<sup>574</sup> Austria, Finland, Lithuania.

<sup>575</sup> Denmark.

<sup>576</sup> France, the Netherlands, Spain.

<sup>577</sup> Ireland.

<sup>578</sup> Italy.

<sup>579</sup> Italy.

<sup>580</sup> Poland, Sweden.

<sup>581</sup> Romania, Slovakia.

<sup>582</sup> Bulgaria, Czech Republic, Romania.

<sup>583</sup> Bulgaria.

<sup>584</sup> Czech Republic, France, Greece, Ireland, Italy, Portugal.

<sup>585</sup> Denmark.

<sup>586</sup> Germany,

<sup>587</sup> Portugal.

<sup>588</sup> Sweden.

In the area of healthcare, the Commission has recommended the national consideration over these key elements to foster the social inclusion of Roma: information of health professionals on Romani culture,<sup>589</sup> support to awareness programs at the local level,<sup>590</sup> active involvement of the civil society representatives and<sup>591</sup> vaccination campaigns.<sup>592</sup> In the area of housing, the Commission highlighted the following elements for the enhancement of the social inclusion of Roma: increase access to social housing for Roma households with low incomes,<sup>593</sup> no differentiation in housing provisions on the basis of the ethnic origin,<sup>594</sup> the resettlement of Roma living in illegal settlements,<sup>595</sup> the eradication of slums and sub-standard housing,<sup>596</sup> a clear and strong position against the “system of camps”,<sup>597</sup> the involvement of traveller accommodation consultative committees both at local and at national levels,<sup>598</sup> the connection with water supply,<sup>599</sup> the social housing construction program<sup>600</sup> and the consideration to the housing needs of Roma in planning.<sup>601</sup>

## 5.7. Critical remarks

This chapter has built on the consideration that notwithstanding the legal guarantees enshrined in contemporaneous democratic constitutions, the fluid nature of economic and social rights is not indissolubly attached to the requirement of citizenship. While, in some cases, the enjoyment of economic and social rights can be extended much beyond the citizenship requirement (such as in the case of “new” minorities), in other cases the enjoyment of this set of rights can be restricted also within the citizenship requirement, since there are groups of

---

<sup>589</sup> Bulgaria, Poland and Portugal.

<sup>590</sup> France.

<sup>591</sup> Hungary.

<sup>592</sup> Italy, Romania.

<sup>593</sup> Czech Republic.

<sup>594</sup> Germany.

<sup>595</sup> Greece.

<sup>596</sup> Spain.

<sup>597</sup> Italy.

<sup>598</sup> Ireland.

<sup>599</sup> Poland.

<sup>600</sup> Romania.

<sup>601</sup> United Kingdom.

citizens, such as Roma, that notwithstanding their formal entitlements to economic and social rights cannot substantially benefit from these provisions.

Indeed, the analysis on the recognition of economic and social rights at the domestic level has shown that even the most promotional legal systems recognizing Roma with the widest set of economic and social rights entitlements (all defining Roma as a “national minority”),<sup>602</sup> have several difficulties in assuring the full implementation of these provisions on the substantial level for Roma who are national of the State. On a strictly *de jure* level, the analysis presented in this chapter has shown that the need to address the “incomplete” economic and social “citizenship” of Roma which make them fall in the “socio-economic trap” is increasingly emerging both at international European levels especially within the monitoring activity of CERD and CEDAW Committees at international level and ECSR Committee at European level and within the jurisprudence of the ECtHR).

Some of the principles elaborated by these international monitoring/judicial bodies have already started to permeate to the domestic level.<sup>603</sup> Yet, the articulation of the set of economic and social provisions enshrined within national legal systems is often generally worded (through the reference to non discrimination principle or through a reference to international human rights law. Accordingly, this makes it impossible to specifically tackle Romani needs in order to break the “socio-economic trap” where the vast majority of this social group are still falling.

To foster the process of effective enjoyment of economic and social rights for Romani individuals, in 2011 the European Commission has required each Member State to design a

---

<sup>602</sup> Croatia, Bosnia-Herzegovina, Serbia, Germany, Austria, Romania, Slovakia, Moldova, Ukraine, Latvia, Lithuania, Finland, Norway, Sweden and partially Greece (recognizing only the Muslim community of Western Trace).

<sup>603</sup> See, *inter alia*, Willers, *Ensuring Access to Rights for Roma and Travellers. The Role of the European Court of Human Rights. A Handbook for Lawyers Defending Roma and Travellers*. C. Cojacariu, "Improving the Effectiveness of the Implementation of Strasbourg Court Judgments in Light of Ongoing Reform Discussions," *Roma Rights Quarterly* 1(2010). G. Kostadinova, "Substantive Equality, Positive Action and Roma Rights in the European Union," ed. Briefing (London: Minority Rights Group International 2006).



“National Roma Strategy” (NRS) with the aim of improving the life condition of Roma living within their national territories in the areas of education, employment, health and housing. Accordingly, Member States are now required to give full development and effective implementation to NRS in a medium-term perspective, by 2020. The operational device that the EC provided on the NRS is a valuable tool to understand the minimum economic and social standards that should be considered while working on the effective enjoyment of this set of rights for Roma, also in the light of their non-territorial belonging.

In the area of education, the Commission has, *inter alia*, suggested considering tailored-made measures, multiculturalism and the teaching of Romanes while working for fostering the enjoyment of education rights for Roma. In the area of employment, the Commission has advised Member States to implement the related set of rights by, *inter alia*, adopting an integrated approach to Roma communities and by introducing special mentors as “bridge builders” between employers and employees. In the area of healthcare, the Commission has recommended considering Romani culture and the role of civil society to foster the access to the right to health by Romani population. Finally, in the area of housing, the Commission has, *inter alia*, condemned the “systems of camps” and advocated for the eradication of slums and sub-standard housing in order for Roma to fully benefit of the related set of rights in respect to their dignity.

The potential enshrined within the NRS is further enriched by a process of constant monitoring (both by governmental and non-governmental organizations) which should accompany their overall implementation stage. Nonetheless, the full realization of the NRS appears quite difficult to be translated on the practical level, especially for Western European States that have generally developed a more limited domestic set of minority rights *vis-à-vis* Eastern European States.

In particular, given the “programmatic” nature of economic and social rights, some doubts arise as regards to the full implementation of the NRS which strongly commit States on a political level but are intrinsically unable to bind them on a legal one. Hence, the risk is that even in this new European framework, economic and social rights for Roma appears only “reformulated” (even in the light of their cultural specificity though) but not more strongly justiciable at the domestic level. Overall it seems, that even if the elaboration of Strategies can undoubtedly represent a first coherent European commitment to eradicate the “poverty cycle” for EU Romani citizens, the ERS lack incisive powers allowing Roma to escape from their conditions of “citizens of the State” but “foreigners in the enjoyment of their economic and social rights”.<sup>604</sup>

---

<sup>604</sup> D. Borgonovo Re, "La scolarizzazione di Rom e Sinti fra l'Europa e il Trentino " in *Tutela delle identità culturali, diritti linguistici e istruzione: dal Trentino-Alto Adige Sudtirolo alla Prospettiva Comparata*, ed. E. Ceccherini and M. Cosulich (Padova : CEDAM 2012), 245.

## Chapter 6

### Cultural Rights

**Summary:** 6.1. Romani cultural identity. – 6.2. Cultural rights at international level. – 6.3. Cultural rights at European level. – 6.3.1. Organization for Security and Cooperation in Europe. – 6.3.2. Council of Europe. – 6.3.2.1. Romani cultural identity in the jurisprudence of the European Court of Human Rights. – 6.3.3. European Union. – 6.4. Collective cultural rights: National Cultural Autonomy. – 6.5. Minimum recognition of Romani cultural identity. – 6.6. Cultural rights of Roma at domestic level. – 6.6.1. Cultural rights in a territorial perspective. – 6.6.2. Cultural rights in a personal perspective. – 6.7. Critical Remarks.

#### 6.1. Romani cultural identity

Romani cultural identity cannot be precisely defined as it is neither a static nor a homogenous concept. Indeed, the general notion of “cultural identity” has been defined as a “living concept”<sup>605</sup> which means that any consideration on the cultural identity of any social group has to be taken in the light of what the group has become, besides than on what the group is, as it implies a reflection on the past as much as on the future.<sup>606</sup> In the specific case of Roma, their cultural identity besides continuously “living” under re/de-construction has also been defined as being “boundary crossing” i.e. as standing in between public and private spheres: between the (private) sphere of the social group and the (public) sphere of national cultures belonging to the territories where Roma have been residing.<sup>607</sup> These spheres have been continuously merging and overlapping.

---

<sup>605</sup> Costantin and Rautz also present the idea of culture as a “living concept” although from a legal perspective, as their the jurisprudential analysis show. Costantin S. and Rautz G., “Culture and Identity ” *European Integration* 25, no. 3 (2003).

<sup>606</sup> Y. Donders, *Towards a Right to Cultural Identity?* (Antwerpen/Oxford/New York: Intersentia 2002), 30.

<sup>607</sup> C. Silverman cited in B. Mundall, “Insights into Gypsy Culture,” *Old Oregon* (1988).

As discussed in chapter 4, Romani cultural identity is strongly connected to Romanes, although not exclusively. According to Okely, non-Roma have habitually defined Romani cultural identity through a biased perspective which for a long time has been perceiving Roma in a state of isolation, with unique and self-contained traditions.<sup>608</sup> These biased misrepresentations of (supposedly) “Romani self-contained traditions” have built around both “ethno-genetic” and “socio-genetic” narratives on Romani origins.

On the one hand, the ethno-genetic narrative contributed to create “romantic” but unfounded images of Roma, which mistakenly fixed Romani cultural identity in biology with the aim of reifying the former existence of some “pure-blooded race” of Indian ancestral origins.<sup>609</sup> On the other hand, the “socio-genetic” narrative contributed to create “real” but obsolete images of Roma, which wrongly attributed Romani cultural identity especially to the traditional image of caravan-dwellers which referred to a nomadic life-style, currently abandoned by the vast majority of Roma.<sup>610</sup> This “socio-genetic” narrative promoted an obsolete representation of Roma which is still reverberating at the European level and which can still be found in the socio-legal categories of “travellers” and “nomads”.<sup>611</sup>

Roma have instead traditionally identified their cultural identity in the corpus of Romani traditions which are transmitted to grand-parents and parents to children and which cover every aspect of life, from birth to death, for interrelations as well as for conflicts, for family life, hygiene and so on. In the lack of a kin-state, i.e. of an “abstract entity” incarnating and regulating the social life of Romani community by means of national public laws, Romani

---

<sup>608</sup> J. Okely, *The Traveller - Gypsies* (Cambridge: Cambridge University Press, 1983), 28.

<sup>609</sup> However, as Bonhann maintains “Race in any case is no more than a social category, it is not a physical reality for any group”. In *Ibid.*, 34.

<sup>610</sup> In Great Britain, where the image of Roma mostly derive from a “socio-genetic” rather than an “ethno-genetic” account, some Romani communities have been paradoxically denied acknowledgement of their ethnic affiliation precisely because they do not conform to the nomadic stereotype. See I. Hancock, “Romance Vs. Reality: Popular Notions of the Gypsy,” *Roma 2*, no. 1 (1976).

<sup>611</sup> See, *inter alia* the written questions and answers presented before the European Parliament C 192/97, No.84/84 (84/C 213/24), No.1141/87 (88/C 93/73), and the CoE Resolution No. (75) 13 “Social Situation of Nomads in Europe”.

cultural identity has in fact predominantly hinged on the social unit of family and the lineage.<sup>612</sup>

This social unity has been customarily granted by the *Kris*, the traditional Romani judicial body, which has been regulating the intra-groups relationships through decisions taken by the most authoritative people of Romani communities on the basis of the principle of consensus.<sup>613</sup> In those Romani communities where the judicial body of *Kris* still exists, this traditional device of self-government still maintains a strong binding force: those who do not comply to the rulings as well as those who commit the most serious crimes are banished from the community.

Although the ritual procedures regulating the administration of Romani justice within the *Kris* may slightly vary within the various communities, especially in the Central-Eastern Europe where the highest percentage of Romani population live, the various *Kris* are characterized by very similar “institutional patterns”.<sup>614</sup> Historically, the *Kris* has deemed to be one of the strongest means of preservation of Romani cultural identity since it guaranteed the maintenance of social norms also in those contexts, such as the former Soviet Republic, where the diffusion of Roma in wide territorial areas could have potentially undermined their unity.

Nowadays, it is impossible to precisely identify the “authentic” and “common” components of an “European traditional Romani cultural identity”, even from a Romani standpoint, since

---

<sup>612</sup> See, *infra*, <http://www.rroma.org/rroma-traditions/> (last accessed on 09/05/2012).

<sup>613</sup> On the Romani administration of justice see, *inter alia*, W.O. Weyrauch, *Gypsy Law. Romani Legal Traditions and Culture* (Berkeley/Los Angeles/London : University of California Press 2001).

<sup>614</sup> “When the trial starts, both parties present their position, followed by a discussion by the court participants - circumstances are clarified, witnesses are summoned by both parties, etc. In the course of hearings, judges are the ones who most often take the floor, yet anyone present has the right to speak, to give evidence, or back their opinion on the relevant question by citing past examples. Discussions are not limited by time, and especially in difficult cases the hearing may take several days. The main aim is to bring the parties’ positions closer and to allow for a consensus to be reached through mutual compromise. After the judges decide that a common position has been established, they hold consultations, formulate a decision which is acceptable to everyone involved, and then publicly declare it (usually this is done by the most respectable among them).” The *Kris* has generally “jurisdiction *ratione materiae*” over the following areas: disputes concerning economic interests, disputes related to family, moral and ethical disputes, problems concerning the entire community (or parts thereof). See <http://romafacts.uni-graz.at/index.php/culture/culture-2/the-roma-court> (last accessed on 09/05/2012).

the differences existing among the various communities have been further emphasized with the process of transition to modern societies. At the present time, three main “derivations” of traditional Romani cultural identity have been identified: Roma who have abandoned many of their traditional beliefs and customs, Roma who speak some form of Romanes but have abandoned part of their traditional beliefs and customs, and Roma who have maintained part of their culture but not their language.<sup>615</sup> Yet, as Marushiakova and Popov clarify

Roma culture, as any other European culture, is ... a dynamic, constantly evolving and enriching system. From this perspective it becomes clear how pointless the often occurring opposition is between “real Roma” (i.e., preserving the traditional elements of Roma culture) and “fake Roma” (who are adhering to modern forms, characteristic of today’s globalised world). The Romani culture in today’s globalised world is constantly changing, and in many cases it is preserved only as ethnic cultural heritage. Cultural development of the Roma (as well as of any other European nation) cannot and should not be restricted, as it is simply impossible for any culture to remain frozen in its traditional form.<sup>616</sup>

In this light, it can thus be inferred that the core essence of the self-contained system of values and symbols<sup>617</sup> forming Romani cultural identity in Europe, can be deducted *ex negativo* as mostly rooted in the juxtaposition with the non-Roma world. This idea has been supported in an operational perspective by Alvaro Gils-Robles, the former CoE Commissioner for Human Rights, when he pointed out that notwithstanding the history of Roma “as integral part of European culture”, they have been generally perceived by the majority of the population as “others, as foreigners in their home countries”.<sup>618</sup> From an academic perspective, Williams has further developed this idea by recently describing the condition of Roma in Europe as

---

<sup>615</sup> Hancock, "Romance Vs. Reality: Popular Notions of the Gypsy."

<sup>616</sup> E. Marushiakova and V. Popov, "Roma Culture " [http://romafacts.uni-graz.at/images/stories/pdf/c\\_1.1\\_culture-ii.pdf](http://romafacts.uni-graz.at/images/stories/pdf/c_1.1_culture-ii.pdf) CoE, Project Education of Roma Children in Europe.

<sup>617</sup> Stavenhagen has defined culture as a “coherent self-contained system of values and symbols” in R. Stavenhagen, "Cultural Rights and Universal Human Rights," in *Economic, Social and Cultural Rights: A Textbook* ed. A. Eide (Dordrecht : Martinus Nijhoff Publishers, 1995), 66.

<sup>618</sup> A. Gil-Robles, "Final Report by Mr Alvaro Gil-Robles Commissioner for Human Rights on the Situation of the Roma, Sinti and Travellers in Europe for the Attention of the Committee of Ministers and the Parliamentary Assembly " (Strasbourg CoE 2006). § 5.

“immerse” in territories inhabited by other populations, “disperse” in different territorial areas and generally considered to be as “illegitimate” by other social groups.<sup>619</sup>

## 6.2. Cultural rights at international level

The nature and the scope of cultural rights are strictly interlinked with the concepts of culture and cultural identity. As discussed in the previous section, the concept of culture cannot be precisely defined not even in relation to a specific ethnic group, because its “fluid” nature continuously escapes any possible definition. Consequently, at the level of international law, both jurisprudence and statutory legislation refer to the notions of “culture” and “cultural rights” by means of a very broad “margin of appreciation”.

Within international jurisprudence, the reference to the concepts of culture and cultural rights covers a wide spectrum of rights: from the rights protecting creativity (such as copyright, artistic and intellectual freedom) to the rights indirectly protecting culture in its various forms (such as the rights to language, education, religion or expression). At the level of international statutory legislation, cultural rights are protected in various legal documents, which cover different cultural areas.<sup>620</sup>

By and large, the doctrine has described cultural rights as “the Cinderella of the human rights family” since, from a legal standpoint cultural rights can be considered being as the less developed rights of the human rights spectrum.<sup>621</sup> At the level of their effective implementation, cultural rights have also been largely regarded as “weak rights”. For a long time, international organizations have been ignoring or neglecting cultural rights, and national

---

<sup>619</sup> P. Williams, "L'ethnologie des tsiganes " in *Des tsiganes en Europe*, ed. M. Stewart and P. Williams (Paris : Editions de la Maison des sciences de l'homme, 2011), 12.

<sup>620</sup> UNESCO and ILO are two most active international organizations working for the protection, promotion and fulfillment of cultural rights, should be in particular mentioned. For an overview over the legal documents produced by these two organizations see in particular chapters 5 and 8 in Donders, *Towards a Right to Cultural Identity?* .

<sup>621</sup> H. Niec, "Casting the Foundation for the Implementation of Cultural Rights " in *Cultural Rights and Wrongs, a Collection of Essays in Commemoration of the 50th Anniversary of the Universal Declaration of Human Rights* ed. H. Niec (Paris: UNESCO Publishing 1998), 176. Cited in Donders, *Towards a Right to Cultural Identity?* , 65.

systems providing legal recognition to cultural rights have assured their practical enforcement quite difficultly.<sup>622</sup>

For the purpose of this analysis, the discussion on cultural rights is restricted to the sphere of *the right to culture*, i.e. to that set of rights which refers to the right to preserve, develop and have access to a distinct culture other than that of the majority within a national state as defined by the recent UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005.<sup>623</sup>

In the case of minority rights, the most important provision that recognizes “a right to culture” at international law level is Art. 27 of the ICCPR, as it has been seen in the case of linguistic rights.<sup>624</sup> This provision specifically refers to minorities and it opens to a collective enjoyment of cultural rights, as the wording “in community with the other members of the group” clarifies. Nonetheless, according to General Comment 23 on Art.27, this collective dimension should not be interpreted as a corollary of Art.1 ICCPR on the rights of people to self-determination. Indeed, the scope of Art.27 is restricted to individuals belonging to minorities and it should be compatible with the sovereignty and territorial integrity of the States.<sup>625</sup>

Moreover, the UN Declaration on Minorities has further clarified, although in a non-binding perspective, that the state obligations under Art.27 ICCPR, should also be interpreted in terms

---

<sup>622</sup> W. Mannens, "The International Status of Cultural Rights for National Minorities," in *Minority Rights in The "New" Europe* ed. P. and Wheatley Cumper, S. (The Hague/ London/Boston : Martinus Nijhoff Publishers 1999), 187.

<sup>623</sup> In particular, Art.1 of the Convention establishes that “Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof”. For a critical discussion over the concept of cultural identity in the recent UNESCO legal instrument see, *inter alia*, L. Zagato, *Le identità culturali nei recenti strumenti Unesco. Un approccio nuovo alla costruzione della pace?* (Padova : CEDAM, 2008).

<sup>624</sup> See, *infra* chapter 4.

<sup>625</sup> Donders, *Towards a Right to Cultural Identity?* , 170.



of “positive obligations” i.e. in terms of State’s active engagement to secure the effective enjoyment of this provision.<sup>626</sup>

More recently, the right to culture has also been included in the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions which enshrines, at Art.2.3, the principle of “equal dignity of and respect for all cultures” whose recognition includes also persons belonging to minorities and indigenous people. This legal instrument, further promotes the right to cultural expression of persons belonging to minorities and indigenous people by requiring States Parties to create an environment which encourages the creation, production, dissemination, distribution and access to cultural expression (Art.7.1. (a) ). Against this background, it can be noted that while this broad set of international cultural norms strongly contributes to found the general principles for protecting Romani cultural identity, the effective implementation of these principles can only be set at European and national levels.

### **6.3. Cultural rights at European level**

In European law, minority cultural rights have found recognition – at different degrees and in diverse legal realms – in each geo-legal sphere. In the case of Roma, the recognition of cultural rights is usually quite underdeveloped, considering that the recognition of their specific cultural identity is still at an embryonic stage as well. Yet, some forms of recognition of both Romani cultural identity and specific cultural rights have progressively started to develop particularly at the levels of the OSCE and CoE. While the OSCE has recently recognized Romani cultural identity in a thematic report presented by the HCNM, the CoE has been increasingly promoting Romani cultural identity on a more binding level through the case-law of the ECtHR. At the level of the EU instead, the recognition of both Romani

---

<sup>626</sup> This interpretation of Art.27 of ICCPR in terms of State’s positive obligations has been quite innovative, given that the wording of the article “shall not be denied the right” has traditionally been interpreted only in terms of negative obligations.

cultural identity and specific cultural rights is still too weak, notwithstanding the existence of some hard-law instruments which can fit Roma's needs.

### **6.3.1. Organization for Security and Cooperation in Europe**

The OSCE has been highlighting in several occasions the importance of protecting the cultural heritage and the cultural rights of minorities through private as well as through public efforts.<sup>627</sup> Cultural life has in fact deemed to be a crucial element for the maintenance of free societies and democratic institutions.<sup>628</sup>

In 1992, the Oslo Recommendations have advocated for both the establishment of national institutions which can take care of cultural concerns at the domestic level and for the effective access to appropriate judicial resources to such institutions (as ombudsmen or human rights commissions).<sup>629</sup> Yet, the practical implementation of these recommendations as far as the realm of cultural rights are concerned, appears by and large quite underdeveloped.<sup>630</sup>

In 1999, the Lund Recommendations have clarified that the effective participation of minorities in public life can be guaranteed also by mean of both territorial and/or non-territorial arrangements of self-government. In particular, non-territorial arrangements have to be understood, according to the wording of the Lund Recommendation, as including "education, culture, use of minority language, religion, and other matters crucial to the identity and way of life of national minorities".<sup>631</sup>

Where forms of minority self-government are activated by mean of non-territorial arrangements, the Lund Recommendations specify that cultural rights can also be promoted

---

<sup>627</sup> "Towards a Genuine Partnership in a New Era", Budapest 1994 Chapter VIII § 39.

<sup>628</sup> The Document of the Moscow Meeting of the Conference of the Human Dimension of the CSCE 1991 § 35.

<sup>629</sup> See in particular, Recommendation 16 of the Oslo Recommendations regarding the Linguistic Rights of National Minorities, and Explanatory Note, 1998.

<sup>630</sup> A. Eide, "Cultural Rights and Minorities: On Human Rights and Group Accomodation " in *Legal Cultures and Human Rights. The Challenge of Diversity*, ed. K. Hastrup (The Hague/London/New York: Kluwer Law International 2001).

<sup>631</sup> See the Lund Recommendations on the Effective Participation of National Minorities, and Explanatory Note, 1999. Part III, Point 18.

by setting some peculiar educational standards, which for instance, can take the form of educational curricula aimed at the promotion of minority culture also through activation of the courses in the minority language. Moreover, according to the Lund Recommendations non-territorial devices for the promotion of cultural rights can allow, *inter alia*, the usage of minority symbols and other forms of cultural expression.<sup>632</sup>

In 2008, the Bolzano/Bozen Recommendations have stressed the importance of respecting the cultural diversity of minorities against any attempts of assimilation of minorities against their will. In this occasion, the OSCE has further emphasized the need to preserve minority cultural identity also through the facilitation of trans-border relationships with persons lawfully residing in other States.<sup>633</sup>

In the case of Roma, the OSCE has reiterated in several occasions, mostly through declaratory documents, the need to protect Romani cultural identity from any form of racism and xenophobia.<sup>634</sup> Although these documents lack binding force, they have strongly contributed to set the legal ground on which the Office of the HCNM has built its thematic report on Roma. In particular, the report prepared by the HCNM has emphasized a high discrepancy between the living conditions of Roma and the principles enshrined at Paragraph 33 of the Copenhagen Document. While Paragraph 33 advocates for the protection of “ethnic, cultural,

---

<sup>632</sup> Ibid. Point 18.

<sup>633</sup> See in particular Recommendations 6 and 8 of Bolzano/Bozen Recommendations on National minorities in Inter-State relations and Explanatory Note, 2008.

<sup>634</sup> In the CSCE Meeting of Experts on National Minorities (1-19<sup>th</sup> July, Geneva) where the particular problem of Roma (Gypsies) concerning the proliferation of acts of racial and ethnic hatred was recognized. In the Moscow Meeting of the Conference on the Human Dimension of the CSCE (10<sup>th</sup> September-4<sup>th</sup> October 1991) it was acknowledged that effective human rights education contributes to combat intolerance and ethnic prejudice against Roma (§42.4). In the Helsinki Document, “the Challenges of Change” (12<sup>th</sup> June, 1992 Helsinki) it was recommended to develop appropriate programmes addressing problems of Romani people (§35). The Budapest Document, “Towards a Genuine Partnership in a new Era” (Budapest, 1994) represents a mild effort to promote Romani cultural identity by welcoming Romani organizations and institutions to actively contribute to the activities promoted by the CoE (§24). These soft-law recognition of Romani cultural identity has been further recalled in the Report of the Chair-in-Office to the Lisbon Summit (including the Reports of the Rapporteurs of the Working Group), (Lisbon, 29 November, 1996), in the Seventh Ministerial Council Meeting, 2<sup>nd</sup> and 3<sup>rd</sup> December 1998 “Enhancement of the OSCE’s Operational Capabilities Regarding Roma and Sinti Issues” p.20, in the Charter for European Security (Istanbul, SUM/DOC/1/99, 19<sup>th</sup> November 1999) § 20 and in the Istanbul Summit Declaration (SUM.DOC/2/99, 19<sup>th</sup> November 1999) § 31.

linguistic and religious identity of national minorities on their territory” and the creation of “conditions for the promotion of that identity”, according to the HCNM, in the case of Roma the implementation of such recommendations needs to be put in place with a particular focus to the access of Roma to the public and the private media.<sup>635</sup>

The HCNM has further highlighted that the full development of Romani cultural identity can be realized once their physical integrity, freedom from discrimination, the right to education, freedom from want and equality of opportunities will be effectively ensured. Indeed, in the perspective of the HCNM, in the lack of minimum conditions guaranteeing human dignity, the full social integration of Roma cannot be assured.<sup>636</sup>

The report of the HCNM has additionally emphasized the need to improve the dimension of education for Roma also in Eastern Europe, where the protection of Romani cultural rights has historically being more promotional. In fact, once the Soviet Bloc has collapsed the practice of including Romani pupils in schools for children with special needs has been dramatically increasing. The HCNM has thus proposed to uphold the good practice of “multicultural schools” that can guarantee both the fulfillment of the cultural right to education for Romani pupils and the reinforcement of the elimination of racial biases for mainstream pupils.<sup>637</sup>

### **6.3.2. Council of Europe**

At the level of the CoE, both the ECRML and the FCNM protect and promote the cultural rights of minorities. As seen in previous chapters, the ECRML aims to protect minority languages, therefore this treaty indirectly addresses the protection of minority cultural rights through a linguistic dimension.<sup>638</sup> Both the preamble and Art.7.1 (a) of ECRML underline the

---

<sup>635</sup> OSCE-HCNM, "Report on the Situation of Roma and Sinti in the Osce Area," (OSCE-HCNM 2000), 9.

<sup>636</sup> Ibid., 15.

<sup>637</sup> Ibid., 82.

<sup>638</sup> See to this regard particularly section 4.4.

need to protect minority languages as a mean to maintain and develop Europe's cultural wealth and traditions. Art.8 (g) invites States Parties to activate the necessary arrangements in order to guarantee besides the teaching in a minority language also “the teaching of the history and the culture which is reflected by the regional or minority language”.

ECRML offers a more prominent protection of cultural rights at Art.12. This provision requires States Parties to protect and promote the cultural dimension of linguistic rights by providing cultural activities and facilities “especially libraries, video libraries, cultural centres, museums, archives, academies, theatres and cinemas, as well as literary work and film production, vernacular forms of cultural expression, festivals and the culture industries, including inter alia the use of new technologies”. According to a recent report of the CoE, at the moment, no European States seems to have provided concrete implementation to the “cultural provisions” enshrined within the ECRLM as far as Romanes is concerned.<sup>639</sup>

In the case of the FCNM, the cultural life of national minorities is promoted by means of a more wide-ranging spectrum of rights. Art.5 specifies that the idea of “cultural life of minorities” (enshrined at Art.4) should be understood as implying the preservation of “religion, language, traditions and cultural heritage”. To this purpose, paragraph 2 of the same article specifies that States Parties are bound to refrain from “policies or practices aimed at assimilation of persons belonging to national minorities against their will”.

At the same time, this provision requires States Parties to “protect these persons from any action aimed at such assimilation”. Moreover, the FCNM identifies in the States Parties the positive obligation “to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity” (Art.6). The effective participation to the cultural life of

---

<sup>639</sup> CoE, *Minority Language Protection in Europe: Into a New Decade*, vol. Regional or Minority Language No.8 (Strasbourg: The Council of Europe Publisher, 2010).

persons belonging to national minorities is recognized as well as a positive obligation of States Parties (Art.15).

As for Roma, the CoE has started to explicitly recognize the need to promote their cultural identity as a mean to effectively combat their social exclusion only in 2005 during the 3<sup>rd</sup> Summit of the Heads of State and Government.<sup>640</sup> Nonetheless, in the last fifteen years the recognition of the Romani cultural identity has also started to appear – in different forms though – in the ECtHR jurisprudence.

### **6.3.2.1. Romani cultural identity in the jurisprudence of the European Court of Human Rights**

In the absence of a specific treaty provision dealing with minority rights in the ECHR, the recognition of Romani cultural identity in the jurisprudence of the ECtHR developed by means of a “jurisprudential legal revolution” which is still in progress.<sup>641</sup> Traditionally, the ECtHR’s approach towards minority rights (and towards any other form of recognition of social difference) has been characterized by a “minimum interventionism”.

In its early jurisprudence, the Court in fact emphasized the formal equality of treatment of persons in accordance with the principle of the rule of law without substantially recognizing different social identities, especially minority ethnic identities.<sup>642</sup> Indeed, the first cases claiming minority recognition before the ECtHR were hinging on an individual basis but they lacked open reference to a specific cultural identity of (minority) social groups to which the individuals belonged. Soon after, the ECtHR has started to progressively develop a doctrine

---

<sup>640</sup> CoE, 3rd Summit of Heads of State and Government (Warsaw, 16<sup>th</sup>-17<sup>th</sup> May 2005), Part III “Building a more humane and inclusive Europe”, Points 1 and 5.

<sup>641</sup> J.A. Goldston and C. Hermanin, "Corti Europee e cause pilota: una finestra di opportunità per combattere la discriminazione dei Rom in Italia?," in *La condizione giuridica di Rom e Sinti in Italia*, ed. P. Bonetti, A. Simoni, and T. Vitale (Milano: Giuffrè Editore, 2011), 205.

<sup>642</sup> R. Sandland, "Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of the Human Rights " *Human Rights Law Review* 8, no. 3 (2008): 480.

of collective recognition of cultural identity, particularly in the realms of religious pluralism, freedom of expression (mostly in relation to the use of a minority language) and education.<sup>643</sup>

While an increasing consideration of minority cultural identity started to emerge in the jurisprudence of the ECtHR,<sup>644</sup> it did not *per se* pave the way for the parallel recognition of Romani cultural identity as well. Some legal evolution developed at European level (namely the adoption of the EU Race Equality Directive in 2000 and the entry into force of Protocol No.12 of the ECHR in 2005) contributed to frame the right of non discrimination as an autonomous right also in European law<sup>645</sup> thus further laying the basis for the legal framework for a recognition of Romani cultural identity.

In this light, the evolution (or rather the “revolution”) of the ECtHR’s approach in the consideration of Romani cultural identity has started to progressively develop. According to Roma rights advocates, besides substantial evidence, three main procedural litigation strategies have strongly contributed to push the consideration of Roma rights violations before the ECtHR: positive obligations, burdens of proof and rebuttable presumptions.<sup>646</sup>

---

<sup>643</sup> Donders, *Towards a Right to Cultural Identity?*, 299.

<sup>644</sup> Benoît-Rohmer foresees a first approach of the ECtHR towards the legal consideration of minorities (and especially national minorities) in four cases whereby the Court considered the Russian speaking community of Latvia (*Podkolzina v. Latvia*, European Court of Human Rights, Application No. 46726/99 decision of 9<sup>th</sup> April 2002) the Kurdish “people” of Turkey (*Freedom and Democracy Party (Özdep) v. Turkey*, European Court of Human Rights, Application No. 23885/94, decision of 8 December 1999) the Greek Macedonians with “irredentist” aspirations (*Sidiropoulos and Others v. Greece*, European Court of Human Rights, Application No. 26695/95 decision of 10<sup>th</sup> July 1998.) and the Macedonian minority of Bulgaria (*Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, European Court of Human Rights, Application Nos. 29221/95 and 29225/95, decision of 2<sup>nd</sup> October 2001.). Benoît-Rohmer identifies a fifth case that can be attributed to this initial approach to minority issues in whereby the religious minority in Moldova claimed to belong to the Metropolitan Church of Bessarabia (*Metropolitan Church of Bessarabia and Others v. Moldova*, European Court of Human Rights, Application No. 45701/99 decision of 13<sup>th</sup> December 2001). F. Benoît-Rohmer, “La Cour Européenne des droits de l’homme et la défense des droits des minorités nationales”, *Revue trimestrielle des droits de l’homme* 13, no. 51 (2002).

<sup>645</sup> The consideration on the right to non discrimination as an autonomous right already existed in international law at Art.26 of the ICCPR.

<sup>646</sup> Goldston and Hermanin, “Corti Europee e cause pilota: una finestra di opportunità per combattere la discriminazione dei Rom in Italia?”

Accordingly, the early jurisprudence of the ECtHR on Roma rights has mostly concentrated on two clusters of cases.<sup>647</sup> The first cluster focused on cases involving patterns of gross human rights violations against Roma (mostly involving the right to life, the prohibition of torture, and the right to an effective remedy, respectively Art.2, Art.3 and Art.13 of the Convention) by police officers. In these cases, States failed to investigate or to promptly provide remedy. A second cluster of cases concerned discriminatory attacks against Roma mostly in the spheres of education and housing (mostly involving the right to respect for family and private life, the right to a fair trial, the protection of property and the right to education, respectively Art.8, Art.6 and Art.1 and 2 of Protocol 1).

As for the first cluster of cases, *Assenov v. Bulgaria*<sup>648</sup> has been considered being the trigger case which paved the way for subsequent jurisprudential developments particularly on practices of police abuse against Roma.<sup>649</sup> One of the most relevant cases which built on the achievements of *Assenov* is *Nachova and Others v. Bulgaria* in which the Court clarified that

---

<sup>647</sup> The two clusters of cases have been identified by the authors Goldston and Hermanin cited above. Yet, this should be considered just as a doctrinal distinction not as “purely” jurisprudential one.

<sup>648</sup> *Assenov and Others v. Bulgaria*, Application No. 90/1997/874/1086, European Court of Human Rights, decision of 28 October 1998. In this case, the Court found a violation of Arts. 3, 13, 5.3., 5.4. and 25.1.

<sup>649</sup> See inter alia among the most relevant cases: *Bekos and Koutropoulos v. Greece*, Application No. 15250/02, European Court of Human Rights, decision of 13<sup>th</sup> December 2005 (violation of Art.3 and Art.14 in conjunction with Art.3 ); *Secic v. Croatia*, Application No. 40116/02, European Court of Human Rights, decision of 31 August 2007 (violation of Art.3 and Art.14 in conjunction with Art.3), *Cobzaru v. Romania*, Application No. 48254/99, European Court of Human Rights, decision of 26<sup>th</sup> July 2007 (violation of Arts. 3, 13 and 14 ), *Angelova and Iliev v. Bulgaria*, Application No. 55523/00, European Court of Human Rights, decision of 26<sup>th</sup> July 2007 (violation of Art.2 and Art. 14 read in conjunction with Art.2 ), *Petropoulou-Tsakiris v. Greece* Application No. 44803/04, European Court of Human Rights, decision of 6<sup>th</sup> December 2007 (violation of Art. 3 and 14); *Moldovan and Others v. Romania* Application Nos. 41138/98 and 64320/01, European Court of Human Rights, decision of 30<sup>th</sup> November 2005 (violation of Art.8, Art. 3, Art. 6.1., Art. 14 read in conjunction with Art. 6 and Art. 14 read in conjunction with Art.8); and *Stoica v. Romania*, Application No. 42722/02, European Court of Human Rights, decision of 4<sup>th</sup> March 2008. In particular, in this last case the Court held two violations of Art. 3 and a violation of Art. 3 in conjunction with Art.14 (As it the decision reads “the Court considers that the remarks from the Suceava Police report describing the villagers’ alleged aggressive behaviour as “pure Gypsy”, are clearly stereotypical and prove that the police officers were not racially neutral, either during the incidents or throughout the investigation” (§128). More recently, the Court has similarly ruled on *Koky and Others v. Slovakia* Application No. 13624/03, European Court of Human Rights, decision of 12<sup>th</sup> June 2012 (violation of Art.3); *Gergely and Others v. Romania* Application No. 57885/00, European Court of Human Rights, decision of 26<sup>th</sup> April 2007 ; *Kalanyos and Others v. Romania* Application No. 57884/00, European Court of Human Rights, decision of 26<sup>th</sup> April 2007, *Tanase and Others v. Romania* Application No. 5269/02, European Court of Human Rights, decision of 12<sup>th</sup> August 2009 (violation of Art.3 and of Art.5.3). *Eremiášová and Pechová v. the Czech Republic*, European Court of Human Rights, Application No.23944/04, decision of 16th February 2012 (violation of Art.2).



States hold a “positive obligation” in actively engaging to prevent and stop racist attacks against Roma, thus indirectly considering Romani cultural identity as well.<sup>650</sup>

Notwithstanding the importance that this first cluster of cases holds in bringing before the international attention serious cases of human rights abuses against Roma as a systematic pattern of discrimination towards this social group, it is in the second cluster of cases that the jurisprudential consideration of Romani cultural identity emerges clearly. In particular, while considering the violation of Art.8 of the ECHR, the Court interpreted the right to respect for private and family life as giving rise to a “positive obligation to facilitate the Gypsy way of life”<sup>651</sup> thus fully taking into account Romani cultural identity.

In *Buckley v. UK*<sup>652</sup> the applicant complained that her rights were violated under Art.8 and under Art.14 of the ECHR since, after a nomadic period, she decided to settle with her children on a caravan in a piece of land possessed by her. Although the home was established unlawfully, this did not prevent the ECtHR to consider the proportionality of the State’s interference. Nonetheless, in this case the Court did not decide whether the case also concerned the applicant’s right to respect for her “private life” and “family life” and in the

---

<sup>650</sup>“State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights”. *Nachova and Others v. Bulgaria*, Application Nos. 43577/98 and 43579/98, European Court of Human Rights, decision of 6<sup>th</sup> July 2005, § 160. In this case the Court found a violation of Art. 2 and a violation of Art. 14 taken in conjunction with Art.2 in that the authorities failed to investigate possible racist motivations causing the deaths of the applicant’s relatives. Interesting enough, the Court however did not consider that a violation of Art. 14 taken in conjunction with Art. 2 occurred concerning the allegation that the deaths of the applicants’ relatives constituted act of racial violence.

<sup>651</sup> This principle is considered in cases involving a breach of Art. 8 ECHR in United Kingdom discussed above. For a consideration on the definition of Romani cultural identity within the ECtHR’s jurisprudence see D. Farget, "Defining Roma Identity in the European Court of Human Rights " *International Journal on Minority and Group Rights* 19, no. 3 (2012).

<sup>652</sup> *Buckley v. the United Kingdom*, Application No. 20348/92, European Court of Human Rights, decision of 25<sup>th</sup> September 1996, Reports of Judgements and Decisions 1996-IV, no.16.

conclusion it held that United Kingdom did not violate Art. 8 when refusing Ms. Buckley planning permission.<sup>653</sup>

However, the influence that the *Buckley* case had on the following case-law on Roma went much beyond the Court's non-recognition of violation of Art. 8. One of the three dissenting judges, Judge Repik, held that the margin of appreciation that the Court invoked to justify its decision was too strict since it did not take into account the possible consequences for the applicant and her children on her private and family life. Additionally, Judge Repik found that the closest site where the applicant could have moved to live with her children, in the Government's opinion, was not an option since it was an unsafe place.

In another dissenting opinion, Judge Pettiti found a violation of both Arts. 8 and 14 as Roma were suffering from disproportionate government measures. Judge Pettiti further argued that the ECHR could provide a remedy for the disrespect and non-recognition of Romani culture in the past by imposing "positive obligations" on the States in order to ensure that in future fundamental rights were guaranteed without discrimination.

This first case slightly opened the historical ECtHR's jurisprudential approach to consider the social diversity of Roma also in terms of cultural identity, yet in subsequent cases the Court detected the full range of nuances of human rights abuses against Roma.<sup>654</sup> Indeed, in the case law that followed immediately after *Buckley*,<sup>655</sup> the Court embraced the same line of argumentation which substantially failed to recognize the differences entailed in the distinct Romani identity and the highly discriminatory approach perpetrated by the mainstream

---

<sup>653</sup> The case was already discussed at section 3.1.3.

<sup>654</sup> Sandland, "Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of the Human Rights ": 485.

<sup>655</sup> Such as in the cases *Velikova v. Bulgaria*, Application No. 41488/98, European Court of Human Rights, decision of 18<sup>th</sup> May 2000 and *Anguelova v. Bulgaria* Application No. 38361/97, European Court of Human Rights, decision of 13<sup>th</sup> June 2002.

society. After the case *Thlimmenos v. Greece*,<sup>656</sup> which established the precedent that different people should be treated differently in order to substantially fulfil the right to equality, the way was paved for a differentiated recognition of Romani cases.

In *Chapman v. UK*,<sup>657</sup> the Court held that the planning and enforcement measures taken against the applicant did fall under the scope of Art.8 because of the applicant's right to respect for her home, but also because of the right to respect private and family life. While in this case, the Court made a step forward in considering the scope of Art.8 with regard to Romani cultural identity, it remained stuck in the "old position" which completely disregarded any possible violation on ethnic grounds as well. In conclusion of its decision, the Court supported its reasoning (no violation of Art.8 and of Art.14) by noting that governmental authorities could not treat a Roma person who illegally established a caravan site, differently from a non-Roma person who did the same.<sup>658</sup> However, by referring to *Buckley*, the Court recognized that

..the fact of belonging to a minority with a traditional lifestyle different from that of the majority does not confer an immunity from general laws intended to safeguard the assets of the community as a whole, such as the environment, it may have an incidence on the manner in which such laws are to be implemented.. [Nonetheless] the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases ... To this extent, there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the Gypsy way of life.<sup>659</sup>

In a dissenting opinion (*Chapman* case) seven judges argued that according to an emerging consensus among the countries of CoE regarding the protection of the rights of minorities – Roma included – not only means of abstention or non discrimination are required but also

---

<sup>656</sup> In *Thlimmenos* the Court held that "The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is...violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different". *Thlimmenos v. Greece* (Application No. 34369/97, European Court of Human Rights, decision of 6<sup>th</sup> April 2000) § 44.

<sup>657</sup> *Chapman v. the United Kingdom*, Application No. 27238/95, European Court of Human Rights, decision of 18<sup>th</sup> January 2001. See again chapter 5 for further analysis on this case.

<sup>658</sup> See § 95.

<sup>659</sup> § 96.

positive action through legislation or specific programmes. The new approach that the Court started to uphold with *Chapman*, marks a watershed with the previous jurisprudence in that it eventually recognized the equality principle by considering the different effects of law on the basis of the different identity of the individuals subject to it.<sup>660</sup>

Some of the following cases<sup>661</sup> continued to be built on similar logical premises of *Chapman* by leading to analogous conclusions: neither violation of Art.8 nor violation of Art. 14. Other cases instead, opened for a more different-sensitive approach. In the dissenting opinions of these cases in fact, the judges emphasized that a violation of Art.8 had occurred and that the Court should not have continued to stick to the distorted image that vacancies for Roma sites were available elsewhere in UK, in the light of shortfall of places.

As seen in the previous chapter as well, the new jurisprudential attitude, more sensitive towards Romani specific cultural identity, led the Court to consider, in *Connors v. UK*,<sup>662</sup> a margin of appreciation that “tends to be narrower where the right at stake is crucial to the individual’s effective enjoyment of intimate or key rights”.<sup>663</sup> Notwithstanding the series of cases reporting gross violations of Roma rights in relation to the prohibition of discrimination,<sup>664</sup> the Court did not openly considered cases of direct discrimination of

---

<sup>660</sup> Sandland, "Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of the Human Rights ": 491.

<sup>661</sup> *Beard v. The United Kingdom*, Application No. 24882/94, European Court of Human Rights decision of 18<sup>th</sup> January 2001; *Coster v. The United Kingdom*, Application No. 24876/94 European Court of Human Rights decision of 18<sup>th</sup> January 2001; *Lee v. The United Kingdom*, Application No. 25289/94 European Court of Human Rights decision of 18<sup>th</sup> January 2001; *Jane Smith v. The United Kingdom*, Application No. 25154/94 European Court of Human Rights decision of 18<sup>th</sup> January 2001.

<sup>662</sup> *Connors v. United Kingdom* Application No. 66746/01 European Court of Human Rights decision of 27<sup>th</sup> May 2004.

<sup>663</sup> *Ibid.*, para 82.

<sup>664</sup> *Anguelova v Bulgaria*, Application No. 38361/97 European Court of Human Rights decision of 13<sup>th</sup> June 2002; *Nachova and Others v Bulgaria*, Application Nos. 43577/98, 43579/98, European Court of Human Rights decision of 6<sup>th</sup> July 2005; *Moldovan and Others v Romania*, Application Nos. s nos. 41138/98 and 64320/01 European Court of Human Rights decision of 30<sup>th</sup> November 2005; *Bekos and Koutropoulos v Greece*, Application No. 15250/02, European Court of Human Rights decision of 13<sup>th</sup> December 2005; *Secic v Croatia*, Application No. 40116/02 European Court of Human Rights decision of 15<sup>th</sup> June 2006.

Roma,<sup>665</sup> until the reconsideration of the case *D.H. and others vs. Czech Republic* before the Grand Chamber.<sup>666</sup>

In 2006, the Second Section of the ECtHR found in this leading case that there was no violation of Art. 14 combined with Art. 2 of Protocol 1. The case regarded 18 Romani students, born between 1985 and 1999 who were placed in special schools for mentally disabled children in the Ostrava Region of the Czech Republic. When the applicants filed an appeal to the Grand Chamber, the issues related to the admissibility of the case were reconsidered *de novo*. The Grand Chamber eventually found the educational practice of Czech Republic *vis-à-vis* Romani pupils in breach of Arts. 14 of ECHR and Art.2 Protocol 1.

Among the major finding identified by the Grand Chamber, a violation of Art.14 in relation to a pattern of racial discrimination in a particular sphere of public life (education) was recognized. Especially in this case, the Court emphasized that the Convention does not only address specific acts of discrimination but also to systemic practices which deny the rights to some ethnic groups, precisely in the light of their distinct cultural identity.<sup>667</sup>

In this case, the Court further established, clarified and reaffirmed other principles. In the case of indirect discrimination it is not necessary to prove any discriminatory intent of judicial authorities (i.e. subjective elements or intent are not required). Also the burden of proof falls on the respondent State which has to prove that the difference in treatment is not discriminatory. Moreover, patterns of discrimination can be identified even when the wording of a particular statutory provision is neutral but its application leads to a racially disproportionate manner without justification. The Court finally reiterated the idea that, as a

---

<sup>665</sup> Such as the breach of any provisions involving the effective enjoyment of individual intimate or key rights in the light of the specific Romani cultural identity.

<sup>666</sup> *D.H. and Others v. Czech Republic*, European Court of Human Rights, Application No. 57325/00, Chamber decision of 7 February 2006 Grand Chamber decision of 13<sup>th</sup> November 2007. The case has already been discussed by chapters 4 and 5 respectively from linguistic and socio-economic perspectives.

<sup>667</sup> It is interesting to note that in its reasoning the Court made reference to Directive 97/80/EC and Directive 2000/43/EC.

result of history, Roma have become a specific type of disadvantaged and vulnerable minority in Europe who require special protection.<sup>668</sup>

On the groundbreaking foundation of *D.H. and Others*, the Court further recognized a violation of Art.14 and Art.1 Protocol 1 in the case *Muñoz Díaz v Spain*. In this case, the applicant was a Romani woman to whom the Spanish Government refused to grant a pension since she had married in accordance with Romani traditional rites in 1971. The applicant presented the argument that the legal treating of her marriage as *more uxorio* cohabitation by Spanish authorities was to be considered as a breach of Art.14 of the ECHR and Art.12. Indeed, in previous equivalent cases, the Spanish judicial authorities had recognized the right to pension to survivors who were not married according to the statutory formalities. Mrs. Muñoz Díaz maintained that at domestic level her ethnic belonging had never been taken into account which constituted discriminatory treatment. In particular, according to the applicant the alleged violations were rooted in the application of the constitutional principle of equal treatment which in its extreme form of “equalization in different situations” can produce discrimination.<sup>669</sup>

The Court recognized a breach of Art. 14 together with Art.1 Protocol 1 of the ECHR (protection of property) in that it deemed the measure of the Spanish State disproportionate, as it previously had granted large-family status, provided health coverage to the Mr. Muñoz Díaz’s family and collected Mr. Muñoz Díaz’s social security contributions for over 19 years. Thus, the subsequent refusal to recognise the effects of Mrs Muñoz Díaz’s Roma marriage for the purpose of the survivor’s pension was seen as in stark contrast with the former

---

<sup>668</sup> On *D.H. and Others v. Czech Republic* see J. Devroye, "The Case of D.H. And Others V. The Czech Republic," *Northwestern Journal of International Human Rights* 7, no. 1 (2009).

<sup>669</sup> This argument could have been supported before the ECtHR thanks to the precedent established by *Thlimmenos*, the precedent rulings *Beard, Coster, Chapman, Smith* and *Lee v. United Kingdom* that highlighted the position “the vulnerability of the Roma entails giving special attention to their needs and their particular lifestyle” together with the vision of “democracy as a society in which diversity is not perceived as a threat, but rather as a source of wealth” outlined in *Nachova and Others v. Bulgaria* (2005).

measures.<sup>670</sup> As regard to Art.12, the complaint was rejected as manifestly ill-founded since according to the Court “The fact that Roma marriage had no civil effects as desired by Mrs Muñoz Díaz did not constitute discrimination prohibited by Article 14”.<sup>671</sup>

In a more recent case, *Aksu v. Turkey*,<sup>672</sup> Romani cultural identity was brought into question again. Mr. Aksu, the applicant, complained about the discriminatory representation of Romani cultural identity in the remarks and in the expressions used in three government funded publications (a book about Roma and two dictionaries).<sup>673</sup> However, in this case the Court considered the case unfounded from a procedural standpoint the case unfounded since Turkish authorities took all necessary steps to comply with their obligations although the Court recommended that “it would have been preferable to label such expressions as “pejorative” or “insulting”, rather than merely stating that they were metaphorical”.<sup>674</sup>

By considering the overall jurisprudential experience developed by the ECtHR in relation to the different aspects of Romani cultural identity, it can be noted that the legal definition of Romani cultural identity is still under evolution. Such a developing definition combines an “integrated approach” which progressively departs from the nomadic lifestyle and the life in

---

<sup>670</sup> Indeed, as the reasoning of the Court makes clear “the Court could not accept the Government's argument that the applicant could have avoided the discrimination by entering into a civil marriage: to accept that a victim could have avoided discrimination by altering one of the factors at issue would render Article 14 devoid of substance”. *Muñoz Díaz v Spain (2009)* Application No. 49151/07, European Court of Human Rights decision of 8<sup>th</sup> December 2009, §70.

<sup>671</sup> Ibid. § 81. On the case *Muñoz* see F. Rey-Martinez and S. Giménez-Giménez, "Discrimination against a Romani Woman before the European Court of Human Rights," *Roma Rights Quarterly* 2(2009).

<sup>672</sup> *Aksu v. Turkey*, Application nos. 4149/04 and 41029/04 European Court of Human Rights decision of 15<sup>th</sup> March 2012. After the Court clarified that the case could not be considered under Art.14 in that Mr. Aksu could not prove that the publications had a discriminatory intent or effect and that discrimination within the meaning of Art. 14 could only be understood as treating people in relevantly similar situations differently, the Court considered the case under Art.8 since the alleged breach potentially interfered with Mr.Aksu's effective right to respect for his private life as a member of the Roma community.

<sup>673</sup> In particular, the applicant referred to the definition of Roma as “who make a living from pick-pocketing, stealing and selling narcotics” and to the expressions “[t]he Gypsies of the central district of Ankara earn their living from stealing, begging ... zercilik (robbing jewellery stores) ...”. contained in the book in question and to the definitions of ‘Gypsy wedding’: a crowded and noisy meeting”, “‘Gypsy fight’: a verbal fight in which vulgar language is used” and “‘Becoming a Gypsy’: displaying miserly behaviour” contained in the dictionaries in question. See § 2-3.

<sup>674</sup> § 85.

caravans as the main elements accounting for Roma identity.<sup>675</sup> Moreover, in the most recent jurisprudence, the Court went increasingly beyond the initial “stereotyped conception” of Roma which considered this social group mostly in terms of a “population seeking exemption”<sup>676</sup> and in terms of a “vulnerable group”.<sup>677</sup>

Indeed, as Farget clarifies “judges are not the only agents in reproducing representations. On the contrary, they are mainly drawing their inspiration from the applicants’ and the States’ complaints”.<sup>678</sup> Thus, the more the jurisprudence of the Court evolves, the more is able to develop a more precise and comprehensive definition of Romani cultural identity and, in parallel, a more specific and fully-fledged protection of Roma rights. Such a protection does not merely comprehend the cultural legal spheres but – as seen in case-law – also the socio-economic one. Indeed, any form of discrimination against Roma involving cultural identity is part of a systemic problem that will be more comprehensively tackled only when a more solid jurisprudential basis will develop also in other judicial international and national legal fora.<sup>679</sup>

### 6.3.3. European Union

At the EU level, although no legal instrument is specifically addressing cultural rights and cultural identity, the doctrine has envisaged in the recognition of “cultural diversity” a constitutional principle of the Union.<sup>680</sup> Since this principle is embedding a number of documents of different legal nature (from *hard-law*, to *soft-law*, to *post-law* and to *para-law*)

---

<sup>675</sup> Farget, "Defining Roma Identity in the European Court of Human Rights ": 314.

<sup>676</sup> According to Farget, this conception especially emerges in the case *Connors v. United Kingdom*.

<sup>677</sup> According to Farget, while the first stereotyped conception particularly emerges in *Connors v. United Kingdom*, the second stereotyped conception especially emerges in the case *Buckley v. United Kingdom*. Farget, "Defining Roma Identity in the European Court of Human Rights ": 300-01.

<sup>678</sup> *Ibid.*: 305.

<sup>679</sup> Goldston and Hermanin, "Corti Europee e cause pilota: una finestra di opportunità per combattere la discriminazione dei Rom in Italia?."

<sup>680</sup> D. Ferri, *La costituzione culturale dell'Unione Europea* (Padova : CEDAM, 2008).



cultural diversity is more and more considered to be one of the core elements underlying the construction of the European identity.<sup>681</sup>

As anticipated in previous chapters,<sup>682</sup> the explicit recognition of minority rights has started to be considered after the entry into force of the Lisbon Treaty in 2009. Since such a recognition is still at an early stage, the EU has not developed yet any specific legal document dealing with the recognition of minority cultural rights.

In the case of Roma though, the recognition of their cultural identity can be partially rooted in the non discrimination provisions enshrined in some existing legal documents of broader scope than minority rights: the Race Equality Directive<sup>683</sup> and in the Equal Treatment in Employment and Occupation Directive.<sup>684</sup> These anti-discriminatory legislation can in fact provide the EU with some legal ground to take actions to support the cultures of Roma since, as Ahmed explains, “they allow Roma to be identified as Roma without their facing inequality in a range of areas related to private and public life”.<sup>685</sup>

To the same token, the Free Movement Directive<sup>686</sup> can also provide some legal ground to foster the recognition of Romani cultural identity, especially with regard to those communities still adopting a nomadic lifestyle. To this regard, the EU geo-legal sphere should be, at least theoretically, the most suitable legal framework protecting and promoting this peculiar Romani cultural aspect, since the right to free movement is one of the bulwarks of the EU *acquis*. Yet, the recent practice of Italy and France have demonstrated that this directive does not find concrete application as regards to the full recognition of the rights of Roma as European citizens. To this regard, O’Nions has emphasized that,

---

<sup>681</sup> Ibid., 157.

<sup>682</sup> See in particular chapter 2.

<sup>683</sup> The Racial Equality Directive 2000/43/EC.

<sup>684</sup> The Employment Framework Directive 2000/78/EC.

<sup>685</sup> T. Ahmed, *The Impact of EU Law on Minority Rights* (Oxford and Portland Oregon: Hart Publishing 2011), 184-85.

<sup>686</sup> The Free Movement Directive 2004/38/EC.

the intransigence of the European Commission reflects a construct of European identity, which views the Roma as outsiders who have no legitimate claim to the bundle of rights given to true European citizens.<sup>687</sup>

In other words, the migration of Roma to Italy and France which were legitimate under the scope of the Free Movement Directive, have highlighted a paradox on the practical level: notwithstanding the EU's legal *acquis*, the construction of the European cultural identity seems *de facto* to go in the direction of either excluding or expelling Roma.

#### **6.4. Collective cultural rights: National Cultural Autonomy**

The analysis of international and European recognition of cultural rights has shown that notwithstanding the recent evolution in the jurisprudence of the ECtHR, Romani cultural identity is far from being fully tackled by the existent sets of legal provisions. As seen in previous chapters as well, Roma are in fact experiencing a sort of “paradox of citizenship”: on the one hand they need to be citizens of the State in order to fully benefit of human and minority rights entitlements provided at the domestic level, while on the other hand, when Roma are recognized as national citizens, they become somehow “entrapped” within a territorial conception of rights which can only partially account for their peculiar cultural identity.

In Europe, the territorial paradigm has traditionally been the predominant device to manage minority claims. Nonetheless, as seen in section 2.2.4., already in 1899 Renner and Bauer, two Austrian statesmen, theorized the National Cultural Autonomy (NCA) model in order to devise minority rights (and especially cultural rights) on a non-territorial basis, as a way to foil the nationalistic claims undermining the unity of the Habsburg empire. This non-territorial management of cultural rights, considered the minority group from a “collective

---

<sup>687</sup> H. O'Nions, "Roma Expulsion and Discrimination: The Elephant in Brussels," *European Journal of Migration and Law* 13, no. 4 (2011): 361.

perspective” by recognizing its ethnic identity of “co-nation” living in the territory of the State.<sup>688</sup>

The difference between a territorial and a non-territorial conception of minority rights can be summarized in these terms. When national autonomy is recognized on a territorial basis, the central power of the State is devolved, in relation to specific legal areas, to sub-national entities by means of federalist (or regional) institutional arrangements. When national autonomy is recognized on a non-territorial basis, the central power of the State is devolved, in relation to specific legal areas, to sub-national entities by means of personal institutional arrangements instead. In other words, within non-territorial national autonomy arrangements, the recognition of minority rights shifts from the *territory* where the minority group lives to the *person* belonging to the minority group. In Renner’s words,

totalities of persons can be divided only according to personal and not territorial characteristics. Unsatisfied fragments of people and points of conflict remain. [where] the conflagration is localized but not extinguished.<sup>689</sup>

However, the NCA model is not the only model that allows a personal devise of minority rights. In the Ottoman empire, for instance, also the legal institute of *millet* pacifically regulated the coexistence of people belonging to different religious communities by devolving the administration of some legal issues of private law to religious communities themselves.<sup>690</sup>

In the idea of Renner and Bauer, the NCA model is structured on a system of dual federalism where the central power is devolved both to territorial and to non-territorial lines. On territorial lines, the central power is devolved to the historic crown lands or provinces

---

<sup>688</sup> T.H. Malloy, *National Minority Rights in Europe* (Oxford : Oxford University Press, 2005).

<sup>689</sup> K. Renner, "State and Nation " in *National Cultural Autonomy and Its Contemporary Critics* ed. E. Nimni (London and New York : Routledge, 2005), 32.

<sup>690</sup> Although the idea that Renner and Bauer found inspiration in the *millet* system to devise their NCA model is not supported by evidence, it can nonetheless be reasonably hypothesized given the geographical proximity between the two empires (the Habsburg and the Ottoman). Yet, the NCA model differs from the *millet* on the basis of one key element: the individual consent to belong to this form of self-government. According to Renner and Bauer, in the NCA each individual can freely decide to have access to this form of cultural self-government of cultural rights, whereas in the *millet* system the religious affiliation of an individual was already decided at the moment of birth. On the millet system see also section 1.3.

(*Länder*) that constituted the basic building blocks of the State (which at the time of Renner and Bauer were coinciding with the Austrian monarchy). On non-territorial lines, the central power is devolved to the nations forming the State i.e. to the communities of people that do not belong to the national majority (which at the time of Renner and Bauer were represented by a cosmos of minority groups such as the Czecks, the Hungarians, the Jews and the Roma).

More specifically, within the NCA model, the central power is devolved to national councils (*Nationalrat*) belonging to each different national community in cultural areas such as education, culture, the arts, sciences and museums. In these national councils, representatives of “cultural nations” are elected on the basis of their cultural belonging and not on the basis of the territory (*Land*) where they are residing. In Renner’s original project, the territory of the State should have been administratively divided in units according to each and every province.<sup>691</sup>

However, it must be clarified that in its original theoretical conception, the NCA model was not conceived to be a complete substitute to any form of national autonomy territorially device. Rather, it was deemed to be a complementary solution which could be applied particularly to those groups that, in the reason of their diffuse presence within the national territory, could not be precisely attributed to a specific territorial area.

Even if in the Habsburg empire the NCA model did never find concrete implementation, at the beginning of the 20<sup>th</sup> century the model started to circulated to other European legal systems, through the medium of the socialist ideology to which Renner and Bauer philosophically affiliated. The NCA model firstly circulated in the liberal and socialist circles

---

<sup>691</sup> Administrative units whose composition was uninational (*Kreis*) would have the right to return three deputies to the appropriate national council. Administrative units whose composition was binational would have the right to return two deputies to the national council of the local majority and one to that of the local minority. Accordingly, the jurisdiction of each national council would have been non-territorial: it would extend to all persons in uninational counties or the nation in question and to persons registered as belonging to that nation in binational counties. J. Coakley, "Approaches to Resolution of Ethnic Conflict: The Strategy of Non-Territorial Autonomy," *International Political Science Review* 15, no. 3 (1994): 300.

of the Tsarist Russia, finding its way in the agenda of Constitutional Democrats and of the Socialist Revolutionary Party.<sup>692</sup>

In particular, Lenin instrumentally supported the NCA model to uphold its revolutionary views on the self-determination of people in general, and of workers in particular. However, Lenin was critical with the idea of nation underlying the NCA model since, in his view, the model could not eradicate capitalism and its basis-commodity production. Moreover, Lenin was quite skeptical in the concrete implementation of the model, since in Renner and Bauer's theorization it was not clear whether all ethnic minority groups could have been equally represented in every region, without requiring more bureaucracy and laws to fully secure the rights enshrined in the NCA.<sup>693</sup>

After the turmoil of the Red Revolution and of the First World War, some residual part of the NCA model remained in the territory formerly controlled by the Russian empire to which the Soviet Union succeeded. In that context, the NCA was applied in a way that was very far from the two Austrian statesmen's vision: it subverted the personal nature of the NCA through a territorial application.<sup>694</sup>

An additional circulation of the model can be found in the Europe of the inter-war period. This circulation was limited to the Estonian case since, after the establishment of the League of the Nations at the end of the First World War, the sanctity of State sovereignty was raised as one of the bulwarks of international order. Indeed, the creation of any intermediate public legal institutions between the State and the individual was avoided in the fear of creating "States within States" which could precisely destabilize that political order.

---

<sup>692</sup> D.J. Smith, "The Revival of Cultural Autonomy in Certain Countries of Eastern Europe: Were Lessons Drawn from the Inter-War Period?," in *Science and Technique of Democracy. The Participation of Minorities in Public Life* ed. CoE (Strasbourg: CoE Publishing, 2011), 88-89.

<sup>693</sup> S.C. Roach, *Cultural Autonomy, Minority Rights and Globalization* (Aldershot: Ashgate, 2005), 47.

<sup>694</sup> "The Communist Party not only possessed a top-down monopoly on political power, but also explicitly rejected Renner and Bauer's personal principle, opting instead for the creation and institutionalization of sub-national, territorial-based identity" Smith, "The Revival of Cultural Autonomy in Certain Countries of Eastern Europe: Were Lessons Drawn from the Inter-War Period?," 89.

In Estonia, the Law on Cultural Autonomy for National Minorities of 1925, was built almost literally on the NCA model in the way it was devised by Renner and Bauer. In this context, NCA was providing to territorial minorities (Russian, German and Swedish) as well as to non-territorial minorities (Jews) recognition to all individuals belonging to these communities the right to elect their representatives in the national cultural councils.<sup>695</sup>

Nevertheless, the Estonian case showed that the NCA model could present some problems at the implementation stage, which were not foreseen at the theoretical one. In fact, in the theorization of the model it was not precisely explained how by providing minorities with cultural autonomy, all outstanding points of contention between the minority group and the State could find eradication.

Moreover, at the ideal stage, the boundary between cultural and political autonomy was very fuzzy, hence if minority groups were provided with an extensive degree of autonomy which was overlapping with the political sphere, this could potentially enshrine a first incubation of new nationalists claims. That was in fact the case of the German minority in Estonia which started to raise political issues initially at the internal level and subsequently at the international level when, in 1925, it proposed the NCA as a guiding principle of the European Congress of Nationalities. According to some scholars,<sup>696</sup> the Congress would have constituted the political basis for the development of the Nazi Germany Foreign Policy in 1930.

After the Second World War, the support to the NCA significantly decreased. Nowadays, the legacy of the model remains even within the current European framework. In Russia, for example the legacy of the model can be considered to be as mostly “definitional” since its practical implementation has almost totally distorted its original meaning. In other cases

---

<sup>695</sup> Ibid., 91.

<sup>696</sup> Ibid., 92.

instead, such as in Hungary, the legacy of the model is fairly substantial, although contrary to Russia, this institutional device has been identified by means of a different legal category.

In the case of Roma, although the vast majority of European States does not currently recognize neither their distinct cultural identity, nor their cultural rights, in some legal systems the legacy of the NCA model encompass Roma cultural rights as well. According to Klimova-Alexander, the NCA model appears particularly suitable to uphold Roma cultural rights, since its non territorial structure can comprehensively address Romani cultural identity of diffuse minority. Yet, the practical application of the NCA model can present some problematic issues in the case of Roma. The first issue relates to the equal attribution of power to all nationalities by completely disregarding their political and economic clouts within each national system. In other words, given the low political and economic power that Romani communities generally hold in European States, it seems quite unrealistic that they NCA council can benefit of the same degree of strength *vis-à-vis* other nationalities.

The second issue relates to the self-declaration of individuals to be attached to a NCA system. Given the persistent stigma existing against Roma, in their case this self-declaration might be very problematic as it can openly expose Roma to xenophobic attacks. A third final issue may derive in the case of Roma from the autonomy of jurisdiction in the cultural areas provided by the NCA: the demand for such cultural autonomy seems to be put forward, according to Klimova-Alexander, only by Romani élites and not by Romani population as a whole.<sup>697</sup>

Furthermore, as the historical development of the model has shown, although in theory the NCA can potentially offer an effective way to escape the “territorial trap” inherent to the effective enjoyment of Roma rights, in practice the concrete application of the NCA model to

---

<sup>697</sup> I. Klímová-Alexander, *The Romani Voice in World Politics: The United Nations and Non-State Actors* (Aldershot: Ashgate, 2005), 128-29.

Roma can further exacerbate the distinctive cultural identity of this minority group, especially in cases where high degree of autonomy is provided.

An additional doubt that can be raised when moving from a theoretical to a practical analysis of the NCA model, relates to the right to not belong to a minority group. Although in theory the participation to the cultural life of the minority group is based on the free consent of the individual, in practice this cannot always be taken as a general rule. When the cultural management of minority rights through NCA is extended to the realm of education as well, it appears unclear how individuals of minor age can freely choose to be attached to NCA model of reference of their parents' social group. Particularly in the case of Romani children which for instance "follow" the nomadic lifestyle of their parents.

#### **6.5. Minimum recognition of Romani cultural identity**

As the previous section has anticipated, only a limited number of CoE States recognize – to different degrees though – Romani cultural identity and Roma cultural rights. Among these national systems, an even smaller group provides Roma with cultural rights either from a territorial perspective or from a personal perspective, as devised by the NCA model.

Where Romani cultural identity is recognized, the parallel recognition of cultural legal entitlements does not however come "automatically". The cases of Germany, United Kingdom, Ukraine and Romania specifically show that when these legal systems recognize Romani cultural identity, such a recognition can be so limited that is unable to set the basis for any "parallel" cultural guarantee.

As seen in chapter 4, in **Germany** the public recognition of Romanes (one of the strongest characterizing elements of Romani cultural identity) is still highly disputed by the German Romani communities notwithstanding the recognition of Roma as a "national minority" under the FCNM which potentially provides a strong ground for the national recognition of their



minority rights.<sup>698</sup> Accordingly, the public process related to the full recognition of Romani identity is still under development since apparently a full agreement has not been reached yet between the Roma and the Sinti communities on the ways through which such public recognition should be realized.

In some *länder* though, some initial attempts for promoting Romani cultural identity have started to take place especially in the school frameworks plans (as in Hesse, in North Rhine-Westphalia and in Baden-Wurttemberg) more than a decade ago.<sup>699</sup> Other initiatives, aimed at the promotion of Romani cultural identity have started to take place at the level of cross-border cooperation (especially with Austria) particularly in the perspective of awareness-raising of Romani cultural heritage and *Porrajmos* during the Nazi period.<sup>700</sup> Yet, all these initiatives can be attributed more to a dimension of political recognition than to a dimension of “specific legal recognition” of Romani cultural identity.

In the **United Kingdom**, the idea that underlies the recognition of any cultural identity, can be found in the ideal “sense of inclusion and shared British identity” to which every British citizen is entitled on the basis of common opportunities and mutual expectations indiscriminately offered to every citizen despite his/her belonging to a minority/majority group. Indeed, as officially stated by the British Government: “the UK Government believes that integration in the United Kingdom is not about assimilation into a single homogenous culture”.<sup>701</sup>

In the case of Roma, British Gypsies and Travellers find a minimum and quite unsatisfactory recognition of their cultural identity mostly in the provisions of non discrimination enshrined

---

<sup>698</sup> Report submitted by Germany pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR(2000)001 received on 24<sup>th</sup> February 2000, 21.

<sup>699</sup> Ibid., 73-74.

<sup>700</sup> Third Report submitted by Germany pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2009)003 received on 9<sup>th</sup> April 2009, § B.18.2.4.

<sup>701</sup> Third Report submitted by the United Kingdom pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2010)003 received on 23<sup>rd</sup> March 2010, § 3.

in the 1976 Race Relations Act.<sup>702</sup> Nonetheless, as already argued, the categories “Gypsy” and “Travellers” which can be especially found both in legislative acts and in the government guidance regulating caravan sites, derive from a “socio-genetic” idea which is *not* based on ethnicity. As a consequence, this legal categorization implies that a person who is ethnically a Romani Gypsy or Irish Traveller can only *in abstracto* find protection of his/her ethnic identity in the provisions related to racial anti-discrimination. In practice in fact, a Romani Gypsy or an Irish Traveller is not entitled to rely upon the positive advice on the provision of accommodation, if he/she has ceased travelling for a reason not included in paragraph 15 of the Office of the Deputy Prime Minister Circular 01/06 “Planning for Gypsy and Traveller caravan sites”.<sup>703</sup>

In **Ukraine**, the constitution besides promoting the consolidation and the development of the Ukrainian nation, also supports “the development of the ethnic, cultural, linguistic and religious identity of all indigenous peoples and national minorities of Ukraine” (Art.11) on the basis of the principles of equality (Art.24) and freedom of association for cultural purposes (Art.36). In the case of Roma, the effective translation of these constitutional provisions is promoted mostly through the action of some Roma organizations which support the revival of Romani language, culture, traditions and customs. Yet, any holistic approach has been taken so far to coordinate this activity of promotion, since according to the national report submitted to the Advisory Committee, these organizations do not work neither in coordination nor in cooperation among them.<sup>704</sup>

---

<sup>702</sup> Race Relations Act, (Statutory Duties) Order 2001.

<sup>703</sup> “Persons of nomadic habit of life whatever their race or origin, including such persons who on grounds only of their own or their family’s or dependants’ educational or health needs or old age have ceased to travel temporarily or permanently, but excluding members of an organised group of travelling show people or circus people travelling together as such”. S. Barton and M. Willers, “Race Discrimination,” in *Gypsy and Traveller Law* ed. C. Johnson and M. Willers (London Legal Action Group, 2007), 292.

<sup>704</sup> Third Report submitted by Ukraine pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2009)006 received on 7<sup>th</sup> May 2009, 62.

Finally, also in the case of **Romania**, the Constitution recognizes the rights of persons belonging to national minorities in terms of “preservation, development, and expression of their ethnic, cultural, linguistic, and religious identity”(Art.4.1). These “cultural protecting measures” shall *de jure* conform to “the principles of equality and non discrimination in relation to the other Romanian citizens” (Art.4.2). As already seen in chapter 2, the Romanian Constitution protects the rights to learn and to be educated in the minority mother tongue as well (Art.32.3).

Currently, Romania mostly promotes the cultural identity of minorities together with their cultural rights by means of a number of political programs and initiatives which are targeting Roma as well.<sup>705</sup> It is interesting to highlight the fact that in Romania, the cultural identity of Roma, is also at the basis of an ethnically connoted party (Pro Europe Roma Party).<sup>706</sup> Notwithstanding these positive examples of Romani cultural recognition in Romania, the analysis of international reports highlights that such recognition has not already developed to the stage of protection/promotion of Roma’s cultural rights as well.

## **6.6. Cultural rights of Roma at domestic level**

In a restricted number of cases, the recognition of Romani cultural identity entitles Roma to a set of cultural rights as well. More specifically, cultural rights can either find expression in the classic, Westphalian territorial perspective or in the more dynamic personal perspective. Broadly speaking, in the cases of Italy, Czech Republic, Macedonia, Montenegro, Poland, Slovakia and Bosnia-Herzegovina, cultural rights are articulated in a territorial perspective and mostly refer to the sphere of the freedom of expression particularly with regards to the protection/promotion of the Romani cultural heritage.

---

<sup>705</sup> Third Report submitted by Romania pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2011)002 received on 16<sup>th</sup> May 2011, 32.

<sup>706</sup> Ibid., 28.

While in the cases of **Austria, Russia, Serbia, Hungary, Finland** and **Croatia** where cultural rights are articulated in a personal perspective, cultural rights fulfill (more or less explicitly) an ideal of *self-determination* of people by promoting on a more promotional foot the cultural expression and development of their cultural identity. This ideal, is often embodied by the NCA model which, as seen, emphasizes (to different degrees) a collective and self-governed enjoyment of cultural rights.

In those legal systems where minority groups are in fact guaranteed a high degree of autonomy in the form of NCA, the collective enjoyment of cultural rights may set the foundation for a more effective enjoyment of political rights as well. Indeed, when minorities are provided with strong guarantees to enjoy their cultural rights in a collective (and in a personal) perspective, their overall participation in the public sphere is strengthened.

This participation which emphasizes the distinct minority cultural belonging, may represents an embryonic form of political participation. Accordingly, in those national contexts where the NCA provides minorities with high degree of autonomy it might turn that the ideal boundary distinguishing cultural rights from political rights may be difficult to identify because of possible overlaps between cultural and political spheres.<sup>707</sup>

### **6.6.1. Cultural rights in a territorial perspective**

In **Italy**, the recognition of cultural rights for Roma is provided by some regional laws, although at a very minimum level. Indeed, as already highlighted in the previous chapters, in Italy there does not exist (yet) any legal recognition of Roma at the national level.<sup>708</sup> When

---

<sup>707</sup> This aspect is discussed more extensively at chapter 7.

<sup>708</sup> As anticipated in chapter 4, in Italy a proposal of recognition of Roma as a “linguistic minority” has recently been presented before the Parliament (see footnote 432). For the sake of comprehensiveness, it should be pointed out that the Italian legal system minimally and discriminatorily recognizes the Romani cultural identity at the level of criminal law and procedure. In recent years, the Italian criminal system has introduced the hypothesis of “culturally motivated crime”. This is a form of mitigation of the criminal sanction that is generally applied with the aim of favoring the charged person, who, in the reason of a different cultural belonging may perceive the crime committed as less relevant because of the different system of values to which this person refers to. Yet, in the case of Roma, Masera explains that the ethnic considerations regarding the Romani cultural

such recognition is provided at the regional level, it is often biased by the common misrepresentations on Romani cultural identity as identified by Okely.<sup>709</sup>

In the Italian regional laws, the cultural rights of Roma entail the distorted images mostly ensuing from an “ethno-genetic” narration, which represent Roma almost exclusively in terms of “nomads”. In this context, the spectrum of cultural rights covered by regional legislation is quite variable as it entails measures aiming at favoring the knowledge of the Romani cultural heritage;<sup>710</sup> the intercultural dialogue, the right to nomadism and free movement;<sup>711</sup> the access to socio-economic rights<sup>712</sup> with a particular focus on education;<sup>713</sup> “Romani crafts activities”.<sup>714</sup> At the level of practical implementation, the already poor content of these cultural rights devised for Roma is further impoverished by the lack of financial resources which affects almost every region.<sup>715</sup>

In the case of **Czech Republic**, the cultural rights of minorities are protected at the national level, by mean of ordinary legislation. Act No.273/2001<sup>716</sup> protects the rights of minority culture in terms of protection of cultural traditions (Art.12) and of freedom of expression in the minority language (Art.13). In the case of Roma, it seems that these legal entitlements have been scarcely implemented up to now.

---

belonging sometimes play the opposite role of intensifying rather than mitigating the criminal sanction. This legal attitude is totally in breach of the international human rights non discrimination principle according to which any consideration over the ethnic/cultural belonging of the accused person is totally inadmissible in the criminal system. L. Maserà, "Diritto penale di fronte a Rom e Sinti," in *La condizione giuridica di Rom e Sinti in Italia*, ed. P. Bonetti, A. Simoni, and T. Vitale (Milano : Giuffrè Editore, 2011), 1104-05.

<sup>709</sup> See, *infra*, section 4.1.

<sup>710</sup> Art. 2 Regional Law of Lombardia 77/89, Art. 4 Regional Law of Sardegna, Art. 2 Regional Law Emilia 47/88, Art. 1 Lazio, Art. 1 Regional Law of Liguria 6/92, Art. 3 Regional Law of Friuli 11/88.

<sup>711</sup> Art. 1 Regional Law of Toscana 2/2000, Art. 1 Regional Law of Umbria 32/90, Art. 1 Regional Law of Sardegna 9/88, Art.1 Regional Law of Veneto 54/89.

<sup>712</sup> Regional Law of Toscana 2/2000 Art.11.

<sup>713</sup> Art. 7 Regional Law of Piemonte 26/93, Art. 9 Regional Law of Umbria 32/90, Art. 5 Regional Law of Veneto 54/89.

<sup>714</sup> Art. 8 Regional Law of Piemonte 26/93, Art. 9 Regional Law of Umbria 32/90, Arts. 3 and 8 Regional Law of Lazio 82/85, Art. 7 Regional Law of Liguria 6/92.

<sup>715</sup> F. Furlan, "Rom e Sinti nelle legislazioni regionali " in *La condizione giuridica di Rom e Sinti in Italia*, ed. P. Bonetti, A. Simoni, and T. Vitale (Milano: Giuffrè Editore, 2011), 722-23.

<sup>716</sup> Act on the Rights of Members of National Minorities No.273/ 2001 Coll. 2 August 2001.

In this realm, the protection of Romani cultural traditions has been mostly delegated to civic associations which promote Romani traditional heritage as a mean to foster their social inclusion. However, on the practical level it is difficult to determine the impact of the activities performed by these organizations as some of them exist only formally in the registration lists whereas the practical activity of the presumed existing ones is not recorded.<sup>717</sup> The promotion of the freedom of expression through the usage of Romanes as a medium language has been recorded in the media, although with some concerns, particularly with regard to the effective support to Romani periodicals.

Moreover, some other issues of concern have been raised as regards to the opposite side of the coin relating to expression of Romani identity: the unsatisfactory presentation of Romani culture, multicultural education projects and awareness raising campaigns to the mainstream public.<sup>718</sup> Accordingly, in the case of Czech Republic as well, it seems that the insufficient recognition of Romani cultural identity is a by-product of the overall segregation of Roma at the socio-economic level which reflects also in an anti-Gypsy rhetoric in the media.<sup>719</sup>

In the case of **Macedonia**, cultural rights have started to be envisaged, for all Members of the Macedonian communities, already at Art.48 of the Ohrid Agreements. This right guarantees the freedom of expression and the development of community attributes by, *inter alia*, allowing the usage of minority symbols and the establishment of institutions for culture, art, science and education in order to protect the ethnic, cultural, linguistic and religious identities

---

<sup>717</sup> M. Horáková and P. Bareš, "The Aspect of Culture in the Social Inclusion of Ethnic Minorities. Evaluation of the Impact of Inclusion Policies under the Open Method of Co-Ordination in the European Union: Assessing the Cultural Policies of Six Member States. Final Report Czech Republic," in *MEU Programme, Minorities in the EU* (Prague: European Centre for Minority Issues 2006), 48.

<sup>718</sup> Ibid.

<sup>719</sup> Advisory Committee on the Framework Convention for the protection of national minorities, Third Opinion on Poland, adopted on 1<sup>st</sup> July 2011, ACFC/OP/III(2011)008, § 12 and §18.

of every constitutive community of Macedonia. Amendments VIII and IX of the Macedonian Constitution<sup>720</sup> recalled these provisions more extensively.

At the moment, however, it is not possible to concretely assess the ways through which these legal provisions have been implemented for each Macedonian constitutive nationality, since at the time when the national report was submitted before the FCNM, data were still under collection.<sup>721</sup> As far as the situation of Roma is concerned, the national report clarifies that some programs have been activated, such as *inter alia* the Decade and the Strategy for the Roma inclusion,<sup>722</sup> with the aim of fostering the effective enjoyment of Romani rights, cultural rights included. Moreover, according to the report presented before the FCNM Committee two Roma representatives are currently working at the Macedonian Ministry of Culture.<sup>723</sup>

In **Montenegro**, the protection and the promotion of minority cultural rights is also guaranteed at the constitutional level. Art.79, in particular, guarantees the enjoyment of minority cultural rights both from an individual and from a collective perspective. This article recognizes minorities with cultural rights in the forms of: expression of their cultural peculiarities, public usage of national symbols, public and official usage of language, inclusion in the curricula of the history and the culture of persons belonging to minority nations and other minority national communities and establishment of educational, cultural and religious associations, with the material support of the state.

---

<sup>720</sup> Amendments adopted by the Assembly of Macedonia, on the session held on 16<sup>th</sup> November 2001.

<sup>721</sup> Comments of the Government of “The Former Yugoslav Republic of Macedonia” on the Third Opinion of the Advisory Committee on the implementation of the Framework Convention for the protection of national minorities by “The Former Yugoslav Republic of Macedonia” GVT/COM/III(2011)007 received on 1<sup>st</sup> December 2011.

<sup>722</sup> Third Report submitted by “The Former Yugoslav Republic of Macedonia” pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2010)002 received on 11<sup>th</sup> March 2010, 13.

<sup>723</sup> *Ibid.*, 14.

Despite the highly promotional potential enshrined in this provision, the scarce availability of financial resources jeopardizes the overall implementation of this provision, as emphasized by the Advisory Committee of the FCNM. In the case of Roma, their socio-economic situation is so precarious, that the implementation of cultural rights seems to be an even more distant goal *vis-à-vis* other social groups, even after the adoption of the national Roma Strategy.<sup>724</sup>

In **Poland**, minority cultural rights find recognition at the constitutional level in a strong collective perspective, by providing the establishment of educational and cultural institutions aimed at the protection of minority cultural identity (Art.35). These provisions find further specification at Art. 17 and 18 of the Law on Minorities<sup>725</sup> which define cultural rights in terms of cultural activities aiming at supporting (also in financial terms) the development of minority cultural identity. Some of these activities are: publications, support for media programs made by minorities, protection of the places associated with minorities, activation and management of libraries and documentation of minority cultural and artistic life and education of children and youth.

Art. 21 of the same law establishes both at the national and at the local levels “agencies in charge of national and ethnic minorities” which are entrusted, *inter alia*, with the mandate of contributing to the maintenance of minority identity both on a cultural and on a linguistic level and with the mandate of disseminating the knowledge of a specific minority culture. At the domestic level, a national or ethnic minority agency is included in a joint commission formed by representatives of Government and representatives of national and ethnic minorities which holds the legal status of a consultative body for the Prime Minister (Art.23).

---

<sup>724</sup> Advisory Committee on the Framework Convention for the protection of national minorities, Opinion on Montenegro, Adopted on 28<sup>th</sup> February 2008, ACFC/OP/I(2008)001.

<sup>725</sup> Act of 6<sup>th</sup> January 2005 on national and ethnic minorities and on the regional languages. (Dziennik Ustaw No. 17, item. 141, with the amendment of 2005, No. 62, item 550).



According to Art. 24. 2 (l) two seats are reserved in the joint commission for the representatives of the Roma minority.<sup>726</sup>

Notwithstanding the strong emphasis on the collective enjoyment of minority cultural rights in Poland, local and national agencies, do not seem to fully articulate the promotion of minority cultural rights through a personal perspective. Indeed, according to the wording of the law, in these agencies the promotion of minority cultural rights is not necessarily embodied, at the local level, by minority themselves but by the “competent minister in charge of religious denominations and ethnic and national minorities” (Art.21.2).

At the national level where the law explicitly foresees the participation of national minorities to contribute to the protection/promotion of their cultural rights, this participation is shared also with governmental representatives. In this light, according to the wording of the law, the competence of these agencies does never foresee any form of full self-determination and self-organization of minorities which can ascribed the enjoyment of their cultural rights fully to a complete personal dimension.

Minority rights are also promoted in Poland in other legislative acts.<sup>727</sup> In the case of Roma, the respect of their cultural identity can find specific protection in the Regulation 220/2002.<sup>728</sup>

Particularly Arts. 2, 9 and 13 protect minority cultural heritage at the school level. To this regard, the recent report of the Advisory Committee presents some concerns on the practical

---

<sup>726</sup> According to the Advisory Committee, in the case of Roma the Polish Government has given practical implementation to this provision. See Advisory Committee on the Framework Convention for the protection of national minorities, Second Opinion on Poland, Adopted on 20<sup>th</sup> March 2009, ACFC/OP/II(2009)002, §197. The role of the Agency can be compared to that of a national human rights body (such as that of a “Human Rights Commission” or the Office of the “Ombudsman”) in the light of its powers, to take measures at the different territorial levels, in order to ensure respect for minority rights also by mean of consultation with agencies and organizations working in this field.

<sup>727</sup> See Annexes to the Second Report submitted by Poland pursuant to Article 25, Paragraph 1 of the Framework Convention for the protection of National minorities, Annexes 1-9 ACFC/SR/II(2007)006, received on 8<sup>th</sup> November 2007.

<sup>728</sup> Regulation of the Minister of National Education and Sport of 3 December 2002 on conditions and methods of performing tasks allowing to sustain the sense of national, ethnic, linguistic and religious identity of students from national minorities and ethnic groups by public schools and educational facilities. (Journal of Laws No 220, item 1853).

implementation of such provisions for Romani pupils. Not only the teaching of Romani history and cultural traditions remain low for Romani pupils but also for the mainstream pupils. Moreover, where “ethnic attention” is paid to Romani cultural identity, this is often done by means of segregationist policies in the form of “special classes” for Romani pupils.<sup>729</sup>

In **Slovakia**, the Constitution protects the development of minority culture at Art.34 of the Constitution. In particular, this article protects the cultural rights of minorities in the forms of: right to education in their own language, use of the language in dealing with authorities and right to participate in the solution of affairs concerning national and ethnic minorities. Act 270/1995<sup>730</sup> further specifies this constitutional provision by guaranteeing the right to use a minority language especially in the realms of education (§4) and in the media, public events and public gatherings (§5).

In the case of Roma, the Advisory Committee has recently noted with satisfaction that representatives of the Romani community have organized their private radio.<sup>731</sup> Yet, at the level of education the promotion of the linguistic dimension of Romani cultural identity through a teaching in Romanes is already very limited, as already emphasized in chapter while analyzing the linguistic dimension: the Committee of Experts has also found cases of segregations towards Romani pupils.<sup>732</sup>

In **Bosnia and Herzegovina**, the cultural rights of minorities are enshrined in the Law on National Minorities 12/2003 at Arts. 15-17.<sup>733</sup> The content of cultural rights mostly relates to the freedom of expression in the public sphere through: the free display of insignia and symbols of the national minority, the establishment media (radio, TV, newspapers), the

---

<sup>729</sup> Advisory Committee on the Framework Convention for the protection of national minorities, Second Opinion on Poland, Adopted on 20<sup>th</sup> March 2009, ACFC/OP/II(2009)002, 30-32.

<sup>730</sup> Act of the National Council of the Slovak Republic on the State Language of the Slovak Republic No. 270/1995 Coll. 15<sup>th</sup> November 1995.

<sup>731</sup> Advisory Committee on the Framework Convention for the protection of national minorities, Third Opinion on Slovak Republic, adopted on 28<sup>th</sup> May 2010, ACFC/OP/III(2010)004, §105.

<sup>732</sup> Vedi, *infra*, section 4.1.

<sup>733</sup> Law on Rights of National Minorities Official Gazette of BiH, no.12/03 of 1<sup>st</sup> April 2003.

establishment of cultural centers and institutions (library, museums, archives).<sup>734</sup> According to the Advisory Committee, in Bosnia and Herzegovina the protection of the cultural heritage of minorities is generally quite underdeveloped. Especially at the educational level “the cultural heritage, history and languages of the national minorities are virtually absent from schools syllabuses and textbooks”.<sup>735</sup>

In each realm, the cultural realm included, Roma continue to perceive themselves as “second class citizens” since they cannot fully benefit of the rights ensuing from their citizenship status.<sup>736</sup> In the second report presented before the FCNM, the Government of Bosnia and Herzegovina discussed the establishment of a “Roma Council” at the level Parliamentary Assembly of the Republic with the purpose of providing better recognition of Romani cultural identity and rights.<sup>737</sup> Nonetheless, the legal personality of this body, its precise tasks together with its possible territorial/personal articulation have not been clarified yet, as requested by the Advisory Body in relation to the general activation of all Minorities Councils.<sup>738</sup>

### **6.6.2. Cultural rights in a personal perspective**

In a small number of legal systems, the recognition of cultural rights in a personal perspective builds on the legacy of the NCA model devised by Renner and Bauer. The NCA model can still be found with some modifications and evolutions in Austria and Hungary, (the States that currently control the territory formerly belonging to the Hapsburg empire), in Russia (where the model circulated through the medium of the Socialist ideology already at the time of the Soviet empire) in Slovenia, in Croatia, in Serbia and in Finland.

---

<sup>734</sup> These cultural rights find application in Bosnia-Herzegovina under the minimum requirements minority numerical representation in each Entity, canton, city and municipality (see Arts. 16 and 17).

<sup>735</sup> Advisory Committee on the Framework Convention for the protection of national minorities, Second Opinion on Bosnia and Herzegovina, Adopted on 9<sup>th</sup> October 2008, ACFC/OP/II(2008)005, §27.

<sup>736</sup> Ibid., §18.

<sup>737</sup> Second Report submitted by Bosnia and Herzegovina pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/II(2007)005 received on 2<sup>nd</sup> August 2007, 80.

<sup>738</sup> Advisory Committee on the Framework Convention for the protection of national minorities, Second Opinion on Bosnia and Herzegovina, Adopted on 9<sup>th</sup> October 2008, ACFC/OP/II(2008)005, 7.

In **Austria**, Art. 3 of the Federal Act of 1976<sup>739</sup> provides national minorities with the right to establish advisory boards to “preserve and represent the overall cultural, social and economic interests”. According to this article, the preservation of minority cultural identity can be fulfilled through the opportunity to submit proposals for improving the general situation of the ethnic groups and their members. These proposals may imply, for instance, the request to use promotional funds (Art.10) which are allocated with the purpose of promoting “associations, foundations and funds that serve to maintain and secure a national minority, its specific folklore and tradition, as well as its characteristics and rights” (Art. 9.2). Furthermore, ethnic group advisory boards are also entitled to present minority proposals to promote general minority cultural interests before the *Länder* Governments whenever they are requested to do so (Art.3.2).

At the level of internal organization, members of the ethnic advisory boards are appointed by the Federal Government for a term of four years, after having heard, the respective *Länder* Governments (Art.4.1). According to the Federal Act, ethnic advisory boards are organized through a variable numerical composition which is established by considering the general numerical proportions of the minority group *vis-à-vis* other minorities and by considering the best ways through which it is possible to provide adequate representation to the political opinions of the ethnic group concerned (Art.3.3).

As a national minority, Roma are *de jure* entitled in Austria to organize ethnic advisory boards. However, from the analysis of the Austrian national reports submitted before international monitoring bodies, it seems that so far Roma have not activated their own ethnic advisory bodies yet. According to the last national report submitted before the Advisory Committee of the FCNM, a first attempt to promote Romani representation in the public sphere has been registered in the city of Linz. In that context, an advisory council was set to

---

<sup>739</sup> Federal Act 396 dated 7th July 1976 on the legal status of ethnic groups in Austria (Ethnic Groups Act).

specifically deal with the issues of integration and diversity.<sup>740</sup> Yet, it is not clear whether the structure of this Roma's council does fully correspond to the structure of other ethnic groups advisory boards and whether the activities that it performs are also developing the promotion of cultural rights.

Indeed, the socio-economic situation of Roma in Austria, appears overall still quite uncertain . In particular, there still persists a substantial gap in the enjoyment of socio-economic rights between Romani groups that have been recognized as national minorities (“autochthonous Austrian Roma”) and Romani groups that do not even hold the citizenship status (“new Romani minorities” migrated during the recent Balkan conflict) which is the precondition to benefit any set of rights.<sup>741</sup> Additionally, in Austria a long term program designed and implemented in close cooperation with Roma representatives is still missing.<sup>742</sup> On these uncertain socio-economic foundations, the “cultural emancipation” of Roma in Austria has still a long way before reaching a complete evolution.

In **Hungary**, the Law on Rights of Ethnic and National Minorities,<sup>743</sup> appears as one of the most developed examples of implementation of the NCA model. The Law recognizes the right to ethnic and national minority identity as a fundamental human rights which shall be promoted both through an individual and through a collective perspective (3.2). Minority culture is in fact recognized to be part of the culture of Hungary (3.1) and such a culture shall be preserved by prohibiting any policy that leads to the assimilation of a minority into a majority of population (Art.4.1). According to the Hungarian law, individuals have the right to freely declare whether they wish to be affiliated to a national or ethnic minority group.

---

<sup>740</sup> Third Report submitted by Austria pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2010)010 rev received on 23<sup>rd</sup> August 2010, 28.

<sup>741</sup> Advisory Committee on the Framework Convention for the protection of national minorities, Third Opinion on Austria, Adopted on 28<sup>th</sup> June 2011, ACFC/OP/III(2011)005 §24.

<sup>742</sup> Ibid., §16.

<sup>743</sup> Act LXXVII of 1993 on the Rights of National and Ethnic Minorities, adopted by the National Assembly of the Republic of Hungary 7<sup>th</sup> July 1993.

Moreover, the affiliation to any minority group does not preclude the recognition of dual or multi-affiliation (Art.7).

The Hungarian Law reiterates the constitutional right to establish local and national self-governments with the aim to “protect and represent the interests of minorities by performing their duties and exercising their statutory authority” (Art.5). Minority self-governments can be articulated at different institutional levels (municipal, local and national levels, as at Art.21) and the councils representing the same ethnic or minority group may also enter in agreement or cooperation in a multi-level perspective (Art.30).

The competence of minority councils *ratione materia* includes the areas of local basic education, local printed and electronic media, promotion of traditions and, adult education and socio-cultural animation (Art.27.3). As a legal entity (Art.36) minority councils are guaranteed the autonomy to decide independently in a wide number of cultural areas which include the right to freely choose: their own names and insignia; the principles and means governing the utilisation of the mass media channels at their disposal; the establishment, organisational structure, mode of operation of their cultural institutions (such as theatres, libraries and museums); and the maintenance of secondary and higher educational institutions with countrywide coverage (Art.37).

According to the Law on national minorities, minority councils are also provided with the right to present their opinions *vis-à-vis* public authorities in the course of the drafting process of legislation affecting their cultural rights (Art.38). Furthermore, in the Hungarian law, minority councils are provided with a high degree of autonomy in the promotion of their cultural rights in the fields of education (Arts. 42-50) and language Art.51-54).

Notwithstanding the highly promotional provisions regulating the establishment of minority councils in the Hungarian Law, on the practical level the weak implementation of these legal

provisions has often mislead the original legal mandate. In its last report,<sup>744</sup> the Hungarian Parliamentary Commissioner for the rights of national and ethnic minorities was particularly critical on the high percentage of “fake” minority councils that were activated all along the Hungarian territory.<sup>745</sup>

In the cases where “real” minority councils existed, the national Commissioner noticed that the representation of minority groups was often considered as merely “formal” both on the governmental and self-governmental levels. According to the same Commissioner, the situation of concrete inefficacy of minority councils could be strongly attributed to the fact that these councils have often been left in isolation at a very early stage of development of their consultation activities when they have been established.<sup>746</sup>

In the case of Roma, the promotion of cultural rights through minority councils has developed especially at the local level, even if in the light of the limitations highlighted before. In the third national report submitted before the Advisory Committee of the FCNM, the Hungarian government has highlighted the promotion of cultural rights for Roma in the broadcasting of Roma programs at the mass media level, particularly at the radio level.<sup>747</sup>

As seen in section 6.4., at the beginning of the 20<sup>th</sup> century the NCA model circulated in the former Soviet empire through the medium of the Socialist ideology. Today, the NCA model can still be found in the Russian legal system and its functioning is regulated by the Federal

---

<sup>744</sup> The Report on the Activity of the Parliamentary Commissioner of the Rights of National and Ethnic Minorities for the year 2009 has been last report presented by the Office of the Commissioner. Indeed, with the enactment of the new Hungarian Constitution in 2012, the Office of the Commissioner has been closed. The new Hungarian Constitution has in fact merged the previous four Parliamentary Commissioners in one single Office whose mandate focuses on the broader realm of fundamental rights (Art.30). Hence, the non-jurisdictional protection of minority rights at the national level has been downgraded by losing its specific mandate in a wider spectrum of rights.

<sup>745</sup> E. Kallai, *Report on the Activity of the Parliamentary Commissioner of the Rights of National and Ethnic Minorities. 2009* (Budapest: Office of the Parliamentary Commissioners, 2010), 45.

<sup>746</sup> *Ibid.*, 46.

<sup>747</sup> Third Report submitted by Hungary pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2009)007 received on 4<sup>th</sup> June 2009, 47.

Law on the National Cultural Autonomy.<sup>748</sup> In Russia, national cultural autonomy is defined by Art.1, as

the form of the national-cultural self-determination which is the social association of citizens of the Russian Federation who consider themselves to belong to certain ethnic communities on the basis of their voluntary self-organization with the aim of the independent solution of the issues related to preservation of their identity, development of language, education, and national culture.

The organization of the NCA in Russia is based on the general principles already envisaged by Renner and Bauer in their early theorization of the model: free will of the citizens to declare themselves as belonging to a certain ethnic community, self-organization and self-government, diversity of internal organization forms of the NCA; combination of public initiative with the national support and respect of the language, culture, traditions and customs of different ethnic communities.<sup>749</sup> According to Art.5 of the institutive law, the NCA organizations in Russia can be organized at the local, regional and federal levels.

As seen in chapter 2, Roma are one of the 16 groups to which the Russian Federal Law has recognized the right to organize its cultural rights through the NCA model.<sup>750</sup> As Osipov has shown in his analysis, most of the time the practical implementation of the NCA model in **Russia** does not give rise to an effective translation of the rights enshrine in the Federal Law: a number of legal provisions remain in fact merely enunciated on a *de jure* level without finding real implementation on a *de facto* one.<sup>751</sup> In the case of Roma, the only right that seems to find concrete implementation among the set enshrined in the NCA law, is that of creating “mass media in the order established by the legislation of the Russian Federation”.<sup>752</sup> According to the national report submitted to the Advisory Committee of the

---

<sup>748</sup> Federal Law on National Cultural Autonomy No. 212 adopted by the State Duma 15<sup>th</sup> April 1996.

<sup>749</sup> Art. 2.

<sup>750</sup> See, section 2.2.4.

<sup>751</sup> A. Osipov, "National Cultural Autonomy in Russia: A Case of Symbolic Law," *Review of Central and East European Law* 35, no. 1 (2010).

<sup>752</sup> Art. 4 of the NCA Law lists the following rights to be recognized under the NCA model: to receive support from the government and local self-government bodies which is necessary for preserving the national identity,



FCNM, under the NCA model Roma have been given the possibility to create “The Gypsy of Russia” magazine as a result of the Project “To the tolerance and resolving problems of the Gypsy people”.<sup>753</sup>

In **Slovenia**, Art. 61 of the Constitution protects the right of individuals to freely express affiliation with their nation or national community and to give expression to their culture by also using their language and script. The Roma Community Act 33/07<sup>754</sup> provides implementation to of cultural rights of Roma (Arts. 3 and 4) also by means of a Council which consists of twenty-one members, of which fourteen are representatives of the Roma Union of Slovenia and seven representatives of the Roma community in the councils of self-governing local communities (Art. 7 and 10).

The tasks of the Council are, *inter alia*, the promotion of activities for the maintenance of the Roma language and culture together with the organization of cultural, informative, publishing and other activities significant for the development of the Roma community (Art.10.7). According to the FCNM report cultural rights for Roma have currently found implementation in Slovenia mostly through annual calls for applications, supports cultural projects and other activities of the Roma community aimed at the preservation and affirmation of the cultural and linguistic identity of the Roma community, including access to media.<sup>755</sup>

---

development of the national (native) language and national culture; to address the bodies of legislative (representative) and executive power, local self-government bodies, representing its national-cultural interests; to create mass media in the order established by the legislation of the Russian Federation, to receive and disseminate information in its national (native) language; to preserve and enrich its historical and cultural heritage, to have free access to the national-cultural values; to follow national traditions and customs, renew and develop art and folk trades; to create educational, scientific and cultural establishments and to provide their functioning according to the legislation of the Russian Federation; to participate through its plenipotentiaries in the activities of international non-governmental organizations; on the basis of the legislation of the Russian Federation, to establish and maintain, without any discrimination, contacts with the citizens and non-governmental organizations of foreign states.

<sup>753</sup> Third Report submitted by the Russian Federation pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2010)005 received on 9<sup>th</sup> April 2010, 62.

<sup>754</sup> Official Gazette of the Republic of Slovenia, No. 33/07, 13<sup>th</sup> April 2007.

<sup>755</sup> Third Report submitted by the Slovenia pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2010)007 received on 28<sup>th</sup> April 2010, 12.

In **Croatia**, the Constitution protects at Art.15 the cultural rights of minorities in the form of cultural autonomy. The Croatian Constitutional Law 155/2002 further specifies this provision by clarifying that for the purposes of Croatian legislation, cultural autonomy is intended to be a mean of preservation, development and protection of minority cultural heritage and traditions (Art.7) and that it shall take the form of organizations, trusts and foundations as well as of institutions engaging in cultural activities (such as museums and libraries at Art.15). In contrast to the Austrian case where the number of members of minority councils varies according to the numerical proportions of the minority groups that it should represent, in Croatia NCA is structured through a fix numerical presence which varies from 10 members at the local level, to 25 members in the county councils.

Furthermore, in Croatia, minority councils are entitled to the right to elect national minority councils which shall be exercised in self-government units where members of national minorities account for non less than 1,5 percent of the total population or in which over 200 members of an individual national minority live and in regional self-government units in which over 500 members of an individual national minority live. Moreover, the Croatian system of minority representation through cultural autonomy guarantees also to those minority groups whose numerical presence is inferior to any threshold to organize a separate councils (less than 100 members per territorial unit), a representative per minority group.

The representatives of minority groups (both as members of the councils and as single representatives) are elected for a four years mandate and are entitled to propose measures to improve the status of national minorities and to provide opinions and suggestions to improve the representation of minorities in the media.<sup>756</sup> According to a recent report produced for the

---

<sup>756</sup> Third Report submitted by Croatia pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/II(2004)002 received on 13<sup>th</sup> April 2004, 16-17.

European Parliament, in Croatia more than 300 of Roma have been elected as members of councils and as representatives of the Roma national minority at all levels in Croatia.<sup>757</sup>

According to a recent opinion of the Advisory Committee on the FCNM, the practical implementation of the provisions of the constitutional law regulating the functioning of the councils appears quite unsatisfactory. In the words of the Advisory Committee,

..in many self-government units, co-operation between the councils of national minorities and local authorities is lacking and the councils are not even informed of planned discussions and decisions affecting persons belonging to national minorities. In addition, the legitimacy of the councils of national minorities remains questionable due to a number of substantial shortcomings.<sup>758</sup>

Additionally, the public financial support to national minorities' cultural activities is too limited to be sufficient to fully meet the needs of persons belonging to national minorities.

In **Serbia**, Arts. 80 of the Constitution recognizes to the members of national minorities the right to found "educational and cultural associations". Art.81 clarifies, as a sort of corollary of the previous provision, "in the field of education, culture and information, Serbia shall give impetus to the spirit of tolerance and intercultural dialogue". These constitutional principles are further specified by the Law on Minorities which recognizes individual and collective rights to minorities with the aim of preserving and developing their national and ethnic specificities also by allowing the usage of their national symbols (Art.16). Serbia devises as well the enjoyment of cultural rights for national minorities in a personal perspective by hinging minority cultural rights not in the territory where minorities traditionally live but in the persons belonging to national minorities.

---

<sup>757</sup> European Parliament, "Protection of the Roma in Croatia (Available at <http://www.Europarl.Europa.Eu/Document/Activities/Cont/201011/20101124att00191/20101124att00191en.Pdf>)," (European Parliament, 2010).

<sup>758</sup> Advisory Committee on the Framework Convention for the protection of national minorities, Third Opinion on Croatia, Adopted on 28<sup>th</sup> June 2011, ACFC/OP/III(2010)005, §28.

The Serbian Law on Minorities<sup>759</sup> does not clearly articulate the personal dimension of cultural rights in a structured NCA model. Indeed, Art. 12 of the Law enshrines the right for national minorities to “found separate cultural, artistic and scientific institutions, societies and association in all spheres of cultural and artistic life”. Although this provision establishes the independency of these cultural bodies in the performance of their activities, it does not precisely specify how these bodies are articulated and the exact activities they are entitled to perform.

Moreover, the final part of the same provision, refers to these cultural bodies by means of the definition of “national councils”. Hence, this ambiguous wording does not satisfactorily allow the comprehension neither of the activities that these cultural bodies should uphold nor of the sphere where they operate: whether merely cultural or also political (by for instance foreseeing the possibility to provide recommendations to the political authorities).

Therefore, although *in abstracto*, according to the open wording of the provision, Roma may potentially exercise a right to self-government in the area of culture (by for instance participating in decision-making processes in activities related to the preservation and development of Romani cultural) in practice the only activities that are recorded to be performed by these cultural bodies are as in the Russian case, those related to the cultural expression in the mass-media. According to the national report submitted before the Advisory Committee of the FCNM,

The Assembly of AP Vojvodina transferred to the National Council of the Roma National Minority the founding rights to the PPI *Them*, which publishes a general magazine “*Them*” and the children’s magazine “*Chavorrengo Them*”, subsidized by the Provincial Secretariat of Information of AP Vojvodina. In 2005 a monthly in the Romany language was launched, the founder of which is also the National Council of the Roma National Minority.

---

<sup>759</sup> Law on Protection of Rights and Freedom of National Minorities, Official Gazette of FRY No. 11 of 27<sup>th</sup> February 2002.

The Ministry of Culture co-finances the paper to the amount of 100% of the required funds.<sup>760</sup>

In **Finland**, the protection of cultural rights of Roma is enshrined at Section 17.3. of the Constitution which entails the general provision of the right to maintain and develop Romani language and culture.<sup>761</sup> So far Finland has not developed any ordinary legislation to further specify the articulation of Roma cultural rights within its domestic jurisdiction. However, the Report prepared in response to the CoE Commissioner for Human Rights,<sup>762</sup> has recognized as a “good practice” administrative structures to enhance Romani participation in the areas affecting their cultural life from the 60s Finland has developed. These administrative structures consist of a National Advisory Board and four Regional Advisory Boards on Romani Affairs.

These Boards fulfill Romani cultural rights through a personal perspective even in the lack of any apparent link with the NCA model. These Boards are in fact entrusted with the mandate of enhancing the equal participation of Roma in the Finnish society, improving the living conditions and socio-economic position of Roma, promoting the rights and equality of Roma, promoting the culture of Roma and enhancing dialogue and co-operation. The Boards operate at different institutional levels by acting as experts on issues regarding Romani population, monitoring the development of the circumstances of Romani population, taking initiatives and issuing statements and opinions.<sup>763</sup> Furthermore, according to the third report submitted before the Advisory Committee of the FCNM, Romani cultural rights in Finland are promoted

---

<sup>760</sup> Second Report submitted by Serbia pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/II(2008)001 received on 4<sup>th</sup> March 2008, 180.

<sup>761</sup> “The Sami, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture. Provisions on the right of the Sami to use the Sami language before the authorities are laid down by an Act. The rights of persons using sign language and of persons in need of interpretation or translation aid owing to disability shall be guaranteed by an Act”.

<sup>762</sup> CoE Commissioner for Human Rights, "Example from Finland “a Good Practise for Participative Structures on Roma Inclusion: The Advisory Board on Romani Affairs in Finland”, "<http://www.coe.int/t/commissioner/Activities/GoodPractices/>, 2012). (last entered on 10/06/2012).

<sup>763</sup> Ibid.

in the broadcasting of Romani mass-media programs, which however do not yet use Romanes as a medium language.<sup>764</sup>

## 6.7. Critical remarks

The analytical excursus developed in this chapter has built on the assumption that the full recognition of minority cultural rights strongly depends on the effective recognition of the peculiar cultural identity of minorities at all legal levels (international, European and domestic). Nonetheless, the analysis has shown that the notion of cultural identity is extremely difficult to be crystallized since it continuously changes in relation to the social evolution of the social group (i.e. minority) to which it refers.

In the case of Roma, the notion of cultural identity is even more difficult to be precisely identified although some general patterns can be related to the “traditional Romani core” characterized by Romanes, traditional customs (regulated by the *Kris*) and a nomadic life-style which even if abandoned by a number of Romani communities still characterize Roma’s diffuse presence in Europe. As clarified by Marushiakova and Popov, this general “traditional Romani core” has historically been subjected to different evolutions, which are part of the intrinsic process of construction and reconstruction of cultures.<sup>765</sup>

Currently, European States have generally recognized Romani cultural identity at a very underdeveloped stage. While the vast majority of legal systems do not recognize at all Romani cultural identity, a limited number of States have recognized instead at a very low level Romani cultural identity. Accordingly, the low recognition of Romani cultural identity produces in turn either an inexistent or a limited recognition of Roma cultural rights. The analysis has shown that in four countries<sup>766</sup> the recognition of Romani cultural identity is still

---

<sup>764</sup> Third Report submitted by Finland pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2010)001 received on 22<sup>nd</sup> of May 2010, 49-50.

<sup>765</sup> See section 6.1.

<sup>766</sup> Germany, United Kingdom, Ukraine and Romania.

too fragile to root a parallel recognition of Roma cultural rights. Whereas in fourteen cases the recognition of Romani cultural identity has allowed the parallel articulation of Roma cultural rights either from a territorial perspective<sup>767</sup> or from a personal perspective.<sup>768</sup>

By and large, it can be noted that the majority of legal systems articulating the cultural rights of Roma either through a territorial or a personal perspective, legally recognize them as a “national minority”.<sup>769</sup> In those legal systems in which Roma cultural rights are devised in a territorial perspective,<sup>770</sup> the content of cultural rights is mostly tailored on the areas of freedom of expression in the minority language, protection of cultural traditions, inclusion of minority language/culture in the educational curricula, support of media/cultural programs activated by the minority group. In one legal system the right to nomadism and free movement for Roma is also included in the sphere of Roma cultural rights.<sup>771</sup>

Whereas in those legal systems where the cultural rights of Roma are devised in a personal perspective,<sup>772</sup> the content of this set of rights does not substantially change. The distinctive feature between the two dimensions can instead be envisaged in the role provided to this social group while exercising this set of rights. In particular, in those legal systems addressing Roma cultural rights through a personal perspective, the collective dimension in which these rights have articulated has shown to mostly derive from the legacy of the NCA model. In this framework, the social group is provided with a certain degree of control and autonomy in the implementation of this set of rights.

From a merely theoretical standpoint, the articulation of Roma cultural rights from a personal perspective has shown to be particularly suitable to Romani cultural identity of non-territorial

---

<sup>767</sup> Italy, Czech Republic, Macedonia, Montenegro, Poland, Slovakia and Bosnia-Herzegovina.

<sup>768</sup> Austria, Hungary, Russia, Slovenia, Croatia, Serbia and Finland.

<sup>769</sup> These are the cases of Austria, Slovenia, Croatia, Serbia, Finland, Czech Republic (which defines Roma both as “ethnic minority” and as “national minority”), Bosnia-Herzegovina and Slovakia.

<sup>770</sup> Italy, Czech Republic, Macedonia, Montenegro, Poland, Slovakia and Bosnia-Herzegovina.

<sup>771</sup> This is the case of Italian regional legislation.

<sup>772</sup> Austria, Hungary, Russia, Slovenia, Croatia, Serbia and Finland.

minority, especially in the form of the NCA model.<sup>773</sup> Moreover, the devise of Roma cultural rights through the NCA model not only derives but also strengthens the overall recognition of Romani cultural identity as it implies (at least *in abstracto*) a stronger Romani presence and a consequent “political” influence on the public sphere (as it can be deduced from the general principles contained in the Oslo and in the Lund Recommendations).

Yet, this model potentially entails a set of critical implications which, in its extreme applications (as the Russian case has shown) can even subvert the high promotional nature of the NCA to the point the effective enjoyment of cultural rights can even be downgraded to a lower stage than the territorial model. In this light, it can be argued that no national “legal good practice” that can be raised to the level of the “best solution” to be taken as a paradigm for future devise of Roma cultural rights in other European systems as well.

In spite of different variations that have developed from the “Romani traditional core”, the different legal systems where the recognition of such an identity takes place and the different dimensions on which the recognition of Roma cultural rights can articulate (either territorial or personal), the recognition of both Romani cultural identity and Roma cultural rights needs to necessarily find on an unavoidable element: the recognition of dignity to Roma as individuals and as European citizens.

Indeed, within the majority of societies where Roma live, their presence has shown to be still perceived as mostly “illegitimate”.<sup>774</sup> Recently, the international Courts and supervisory bodies (especially the ECtHR) have developed a series of judgments and opinions aimed at raising the legal standards of recognition on Romani cultural identity. However, if practical implementation of cultural rights for Roma wishes to escape the “Cinderella syndrome”<sup>775</sup> it

---

<sup>773</sup> Klímová-Alexander, *The Romani Voice in World Politics: The United Nations and Non-State Actors*. Mentioned in section 4.4.

<sup>774</sup> Williams, "L'ethnologie des Tsiganes".

<sup>775</sup> Niec, "Casting the Foundation for the Implementation of Cultural Rights".



should be more developed and financially supported at the domestic level, in a holistic framework of Romani emancipation by necessarily passing from the preliminary guarantee of socio-economic rights which is the precondition for the full realization of cultural rights as the HCNM has emphasized.<sup>776</sup>

---

<sup>776</sup> See section 6.3.1.



## Chapter 7

### Political Rights

**Summary:** 7.1. Participation and representation of Roma in the public sphere in a legal perspective. – 7.2. Political rights at international level. – 7.3. Political rights at European level. – 7.4. Individual and collective political rights. – 7.5. Political rights of Roma at domestic level. – 7.5.1. Co-decision mechanisms. – 7.5.2. Consultation mechanisms. – 7.5.3. Coordination mechanisms. – 7.5.4. Self-government mechanisms. – 7.5.5. Multi-level political representation. – 7.6. Critical remarks.

#### 7.1. Participation and representation of Roma in the public sphere

At international level the right to promote the political representation of minorities is enshrined in a number of legal texts. Nonetheless, this right can entail several meanings and diverse interpretations. According to the doctrine, this right ensues from an inner tension between the principle of (formal) equality underlying the foundations of each democratic system and the legal recognition of different social groups that cannot be encompassed by the application of the principle of (substantial) equality.

In those legal systems where the principle of (formal) equality is emphasized, minority political rights inevitably appear “sacrificed” since minority rights are structurally inferior to those of the majority. On the contrary, in those legal systems where the political rights of minorities are promoted, the dimension of (substantial) equality in the sphere of political representation appears instead necessarily “compressed” since the political participation of minorities needs to be assured by means of special mechanisms.<sup>777</sup> By and large, the recognition of minority political rights can be understood as closely connected to the notions

---

<sup>777</sup> F. Palermo and J. Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze (2nd Edition)* (Padova: CEDAM, 2011), 128.

of State and nation: when a minority is legally recognized as representing one State's nationality (as in the case of national minorities),<sup>778</sup> political rights are likely to be fully guaranteed to this minority group.

However, no general rule regulates the balancing of the competing instances of (formal) equality in political representation and the (substantial) promotion of minority political rights: each "medium point" results from a precarious equilibrium which ensues from political choice. In other words, the "solutions" that can guarantee the effective participation of minorities in public affairs are numerous and diverse according to the "compromise" that has been reached in each and every case between competing minority claims and national interests.

In literature, the notion of effective participation of minorities in public affairs is analyzed alongside with the notion of "political representation". This notion involves different sets of interpretations which consider a minority representative either as a person who is part of the minority group or as a person who speaks *on behalf* of the minority group.<sup>779</sup> Nevertheless, none of these cases can be understood as the "real" or as the "authentic" device able to ensure minority representation, since at the practical level, both cases give rise to issues of authorization and accountability which deal with the effective fulfillment of minority's interests.

---

<sup>778</sup> Defined also in terms of "co-nations" see T.H. Malloy, *National Minority Rights in Europe* (Oxford: Oxford University Press, 2005).

<sup>779</sup> According to a first interpretation of "representation" a representative may be a trustee i.e. a person who is vested with formal responsibility for another's property or affairs. In the second interpretation of the concept of "representation", a representative can be understood as a delegate i.e. as a person that is chosen to act on behalf of another on the basis of clear guidance and instructions. A representative however, can be also understood, according to the third interpretation, as a person who carries out the promises on the basis of which he/she has been elected. Finally, a representative may typify or resemble the group that he/she claims to represent since it contains members drawing from all groups and sections in societies. This last notion is also defined as "mirror representation" and it implies that a representative government or parliament would constitute a microcosm of a larger society, containing members drawing from all groups and sections of a society. See A. Heywood, *Key Concepts in Politics* (London: Macmillan, 2000). cited in A. Verstichel, *Participation, Representation and Identity. The Right of Persons Belonging to Minorities to Effective Participation in Public Affairs: Content, Justification and Limits* (Antwerp/Oxford/Portland: Intersentia, 2009), 29-30.

When considering the participation of Romani communities in Europe both at national and at trans-national levels, again such a political participation cannot be described by means of “univocal” institutional devices since as part of the minority rights discourse it can be realized by means of different “political” solutions. A recent study from ENAR/ERIO has shown that the participation of Roma is generally very low in the political sphere. According to this study,

Racial prejudice, poverty, low education levels, sub-standard living conditions, language barriers, and other social and economic factors increase the communication and policy gap between governments and the majority population on one side, and the Roma population on the other, reinforcing mutual distrust.<sup>780</sup>

Nonetheless, this vicious-circle of “poverty-discrimination-exclusion” does not reflect into a lack of relations or contacts in the political sphere.<sup>781</sup> The general framework of Romani participation in public life – although very limited – appears much more complex than what can be expected from a first approach to the issue. Especially in the last two decades, the participation of Roma in the European public sphere has generally increased either through the direct participation of Romani representatives themselves or through the participation of people and organizations promoting the representation of Romani claims and interests at the trans-national level.<sup>782</sup> This chapter partially accounts for the complexity of the political representation of Roma in Europe by comparatively consider the extent to which the international and the European sets of minority political rights allow the direct participation of Roma in the public sphere and, in parallel, the extent to which these general principles of political participation are implemented at the domestic level.

---

<sup>780</sup> ENAR/ERIO, "Political Participation of Roma, Traveller and Sinti Communities," *Fact Sheet 32*(2007).

<sup>781</sup> See also V. Vatta, "I gruppi di interesse e la rappresentanza politica dei Rom," in *Il Mosaico Rom. Specificità culturali e governance multilivello* ed. S. Baldin and M. Zago (Milano: FrancoAngeli 2011), 131.

<sup>782</sup> A. McGarry, *Who Speaks for Roma?* (New York/London : Continuum 2010). A more in depth discussion of Romani representation at the trans-national level is developed at chapter 9.

## 7.2. Political rights at international level

At international level, the ICCPR is considered to be the paramount legal instrument protecting/promoting political rights. These rights articulate on a binding level the general principle already enshrined at Art. 21.3 of the UDHR according to which the “will of the people shall be the basis of the authority of the government”. More specifically, the ICCPR guarantees to each person the right to take part in the conduct of public affairs, directly or through the free choice of representatives without distinction of any kind (Art.2), to vote and be elected at genuine periodic elections by universal and equal suffrage held by secret ballot and to have access on general terms to equality to public service in one’s country (Art.25).

Similarly, also the ICERD binds States to guarantee everyone without discrimination with “political rights, in particular the right to participate in elections – to vote and stand for elections – on the basis of universal and equal suffrage; to take part in the government as well as in the conduct of public affairs at any level and have equal access to public service” (Art.5)

A more specific recognition of minority political rights can be found at international level only in *soft-law* instruments. Art. 2 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities expressly address the right of minorities to effectively participate in the public life, through the establishment of their own associations, in a manner not incompatible with national legislations. The Human Rights Committee has further interpreted the right of participation of minorities as requiring positive legal measures in order to more effectively guarantee the participation of these minority groups to decisions directly affecting them.<sup>783</sup>

---

<sup>783</sup> Although in Comment No. 23, the Committee explicitly referred to the exercise of cultural rights, section 6.4. has already emphasized how the boundary between cultural rights and political rights, sometimes appears quite fuzzy since there may be some overlapping between the two legal areas, especially with regard to minorities. In this light, the consideration of this comment also for political rights appears certainly relevant as it referred to the participation of minorities in the public life in general terms.

However, as seen in the previous chapter on cultural rights, the involvement of minority groups at decision-making level on issues directly affecting them can either articulate on a territorial or on a cultural dimension. In the light of the non-territorial and diffuse nature of Roma, it remains to be seen how this general principle of “guaranteeing the effective participation of minorities” is assured at European and domestic levels.

### **7.3. Political rights at European level**

At the European level, the legal recognition of minority political rights is mostly enshrined in the geo-legal spheres of the OSCE and of the CoE.<sup>784</sup> The OSCE, in particular, has played a key role in reinforcing the legal background related to the rights of political representation of minority groups not only from a general perspective but also from the specific perspective of Roma political rights. Already in the framework of the Copenhagen Meeting of 1990, the OSCE recognized the effective participation of minority groups in public life as an essential element of justice which guarantees their inherent dignity of minority groups as human beings. Significantly, within the same legal document, the OSCE recognized the particular problems of Roma in Europe as well.<sup>785</sup>

In the subsequent Concluding Document of Budapest, the OSCE recalled and expanded the principles enshrined in the Concluding Document of Copenhagen by paying a specific attention to Roma. In this framework, a legal basis was set to create – within the ODIHR – a “Roma Contact Point” with the mandate to act as a “clearing house” to exchange information on the implementation of commitments relating to Roma and to facilitate contacts on Romani

---

<sup>784</sup> The EU law has still not developed any legal provision to guarantee its citizens with the right to adequate political representation at the national level. Accordingly there are no “special political rights” for minorities at the EU level such as autonomy or special quotas. The only “political rights” that Roma EU citizens can enjoy at the EU level are that related to vote and stand for elections at the local as well at the European level as any other EU citizen. These rights, however, derive from their EU citizenship status and have nothing to do with their minority status.

<sup>785</sup> See the Concluding Document of the Human Dimension meeting in Copenhagen on the 29 June 1990.

issues among participating States, international organizations and NGOs.<sup>786</sup> In the following years, the OSCE further expanded the mandate of the Roma Contact Point as to comprehend the tasks of monitoring the advancement of Roma political rights in Europe by focusing in particular on the analysis of institutional devices promoting the coordination and representation of Roma.<sup>787</sup>

With the establishment of the Roma Contact Point, the ODIHR started to deal more consistently with the issue of the political representation of Roma in Europe and, in the following Human Dimension Meeting, a Roundtable on Strategies for Implementing the Minority Rights of Roma and Sinti was organized to critically discuss the situation of this social group in Europe. In its final part, this Roundtable came at the conclusion that, at the political level, the Romani movement was functioning at different levels, more or less independently with loose structures of competence and communication. In order to strengthen the effective participation of Roma also within national institutional structures, in the same meeting, the ODIHR called for urgent dialogue between Romani activists and leaders to further strategize political participation and representation of Romani groups.<sup>788</sup>

With the adoption of Lund Recommendations, the process of recognition of the necessity of a more effective Romani participation in political life was further enhanced.<sup>789</sup> It is, in fact, in the same year of adoption of the Lund Recommendations that the Supplementary Human Dimension Meeting on Roma and Sinti Issues of the OSCE/ODIHR proposed a survey on the

---

<sup>786</sup> Budapest Concluding Document 1994.

<sup>787</sup> OSCE-ODIHR, "The ODIHR Contact Point for Roma and Sinti Issue," ed. OSCE-ODIHR (Warsaw: OSCE Office for Democratic Institutions and Human Rights Contact Point for Roma and Sinti Issues, 2001).

<sup>788</sup> E. Sobotka, "Special Contact Mechanisms for Roma " in *Political Participation of Minorities. A Commentary on International Standards and Practice*, ed. M. Weller and K. Nobbs (Oxford/New York: Oxford University Press, 2010), 506.

<sup>789</sup> In particular, Recommendation 6 focuses on the specific recognition of minorities in public life through a mechanism for dealing with minority issues through high level ministerial advisory bodies and the formal inclusion of such groups within the political decision-making structure through special measures. Recommendation 11 highlights the importance of promoting minority political participation also at the local and regional levels. Recommendation 12 clarifies that minority political participation can also articulate through advisory and consultative mechanisms which fulfil the ideals of participatory democracy by facilitating the dialogue in the adoption of any legislative or administrative measure that directly affects the relevant group.



“best practices” regarding the participation policies for promoting Roma’s political representation within the OSCE States.<sup>790</sup>

The meeting was opened by an introductory speech of the HCNM which recommended that the participation and representation of Roma should have been articulated through specific institutional mechanisms on the political level. In particular, such mechanisms should have been aimed at guaranteeing the genuine and meaningful representation of Roma in a way which could enable them to preserve their specific identity and cultural characteristics. According to the HCNM, the efficacy of such mechanisms can be measured through a number of criteria which guarantee the effective participation of Roma at all institutional levels and different political stages.<sup>791</sup> During the Oslo Ministerial Meeting<sup>792</sup> and the Bucharest Ministerial Council Meeting,<sup>793</sup> the issue of political representation of Roma was further recalled. In particular, during these meetings the OSCE recommended devising appropriate solutions in order to ensure that adequate resources were made available to provide effective implementation to the actions of the Roma Contact Point.<sup>794</sup>

Although, as repeatedly argued, the legal documents of the OSCE do not have binding force, the general principles enshrined within these documents were nonetheless important to constitute the legal ground to build the binding commitments of the FCNM in the CoE geo-legal sphere. These are particularly the cases of Art.2.2 and Art.15 of the FCNM which require Member States to create the necessary conditions to allow the participation of national minorities in cultural, social and economic life especially in those areas directly affecting them. In the case of Roma, in line with the principles identified by the OSCE and particularly by the HCNM, the Advisory Committee of the FCNM recommended a more effective

---

<sup>790</sup> OSCE/ODIHR Supplementary Human Dimension Meeting, Roma and Sinti Issues, Vienna, 6 September 1999.

<sup>791</sup> Address by Max van der Stoep to the OSCE/ODIHR Supplementary Meeting on Roma and Sinti Issues, Vienna, September 6, 1999 cited in Sobotka, "Special Contact Mechanisms for Roma ", 506.

<sup>792</sup> Seventh Meeting of the Ministerial Council, Declaration on Kosovo, 2-3 December 1998, Oslo.

<sup>793</sup> Ninth Meeting of the Ministerial Council, Ministerial Declaration, 3 and 4 December 2001.

<sup>794</sup> Sobotka, "Special Contact Mechanisms for Roma ".

implementation of these legal provisions particularly in the realm of public administration where Roma are still very under-represented.<sup>795</sup>

More recently, the ECtHR has interpreted some general provisions enshrined within the OSCE background. In *Sejdić and Finci v. Bosnia and Herzegovina*,<sup>796</sup> the ECtHR has in fact found a breach of, *inter alia*, Art. 3 Protocol 1 (right to free elections) in a case involving two applicants both citizens of Bosnia and Herzegovina respectively of Romani and Jewish origins. The applicants complained their exclusion – on the basis of their ethnic origins – from the candidacy to the Presidency of the House of People and to the Parliamentary Assembly despite possessing experience comparable to the highest elected officials.

According to the Constitution of Bosnia and Herzegovina, which was drafted within the framework of the Dayton Agreement of 1995 in order to restore peace after “ethnic” cleansing, only members of the “constituent” peoples (identified as Bosniacs, Croats and Serbs) were in fact entitled to political representation at the Presidential level. Although the non constituents people of Bosnia and Herzegovina could theoretically enjoy their political rights by being indirectly represented by constituents people, the Court considered, in its reasoning, the applicants’ active participation in public life and their choice to run for the House of People or the Presidency as completely coherent.

In particular, in its reasoning, the Court considered the overall socio-political situation in Bosnia and Herzegovina to have generally improved since the Dayton Peace Agreement. Furthermore, the Court upheld the position of the Venice Commission, one of the interveners in the case, according to which the existing power-sharing mechanisms of Bosnia and Herzegovina did not require the total exclusion of one group of citizens. Indeed, power-

---

<sup>795</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, “The effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs” ACFC/31DOC(2008)001, adopted on 27 February 2008 §124-125.

<sup>796</sup> *Sejdić and Finci v. Bosnia and Herzegovina*, Application Nos. 27996/06 and 34836/06, European Court of Human Rights Grand Chamber decision of 22 December 2009. See footnote 187

sharing mechanisms constitutionally settled in Bosnia and Herzegovina, were designed with the aim of assuring a cease-fire through the approval of constituent people.

However, once the restoration of peace was fully achieved, the persistent applicants' ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina was considered by the Court as lacking an objective and reasonable justification precisely in the light of the CoE democratic standards. Moreover, the Court clarified that when joining the Council of Europe in 2002 and when consequently ratifying the ECHR and its additional Protocols, Bosnia and Herzegovina agreed to adhere to the CoE relevant standards.

Likewise, when ratifying a Stabilization and Association Agreement with the European Union in 2008, Bosnia and Herzegovina committed itself to “amend[ing] electoral legislation regarding members of the Bosnia and Herzegovina Presidency and House of Peoples delegates to ensure full compliance with the European Convention on Human Rights and the Council of Europe post-accession commitments” within one to two years.<sup>797</sup> In its decision, the Court therefore found that the applicants' continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina a violation of Article 14 taken in conjunction with Article 3 of Protocol No. 1.

It is interesting to highlight that, in its reasoning, the Court reiterated its interpretation of discrimination that in the Court's words means “treating differently, without an objective and reasonable justification, persons in similar situations”.<sup>798</sup> Moreover, the Court clarified once again that discrimination does occur whenever there is no objective and reasonable justification i.e. whenever the distinction does not pursue any “legitimate aim” and whenever there does not exist any proportionality between the means employed and the aim sought to be realized. In this logical framework, racial discrimination has to be understood as a

---

<sup>797</sup> §49.

<sup>798</sup> §42.

particular kind of discrimination that, according to the Court, requires special vigilance and vigorous reaction, from national authorities.<sup>799</sup>

By recalling the principles enshrined in *Nachova*,<sup>800</sup> the Court reaffirmed that authorities must use all available means to combat racism in order to reinforce the democratic visions of a society whereby diversity is not perceived as a threat but as a source of enrichment. Moreover, although Art.14 does not prohibit Contracting Parties from treating groups differently in order to correct “factual inequalities” between them, on the basis of the precedent *D.H. and Others*,<sup>801</sup> the Court noted that, in certain circumstances, a failure to attempt to correct inequality through different treatment may also give rise to a breach of that Art.14 in the lack of an objective and reasonable justification.

This brief excursus on the recognition of political rights at the European level has shown that especially at the OSCE and at the CoE levels,<sup>802</sup> a general trend is starting to develop as far as the recognition of minority political rights in general and Roma political rights in particular, is concerned. This trend has developed in line with the direction already identified by the Human Rights Committee: the effective participation of minorities in general and of Roma in particular should be assured also by means of “positive legal measures”. In the case *Sejdić and Finci v. Bosnia and Herzegovina*, the ECtHR has clarified that particularly in the case of non-territorial groups such as Roma, the meaning of “positive legal measures” may find concretization through the indiscriminate access of minority individuals to electoral rights.

---

<sup>799</sup> §43.

<sup>800</sup> *Nachova and Others v. Bulgaria*, Application Nos. 43577/98 and 43579/98, European Court of Human Rights Grand Chamber decision of 6 July 2005 § 145. Chapter 6 has briefly discussed this case as well.

<sup>801</sup> *D.H. and Others v. Czech Republic*, Application No. 57325/00, Chamber decision of 7 February 2006 Grand Chamber decision of 13 November 2007. § 175. Chapters 4, 5 and 6 have already discussed this case respectively from the perspective of linguistic rights, economic and social rights (right to education) and cultural rights.

<sup>802</sup> In particular, this legal trend can be identified in the legal standards enucleated by the OSCE Lund Recommendations and by the activity of the OSCE Roma Contact Point as well as by the provisions enshrined in the ECHR as interpreted by the ECtHR.

#### 7.4. Individual and collective political rights

Nonetheless, the promotion of minority participation in public life by means of “positive legal measures” does not exhaust in the guarantee of the indiscriminate access to electoral rights for all minority individuals. Such a guarantee which does concretely translate on the right to vote and to stand for elections, considers just the individual dimension of minority political rights. However, when considering the collective dimension of minority political rights, the meaning of “positive legal measures” reveals a much more complex question.

According to the OSCE Lund Recommendations 7 and 8, the right to vote and to stand for elections without discrimination (together with the freedom of association) are just the preconditions for the effective representations of minorities in elected bodies from a collective dimension. Once these preconditions are met, the effective representations of minorities from a collective dimension can substantiate on special institutional mechanisms such as reserved seats (Recommendation 6), advisory and consultative bodies (Recommendations 12 and 13) and self-governance mechanisms (Recommendation 16).<sup>803</sup>

According to Bieber, in the lack of a binding reference on the ways through which the effective participation of minorities from a collective dimension concretely find articulation,<sup>804</sup> the Lund Recommendations constitute the legal point of reference to this regard, even if this legal document can be seen more as “identifying best practice” rather than as a pure “legal standard”. More specifically, according to the same author, the Lund

---

<sup>803</sup> For a commentary on the institutional measures to promote minority political participation under the Lund Recommendations see A. Verstichel, "Special Measures to Promote Minority Representation in Elected Bodies: The Experience of the Osce High Commissioner on National Minorities " in *Science and Technique of Democracy. The Participation of Minorities in Public Life* ed. CoE (Strasbourg: CoE Publishing, 2011).

<sup>804</sup> While at the CoE level, the paramount instrument for the protection and the promotion of minority rights, the FCNM, does not concretely specify how to interpret the meaning of “positive legal measures” in a collective dimension, the Commentary of the FCNM Advisory Committee on the Effective Participation of National Minorities in Public Life specify – in a no comprehensive way though – that in order to provide execution to the political representation of minorities “posts assigned for minority representatives” should be guaranteed “in the executive at all levels”. See Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social, and Economic Life and in Public Affairs, 27<sup>th</sup> February 2008, ACFC/31DOC (2008)001, §128.

Recommendations constitutes a clear reference to power-sharing rather than to occasional representation of minorities.<sup>805</sup>

While at the international minority law level, the notion of power-sharing still appears quite underdeveloped, in doctrine this notion has progressively become an important feature of discussion in the debate of minority inclusion. Traditionally, the notion of power-sharing was regarded as the prerequisite of consociational democracy, however as the European practice has shown, in several cases different forms of power-sharing exist, also in national systems institutionally organized other than through consociational devices. Against this background, the notion of “power-sharing” has been described as

..a firm and durable commitment towards the inclusion of different groups within the government. Such a commitment may be expressed either by a political agreement, which has evolved over time into a tradition, or a legal requirement.<sup>806</sup>

In the light of this broader understanding of minority political representation, the following section analyzes Roma political rights especially from a collective rights perspective of executive power-sharing. The analysis departs in fact from the assumption that only when individual political rights are guaranteed, Roma cannot fully enjoy their minority representation rights, as in this case political rights are too weak to provide the social group with effective and inclusive safeguards.

## **7.5. Political rights of Roma at domestic level**

The classic understanding of the right to participation of people belonging to minorities conceive minority political rights in terms of an “in-ward entitlement of the group” within a

---

<sup>805</sup> F. Bieber, "Power-Sharing at the Governmental Level," in *Political Participation of Minorities. A Commentary on International Standards and Practice*, ed. M. Weller and K. Nobbs (Oxford/New York: Oxford University Press, 2010), 416-17.

<sup>806</sup> *Ibid.*, 422.

given “geographical and jurisdictional space”.<sup>807</sup> While the political rights of Roma, as the political rights of any other minority group, can certainly be articulated within a “jurisdictional space”, they cannot be instead articulated within a defined “geographical space” by means of any territorial forms self-governance.<sup>808</sup> Therefore, by recalling the wording of the Lund Recommendations, the political rights of non-territorial groups need to be articulated – particularly in this case – more than in the “areas where minorities live” in the “matters that particularly affect them”.

In the case of cultural rights, the participation of minorities in the public sphere has shown to be often organized non-territorially according to the National Cultural Autonomy model (NCA) devised by Renner and Bauer. While discussing, at chapter 6, the national cases that have implemented the NCA to promote cultural rights, it has been shown how the notions of “personal” and of “cultural” autonomy are often used interchangeably, mostly because these institutional arrangements involve cultural areas which are directly linked to the personal identity of minorities.

However, according to the doctrine, the concept of personal autonomy should be understood as broader than that of cultural autonomy: the former refers to the criterion of delimitation of autonomy, whereas the latter refers to the competence allocated to the autonomous authority.<sup>809</sup> While this doctrinal distinction of non-territorial arrangements of self-

---

<sup>807</sup> M. Weller, "Minority Consultative Mechanisms. Towards Best Practice," in *Political Participation of Minorities. A Commentary on International Standards and Practice*, ed. M. Weller and K. Nobbs (Oxford/New York: Oxford University Press, 2010), 477.

<sup>808</sup> The two main forms of territorial self-governance are autonomy and federalism. While in both cases there is division of powers between the center and the regions and separate governments at both levels, in the case of autonomy only one or two regions have a special status whereas in the case of federalism all parts of the country are involved in the system of divided powers and institutions. According to the doctrine, autonomy is generally more appropriate where there are only one or two ethnic minorities concentrated in a region wishing to have some measure of control over its territory in order to preserve and to promote their culture or to protect some special interest. Y. Ghai, "Participation as Self-Governance," in *Political Participation of Minorities. A Commentary on International Standards and Practice* ed. M. Weller and K. Nobbs (Oxford/New York: Oxford University Press, 2010), 621.

<sup>809</sup> Indeed, as the case of Belgium shows territorial autonomy can also be a mere cultural autonomy. Another type of autonomy that is identified in the literature is “functional autonomy” which can also be understood as a separate form of autonomy implying the only the devolution of certain powers (such as culture, education and

governance appears almost irrelevant in the case of cultural rights as the categories of “personal” and “cultural” autonomy are almost completely overlapping, in the case of political rights this distinction appears instead much more significant.

Cultural autonomy can in fact be understood as a means to guarantee the participation of non-territorial minorities in the public sphere especially with regard to the promotion of their cultural identity. Chapter 4 has shown that some forms of cultural autonomy can “in embryo” entail some degree of political autonomy as well since they allow the representation of minority claims in the public sphere. However, as a general rule, it cannot be argued that “cultural representation” automatically turns into “effective political representation” i.e. into a form of representation that automatically spills over each aspect of public governance affecting the minority group.

Therefore, when considering the participation of minorities in the public sphere from a political perspective, it is important to distinguish the different degrees through which such a participation is articulated in order to comprehend to which extent this participation amounts to the effective enjoyment of political rights. To this purpose, the doctrine has identified four legal macro-typologies that provide a simplified key to the reading to interpret the different shades enshrined within the notion of effective political participation of minorities: co-decision, consultation, coordination and self-government mechanisms.<sup>810</sup>

Especially in Central-Eastern Europe, a number of States have recognized the right of Roma to participate in the public sphere through a number of institutional mechanisms that promote their political participation through one or more of the four macro-typologies identified above.

---

religious issues) to a minority organization constituted as a juristic person under private law. Hence, functional autonomy differs from personal autonomy in the fact that not all persons belonging to the minority are subjected to the jurisdiction of these empowered bodies. See Verstichel, *Participation, Representation and Identity. The Right of Persons Belonging to Minorities to Effective Participation in Public Affairs: Content, Justification and Limits*, 473-74.

<sup>810</sup> On the different typologies of political representation mechanisms see Weller, "Minority Consultative Mechanisms. Towards Best Practice."



Nevertheless, there is still a number of countries where the political participation of Roma is not promoted at all or where it is promoted at a such a minimum level that it cannot be comprised in none of the above-mentioned four typologies.<sup>811</sup>

### **7.5.1. Co-decision mechanisms**

The doctrine distinguishes two main categories of co-decision mechanisms. To the first category of co-decision mechanisms belong those institutional bodies that are entitled of co-decision powers in terms of mandatory review of the draft legislation that interests the area of competence of the minority body. In the most promotional cases, these co-decision mechanisms are also entitled to veto powers which can block the adoption of sensitive legislation affecting minority interests. These co-decision bodies are generally attached to national or local parliaments.

To the second typology of co-decision mechanisms belong those minority institutional bodies that have instead more genuine decision-making powers which entitle them to directly programming, planning and funding issues related to minority rights and interests. More specifically, in these cases, the mechanism of co-decision is articulated as to allow the central government to set the general framework of, and the funding level for, minority policy and programs, while minority consultative councils decide how to allocate this funding in order to concretely implement these policies and programs.

---

<sup>811</sup> In Germany, the participation of Roma to the public life is mostly promoted at the federal level by the Central Council of German Sinti and Roma which serves as an umbrella organization for nine regional Romani associations. Third Report submitted by Germany pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2009)003 received on 9 April 2009, §2.4. In Russia, although a system of NCAs has developed as to theoretically encompass Roma communities as well, any structure of political representation has been registered at the federal, regional and local levels for Roma. See point 1 of Council of Europe Round Table On the situation of the Roma in the Russian Federation, 2001.Strasbourg, 6 November 2001 MG-S-ROM (2001) 14 rev. available at <http://www.coe.int/t/dg3/romatravellers/archive/documentation/fieldvisit> (last accessed on 24/05/2011). In Sweden, governmental authorities have recently started to held some meetings with representatives of national minorities, Roma minority included. Third Report submitted by Sweden pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2011)003 received on 1<sup>st</sup> June 2011, 5.

In the case of Roma, a hybrid case promoting Roma political rights by means of an institutional device which stands in-between these two typologies of co-decision can be identified in the case of **Serbia** which has established the Council of Roma minority. In this case, Art. 10 of the Law on National Councils of National Minorities<sup>812</sup> entitles Minority Councils, *inter alia*, to submit motions for amendments in regulations prescribing the national minority rights guaranteed at the constitutional level especially in the areas of culture and language (§10), to initiate the adoption of and monitor the implementation of law and other regulations especially in the areas of culture and language (§9). Furthermore, the national minority councils in Serbia, including the Council of Roma, are generally guaranteed a high degree of autonomy to establish institutions, associations, businesses and funds in all areas related to the promotion of their minority identity, especially in the areas of culture and language (§6).

### **7.5.2. Consultation mechanisms**

The doctrine identifies three main typologies of consultation mechanisms. Although each consultative mechanism can articulate on different institutional levels and can be invested with diverse competences, the discriminatory feature distinguishing the variety of consultation mechanisms relies on their composition. In fact, to the first typology generally belong those consultative bodies exclusively composed of minority representatives; to second typology generally belong consultative bodies composed of minority as well as by governmental representatives; while to the third typology generally belong those consultative bodies led by governmental representatives.

More specifically, the first typology of consultation mechanisms can be identified with those minority councils that are mostly composed and organized by minority representative organizations whose task is assisting the coordination and the articulation of minority interests

---

<sup>812</sup> Decree on the Establishment of the Council for National Minorities of the Republic of Serbia, Republic of Serbia Official Gazette no. 61/2006.

by considering the broad spectrum of minorities living within the State. These minority groups are represented jointly in the government or in the parliament. Consultative councils belonging to this category also perform an important function in mobilizing minority communities by streamlining their own ability to represent themselves through umbrella organizations.

In the case of Roma, the Spanish case constitutes an example of consultation mechanism that can be referred to this first typology. Although **Spain** does not officially recognize any minority groups within its territory,<sup>813</sup> the creation in 2005 of the State Council of Roma (*Consejo Estatal del Pueblo Gitano*) performs the role of catalyst in converging the interests and the opinions of the various Romani organizations before the Spanish Ministry of Labor and Social Affairs.<sup>814</sup>

In particular, the State Council of Roma is entrusted with the mandate to propose and advise on measures related to the promotion of the Romani population, to draft initiatives in relation to funding programs targeting the Romani population, to issue opinions and reports on those regulatory proposals affecting the Romani population (especially on the development of equal treatment and opportunities) and to promote communication and exchange of information in order to facilitate the coexistence and the social cohesion among Romani citizens and the mainstream society. Moreover, at regional and local levels some *Comunidades Autonomas*<sup>815</sup> activated Roma Councils whose structure is homologous to the national one.

---

<sup>813</sup> As already explained at section 2.2.5.

<sup>814</sup> The State Council of the Roma people was created in Spain through the *Real Decreto 891/2005, de 22 de julio, por el que se crea y regula el Consejo Estatal del Pueblo Gitano*.

<sup>815</sup> These are the cases of the Romani Municipal Council of Barcelona, the Romani Council of the Social Affairs Department of Basque Government, the Romani Council of Catalonia and the Romani Regional Council of Castilla La Mancha see [http://www.iustel.com/v2/diario\\_del\\_derecho/noticia.asp?ref\\_iustel=1](http://www.iustel.com/v2/diario_del_derecho/noticia.asp?ref_iustel=1) (Last accessed on May, 28<sup>th</sup> 2011).

The creation of the State Council of Roma has been considered to be a major step towards the institutional recognition of the Romani community in Spain,<sup>816</sup> since it has contributed to facilitate the political participation of *Gitanos* for collective action. In Spain, in fact the high territorial dispersion of Roma together with their low voting rates have traditionally limited their possibility to influence the agenda of mainstream parties.<sup>817</sup>

In **Albania**, the National Minority Committee has been established with mandate similar to that of the Spanish Council of Roma.<sup>818</sup> Currently, one Romani representative sits in Albanian National Minority Committee, since its composition includes one member from each minority officially recognized either as a cultural or as an ethnic minority.<sup>819</sup> According to the Third Report submitted by Albania before the FCNM Advisory Committee, the activity of the National Minority Committee has been particularly significant in enhancing the participation of minority groups. In fact, according to this report, “the Committee has managed not only to put forward institutionally the concerns of minorities, but also to present recommendations for their solutions”.<sup>820</sup>

**Slovakia** as well activated a consultation mechanism for the political participation of Roma which can always be ascribable to this first typology: the Government Council for National

---

<sup>816</sup> European Parliament, "Measures to Promote the Situation of Roma EU Citizens in the European Union. Country Reports," ed. Citizens' Rights and Constitutional Affairs Policy Department (Bruxelles: European Parliament, 2011), 374.

<sup>817</sup> M. Laparra and A. Macías, "Spanish Gitanos, Romani Migrants and European Roma Identity: (Re)Unification or Self-Affirmation?," in *Romani Politics in Contemporary Europe. Poverty, Ethnic Mobilization and the Neoliberal Order* ed. N. Sigona and N. Trehan (Houndmills/Basingstoke/Hampshire/New York : Palgrave Macmillan 2010), 233.

<sup>818</sup> In particular, in the Albanian case the National Minorities Committee is entrusted with the mandate to propose to both national and local entities measures for improving the situation of individuals that belong to different minority groups; to give opinion and to propose measures on the economic, social cultural and educational development, to promote the broadcasting of minority programs in the public media; to receive from the central and local government entities data and reports on matters related to minorities; to request the participation of minority representatives of the central and local governments regarding matters which fall under its responsibility. See

<http://www.pad.gov.al/content/Institucione/instvaresiKM/EN/NATIONAL%20COMMITTEE%20OF%20MINORITIES.htm> (last accessed on August, 10<sup>th</sup> 2012).

<sup>819</sup> European Commission against Racism and Intolerance, Third Report on Albania, CRI(2005)23, adopted on 17 December 2004, 11.

<sup>820</sup> Third Report submitted by Albania pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2011)001 received on 10<sup>th</sup> January 2011, 25.

Minorities and Ethnic Groups. This Council for National Minorities grants on an equal foot the representation of the 12 officially recognized national minorities of Slovakia. Although the institutive law of the Council, foresees the participation of some governmental representatives in this institutional body as well, the right to vote in the Council is exclusively reserved to national minorities representatives. At the same time, no issue concerning a particular national minority or ethnic group may be considered in the absence of any minority representative. The mandate of the Council deals in particular with minority cultural, economic and social interests.<sup>821</sup> Besides this consultative body and the appointment of the Representative of Roma Communities in Slovakia, the overall representation of Roma together with their political participation is particularly low in Slovakia.<sup>822</sup>

To the second typology of consultation mechanisms belong those consultative bodies that have been appointed around a high ranking governmental official or a governmental office for minority issues. This is the case of **Poland**, where the promotion of the participation of Roma in the public sphere is guaranteed in the Joint Commission of Government and National and Ethnic Minorities which has been appointed by Art.23 of the Law on Minorities<sup>823</sup> as the Prime Minister's consultative body with the tasks of presenting opinions on minority rights and needs, on minority cultural and linguistic programs and on draft laws as well as on budgetary allocations that directly affect the interests of minorities. Two Romani representatives are legally entitled to take part to the Commission.

---

<sup>821</sup> In particular, the Council is chaired by the Deputy Prime Minister and administration authorities as well as minority experts are invited to participate to the Council. Third Report submitted by Slovak Republic pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2009)008 received on 22<sup>nd</sup> July 2009, 6.

<sup>822</sup> M. Vašečka and M. Sadovská, "The Aspect of Culture in the Social Inclusion of Ethnic Minorities. Evaluation of the Impact of Inclusion Policies under the Open Method of Co-Ordination in the European Union: Assessing the Cultural Policies of Six Member States. Final Report Slovakia," in *MEU Programme, Minorities in the EU* (Bratislava: Center for Research on Ethnicity and Culture, 2006)., §28.

<sup>823</sup> Act of 6<sup>th</sup> January 2005 on national and ethnic minorities and on the regional languages. (Dziennik Ustaw No. 17, item. 141, with the amendment of 2005, No. 62, item 550).

In contrast with the previous cases analyzed which were characterized by a “purely” minority composition (or at least by a “pure” minority decision-making powers as in the case of Slovakia), the composition of the second typology of consultative body is mixed: it is composed both of minority representatives and of governmental representatives. As a consultative body of the executive branch, this institutional body is generally meant to work in cooperation with agencies of the governmental administration at both national and local levels, as also foreseen by the Polish Law at the third paragraph of Art.23. Moreover, in Poland two additional consultative bodies operate within the framework of the Ministry of the Interior and Administration whereby Roma are in consultative relationship with the State administration on the formation of a Roma policy.<sup>824</sup>

The third typology of consultative bodies stands borderline with coordination mechanisms. In this case, in fact, governmental representatives lead these bodies by dominating the process of selection of the members participating to the working process. In this light, the process of minority consultation cannot be considered as completely genuine since its possible hetero-direction from the outside can highly compromised the result of its consultation.

At **Italian regional level**, some examples of consultation mechanisms designed for Roma can be attributed to this third typology as well. In fact, in some cases the participation of Romani representatives in some Regional consultative bodies is either filtered by the governmental authority<sup>825</sup> or by non-governmental organizations working for the promotion of Roma rights.<sup>826</sup> Nonetheless at the Italian regional level, some cases of consultation mechanisms can

---

<sup>824</sup> E. Sobotka, "Political Representation of the Roma: Roma in Politics in the Czech Republic, Slovakia and Poland," *International Policy Fellowship Programme* (2003).

<sup>825</sup> This is the case of Piemonte where according to Art. 9 (b) of the regional law 25/02/1993 the Regional Council (the regional parliamentary body) selects one Romani representative to be appointed to the consultative body. Letter (e) of the same article appoints other five representatives who are selected by non-governmental organizations working for the promotion of Romani rights. Although this provision requires non-governmental organizations to ensure the participation of Romani representatives themselves, it does not clearly specify the exact number of Romani representative.

<sup>826</sup> These are the cases of Lombardia (Art.10 Law 77/89), Emilia Romagna (Art. 16 (c) Law 47/88) Lazio (Art. 9 Law 82/85), Liguria (Art.10 (d) Law 6/92) and Veneto (Art.10 (e) Law 54/89) where the regional laws require

instead be attributed to the second typology since these institutional mechanisms legally foresee more genuine forms of Romani representation.<sup>827</sup>

Despite their different composition, it is interesting to highlight that the mandate of these consultative bodies is by and large not very incisive in terms of guaranteeing the participation of Romani instances on the public sphere. Only in case, consultative bodies are in fact entitled to produce opinion on legislation that may interest Romani population. As Sigona has recently highlighted, the participation of Roma in the Italian public sphere is, by and large, extremely limited since public authorities often implement policies that directly or indirectly, discourage and obstruct the political participation of Roma.<sup>828</sup>

### **7.5.3. Coordination mechanisms**

Mechanisms of coordination cannot be considered as “genuine minority consultative bodies” since their institutional organization is devised to be coordinated between minority and governmental representatives. The difference between coordination mechanisms and consultation mechanisms of mixed composition relies on the degree of incisiveness that they can assure in the promotion of minority interests and claims. The doctrine identifies “coordination mechanisms” as those institutional bodies charged with ensuring that minority policy is delivered in a consistent way throughout all relevant branches of government. This is for instance the case of inter-ministerial working parties.

---

non-governmental organizations to select a Romani representative. Yet a part from the case of Veneto, where the law explicitly states that two Roma are entitled to take part to the consultative body, in the other cases it is often not very clear whether a Romani representative should be someone of Romani origin or someone speaking on behalf of Roma.

<sup>827</sup> These are the cases of Marche (Art.8 (b.4) Law 3/94) and of the Friuli Venezia Giulia (Art.19 (e) Law 11/88) and of the Provincial Law of Trento (Art.10 (f) Law 12/09) where according to the regional laws, Romani representatives need to be autonomously chosen by Romani communities themselves.

<sup>828</sup> N. Sigona, "The 'Problema Nomadi' Vis-À-Vis the Political Participation of Roma and Sinti at the Local Level in Italy," in *Romani Politics in Contemporary Europe. Poverty, Ethnic Mobilization and the Neoliberal Order* ed. N. Sigona and N. Trehan (Houndmills/Basingstoke/Hampshire/New York: Palgrave Macmillan 2010).

The case of the Finnish Advisory Board on Romani Affairs can be considered to stand borderline between a consultation mechanism of mixed composition and a coordination mechanism. This Board was created already in 1956 in conjunction with the Ministry of Social Affairs and Health to served as a link between the Romani people living in **Finland** and the public authorities. Its composition equally represents governmental authorities and Romani representatives.<sup>829</sup> Its mandate covers the monitoring and reporting to the authorities on the development of Romani people living conditions, the furthering of promotion of Romani language and culture and the general improvement of Romani living conditions.

Despite its historical activity, it is only in the 2000s that the Board has established links with the local level through the creation of regional advisory boards on Romani affairs in order to increase the interaction with Romani population. However, as the Third Report submitted by Finland before the Advisory Committee of the FCNM emphasizes, the process of “genuine” consultancy with Romani population is still underdeveloped (and thus more likely to approach “coordination” mechanisms than to “pure” consultative mechanisms). In particular, in the Finnish Policy on Roma there is a proposal to review on how to improve the hearing of Roma during bill drafting and during the overall legislative work.<sup>830</sup>

#### **7.5.4. Self-government mechanisms**

The doctrine identifies among self-government mechanisms those institutional devices that are established with the aim of organizing the functional or the cultural autonomy of minority groups at national, regional or local levels. As already discussed at section 6.6.2., the Hungarian case constitutes one of the most promotional examples to this regard. Through Law 77/1993, Hungary had in fact created a system of minority self-governments ensuring the

---

<sup>829</sup> 18 members total, 9 Roma and 9 non-Roma. On the composition, mandate and achievements of the Advisory Board on Romani affairs see <http://pre20031103.stm.fi/english/pao/publicat/roma/board.htm> (last accessed on 24/06/2011).

<sup>830</sup>Third Report submitted by Finland pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2010)001 received on 17<sup>th</sup> February 2010, 68.



collective participation of minorities in public life by providing them with a high degree of autonomy in the management of their cultural rights. After the approval of the “Rights of National and Ethnic Minority Law” in Hungary, minority councils were established for more than ten years on a double tier mechanism: local and national levels. Only in 2007, minority councils have started to be activated at the Hungarian regional level as well.

Notwithstanding the high promotional opening of the Hungarian law and the complex institutional articulation of minority councils that on the practical level is provided on a multi-level perspective, these Councils regrettably hold a very limited political incisiveness, as it has already been highlighted. Indeed, several operational difficulties have been identified already in 2008 by the Parliamentary Commissioner on Ethnic Minorities with regard to the effective powers of the Minority Councils at all levels. According to the Commissioner’s report,

Minority self-governments are in a special public law situation. As for their legal status, they qualify as self-governments, while their operational circumstances are much worse than those of an NGO disposing of an own office.<sup>831</sup>

The incomplete implementation of the provisions establishing minority councils in Hungary has supposedly worsen in the last year when the new Hungarian Constitution has decreased the powers of the Office of the Parliamentary Ombudsman on Ethnic minorities i.e. the highest administrative authority entitled to denounce cases of maladministration in the application of legal provisions affecting minority rights. Against this background, it can be noted that theoretically in Hungary self-government mechanisms are *in abstracto* the institutional devices promoting minority political rights to the lowest extent since they address political rights more on a cultural than on a personal perspective. Nonetheless, on the practical level, after the entry into force of the new Hungarian Constitution in 2012, self-government

---

<sup>831</sup> E. Kallai, *Report on the Activity of the Parliamentary Commissioner of the Rights of National and Ethnic Minorities. 2008* (Budapest: Office of the Parliamentary Commissioners, 2009), 16.

mechanisms have been further deprived of their institutional powers, particularly of the powers of “national control” in the monitoring of the effective execution of the cultural perspective as well.

#### **7.5.5. Multi-level political representation**

In some States, the political representation of Roma articulates on a plurality of institutional mechanisms and on different administrative levels. This is for instance the case of **Macedonia**, where Roma are not recognized as a minority group but as a constitutive nationality of the State that is *de jure* entitled to fully participate to the State’s power-sharing mechanisms. According to Amendment VI to the Constitution, in the Republic of Macedonia citizens belonging to all communities shall in fact be guaranteed appropriate and fair representation both in the bodies of the state authority and in other public institutions.<sup>832</sup>

Amendment XII further establishes an “Inter-community Relations Committee” within the Parliamentary Assembly to consider issues on the relations of the communities in the Republic and shall also give opinions and proposals for their resolving. The composition of the Committee comprises one Romani member (out of the 19 total members) chosen among the Macedonian members of the Parliament. Moreover, in Macedonia the participation of Roma in the public sphere is guaranteed also in different Romani ethnically connoted Parties.<sup>833</sup>

Also Bosnia and Herzegovina, Montenegro, Croatia, Serbia, Czech Republic, Romania, Slovenia and Bulgaria guarantee in a multiethnic perspective the participation on the public sphere of the different national/ethnic groups living within their territories. In particular,

---

<sup>832</sup> Amendment XVII guarantees the political participation of all citizens in the local units of self-governments as well either directly or through representatives in all decision making of local significance.

<sup>833</sup> M. Demirovski, "Roma in Sredorek Settlement," in *Managing Multiethnic Roma Communities in the Countries of Former Yugoslavia* ed. N. Dimitrijević (Budapest: Open Society Institute, 2000), 155.

**Bosnia and Herzegovina** guarantees at Art.19 of the Law on Rights on National Minorities<sup>834</sup> in the participation of minorities in the authorities and in other public services at all levels in proportion to the percentage of their participation in the population. Moreover, the Law established at Art.21 the Council of National minorities consisting of members of national minorities (therefore Roma included) whose mandate is providing opinions, advice and proposals regarding the rights, the status and the interests of national minorities.

In 2001, the Council of Roma was constituted through the support of international organizations, in order to guarantee a more active role in the political representation of Roma. The Council of Roma operates within the framework of the Council of Ministers and it represents more than 42 national NGOs operating for the promotion of the rights of Roma. The Board of the Council consists of nine Romani representatives and three governmental representatives. However, the activity of the Council of Roma could not be effectively realized until 2008 when the Council of Ministers firstly opened an *ad hoc* budget line to intervene in the areas identified by the Roma Decade.<sup>835</sup>

In **Montenegro**, Art. 79 of the Constitution guarantees the political rights of minorities in the forms of local self-governments, right to representation in the Parliament, proportionate representation in public services and councils for the protection and improvement of special rights. According to the reports produced within the framework of the FCNM, it seems that Roma population in Montenegro is not sufficiently involved in any civil party's life but that it participates to the public sphere mostly through a coalition of NGOs.<sup>836</sup>

---

<sup>834</sup> Law on National Minorities of 12<sup>th</sup> April 2003 Bosnia and Herzegovina Official Gazette, 12/03.

<sup>835</sup> Third Report submitted by Finland pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2012)003 received on 22<sup>nd</sup> May 2012, § 8.

<sup>836</sup> Report submitted by the Republic of Montenegro pursuant to Article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR(2007)002 received on 25<sup>th</sup> July 2007, 42.

Indeed, although a Roma Council was established in 2008,<sup>837</sup> Roma have not achieved a full representation at the national level yet. According to the Helsinki Committee, Roma can neither benefit of the reserved seats in the Parliamentary Assembly guaranteed by Art.23 of the Minority Law,<sup>838</sup> given that in the official census their population percentage is inferior to the 5 percent threshold required by law.<sup>839</sup> At the local level, the participation of Roma needs to be further developed as well<sup>840</sup> as emphasized by the Advisory Committee of the FCNM.

In **Croatia**, Art.7 of the Constitutional Law on the Rights of Minorities ensures the political representation of minorities through homologous devices as in Montenegro.<sup>841</sup> According to the reports submitted before the Advisory Committee of the FCNM, Roma have participated to the elections of their representatives both in the national and in the local units of self-governments<sup>842</sup> even if it is not clear to what extent they are effectively and incisively able to politically participate to the public sphere. Even if there seems to exist at least one ethnically connoted party in Croatia representing Roma,<sup>843</sup> the Advisory Committee has repeatedly emphasized that efforts should be made at all institutional levels to improve the participation

---

<sup>837</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities. Comments of the Government of Montenegro on the first opinion of the Advisory Committee on the implementation of the Framework Convention for the protection of National Minorities by Montenegro. GVT/COM/I(2008)001 received on 18<sup>th</sup> November 2008, §7.

<sup>838</sup> Law on Minority Rights and Freedoms Law of the Republic of Montenegro, Official Gazette of the RMN, No. 31/06, 51/06, 38/07.

<sup>839</sup> M.D. Janković, Čobaj, E.H., "Minorities in Montenegro Legislation and Practice," ed. Youth Initiative for Human Rights (Podgorica: Swedish Helsinki Committee for Human Rights, 2007), 55.

<sup>840</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities. Comments of the Government of Montenegro on the first opinion of the Advisory Committee on the implementation of the Framework Convention for the protection of National Minorities by Montenegro. GVT/COM/I(2008)001 received on 18<sup>th</sup> November 2008, §10.

<sup>841</sup> Art. 7 of the Constitutional Law 155/2002 establishes: "...7. self-organisation and association in pursuance of their common interests; 8. representation in the Parliament and in local government bodies, in administrative and juridical bodies; 9. participation of the members of national minorities in public life and local self-government through the Council and representatives of national minorities; 10. protection from any activity jeopardising or potentially jeopardising their continued existence and the exercise of their rights and freedoms".

<sup>842</sup> Third Report submitted by Croatia pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2009)009 received on 12<sup>th</sup> October 2009, 17.

<sup>843</sup> See the "Democratic Party of the Croatian Roma" <http://www.crwflags.com/fotw/flags/hr%7Dhrds.html> (Last accessed on 10<sup>th</sup> August 2012).

of Roma in decision-making processes. More specifically, Romani organizations should be treated as key partners in governmental programs aiming at improving their situation.<sup>844</sup>

In **Serbia**, the participation of Roma in the public sphere is promoted through co-decision mechanisms as well as through other mechanisms of consultation. The Law on Local Self-Government<sup>845</sup> provides for the establishment of a council on interethnic relations in ethnically mixed local self-government units, as an independent body of consultation. Although Roma are *de jure* entitled to take part to this council, so far no comprehensive data have been collected on the implementation of this legal provisions for this social group.<sup>846</sup>

Moreover, in Serbia the Law on Local Elections<sup>847</sup> has stipulated that the political parties of national minorities participate in the distribution of seats even when they win less than 5 percent of votes of the total number of voters who voted. As a result, a cosmos of Romani ethnically connoted parties has been created in Serbia although with no particularly incisive results.<sup>848</sup> Only two Roma were in fact eventually able to accede the Parliament even after the threshold for acceding the distribution of seats was cancelled. The overall political engagement of Roma in Serbia presents several weaknesses which has been mostly attributed to the inactivity of Roma political parties in the period between the elections. Moreover, funding problems of election campaigns and low level of turnout of the Romani community in elections have also been identified as weaknesses of Romani political engagement. Conversely, the participation of Roma in Serbia seems to be very active in the civil society.<sup>849</sup>

---

<sup>844</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities. Third Opinion on Croatia ACFC/OP/III(2010)005, adopted on 27<sup>th</sup> May 2010, § 188.

<sup>845</sup> Law on Local Self-government, Republic of Serbia Official Gazette, nos. 9/2002, 33/2004 and 105/2004.

<sup>846</sup> The Government of the Republic of Serbia, "Strategy for Improvement of the Status of Roma in the Republic of Serbia" (available at <http://www.ljudskaprava.gov.rs/dokumenti/roma/strategija%20za%20web%20en.pdf> last consulted on 12/05/2011), 57-58.

<sup>847</sup> Law on Local Elections Official Gazette of the Republic of Serbia No. 33 of 13 June 2002.

<sup>848</sup> In 2010, 31 Roma political parties were registered in the Republic of Serbia, see Serbia, "Strategy for Improvement of the Status of Roma in the Republic of Serbia", 58.

<sup>849</sup> Second Report submitted by Serbia pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/II(2008)001 received on 4<sup>th</sup> March 2008, 151.

In **Czech Republic**, since the creation of the State, several steps have been undertaken to reinforce the political participation of Roma in lawmaking bodies.<sup>850</sup> In 1997, an inter-departmental Commission for Romani Community Affairs was established (and subsequently reformed in 2001 and in 2010). In 2000, the administrative system of Czech Republic was reformed and the institute of coordinator of Roma Advisors was introduced and appointed to each of the 14 higher self-governing regions with the role of advising the Council for Romani Affairs and to coordinate the activities of Romani Advisors who were employed in municipalities.<sup>851</sup> Finally, in 2001 the approval of the Law 273/2001 further enhanced the right of participation of national minorities through the establishment of the Council for National Minorities with the mandate to express opinions on draft-laws, to prepare reports on the situation of national minorities for the government and to present recommendations on minority related issues (Art.6).

So far, no comprehensive data have been collected on the effective degree of participation of Roma in national representative structures for minorities. At the local level, however, the ECRI condemned the separation of Romani communities from mainstream societies. To this purpose, ECRI has recommended Czech authorities to establish local agencies of the Ombudsman or similar institutions in order to guarantee equality and non discrimination in the implementation of national strategies and policies aiming at enhancing political participation of Roma.<sup>852</sup>

In 1993, **Romania** established a Council for National Minorities as a governmental consultative body on minorities issues. Its mixed composition together with the strong

---

<sup>850</sup> M. Horáková and P. Bareš, "The Aspect of Culture in the Social Inclusion of Ethnic Minorities. Evaluation of the Impact of Inclusion Policies under the Open Method of Co-Ordination in the European Union: Assessing the Cultural Policies of Six Member States. Final Report Czech Republic," in *MEU Programme, Minorities in the EU* (Prague: European Centre for Minority Issues 2006), 49.

<sup>851</sup> European Parliament, "Measures to Promote the Situation of Roma Eu Citizens in the European Union. Country Reports," 59.

<sup>852</sup> ECRI Report on the Czech Republic (fourth monitoring cycle) CRI(2009)30, adopted on 2<sup>nd</sup> April 2009, § 122.

limitation of its prerogatives made the political participation of national minorities in this realm mostly ascribable to tokenism.<sup>853</sup> In 2001, this body was replaced by the Council of National Minorities as an advisory body to the government. The council is composed of three representatives belonging to each minority organization in the Romanian Parliament and its mandate has been broadened as to become much more incisive in putting forward the instances of minorities *vis-à-vis* the previous Council for National Minorities.<sup>854</sup>

In 1997, the coordination of all activities related to Roma minority was entrusted to a National Office for Roma. The following year, the Inter-Ministerial Committee with special subcommittee on Roma was established and in 2004 the National Office for Roma became a separate governmental institution called the National Agency for Roma. The Agency started to progressively implemented community development projects in long-lasting perspective to improve the overall situation of Roma. According to the last report submitted before the Advisory Committee of the FCNM, the activity of the National Agency for Roma, has been increasing in the last year especially in partnership with the Department for Interethnic Relations.<sup>855</sup>

The participation of Roma to public life seems to have generally increased in Romania in the last years not only at national but also at local level.<sup>856</sup> Additionally, Romani interests and claims are also represented in Romania by two representatives. Yet, according to Rostas, overall Romania, Roma have generally shown a

---

<sup>853</sup> "Legal Country Study: Romania," in *Mimi Project: Practice of Minority Protection in Central Europe Legal-Theoretical Part*. (available at <http://www.eurac.edu/en/research/institutes/imr/Projects/ProjectDetails.aspx?pid=4688>), 37.

<sup>854</sup> The Council of National Minorities is entitled to coordinate and support the activities of the organizations of people belonging to national minorities by, *inter alia*, submitting for approval the allocation of state budget funds for the support of organizations of persons belonging to national minorities and, by suggesting improvements of the legislative framework in the field of national minorities. Furthermore, the council has six specialized commissions that deal with specific issues such as legislation, finance, education and culture. *Ibid.*, 38.

<sup>855</sup> Third Report submitted by Romania pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2011)002 received on 16<sup>th</sup> May 2011, 73.

<sup>856</sup> According to the Third Report submitted before the FCNM Roma are now directly involved in the work of the National Agency for Roma, they are present in the structures of the National Council Against Discrimination, the Ombudsman, the prefectures, town halls. *Ibid.*, 17.

limited capacity for coalition building amongst themselves as well as with other organizations. Nearly all attempts to establish networks of Romani organizations have failed to achieve greater influence in promoting the general interests of Roma.<sup>857</sup>

In **Latvia**, Romani political activity structures as well on a multi-level perspective. In comparison to other cases, Roma are quite active voters and they do participate to national as well to local elections. Moreover, Roma in Latvia seems to be also quite active on the civil society sphere through a number of NGOs which promote especially their cultural identity.<sup>858</sup>

In **Slovenia**, the Roma Community Act established at the national level a Council representing the interests of the Roma community through strong mechanisms of co-decision. The Council has in fact the right to submit proposals, initiatives and opinions before the National Assembly on issues related to the Romani community. Additionally, the political rights of Roma in Slovenia finds strong articulation at the local level as well. The Roma Community Act has introduced special working bodies at the municipal level with the mandate to monitor the situation of the Romani community. The members of the Roma community elected in municipal councils may be involved in solving the problems faced by the local community. Representatives of the Roma community in municipal councils are active in two main associations: the Union of Roma in Slovenia and the Forum of Roma Councilors. Both bodies represent a link among Roma councilors in the municipalities where Roma elect their own representatives.<sup>859</sup>

Finally, it is interesting to report the case of **Bulgaria**, where as previously discussed, Roma are not legally recognized as a minority<sup>860</sup> but they nonetheless participate to the political life of the country both at the national and the local levels. Especially in the last years, Roma

---

<sup>857</sup> I. Rostas, "The Romani Movement in Romania: Institutionalization and (De)Mobilization," in *Romani Politics in Contemporary Europe. Poverty, Ethnic Mobilization and the Neoliberal Order* ed. N. Sigona and N. Trehan (Houndmills/Basingstoke/Hampshire/New York : Palgrave Macmillan 2010), 165.

<sup>858</sup> LCESC, "The Situation of Roma in Latvia," (Riga : Latvian Centre for Human Rights and Ethnic Studies 2003).

<sup>859</sup> Third Report submitted by Slovenia pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2010)007 received on 28<sup>th</sup> April 2010, 19-20.

<sup>860</sup> See section 2.2.



participation in the public sphere is structuring around the framework of mainstream political parties and within Roma designated parties. Roma experts are also employed in different Ministries and in local public administrations. Moreover, a significant number of Roma has been elected as municipal counselors both among the lists of various Romani parties or among the lists of mainstream political parties.<sup>861</sup>

## 7.6. Critical remarks

This chapter has argued that while the participation of Roma in the public sphere is generally quite low, especially the last two decades have witnessed an overall increase in the political claims of Roma both at national and at European levels. These political claims have shown to be expressed not only by the Romani population itself but also by a constellation of individuals and organizations that are *not* Roma but that speak *on their behalf*.

In this very heterogeneous framework of political representation of Roma in Europe, the comparative analysis developed in this chapter has particularly focused on the legal guarantees available in the catalogue of minority political rights for Roma to advance *by themselves* their political claims at the domestic level as a minority group. Accordingly, the analysis has clarified that notwithstanding the limited political representation of Roma in Europe, minority rights catalogue offers different devices on which such a political participation can articulate, with diverse degrees of incisiveness though.

At international and at European levels an emerging legal trend identifies the effective realization of the general principle of “political participation of minorities” as ensuing from “positive legal measures”. While, at the hard law level, no single provision provides specification to this principle, in *Sejdić and Finci v. Bosnia and Herzegovina*, the ECtHR has provided a possible translation – from an individual rights perspective – of this “positive legal

---

<sup>861</sup> Roma Education Fund, "Advancing Education of Roma in Bulgaria," ed. Country Assessment and the Roma Education Fund's Strategic Directions (Available at <http://www.romaeducationfund.hu/publications/country-assessments> 2007). When the report was published, Bulgaria counted 26 Roma political parties., 17.

measure” as regards to the political representation of minorities in general and of Roma in particular.

According to the Court, each State belonging to the CoE (and thus embedding its democratic principles) should actively engage in guaranteeing the indiscriminate access to the right to vote and to stand for election for minority individuals, even when belonging to non-territorial groups. In the Lund Recommendations instead, some general operational advice has been provided as far as a collective rights perspective of minority political representation is concerned.

On the basis of this *soft-law* document, Bieber has identified new theoretical interpretation and practical implementation of the notion of “power-sharing” which more extensively interprets the principle of “positive legal measures” in minority political representation as separate from the classic notion of consociationalism. According to the new legal practice analyzed by Bieber, the notion of “power-sharing” should be regarded as including those institutional devices encompassing a collective perspective of minority political rights, which provide a “firm and durable commitment” towards the inclusion of different groups within the government.

In the case of Roma, the analysis has shown that the collective participation of this social group in the domestic public sphere concretely translates the theoretical notion of “power-sharing” in four main institutional devices: co-decision mechanisms, consultation mechanisms, coordination mechanisms and self-government mechanisms. Although in the majority of the cases, the political representation of Roma mostly hinges around one main institutional device, there is also a small number of cases where the political representation of

this social group articulates also from a multi-level perspective which provides a combination of different institutional devices at the same time.<sup>862</sup>

The analysis has further shown that political devices to guarantee the political participation of Roma from a collective rights perspective, have especially developed in Central-Eastern Europe starting from the 1990s in order to provide at least *de jure* – the “stability of institutions guaranteeing the respect for minorities” required by the Copenhagen criteria. At the same time, it can be noticed that the political participation of Roma in the public sphere has mostly articulated in those national systems recognizing Roma as a “national minority”.

863

While the creation of these different forms of “power-sharing” mechanisms has certainly contributed to provide Roma with a political space in the countries where they live, on the practical level the analysis has shown that these institutional mechanisms hold a different degree of incisiveness which mostly depends on the institutional level where they have been activated (local, regional, national) and on their internal composition (“pure” minority composition, or mixed composition minority/majority). In abstract legal terms, it can be argued that co-decision mechanisms entrusted with genuine legislative powers (such as legislative initiative and mandatory draft law revision) hold the most promotional degree of decision-making power. The incisiveness of decision-making progressively decreases when

---

<sup>862</sup> The category “national minority” articulates the political participation of Roma in a multi-level perspective in: Bosnia and Herzegovina, Croatia, Czech Republic (even if in this legal system, as seen, Roma are defined also through the legal category “ethnic minority”), Latvia, Romania, Serbia. There are other legal systems that, while not defining Roma through the legal category “national minority” they nonetheless articulate their political participation on a multi-level dimensions such as in the cases of Macedonia (“constitutive people”), in Montenegro (“ethnic minority”), in Slovenia (Romani Community).

<sup>863</sup> Among the countries recognizing Roma through a legal definition other than “national minority” there are: Albania has recognized Roma as a “linguistic minority”; Czech Republic has recognized Roma both as an “ethnic” and as a “national” minority; Hungary, Montenegro and Poland, have recognized Roma as an “ethnic minority”; Bulgaria and Spain have not officially recognized Roma as a minority. Among Western European countries activating political representation structures there are: Finland, Germany, Spain and some Italian regions.

respectively considering – from a legal standpoint – mechanisms of consultation,<sup>864</sup> coordination,<sup>865</sup> and self-government.<sup>866</sup>

From a political perspective instead, a general consideration on the effective degree of incisiveness of these “power-sharing mechanisms” appears much more complex to be formulated. Besides their formal decision-making powers to which these institutional devices are entrusted by law, a political perspective considers in fact *also* the effective implementation of their legislative mandate: i.e. the effective degree through which these institutional mechanisms promote and fulfill Romani rights and interests. As Sobotka has critically argued while considering the effective role of these consultative mechanisms, with specific regard to the case of Czeck Republic,

The role of Advisory Bodies – preparation and reviewing policies on the Roma for consideration by the government and ensuring state endowment focused on creating conditions for integration of Roma into society – have been confused with Roma community desired political representation.<sup>867</sup>

In other words, any consideration on the incisiveness of these institutional mechanisms from a political perspective needs to analyze the effective degree of representation of the minority group in institutional bodies from the minority perspective as well. Indeed, in the most extremist cases, minority representation at the executive level can eventually results in tokenism i.e. being totally controlled by the majority group thus depriving them of any incisive powers.

Nevertheless, according to Verstichel, the practical experience developed by these bodies, has shown that these institutional mechanisms can generally consider being more effective than other “classic minority representation devices”, namely minority representation in Parliament

---

<sup>864</sup> This is the case of Spain, Slovakia, Poland and some Italian regions.

<sup>865</sup> Although in the case of Roma, no “pure” coordination device has been created for the promotion of their political rights in Europe, Finland has been identified as a hybrid case which stands in between coordination and consultation mechanisms.

<sup>866</sup> This is the case of Hungary.

<sup>867</sup> Sobotka, "Political Representantion of the Roma: Roma in Politics in the Czech Republic, Slovakia and Poland.", 29.

which can be guaranteed either through political parties or through reserved seats.<sup>868</sup> However, any “best solution” can be identified neither for minorities in general nor for Roma in particular as comprehensively fulfilling the general requirement of “positive legal measures” identified by international bodies. Rather, *in abstracto* a complementarity among the various institutional mechanisms (representation in the executive through reserved seats/political parties/advisory bodies) can maybe prove to be the most “effective solution” guaranteeing the enjoyment of political rights from a collective rights perspective.

---

<sup>868</sup> Verstichel, "Special Measures to Promote Minority Representation in Elected Bodies: The Experience of the Osce High Commissioner on National Minorities ", 66.



## PART III

INDIGENOUS AND TRANS-NATIONAL PEOPLE (S) ?





## Chapter 8

### Sami in Europe

**Summary:** **8.1** Roma and Sami? Grounds for a legal comparison. – **8.2.** Looking at the experience of Sami. – **8.3.** Sami in Scandinavia. – **8.4.** Sami in Nordic legal systems. – **8.4.1.** International recognition of Sami. – **8.4.2.** Domestic legal recognition of Sami. – **8.4.3.** Individual and collective indigenous rights. – **8.5.** Linguistic rights. – **8.6.** Economic and social rights. – **8.7.** Cultural and political rights. – **8.7.1.** Sami cultural identity. – **8.7.2.** Cultural vs. personal autonomy? The role of Sami Parliaments. – **8.8.** Land rights. – **8.9.** Towards a trans-national recognition of Sami: the 2005 Sami Draft Convention. – **8.10.** Learning from the experience of Sami. Critical remarks.

#### 8.1 Roma and Sami? Grounds for a legal comparison

As anticipated at the end of Chapter 2, although the legal definitions of “minority” and “indigenous people” formally belong to two different spheres of human rights law (minority rights law and indigenous rights law) these two legal categories (and the two social groups to which they refer to) rather form a “subtle continuum”.<sup>869</sup>

Particularly when considering the category of “old” minority in relation to the category of “indigenous people” this “subtle continuum” appears more visible, since the two social groups to which the two legal categories respectively refer, share the common feature of “autochthony” with the territory.

Indeed, the doctrinal debate has identified a common denominator between the two groups both at objective and at the subjective levels.<sup>870</sup> At the objective level, both “old” minorities and indigenous peoples share a distinctive cultural heritage (culture, language, religion) and a

---

<sup>869</sup> See in particular sections 1.8. and 1.9.

<sup>870</sup> See, *inter alia*, R. Medda-Windischer, *Old and New Minorities: Reconciling Diversity and Cohesion. A Human Rights Model for Minority Integration* (Bozen: EURAC Research, 2009), 40.

position of numerical inferiority/non-dominance *vis-à-vis* the majority. At the subjective level, both groups share a will to preserve their distinct cultural identity through forms of group solidarity.<sup>871</sup>

Yet, the notion of “indigenous people(s)”<sup>872</sup> has been understood by Western doctrine as usually referring to ethnic groups living in former colonial contexts whose survival can only be guaranteed by means of “special protection”. In this doctrinal understanding, such a protection is different to that afforded to any minority group (autochthonous minorities included) given the “ancestral tie with the land” which entitles indigenous peoples<sup>873</sup> – at least

---

<sup>871</sup> To this regard, it is interesting to remind that the definition of indigenous people provided by the UN Special Rapporteur Martinez Cobo is very closed to the general definition of minority provided by Capotorti and by Deschênes. (See section 1.5.). Indeed, according to Martinez Cobo “indigenous communities, peoples and nations are those which, having historical continuity with the pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems”. See UN Doc E/CN.4/Sub.2/1986/7 and adds. 1-4.

<sup>872</sup> As in the case of “minority”, international law does not provide any binding definition of “indigenous people”. Jose R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his famous Study on the Problem of Discrimination against Indigenous Populations (UN Doc. E/CN.4/Sub.2/1986/7 and Add. 1-4. The conclusions and recommendations of the study, in Addendum 4, are also available as a United Nations sales publication (U.N. Sales No. E.86.XIV.3)) defined indigenous peoples, communities and nations on the basis of the “historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them”. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system. “This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors: a) Occupation of ancestral lands, or at least of part of them; b) Common ancestry with the original occupants of these lands; c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.); d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language); e) Residence on certain parts of the country, or in certain regions of the world; f) Other relevant factors

<sup>873</sup> On the definition of indigenous peoples see, *infra* footnote 253. The plural noun form “indigenous peoples”, instead of “indigenous people” is generally used in international law and legal doctrine to refer to a cosmos of groups that are living worldwide and are identified through the legal definitions “indigenous ethnic minorities”, “aboriginals”, “hill tribes”, “minority nationalities”, “scheduled tribes”, or “tribal groups (See, *inter alia*, World Bank, OP 4.10 on Indigenous Peoples, July 2005 and revised in 2013.) Moreover, according to the doctrine the use of the terminology “peoples” at the plural form implies a direct reference to the right of self-determination held by indigenous communities. In the words of Anaya “Although self-determination presumptively benefits all human-beings, its linkage with the term *peoples* in international indicates the collective or the group character of the principle. Self-determination is concerned with human beings, not simply as individuals with autonomous will but more as social creatures engaged in the constitution and functioning of communities...the principle of self-determination is deemed only concerned with “peoples” in the sense of a limited universe of narrowly defined, mutually exclusive communities, entitled a priori to the full range of sovereign powers, including independent statehoods.” Anaya, S.J., *Indigenous Peoples in International Law*, Oxford University Press: New

*de jure* – to land rights.<sup>874</sup> In contrast with minorities, the special set of land rights has been interpreted as an essential element necessary to preserve the survival of indigenous communities since it has been considered being a vital support to indigenous customs and traditional crafts.<sup>875</sup>

The proximity between the legal categories of “old” minority and “indigenous people” has been recently recognized at the international law level as well, whereby the Advisory Committee on the Framework Convention for National Minorities has interpreted some provisions of the FCNM (devised to protect national minority groups) to be enjoyable by Sami as well.<sup>876</sup> At the national level, the proximity between these two legal categories has been recognized in the specific case of Ireland while submitting the first report before the Advisory Committee of the FCNM.<sup>877</sup> In this light, when considering the theoretical grounds for comparing Roma and Sami from a legal standpoint, it can be argued that the theoretical approaching between these two legal categories is possible and has already started to be undertaken.

Moreover, the parallel consideration of Roma and Sami has shown to be practicable from a sociological standpoint as well. As Mayer argues, Roma and Sami besides sharing a past of deprivation and rights denial ensuing from their socio-economic position of inferiority as non-dominant groups in societies where they have been living, also share a “community of memory” which make the trans-national link with their respective communities living cross

---

York/Oxford, 1996, 75-77. On the legal definitions of “indigenous peoples”, legal recognition and its implications with the right of self-determination see also Allen, S. and Xanthaki A., *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Hart Publishing: Oxford, 2011. Xanthaki, A., *Indigenous Rights and United Nations Standards*, New York City: Cambridge University Press, 2007.

<sup>874</sup> The differences between the legal definitions of “indigenous people” and “autochthonous minority” have been anticipated at section 2.3. see also P. Geschiere, *Inclusi/Esclusi. Prospettive africane sulla cittadinanza* (Torino: UTET, 2009).

<sup>875</sup> A. Xanthaki, "Indigenous Rights in the Russian Federation: The Case of Numerically Small Peoples of the Russian North, Siberia, and Far East," *Human Rights Quarterly* 26, no. 1 (2004): 89-90.

<sup>876</sup> See footnote 254.

<sup>877</sup> See footnote 260.

boarder still vivid and existent.<sup>878</sup> While in the case of Sami a “territorial cultural affinity” stands at the basis of the trans-national link among the Sami communities living in the Nordic area, in the case of Roma the cultural affinity, as largely discussed, is non-territorial at all.

## **8.2. Looking at the experience of Sami**

This chapter aims to analyze the legal implications of the legal definition “indigenous people” on Sami rights. This shall allow to draw some lessons on the future development of Roma rights. In particular, the implications are analyzed in the light of the parallel trans-national claims that both groups are currently advancing as social groups living dispersed across different legal systems.<sup>879</sup> Such claims can contribute to enhance the recognition of their minority/indigenous rights at domestic level since they frame the political and legal recognition of the groups precisely as a trans-national question i.e. as a question that “transcends” domestic legal categorizations.

Although the mutual influence between international law and constitutional law (also defined as the “internationalization of constitutional law” and the “constitutionalization of international law”)<sup>880</sup> has particularly been intensifying in the last two decades and at the CoE level, with the adoption of two major European legal instruments for the protection of minority rights – the FCNM and the ECRML – the “content” of minority rights has not moved beyond the traditional Westphalian/territorial conception of rights.<sup>881</sup>

Against this background, the legal analysis developed in the previous chapters has shown that the legal status of Roma can be summarized as follows:

---

<sup>878</sup> L.H. Meyer, "Transnational Autonomy: Responding to Historical Injustice in the Case of the Saami and Roma Peoples " *International Journal of Minority and Group Rights* 8, no. 2-3 (2001).

<sup>879</sup> For a more in-depth discussion of the trans-national claims of Roma see in particular chapter 9, whereas for a more in-depth discussion of the trans-national claims of Sami see section 8.9.

<sup>880</sup> F. Palermo, "Internazionalizzazione del diritto costituzionale e costituzionalizzazione del diritto internazionale delle differenze," *European Diversity and Autonomy Papers*, no. 2 (2009).

<sup>881</sup> See section 1.3. Although the ECRML includes the protection of non-territorial languages as well (such as Yiddish and Romanes), this protection, as repeatedly highlighted, focuses on the minority languages and only indirectly on the minority groups. Thus, it cannot be openly said that the Westphalian paradigm has been extensively “by-passed” by the ECRML as fully comprehending the protection of non-territorial minorities as well.

- (1) Both, at international and national levels, the legal categories ensuing from minority rights law are currently unable to recognize comprehensively Roma from a legal standpoint, since these legal categories develop from a Westphalian conception of “State” and “nation” which identifies a social group in connection with one territory. Such a conception is intrinsically incapable of comprehending historical non-territorial groups as they naturally escape the Westphalian “territorial paradigm”.
- (2) In the absence of a specific legal category identifying non-territorial minorities historically living in Europe, Member States lack a comprehensive (and univocal) framework of reference to legally identify Roma. As a result, Roma are not always legally recognized as a minority group in the States where they are residing. The analysis has shown that in a number of legal systems Roma live in a “legal limbo” i.e. they are neither entitled to any special protection which should derive from their eventual minority status nor they can fully enjoy the minimum legal guarantees enshrined within the non discrimination principle.
- (3) In those legal systems where Roma are recognized as a minority group their legal identification is generally influenced by the political understanding of “State” and “nation” of the domestic legal system of residence.<sup>882</sup>
- (4) The different legal definitions identifying Roma entail different degrees of recognition of their minority rights. In other words, the extent of the set of rights that is attributed to Roma when they are recognized as a minority group, is strongly connected to their legal definition.
- (5) Albeit some legal categories (particularly those of “national” and “ethnic” minority) have shown to be more able to ensure – at least *de jure* – a wider recognition of Roma rights than others, also in the most promotional legal systems the living conditions of Roma generally appear very precarious. Indeed, the effective enjoyment of human and minority rights for Roma is far from being fully implemented even within the highest promotional legal systems: everywhere in Europe many Roma are still experiencing anti-Gypsy attacks on a daily basis.

---

<sup>882</sup> As discussed in section 1.2., this is true not only for Roma but for of any minority group whose minority status is recognized by European legal systems.

Thus, the experience of Sami might help to draw some inspiration for the improvement of Roma rights in order to understand:

- 1) the general effects that the usage of the legal category “indigenous people(s)” can propel at both national and international levels in the trans-national recognition of the status of a social group;
- 2) the specific effects that the usage of the legal category “indigenous people(s)” can propel in the recognition of linguistic rights, economic and social rights, cultural rights and political rights.

### **8.3. Sami in Scandinavia**

The Sami population (also spelled Saami, Sámi, Sapmi or called Lapps<sup>883</sup>) spans across the northern part of Finland, Sweden (Lapland), Norway (Finnmark) and the northwestern part of Russia (Kola Peninsula). The majority of Sami still occupy their traditional territories from times immemorial. Historical evidence has shown that Sami were already inhabiting the area of Härjedalen in Sweden in the 1000 A.D., although some archeological remains, found by the Arctic Sea and dating 4.000 years, have been attributed to a Sami’s ancestral culture. According to historical reconstructions, Sami arrived to the territories which now coincide with Finland and Eastern Karelia during the last ice age, following herds of reindeers. Nonetheless, historical evidence clarifying where Sami exactly originated from or the precise historical moment when the various communities merged together into the present group known as Sami, is still in need to be provided.

Nowadays, the total number of Sami population is reasonably supposed to rate between 60.000 and 100.000 individuals of which approximately 45.000 individuals are living in Norway, 20.000 in Sweden, 6.000 in Finland and 2.000 in Russia.<sup>884</sup> According to their own

---

<sup>883</sup> “Lapp”, “Lap” or “Laplanders” are hetero-directed definitions of Sami (exactly as “Gypsy” for Roma) which many Sami perceive in discriminatory/pejorative terms.

<sup>884</sup> See E. Josefsen, "The Saami and the National Parliaments: Channels for Political Influence," *Promoting inclusive parliaments: The representation of minorities and indigenous peoples in parliament*(2010).

perspective, Sami constitute one people, united in its own culture, language and history, living in the *Sápmi*, a nation that, notwithstanding State borders, is still considered being united.<sup>885</sup>

The traditional territory of *Sápmi* has been defined “Sami administrative area” in Norway and Sweden and “Sami Homeland” in Finland.

Although in their own perspective, the extension of *Sápmi* is broader than the respective domestic recognition of Sami’s ancestral land, to date a comprehensive survey on Sami’s territorial distribution is still lacking. Therefore, it is impossible to understand the numerical distribution of Sami within their ancestral territory of *Sápmi* and to which precise extent their incapacity to access land rights amounts. The lack of a comprehensive survey depends also on the fact that no shared legal definition exists at the “transnational” level to identify Sami. Each legal system identifies Sami according to different criteria.<sup>886</sup> Sami cultural identity is still strongly based on a nomadic-hunter-gatherer lifestyle and in some cases, such an identity is believed to be acquired more than through genetic origins, through the adoption of the Sami lifestyle.<sup>887</sup>

#### **8.4. Sami in Nordic legal systems**

Traditionally, Sami were not having a fixed or a static notion of territory since their flexible and adaptive use of land was based on the seasonal migration of reindeers. As Donders explains, Sami’s traditional use of land was neither based on legal concepts of property nor on territorial rights, rather on ancestral knowledge ensuing from the customary usage of their territorial heritage.<sup>888</sup> When the process of nation State-building started to develop in the Nordic countries, Sami saw their land divided among different national powers (Denmark, Finland, Norway, Sweden and Russia) which imposed on Sami culture several change on

---

<sup>885</sup> M. Åhrén, "The Saami Convention " *Gáldu Čála – Journal of Indigenous Peoples Rights* 3(2007): 20.

<sup>886</sup> Y. Donders, *Towards a Right to Cultural Identity?* (Antwerpen/Oxford/New York: Intersentia 2002), 302.

<sup>887</sup> M. Fitzmaurice, "The New Developments Regarding the Saami Peoples of the North," *International Journal on Minority and Group Rights* 16, no. 1 (2009): 77-78. In other words, exactly as the socio-functional narrative identifying Roma, people adopting Sami’s lifestyle may be *in abstracto* considered becoming a Sami in turn.

<sup>888</sup> Donders, *Towards a Right to Cultural Identity?* , 305.

their customary use of land. When Northern nations became defined, Sami were initially treated favorably by the respective governments because they provided tax incomes to national resources. In contrast with national populations, Sami were in fact taxed triply since they were moving across three jurisdictions because of their reindeer herds.<sup>889</sup>

Following the division by land taxation regimes, Sami's ancestral homeland was divided by border treaties and Sami were no longer living as a whole social group but as different sub-groups divided into Russian, Swedish or Danish subjects. In particular, when the Danish-Norwegian and the Swedish-Finnish Kingdoms expanded northward to encompass Sami ancestral homeland, these national powers started to assert claims that Sami belonged to them.

In 1751, Nordic national entities (Denmark-Norway and Sweden-Finland) fixed their early frontiers in Nordkalotten through an international treaty.<sup>890</sup> While the two States agreed upon a permanent border between them, in an addendum to this international treaty, called the Lapp Codicil, the two national powers provided Sami with a special status by agreeing to make their border immaterial so that Sami could continue to use the land and the water of the region to follow their reindeer herding. At the same time, the two States committed themselves to assure the survival of Sami, of their culture and of their traditions.<sup>891</sup>

According to Watters, the Lapp Codicil provided recognition to Sami rights on the basis of their ancient usages and customs. The Lapp Codicil implied full rights to reindeer pasture, fishing and hunting which in many ways recognized "the equivalent of ownership in their

---

<sup>889</sup> H. Beach, "The Saami of Lapland " in *Polar Poles: Self-Determination and Development*, ed. Minority Rights Group (1994), 4.

<sup>890</sup> The Strömstad Treaty defined the borders between Denmark-Norway and Sweden-Finland. More specifically, Denmark-Norway enlarged its borders as to encompass Kautokeino, Karasjok and Utsjoki on the north side of the Tana River (Polmak). Sweden-Finland instead lost its fishing and trading places on the Arctic Sea coast. The Lapp Codicil was part of the border treaty and was intended to secure the rights of reindeer-herding Sámi to move across the national borders.

<sup>891</sup> The Codicil stated "The Sami need the land of both States. Therefore, they shall, in accordance with tradition, be permitted, both in autumn and in spring to move their reindeer herds across the border into another State. And hereafter, as before, they shall like the State's own subjects, be allowed to use land and share it for themselves and their animals, except in the places stated below, and they shall be met with friendliness, protected and aided..."Donders, *Towards a Right to Cultural Identity?*, 308.



own country and rights of seasonal use in the one adjacent to them”.<sup>892</sup> During the 19<sup>th</sup> century, the 1751 agreement started to be strongly undermined by the political changes of national sovereignties. In 1852, the decision of Russia/Finland to close the border to trans-frontier movements of reindeer herders was immediately followed by Sweden/Norway. This political decision produced dramatic effects on Sami who – for the first time in their history – find themselves unable to follow their ancestral ecological paths.

During the following decades, Nordic countries started to adopt a general assimilationist attitude towards Sami. By emphasizing the superiority of national identity and language over Sami “uncivilized people” of “lower order”, Sami culture and Sami language were seriously threatened to a point very close to disappearance.<sup>893</sup> The 20<sup>th</sup> century witnessed a further exacerbation of these assimilationist policies. The increasing drive for expansion in the region traditionally inhabited by Sami was accompanied by a governmental emphasis on legal positivism and written law as a source of rights. The legal position of Sami was progressively undermined, as it was perceived to be the result of legal developments outside Sami society: any rights that was recognized to Sami arose from decisions of the government without taking into consideration Sami’s perspective and Sami’s ancestral occupation of the land.

With the adoption of the first universal human rights instruments after the Second World War, Sami’s issues and claims started to be progressively framed within the international discourse of indigenous rights. From the 80s, the pressure put on the international agenda began to produce some substantial results. According to Eide, the recognition of Sami rights could only

---

<sup>892</sup> L. Watters, "Indigenous People and the Environment: Convergence from a Nordic Perspective " *Journal of Environmental Law and Policy* 20(2001): 255.

<sup>893</sup> In particular in Finland, Sami language and culture were seriously undermined by assimilationist policies which promoted the migration and settlement of Sami in the northern areas. See Saamelaiskäräjät/Sametinget/The Sámi Parliament, "The Sámi in Finland," *Sámi Parliament Publications*(2008).

occur at this point, since it is precisely at the end of the 1970s that the Nation-state started to decline as a result of international developments.<sup>894</sup>

#### **8.4.1. International recognition of Sami**

An initial consideration on the rights of indigenous peoples started to appear, although in embryo, within the League of the Nations whereby President Wilson proclaimed the right to self-determination of peoples.<sup>895</sup> Wilson's political aspiration laid the foundations for establishing a first international system of minority rights protection, which at that time was the first legal framework where the rights of indigenous peoples began to be considered. In fact, indigenous peoples were not initially entitled to any specific form of legal protection under the Versailles system but only to some forms of "incidental" protection through minority rights. In the case of Sami, such a minimum protection was granted just in Finland, the only State of the Nordic area accepting a special treaty for protecting minority rights when entering the League.<sup>896</sup>

Nevertheless, within the international arena set by the League the peculiar situation of indigenous peoples was not encompassed only by minority rights. Inside the International Labour Organization (ILO) which was created as part of the League, the problems of the indigenous peoples of Latin America gained a certain degree of attention. This international interest on indigenous issues paved the way for starting negotiations to adopt an international binding instrument focusing on indigenous rights whose process culminated only after the Second World War with the adoption, in 1957, of the ILO Convention No. 107 Concerning

---

<sup>894</sup> A. Eide, "Legal and Normative Bases for Saami Claims to Land in the Nordic " *International Journal of Minority and Group Rights* 8, no. 2 (2001): 134.

<sup>895</sup> In the "Fourteen Points" speech that President Wilson gave before a joint session of the Congress on January, 8<sup>th</sup> 1918, the principle of self-determination (point 10) of people was, *inter alia*, firstly proclaimed. In particular, by proclaiming this principle Wilson wanted to call for adjustment of colonial claims. Subsequently, the indigenous movement identified in Wilson's first enunciation of this principle the first international basis for funding the indigenous claims to independence from colonial powers.

<sup>896</sup> H. Minde, "Sami Land Rights in Norway: a Test Case for Indigenous Peoples," *International Journal of Minority and Group Rights* 8, no. 2 (2001): 110.

the Protection and Integration of Indigenous and Other Semi-Tribal Populations in Independent Countries.<sup>897</sup>

Although this Convention recognized the customary rights of indigenous peoples and advocated for the protection of their essential material conditions, its legal foundations were shaped on the British colonial law of the 1920s with an inner assimilationist political orientation.<sup>898</sup> Interesting enough, none of the Nordic States ratified the Convention to “protect” Sami rights. Ironically, this lack of ratification of the ILO Convention No. 107 was not motivated in objection to the inner “assimilationist purpose” of the treaty, but it was founded on the view that Sami were generally well integrated within Nordic States. Hence, in the States’ view, Sami were not at all in need for any “additional” protection under international law.

The attitude of Nordic States towards Sami did not significantly change until the Alta conflict of 1979-1982. This conflict, between Sami (supported by environmental movements) and the Norwegian Governmental authorities, started after the decision to build a dam across the Alta-Kautokeino River which was draining a big part of the water system of the Finnmark plateau, one of the territorial area inhabited by Sami. Even if Sami lost the Alta case, the conflict represented a key event to strengthen the recognition of Sami cultural identity and Sami rights at the domestic level, in particular in Norway.<sup>899</sup>

---

<sup>897</sup> The ILO was created in 1919 as the first international specialized agency devoted to the protection of human rights. More specifically, the mission of this agency was the “maintenance of the industrial peace” by promoting the economic and social rights of the workers in the climate of social revolution that followed the collapse of European empires after the First World War. In this context, the ILO identified since the beginning the dispossession of Latin American Indians as a “labor” problem which was meant to be solved only through the protection of indigenous peoples as “land-owners” and as “workers”. S.J. Anaya, "Indigenous Peoples in International Law," *Cultural Survival* 21, no. 2 (1997).

<sup>898</sup> Minde, "Sami Land Rights in Norway: A Test Case for Indigenous Peoples."

<sup>899</sup> The Alta conflict was caused by the construction of a hydroelectric power plant in Alta river, when in 1978 Norwegian Parliament adopted a bill for the construction of a high dam near Alta. This dam was considered being by Sami native communities as an enormous threat to their ancestral land and customary values (particularly to reindeer traditional pathways). At the same time, also environmental movements considered the construction of the dam a big harm for the ecosystem, particularly for salmon fisheries in the Alta river. Notwithstanding the strong demonstrations which followed the approval of the project for building the dam, the

It is not by chance that the conflict occurred at the domestic level precisely in a moment when Sami were gaining political awareness of their indigenous status in the international arena. The coincidence of the two moments propelled an osmotic force in the recognition both of the cultural identity and of indigenous rights of Sami. At domestic level, the Norwegian Government appointed a Sami Rights Commission to update the political and juridical basis for a new minority policy in the country. At international level, Sami actively contribute to the revision of ILO Convention No. 107, whose updated version (ILO Convention No. 169 of 1989) was eventually ratified by Norway in 1990.<sup>900</sup>

However, the international process of legal recognition of Sami distinct cultural identity and Sami indigenous rights at domestic level did not equally involve the other Nordic countries too. Norway apart, no other Nordic country has ratified ILO Convention No.169 yet, although the international recognition of Sami indigenous identity has not left these countries completely indifferent. Indeed, as Xanthaki has pointed out while critically commenting on the Russian case, “even if the [ILO] convention [No.169] does not become binding for the Federation, it still constitutes a solid political tool to provide pressure for the development of indigenous rights”.<sup>901</sup> To this regard, it can be highlighted that the ILO Convention has already propelled its “political power of persuasion” since particularly Sweden and Finland

---

conflict ended up in the Norwegian Supreme Court which ruled in favor of the development of the project. However, in order to solve the claims deriving from Sami’s opposition, the Government appointed two committees to discuss Sami cultural issues and Sami legal relations. One of the Committee set the basis for creating the first democratically elected body for the Sami in Norway: the Norwegian Sami Parliament which was created in 1987. For further details on the Alta case, see *inter alia* [http://www.galdu.org/govat/doc/eng\\_damning.pdf](http://www.galdu.org/govat/doc/eng_damning.pdf)

<sup>900</sup> Convention No. 169 constitutes the revised version of Convention No. 107 of 1957. The Committee of Experts convened in 1986 by the Governing Body of the ILO concluded “the integrationist approach of the Convention was obsolete and that its application was detrimental in the modern world” thus in need to be updated. After the adoption of Convention No. 169 in 1986, ILO Convention No.107 of 1957 is no longer open for ratification although it is still in force in 18 countries. See <http://www.ilo.org/indigenous/Conventions/no107/lang--en/index.htm>

<sup>901</sup> Xanthaki, "Indigenous Rights in the Russian Federation: The Case of Numerically Small Peoples of the Russian North, Siberia, and Far East," 76.

have respectively recognized the existence of a “Sami nation” in 1989 and the existence of Sami as a “people” in 1995.<sup>902</sup>

Furthermore, in 1998, Sweden has formally apologized for the wrongs committed against Sami and since 2010, after 14 years of litigation, the region of Lapland recognized by the UNESCO as a World Heritage is now governed by “Laponiatjuottjudus” an association with Sami majority control.<sup>903</sup> In Finland, the international recognition of Sami indigenous rights indirectly permeated at the national level by means of the legal opinion of the Human Rights Committee which has jurisdiction on the Finnish legal system after the ratification of the ICCPR. The Committee’s decisions clarified that Sami are members of a minority within the meaning of Art.27 and that their right to practice traditional activities fall in the scope of Art.27 as well, being an essential element of their culture.

In Russia, where the smallest percentage of Sami population has historically been living, the international discourse on indigenous rights has so far produced just a nominal recognition of Sami, since on the practical level, it seems that no special right is concretely accessible to them. Since the Soviet era in fact, the Russian part of the *Sápmi* has historically been politically and legally isolated from the other Nordic States.<sup>904</sup> According to Osherenko, the failure to translate on the substantial level a minimum set of indigenous rights enshrined at the legal level, has pushed local indigenous communities, Sami included, into a “criminal cycle” in order survive.<sup>905</sup>

---

<sup>902</sup> Sweden has recognized the existence of a “Sami nation” in the Saami Parliament Act (*Sametingslagen*) No.1433 of December, 17<sup>th</sup> 1992. In Finland, the recognition of “Sami” a “people” has taken place in the context of the Fundamental Rights Reform whereby a new Section 17 was included in the Constitution Act of Finland which recognizes Sami people as indigenous peoples entitled to the right to maintain and develop their own language and culture.

<sup>903</sup> See <http://www.laponia.nu/eng/> (last accessed on 11<sup>th</sup> November 2012).

<sup>904</sup> Even today the interactions between Russian Sami inside and outside the Russian Federation are very difficult if not almost impossible. See Åhrén, “The Saami Convention ”: 21.

<sup>905</sup> G. Osherenko, “Indigenous Rights in Russia? Is Title to Land Essential for Cultural Survive? ,” *Georgetown International Environmental Law Review* 13, no. Spring (2001).

Besides the international recognition of Sami identity and of Sami's rights ensuing from ILO Convention No. 169, it is worth mentioning another international recently adopted by the UN development that has recently occurred in the UN panorama as far as the recognition of the rights of indigenous peoples are concerned in general and the rights of Sami in particular: the UN Declaration on the Rights of Indigenous Peoples of 2007. Notwithstanding its soft-law nature, the Declaration represents a comprehensive instrument for protecting and promoting the rights of indigenous peoples both in terms of individual and collective dimensions. In particular, the Declaration addresses the rights to identity, education, health employment, language and the right to maintain and strengthen indigenous institutions. At the same time, the Declaration addresses the rights of indigenous peoples to fully participate in the political, economic, social and cultural life of the State.

Norway, Sweden and Finland committed themselves to work with Sami people within the legal framework established by the Declaration.<sup>906</sup> In particular, Norway highlighted the signed agreements with the Sami Parliament which allowed cooperation in legislative matters. Sweden emphasized that a large part of the realization of the right to self-determination could be ensured through Art. 19 of the Declaration, which dealt with the duty of States to consult and cooperate with indigenous peoples. In line with Sweden, Finland as well highlighted the importance of the full participation of indigenous peoples in decision making processes determined by the Declaration. The Russian Federation instead did abstain from voting the Declaration.

#### **8.4.2. Domestic legal recognition of Sami**

The previous section has shown how the historical process of international recognition of indigenous rights has reverberated, at different extents, in the domestic recognition of Sami indigenous identity. Nowadays, Finland and Russia are the only two countries recognizing

---

<sup>906</sup> See the vote proceedings of the UN Declaration on the Rights of Indigenous Peoples at [www.un.org/News/Press/docs/2007/ga10612.doc.htm](http://www.un.org/News/Press/docs/2007/ga10612.doc.htm) (last accessed on 02/05/2012).

Sami as “indigenous people” at constitutional level,<sup>907</sup> whereas Norway and Sweden have not officially formalized such a recognition in any binding document yet.<sup>908</sup>

In Finland and Russia, the constitutional recognition of the Sami indigenous status has produced a parallel recognition of Sami indigenous rights both at constitutional and at ordinary law levels. Interestingly enough, in Norway, Sami are nonetheless explicitly entitled to specific rights at the constitutional level even in the lack of a formal recognition of their indigenous status.<sup>909</sup> In Sweden instead, the Constitution does not provide for any specific recognition to Sami but it indirectly includes the protection of Sami rights in the broader framework of Art.2.4 which refers to “ethnic, linguistic, and religious minorities”.

In **Finland**, according to the Act of the Sami Parliament of 1995,<sup>910</sup> a Sami is recognized as a person who considers himself/herself as Sami (subjective element) and who can demonstrate one of the following factors (objective elements): himself/herself, or at least one of his/her parents or grandparents, has learnt Sami as his/her first language; he/she is a descendant of a person who is registered in a land, taxation or population register as a mountain, forest or fishing Lapp; he/she has at least one parent who could have registered for election to the Sami Parliaments. Moreover, the Finnish legal recognition of the Sami identity requires the fulfillment of another objective criteria: one of the descendants of the person or his/her ancestry with the traditional occupants of the lands as decisive elements.<sup>911</sup>

---

<sup>907</sup> In particular, Finland recognizes Sami at Section 17.3. of the Constitution whereas Russia recognizes Sami at Art.69 of the Constitution.

<sup>908</sup> Nonetheless, a form of indirect recognition can be inferred in the Norwegian case through the ratification of the ILO Convention No. 169.

<sup>909</sup> The Constitution of Norway recognizes the rights of the Sami at Art. 110 (a), which reads: “It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life”. The Constitution of Finland recognizes the rights of the Sami at Section 17.3, which reads “The Sami, as indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture. Provisions on the right of the Sami to use the Sami language before the authorities are laid down by an Act. The rights of persons using sign language and of persons in need of interpretation or translation aid owing to disability shall be guaranteed by an Act”.

<sup>910</sup> The *Sámi Parliament Act* (Laki saamelaiskäräjistä) No.974 of 17<sup>th</sup> July 1995.

<sup>911</sup> Donders, *Towards a Right to Cultural Identity?* , 306.

By contrast, in **Russia**, still no specific legal definition exists to identify Sami as they are comprised in the broad “Common List of Minor Indigenous Peoples of Russia” which establishes four main criteria for a social group to be recognized as indigenous people: to live in their historical territory; to preserve traditional way of life, occupations, and trades; to self-recognize themselves as a separate ethnicity; to be at most 50.000 of population within Russia.<sup>912</sup> Sami benefit of the constitutional recognition of “indigenous peoples” and have also been recognized as one of the small indigenous peoples communities in other ordinary legislative acts.<sup>913</sup> However, in line with Osherenko’s perspective, Xanthaki confirms that such a legal recognition is merely formal, since it has not provided any effective positive impact on the lives of any Russian indigenous peoples yet, Sami included.<sup>914</sup>

In **Norway**, the constitution directly protects Sami rights within the framework of minority rights at Art. 110 (a). According to Art.2.6 of the constitutive Act of the Sami Parliament of 1987,<sup>915</sup> a person can be identified as Sami if he/she has knowledge of the Sami language as a domestic language or he/she has a parent, grandparent or a great-grandparent with Sami as his or her domestic language, or he/she is the child of a person who has been registered in the Sami electoral register.

In **Sweden**, the first legal recognition of Sami was enshrined in the Reindeer Pasture Law of 1866. According to this law, each person invoking his/her Sami origin was recognized as such. Until the establishment of the Sami Parliament in 1992, the fundamental legal act recognizing Sami was the Protection of Saami Reindeer Breeding Through Reindeer Herding

---

<sup>912</sup> *Единый перечень коренных малочисленных народов России* approved by the government of Russia on March 24, 2000.

<sup>913</sup> The Federal Law on National Cultural Autonomy of No.74, F 3 22<sup>nd</sup> May 1996; The Federal Law on General Principles of the Organization of Communities of Indigenous Peoples of the North, Siberia, and the Far East No. 104, F3 of July, 20<sup>th</sup> 2000; The Federal Law on the Territories of Traditional Nature Use by Indigenous Numerically Small Peoples of the North, Siberia, and the Far East No. 49 FZ 6<sup>th</sup> July 2001. See Osherenko, "Indigenous Rights in Russia? Is Title to Land Essential for Cultural Survive? ."

<sup>914</sup> Xanthaki, "Indigenous Rights in the Russian Federation: The Case of Numerically Small Peoples of the Russian North, Siberia, and Far East," 78-79.

<sup>915</sup> *The Sami parliament Act* relating to the *Sameting*, No. 56 of June, 12<sup>th</sup> 1987.



Act.<sup>916</sup> The legal basis for establishing that a person was a Sami was proving that at least one of his/her parents, or any of his/her grandparents were full-time reindeer-keepers. When the Sami Parliament was established in Sweden in 1992, the Sami Parliamentary Act developed a more articulated definition of Sami on the basis of subjective and objective criteria.

According to the subjective criteria, the person in question should regard himself/herself as Sami to be recognized as such, whereas according to the objective criteria, the person should be able to speak the Sami language. In particular, the objective criteria requires that the Sami language is spoken at home, but this criterion is met even if the language is spoken by grandparents.<sup>917</sup> However, the entry into force of the 1992 Parliamentary Act in Sweden has not abrogated the previous 1971 Reindeer Husbandry Act.<sup>918</sup> As a consequence, nowadays in Sweden the two legal definitions of Sami coexist thus making the identification of their legal status possible according to both subjective and objective criteria.

Finally, it is important to highlight that the legal identification of Sami through the criteria identified by the four legal systems where Sami are living (self-identification, Sami's descent, knowledge of Sami language and electoral registration in Sami Parliaments) appears increasingly difficult to be applied. In particular, the linguistic criterion which has shown to be one of the common denominators identifying Sami in three legal systems (Finland, Norway and Sweden), appears increasingly problematic to be invoked by a Sami person, since a significant percentage of Sami do not speak Sami language any longer even if they have lived in the *Sápmi* and even if they have strong ties with Sami culture.

Moreover, contemporaneous social developments affecting Sami lifestyle (in particular Sami's mixed marriages, Sami's "new professions" other than traditional Sami livelihoods and Sami's "new residencies" outside *Sápmi*) challenge the traditional notion of Sami cultural

---

<sup>916</sup> Fitzmaurice, "The New Developments Regarding the Saami Peoples of the North," 83.

<sup>917</sup> *Ibid.*: 84.

<sup>918</sup> Reindeer Husbandry Act, No. 437 of July, 1<sup>st</sup> 1971.

identity of “indigenous group” thus making their identification with other criteria (especially the subjective criterion of self-identification together with the objective criterion of Sami’s descent) also very difficult to be invoked by a Sami person.<sup>919</sup>

### **8.4.3. Individual and collective indigenous rights**

While at the substantial level, no significant difference can be made between the individual and collective rights of minorities and the individual and collective rights of indigenous peoples, at the formal level the doctrine has identified a certain degree of distinction. The theorization of such a distinction has been based on the analysis of the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic minorities of 1992. The doctrine has regarded the non-binding nature of this document as a “minimum universal denominator” for understanding the rights of minorities.

Nordic doctrine emphasizes that minority rights should be considered always individual by nature since they belong to the individual members of the minority group although some minority rights have to be exercised together with other members of the minority group. In the words of Henriksen, Scheinin and Åhrén:

To simplify matters, the difference between the rights of minorities and the collective rights of indigenous peoples can be said to be that the purpose of minority rights is to enable minority individuals to maintain and develop their specific identity as part of the majority community, while the collective rights of indigenous peoples emphasize the right of indigenous peoples to maintain and develop their specific society and social structures apart from, or if relevant, in parallel with the majority community.<sup>920</sup>

In other words, according to this doctrinal interpretation indigenous peoples should be able to preserve their social institutions to a larger extent than minorities, thus indigenous collective rights are devised with the aim of enabling indigenous peoples to make their own decisions separate from those of the majority. In contrast, minority collective rights aim at guaranteeing

---

<sup>919</sup> I., Seurujärvi-Kari, S.Pedersen, and V. Hirvonen, *The Sámi: the indigenous people of northernmost Europe. European languages* 5. EBLUL, Brussels, 1997, 10-14.

<sup>920</sup> B.J. Henriksen, M. Scheinin, and M. Åhrén, "The Saami People's Right to Self-Determination " *Gáldu Čála – Journal of Indigenous Peoples Rights* 3(2007): 63.

the efficient political participation of minority members the wider community of which they are a part.

## 8.5. Linguistic rights

As seen in section 8.4.2., language plays a key role in the self-identification and in the hetero-identification of Sami cultural identity. Indeed, three out of the four legal systems encompassing *Sápmi* (Norway, Sweden and Finland), recognize language among the core constitutive elements determining Sami individual belonging.<sup>921</sup> Sami speak a language bearing the same name, Sami, which is strongly related to the Finno-Ugric branch. An outdated estimation of Sami speaking individuals rated them to be less than half of the overall Sami population.<sup>922</sup> Yet, as Andde has critically observed,

The term “Sami-speaking” is somewhat vague, as it depends on what one uses as the criterion, i.e. how well a person must know the language, and how regularly he/she must use it to be considered Sami-speaking.<sup>923</sup>

Moreover, among Sami speakers there is a cosmos of dialects which can be divided according to three major geographical groups (Southern, Central and Eastern) and which are not necessarily mutually intelligible.<sup>924</sup> The most important source for learning of Sami language is the family and the use of Sami language is still mostly relegated to the private sphere.

**Norway**, as already emphasized, is the country where the majority of Sami population currently lives and the only country having ratified ILO Convention No.169. In this country, the international discourse on Sami indigenous rights promoted a first recognition of Sami linguistic rights already in 1975. In that year, a Sami Educational Council was in fact created

---

<sup>921</sup> It is not by chance that the same three legal systems have ratified the ECRML (Norway in 1993, Finland in 1994 and Sweden in 2000). Russia instead has just signed this treaty in 1994 but it has not ratified it yet.

<sup>922</sup> The study of Magga of 1975 rated the number of Sami-speaking individuals to be approximately 35,000. O. H. Magga, *Samisk Språk Og Samisk Språkråds Arbeid. Særtrykk Av Språk I Norden.* (1975), 38. Cited in S. Ándde, "Regional Characteristics of Sapmi and the Sami People," in *The Regional Identity of Ethnic Groups in Europe*, ed. Ándde (Anders) Sara (—Nordic Sami Institute, Guovdageaidnu, Norway: Sámi Instituhtta NordisSamisk Institutt 2002), 4.

<sup>923</sup> Ándde, "Regional Characteristics of Sapmi and the Sami People," 4.

<sup>924</sup> A. Moyers, "Linguistic Protection of the Indigenous Sami in Norway, Sweden and Finland," *Transnational Law and Contemporary Problems* 15, no. 1 (2005): 365.

and placed under the Ministry of Education, Research and Church Affairs. The Council is nowadays responsible for tuition measures for the Sami population, for preparing and adapting study programs and for monitoring continuing education and providing expert advice to school authorities at all three administrative levels.<sup>925</sup>

Since 1988, Sami linguistic rights have been conferred constitutional status. Art. 110 (a) Constitution of Norway implies a positive obligation for the State to “create conditions” in order to “preserve and develop” the Sami language.<sup>926</sup> These constitutional provisions have been further specified by the Sami Act which has recognized equal status of the Sami language with the Norwegian language (Art.1.5).<sup>927</sup>

Accordingly, the law establishes that if the speaker is Sami, certain services should be provided in the Sami language (such as in Sami parliamentary proceedings, in national judicial proceedings and in local administrations).<sup>928</sup> Moreover, the Act establishes the Sami Language Council in charge to preserve and develop the Sami language and to provide an annual report to the Parliament on the status of Sami language.<sup>929</sup> Although the Act seems to refer to an unique Sami language, Norway counts at least three Sami languages: North Sami, Lulea Sami and South Sami each having a different orthographic system.<sup>930</sup> However, the Sami Act mostly promotes the North Sami since that is the Sami language mostly spoken in the administrative area covered by the Act.<sup>931</sup>

---

<sup>925</sup> European Charter for Regional or Minority Languages, Initial periodical report presented to the Secretary General of the Council of Europe, Norway, MIN-LANG/PR (99) 5, submitted on 31 May 1999, 7.

<sup>926</sup> Moyers, "Linguistic Protection of the Indigenous Sami in Norway, Sweden and Finland," 2.

<sup>927</sup> Act of 12 June 1987 No. 56 concerning the Sameting (the Sami parliament) and other Sami legal matters (the Sami Act).

<sup>928</sup> See Arts. 2.13, 3.4 and 3.9 of the Sami Act.

<sup>929</sup> As established by Art. 3.12 of the Act. As regards to the reporting activity of the Sami Language Council see [http://www.samediggi.fi/index.php?option=com\\_content&task=view&id=52&Itemid=65&lang=english](http://www.samediggi.fi/index.php?option=com_content&task=view&id=52&Itemid=65&lang=english) (last accessed on 17<sup>th</sup> September 2012).

<sup>930</sup> Ándde, "Regional Characteristics of Sapmi and the Sami People," 4.

<sup>931</sup> Ibid. As it emerged in the Initial Periodical Report submitted by Norway in accordance with Article 15 of the ECRML: “Among other things, the Council shall safeguard the cultural heritage embodied in the Sami language, both written and spoken, develop Sami terminology, determine the spelling of Sami words, advise and provide information on Sami language issues, maintain a list of qualified translators and interpreters and promote and

Although the promotion of Sami language has generally increased in the realms of media and education,<sup>932</sup> Norway has recently acknowledged the deficiency in the full promotion of Lulea Sami and South Sami languages and in the last report submitted before the Committee of Experts of the ECRML. In particular, Norway has committed itself to increase the number of beneficiaries of Sami linguistic provisions in Action Plan of five years.<sup>933</sup> The Action Plan for Sami languages focuses on three main components: learn (strengthening the arenas for the use of Sami), use (increasing public service provision in Sami) and see (raising the visibility of Sami language in public).<sup>934</sup>

In **Sweden**, no constitutional recognition has been provided to the Sami language. Nonetheless, in 1999 the Swedish Parliament passed an Act concerning the right to use the Sami language while dealing to public authorities and in courts.<sup>935</sup> According to Moyers, on the substantial level the current legal framework is unable to guarantee the full enjoyment of Sami linguistic rights, as the CERD Committee has also been recently emphasized.<sup>936</sup>

Recently, some positive developments in the recognition of Sami linguistic rights can be observed. In 2010, the administrative areas for which the use of the Sami language is foreseen

---

participate in national and Nordic cooperation on Sami language issues". European Charter for Regional or Minority Languages, Initial periodical report presented to the Secretary General of the Council of Europe, Norway, MIN-LANG/PR (99) 5, submitted on 31<sup>st</sup> May 1999, 3.

<sup>932</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Norway, ACFC/INF/OP/I(2003)003 received on 12<sup>th</sup> September 2012, 2.

<sup>933</sup> When Norway ratified the ECRML in 1993 it has recognized under the framework of the Convention "Sami language" without specifying its different linguistic derivations.

<sup>934</sup> European Charter for Regional or Minority Languages, Fifth periodical report presented to the Secretary General of the Council of Europe, Norway, MIN-LANG/PR (99) 5, submitted on 31<sup>st</sup> May 1999, 7.

<sup>935</sup> Act Concerning the right to use the Sami language in dealings with public authorities and courts No.1175 of 17 December 1999. In particular, within the administrative areas, individuals have the right to use minority languages in their verbal and written dealings with an administrative authority in a geographical which wholly or partly covers the administrative area in matters where the individual is party to the process and if the matter is linked to the area. If the individual is Sami, Finnish or Meänkieli in such a matter, the authority is obliged to reply verbally in the same language. Individuals who do not have legal counsel also have the right, on request, to receive a written translation of decisions on cases in Sami, Finnish or Meänkieli. The authority also, as previously, has to endeavour to address individuals in these languages. The right to written translation has been introduced.

<sup>936</sup> In particular, the CERD Committee recommended that Sami ought to be more involved in the decision-making processes of the Sweden political system in order to foster the use of their native language in all parts of Sweden. Moyers, "Linguistic Protection of the Indigenous Sami in Norway, Sweden and Finland," 375.

were extended and the 2009 Language Act entered into force.<sup>937</sup> According to the Act, public institutions are now entitled with the responsibility to promote the opportunity for national minorities to retain and develop minority languages and culture (sections 8 and 14). Persons belonging to a national minority are to be given the opportunity to learn, develop and use the minority language (section 15).

However, the Act focuses more on the usage of the Swedish language than on the specific domains of application of the minority languages. At the same time, the Act does not distinguish among the different minority languages (and the potential different linguistic needs of the various social groups), by indiscriminately addressing the various linguistic groups living in Sweden.<sup>938</sup> In order to revitalize Sami language, the Swedish Government is also planning to establish two Sami language centers respectively in Östersund and Tärnaby. The Sami Parliament has been identified as the authority in charge of managing these language centers.<sup>939</sup>

Among Nordic countries, **Finland** represents the most promotional legal system recognizing Sami culture and language. In contrast with the other two Nordic countries, Finland has a historical past of bilingualism. Until 1917, Finland was in fact part of Sweden and in 1919 the two languages gained official status. According to Moyers,

With this history and system already in place Finland has become accustomed to accommodating speakers of another language. ... This makes providing for and accommodating a third language seem much less of a concern and much less intrusive.<sup>940</sup>

Against this background, it can be better understood why Section 17 of the Finnish constitution explicitly protects the linguistic rights of Sami and of other groups (such as

---

<sup>937</sup> European Charter for Regional or Minority Languages, Fourth periodical report presented to the Secretary General of the Council of Europe, Sweden, submitted in September 2010.

<sup>938</sup> Section 7, in fact, clarifies the national minority languages protected under the Act are Finnish, Yiddish, Meänkieli, Romani Chib and Sami.

<sup>939</sup> European Charter for Regional or Minority Languages, Fourth periodical report presented to the Secretary General of the Council of Europe, Sweden, submitted in September 2010, 13.

<sup>940</sup> Moyers, "Linguistic Protection of the Indigenous Sami in Norway, Sweden and Finland," 384.

Roma). Section 121 provides Sami with linguistic and cultural self-government in the administrative areas inhabited by the majority of Sami population. Moreover, in Finland the linguistic rights of Sami find protection within the Language Act 423<sup>941</sup> and within the Sami Language Act<sup>942</sup> as well.

While Act 423 principally focuses on Finnish and Swedish languages, it nonetheless refers to the use of the Sami language within certain jurisdictional areas.<sup>943</sup> The Sami Language Act instead, more specifically accounts for Sami linguistic rights, in particular it regulates the usage of Sami language both on the national public dimension and on the special administrative area of Sami Homeland.<sup>944</sup> It is interesting to highlight that both linguistic acts provide monitoring mechanisms to oversee the substantial implementation of their legal provisions. The application of Act 423 is supervised by the Ministry of Justice, while the application of the Sami Linguistic Act is supervised by the Sami Parliament.

Nonetheless, according to the reports presented before the Committee of Experts of the ECRML, the promotional legal framework of Finland is still unable to offer a comprehensive protection of Sami linguistic rights. Recently, a Sami language report has highlighted that despite the entry into force of the Sami Language Act practically changed the number of state or municipal employees speaking Sámi practically has remained unchanged. Moreover, for a

---

<sup>941</sup> Language Act No.423 of 2003.

<sup>942</sup> Sami Language Act No.1086 of 2003.

<sup>943</sup> While the general purpose of the Act is to ensure the constitutional right of every person to use his or her own language, either Finnish or Swedish, before courts and other authorities (s. 2), Sections 8 and 9 specifically entail special provisions on the use of the Sami language and other minority languages. In particular, Section 8 establishes that separate provisions apply on the use of the Sami language by authorities in performance to their function. Section 9 clarifies “provisions on the right to use languages other than Finnish, Swedish and Saami before an authority are contained in the legislation on court proceedings, administrative proceedings and administrative judicial procedure, legislation on education, legislation on health care and social welfare and legislation on other administrative sectors”.

<sup>944</sup> The Sami Language Act No.1086 of 2003. In particular, chapter 2 of the Act regulates the general use of Sami in the national public dimension such as in representative bodies or in representative meetings (Section 6) and in official communications between public authorities and Sami people (Section 8). Chapter 3 regulates the special use of Sami in the Sami Homeland, especially as far as regards: the knowledge of Sami language by public authorities and their qualifications requirements (Section 14); the duty of authorities to use Sami language (Section 15), the State enterprises and the State or municipality owned companies (Section 17), the obligation of private entities to provide linguistic services (Section 18).

number of public authorities it is still unclear how the obligations under the Sami Language Act should be fulfilled in practice.<sup>945</sup>

Furthermore, just as in the case of Norway, also in Finland a coexistence of a plurality of Sami languages (or Sami linguistic branches) can be noted although both Language Acts abstractly refer to the “Sami language”: North Sami, Inari Sami and Skolt Sami. North Sami is the most widely spoken Sami language and it is the language that was traditionally spoken in the Sami Homeland. Nowadays, however, an increasing percentage of Sami has started to move outside the Sami homeland. According to the report submitted before the ECRML,

The statistics compiled in connection with the elections of the Sámi Parliament in 2007 showed that 38% of the Sámi in Finland resided the Sámi Homeland. Many children and young Sámi reside outside the Homeland, for in 2007 in all 59% of the Sámi aged 11–17 years and more than 60% of those aged 18–24 resided outside the Homeland. In the group of Sámi children younger than 10 years the percentage was approximately 70%.<sup>946</sup>

Outside of Sami Homeland, i.e. outside of the administrative area covered by the linguistic legislation Sami is taught, in the words of the ECRML report, “on the same grounds as immigrant languages”. In order to improve such a situation, in September 2010, the Ministry of Education and Culture set up a working group to draft a proposal for a program aimed at revival the three Sami languages.<sup>947</sup>

As discussed in previous sections, the Sami population living in **Russia** represents the smallest percentage of the overall Nordic area (approximately 2000 individuals). As seen, Russia has legally recognized Sami as one of its smallest indigenous peoples. The Russian legal system guarantees indigenous people’s rights mostly through positive measures aimed at

---

<sup>945</sup> European Charter for Regional or Minority Languages, Fourth periodical report presented to the Secretary General of the Council of Europe, Finland, submitted in 22<sup>nd</sup> September 2010.

<sup>946</sup> European Charter for Regional or Minority Languages, Fourth periodical report presented to the Secretary General of the Council of Europe, Finland, submitted in September 2010, 69.

<sup>947</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Comments of the Government of Finland on the Third Opinion of the Advisory Committee on the implementation of the Framework Convention for the Protection of National Minorities by Finland, GVT/COM/III(2011)002, received on 13<sup>th</sup> April 2011, 8.



eliminating discrimination. Such a view is enshrined both at the level of constitutional law and ordinary legislation.

Art. 19 of the Constitution guarantees equal rights regardless of, *inter alia*, their different linguistic belonging. At the same time, Art. 69 of the Russian Constitution safeguards the rights of indigenous peoples, linguistic rights included, in accordance with the generally accepted principles of international law. The extent to which the ordinary legislation that Russia has adopted to protect the rights of indigenous peoples, provides Sami with a substantial enjoyment of their linguistic rights is not clear on the practical level. Russia has signed but not yet ratified the ECRML. Currently there is a lack of international monitoring mechanisms that can provide substantial data on the effective implementation of Sami linguistic rights.

## **8.6. Economic and social rights**

In none of the Nordic countries, Sami are currently entitled to “special” economic and social rights ensuing from their indigenous status. Their economic and social rights are in fact protected by general constitutional provisions which hinge on their citizenship rather than on their indigenous status.

The economic and social situation of Sami in the Nordic area cannot be exhaustively reported since, to date, any precise and specific data is available because of the geographical dispersion of the population.<sup>948</sup> For many years, Sami had lived as “an invisible group” whose economic and social status was generally perceived as “inferior” to that of the majority population in Nordic societies. Nonetheless, their political emancipation as increasingly developed in the last thirty years and has contributed to improve their overall economic and social status as well.

---

<sup>948</sup> G. Duhaime and A. Caron, "Economic and Social Conditions of Arctic Regions " in *The Economy of the North 2008*, ed. S. Glomsrød and I. Aslaksen (Oslo/Kongsvinger: Statistisk Sentralbyrå-Statistics Norway, 2009), 19.

By and large, the overall economic and social situation of Sami in the Nordic area has been considered being quite positive, especially when compared to most other indigenous peoples worldwide. Sami in fact do not have to battle with problems of hunger, extreme poverty, summary executions or other direct threats to their physical health.<sup>949</sup> Nowadays, most of the problems related to the full enjoyment of Sami economic and social rights are strongly connected to their cultural survival.

A major issue of concern for Sami is related to the area of education. For many years, the area of education has been one of the major instruments that Nordic States have been using to promote the process of assimilation of Sami within mainstream societies. Sami children were in fact prevented from using their native language at school and from engaging in their cultural practices. The school system was also one of the core vehicles for promoting the idea that Sami culture *vis-à-vis* that of the majority.<sup>950</sup>

Although in **Finland, Sweden** and **Norway** the education system is generally more attentive to the respect and to the promotion of Sami culture, some cases of ethnic discrimination towards Sami children have been reported. Recently, the Advisory Committee for the FCNM has detected, especially with regard to the case of Sweden, that whenever Sami children are subject to any forms of harassment connected to their ethnic belonging within the national school system, most of the times they are not receiving the protection they are *de jure* entitled to.<sup>951</sup>

## **8.7. Cultural and political rights**

Chapter 6 and chapter 7 have respectively shown the strong contiguity existing between cultural rights and political rights, in the realm of minority rights in general and of Roma rights in particular. Whenever minority cultural rights are promoted through a personal

---

<sup>949</sup> Åhrén, "The Saami Convention ": 36.

<sup>950</sup> See <http://www.utexas.edu/courses/sami/dieda/hist/suffer-edu.htm>

<sup>951</sup> FCNM, 2011, p.19.

perspective i.e. by means of the National Cultural Autonomy (NCA) model for instance, the participation of minorities in the public sphere has appeared to be promoted to such an extent that it intersects (and partially comprehends the promotion of) political rights as well.

Indeed, so far the analysis has repeatedly emphasized how in doctrine, the notions of “personal” and of “cultural” autonomy are often used interchangeably, mostly because these institutional arrangements involve cultural areas which are directly linked to the personal identity of minorities.<sup>952</sup> When considering this theoretical debate in the case of Sami, the link between the spheres of cultural rights and political rights appears even tighter, particularly within the legal systems of Norway, Sweden and Finland where such a promotion is strongly connected to Sami indigenous cultural identity.

### **8.7.1. Sami cultural identity**

Reindeer has always been playing a key role in shaping Sami cultural identity. While the majority of Sami have nowadays abandoned the nomadic lifestyle connected to reindeers' seasonal migrations, Sami still consider reindeers to be “[t]he basic guardians of their culture, their language, their identity and the flame which keeps their identity alive”.<sup>953</sup> Sami consider man and nature as a whole since except for reindeer husbandry, any other economic activity of Sami depends on land and water (fishing, hunting, small-scale agriculture and berry gathering).

The traditional social organization of Sami used to hinge on the “siida” (or Lapp village) whose size was determined according to the resources available in the surrounding area. Nowadays, the majority of Sami do not live any longer in “siida” but in modern Sami villages. Sami used the term “Sapmi” or “Saapmi” to refer both to a territorial dimension

---

<sup>952</sup> In particular, section 7.4. has specified that the concept of personal autonomy has been understood, by the doctrinal debate, as broader than that of cultural autonomy. While the former refers to the criterion of delimitation of autonomy, the latter refers to the competence allocated to the autonomous authority.

<sup>953</sup> Beach, "The Saami of Lapland ", 152. Cited in Fitzmaurice, "The New Developments Regarding the Saami Peoples of the North," 80.

("Samiland") larger than the local one ("siida") and to refer, at the same time, to the Sami people and to the Sami language. Interesting enough, also linguistically, the strong tie linking the Sami man with the territory was traditionally recalled.<sup>954</sup>

### **8.7.2. Cultural vs. personal autonomy ? The role of Sami Parliaments**

The political power of Sami is deeply connected to their cultural representation in the Sami Parliaments. According to Josefsen, the representation of Sami's political claims through the cultural device of Sami Parliaments represents an "indirect channel" of political influence, since the "direct channel" of political influence, which regulates the composition of and participation in national democratically elected bodies (i.e. national parliaments), is at least on the practical level, almost inaccessible to Sami.<sup>955</sup>

Sami Parliaments have been established under the belief that the ordinary channels for political representation are not able to always ensure that Sami's voice is heard, being a small minority in each national political system where they live.<sup>956</sup> Sami Parliaments are established through different (but homologous) institutional devices whose common aim is promoting Sami cultural identity at an "advisory" level through general political representation assemblies. Indeed, although Sami Parliaments are not entitled to exercise binding powers, they represent a complementary, indirect, tool for influencing the public sphere on Sami's related cultural issues and indigenous matters. In 2000, the Sami Parliamentary Council, a joint Nordic Cooperative Body was established among the Sami Parliaments of Norway, Sweden and Finland. The purpose of the Sami Parliamentary Council is safeguarding Sami's interests through a coordinated trans-frontier cooperation.<sup>957</sup>

---

<sup>954</sup> Donders, *Towards a Right to Cultural Identity?* 303.

<sup>955</sup> Josefsen, "The Saami and the National Parliaments: Channels for Political Influence." In Finland, after the establishment of the Sami Parliament, Sami have started to be elected to municipal councils as representatives of Finnish Parties in the Sami municipalities in Northern Finland. In Sweden, after the establishment of the Sami Parliament, several Swedish Parties have prepared a separate Sami Platform.

<sup>956</sup> Ibid.

<sup>957</sup> Ibid.

Even though **Russia** holds a status of observer in the Council, this State has so far not activated any domestic institutional device for promoting Sami's political representation to the same extent of the other Nordic Countries. In fact, as Xanthaki has emphasized, according to the 1999 Indigenous Law, in Russia, indigenous peoples are *de jure* entitled to establish "territorial bodies of public self-government" and they can enjoy the right "on the voluntary basis to organise [their] communities ... for the social, economic and cultural development, protection of their traditional habitat and the environment, lifestyle, economy and aboriginal activities".<sup>958</sup> However, it remains unclear to what extent this legal provision is *de facto* implemented in Russia for Sami.

In **Norway**, the cultural rights of Sami have been promoted since 1948 through the Norske Reindriftssamers Landsforbund, a national Sami organization.<sup>959</sup> In 1968 and in 1979 two other Sami organizations were respectively established: the Norske Samers Riksforbund and the Samens Landsforbund.<sup>960</sup> These organizations started to play a crucial role in the promotion of Sami rights in the public sphere after the Alta Case.<sup>961</sup> Indeed, the intense consultations between Sami and the Norwegian government to solve the Alta conflict led to the appointment of the Committee on "Sami cultural issues" and the Committee on "Sami legal relations".<sup>962</sup>

The work of these two committees (and especially of the Committee on Sami legal relations) set the foundations to adopt the Sami Act in 1987 and to amend the Norwegian Constitution in 1988. These two legal measures have to be understood in a complementary perspective.

---

<sup>958</sup> Xanthaki, "Indigenous Rights in the Russian Federation: The Case of Numerically Small Peoples of the Russian North, Siberia, and Far East," 84.

<sup>959</sup> The Norske Samers Riksforbund (Norwegian Sami Association) has been working since its creation for the development of Sami society and culture. The Norwegian Sami Association has always been working independently from any outside political party or religion.

<sup>960</sup> The Samens Landsforbund (the Norwegian Sami Union) has been working particularly for the promotion and for the development of Sami language. The Norwegian Sami Union safeguards the special interests of Sami in the areas where they form a clear minority.

<sup>961</sup> As seen at section 8.4.1., the Alta Case marked a watershed in the domestic recognition of Sami's indigenous identity and Sami's indigenous rights

<sup>962</sup> Minde, "Sami Land Rights in Norway: A Test Case for Indigenous Peoples."

While Art. 110 (a) of the Norwegian Constitution recognizes the general responsibility of national authorities to “create conditions enabling the Sami people to preserve and develop its language, culture and way of life”, the Sami Act provides the specific means to fulfill this constitutional obligation.

The Sami Act was created for the purpose of enabling Sami people in Norway to safeguard and develop their language, culture and way of life.<sup>963</sup> The Sami Parliament (*Sameting*) is the institutional device recognized by the Act to promote the Sami cultural identity in Norway.<sup>964</sup> Although the Norwegian Sami Parliament mostly deals with the protection and the promotion of the Sami language,<sup>965</sup> its jurisdictional competence *ratione materiae* comprehends also religious rights<sup>966</sup> and incidentally some sets of economic and social rights.<sup>967</sup>

The Norwegian Sami Parliament is composed of 43 representatives who are elected in concomitance with the Norwegian Parliament. All persons that are included in the Sami Parliament’s electoral register are eligible for the election to the Sami Parliament.<sup>968</sup> According to Art. 2.4. of the Sami Act, the composition of the Parliament has to guarantee a distribution of seats which assures that three members with alternates have to be elected from each of the 13 administrative districts in which Norway is divided.

The Parliament holds a substantial degree of independency (organizational) independence (Art.2.12) from the central government and has the right of initiative on any matter coming in its scope of action both in relation to public authorities and in relation to public institutions

---

<sup>963</sup> See Art.1.

<sup>964</sup> See Art. 1.2.

<sup>965</sup> Chapter 3 of the Sami Act regulates the Sami language. In particular, Art. 3.2. disciplines the translation of rules, announcements and forms, Art.3.3. the right to reply in Sami, Art. 3.4. the extended right to use Sami in the judicial system and Art. 3.5. the extended right to use Sami in health and social sector, Art.3.7. Right to leave or absence for educational purposes and Art. 3.8 right to tuition in Sami

<sup>966</sup> See Art. 3.6. which entitles Sami to receive individual church services in Sami in the Church of Norway’s congregations in the administrative district.

<sup>967</sup> While, as discussed, the Sami Act mostly focuses on the promotion of the linguistic dimension, some “linguistic provisions” can also indirectly protect some other rights on the economic and social realm. See, in particular, Arts. 3.5, 3.7 and 3.8.

<sup>968</sup> In order to be included in the national register a Sami has to fulfil the requirements already discussed at section 8.4.2.

(Art. 2.1). This means that the Sami Parliament is entitled to political initiative in matters of Sami's concern in the national agenda. However, the opinions of the Sami Parliament have only a recommendatory nature since they are not binding.

Moreover, the Norwegian Sami Parliament holds also a certain control on Sami land rights after the Finnmark Act was adopted in 2005. This Act established the Finnmark Estate, an autonomous organization in charge of administering the Finnmark area. The Sami Parliament has been entitled with the right to appoint half of the members of the Finnmark Estate; however, as section 8.8. of this chapter shows, in Norway the effective control on land rights by Sami has given rise to a number of critiques since the compliance with the standards of the ILO Convention No. 169 is still only partial.

In **Sweden**, the Sami Parliament (*Sametinget*) was established in 1992 following the Finnish and the Norwegian model/experience after the Swedish Parliament adopted the Sami Act. Although, after the Second World War, two national Sami organizations were created, the national recognition of Sami cultural identity in Sweden was overall quite reticent until the 1990s.<sup>969</sup> The Swedish Sami Parliament as well can be considered being a sort of by-product of such a reticent national recognition.

Indeed, this Sami Parliament has been described as a “compromised solution” which is not comparable to the Sami homologous experiences of cultural/political representation, since “it is a state administrative body with regulatory tasks, but without representative aims”.<sup>970</sup>

According to the Sami Parliament Act, the competence of the Swedish Sami Parliament is the promotion of the Sami culture. In particular, the Parliament is entitled to take initiatives for

---

<sup>969</sup> In 1945, the Same Ätnam was created to deal with general Sami issues, while in 1950 the Svenska Samernas Riksförbund was created to deal with issues involving Sami herders. In 1971, Sweden adopted the first legislative Act concerning Sami: The Reindeer Husbandry Act (No.437). The claims for recognition of Sami as indigenous people in Norway together with the action of the Sami national organizations in Sweden pushed for the creation of the Sami Parliament based on the Sami Assembly Act No. 41 of 1989.

<sup>970</sup> P. Grandholm and A. Tomaselli, "The Frustration of the Right to Political Participation of Minorities: Practical Limitations in the Case of the Nordic Sami and the Roma," in *European Yearbook of Minority Issues* (Martinus Nijhoff Publishers, 2010), 163.

activities and to propose measures for the promotion of Sami culture especially in the realms of Sami language and of reindeer breeding in the use of land and water (section 1).

However, the independence that Sami retain in the management of such a parliamentary competence is limited both by the influence of the Swedish government that has the right to appoint the chairman of the Sami Parliament (although by proposal of the Sami Parliament)<sup>971</sup> and by the influence of the Board of Directors that is entrusted with the ordinary management of the activities of the Parliament.<sup>972</sup> According to Section 4 of the Act, the Board of Directors is composed of a maximum of seven members who are in charge of managing the regular operations of the Parliament. In particular, the Board has the right to:

1. prepare and present motions in matters that shall be handled by the Sami Parliament,
2. manage the financial administration,
3. implement the decisions of the Sami Parliament if such implementation has not been assigned to anybody else,
4. perform the assignments that the Sami Parliament has given to the Board.

Moreover, according to the Sami Act, not every Sami person legally residing in the State for the last three years can be elected in the Sami Parliament, as in the cases of Norway and Finland, but only Sami Swedish citizens.<sup>973</sup>

In **Finland**, Sami have their own representative organization, called “Sami Delegation”, since 1973.<sup>974</sup> This organization, which can be considered the first in embryo example of Sami Parliament created in the Nordic area, was born on the legacy of both non-Sami and Sami civil society past efforts.<sup>975</sup> In 1995, Finland recognized cultural autonomy to Sami in its

---

<sup>971</sup> Section 2.

<sup>972</sup> Section 4, 5 and 5a.

<sup>973</sup> Donders, *Towards a Right to Cultural Identity?* , 314.

<sup>974</sup> The “Sami delegation” was created as a public body in 1973 through the “Finnish Decree on the Delegation for Sami Affairs”. The “Sami Delegation” operated between 1973 and 1995 and was the legal predecessor of Samediggi.

<sup>975</sup> Already in 1931 non-Sami created the *Lapin Sivistysseura*: the first organization of Scandinavia dealing with Sami issues. In 1945, Sami created their own organization: the *Saami Litto*. The joint action of non-Sami and Sami civil society paved the way for the creation of the first Commission on Sami Issues in 1949. The Sami Parliament of 1973 was created as a result of the Commission’s action.



Constitution,<sup>976</sup> and in 1996 the Act on the Sami Parliament (*Sami Ting*) was adopted. As in previous cases, also in the Finnish case the area of competence of the Sami Parliament mostly aims at guaranteeing the protection and the promotion of Sami cultural and linguistic rights (section 1). Nonetheless, the Sami Parliament is also entrusted with the power to negotiate with Finnish governmental authorities some specific matters in the Sami Homeland.<sup>977</sup>

Also the Finnish Sami Parliament has the power of political initiative, i.e. issuing proposals, statements and recommendations to national authorities on matters related to Sami cultural identity and reporting on Sami's cultural situation in the country. Although formally independent, according to section 1 of the Act on the Sami Parliament, this body functions under the jurisdiction of the Ministry of Justice<sup>978</sup> which clearly has the power to determine a certain influence over its activities although not as strong as in the Swedish case.

## **8.8. Land rights**

At international law level, Art.14 of the ILO Convention No.169 constitutes the legal basis for the recognition of land rights to indigenous peoples. This article identifies the relationship between indigenous peoples and the land used by the latter in a collective dimension, by distinguishing between two main categories of rights: (1) lands that indigenous peoples traditionally occupy and (2) lands that are not exclusively occupied by indigenous peoples but

---

<sup>976</sup> In Finland, the Constitution of 1995 recognized Sami cultural autonomy at Section 51, while the Constitution of 2000 recognizes Sami cultural autonomy at Section 17 (right to one's language and culture) and at Section 121 (Municipal and other regional self-government). In particular, Section 121 disciplines the cultural autonomy in Sami Homeland.

<sup>977</sup> These specific matters are enlisted in Section 9: 1) community planning; 2) the management, use, leasing and assignment of state lands, conservation areas and wilderness areas; 3) applications for licenses to stake mineral mine claims or file mining patents; 4) legislative or administrative changes to the occupations belonging to the Sami form of culture; 5) the development of the teaching of and in the Sami language in schools, as well as the social and health services; or 6) any other matters affecting the Sami language and culture or the status of the Sami as indigenous people.

<sup>978</sup> Section 1 of the Finnish Act on the Sami Parliament in fact reads: "The purpose of this Act is to guarantee the Sami as indigenous people cultural autonomy in respect to their language and culture. For the tasks belonging to cultural autonomy the Sami shall choose a Sami Parliament from among themselves at an election. The Sami Parliament shall function under the jurisdiction of the Ministry of Justice".

to which they have traditionally had access.<sup>979</sup> Accordingly, this article has been interpreted as enshrining two different dimensions of rights: the rights of “ownership and possession” and the right of “use”.<sup>980</sup>

Art.15 of the ILO Convention No. 169 can be understood as a corollary to the previous provision since it enshrines the right to natural resources pertaining to the land that indigenous peoples have been inhabiting or using. In particular, according to the wording of this article, indigenous peoples “participate in the use, management and conservation of these resources”. According to the doctrine, while the rights to exploitation of natural resources of which the State retains ownership are generally subject to domestic rules (which therefore vary according to the different legal systems), indigenous peoples cannot advance any claim on natural resource used by other people and not conflicting with their rights.<sup>981</sup>

As already emphasized in the previous sections of this chapter, among the Nordic States, the only country ratifying the ILO Convention No. 169 (and thus having implemented a minimum legal ground to recognize land rights to indigenous peoples) is **Norway**. As a result of international obligations, in the Norwegian legal system, Sami are therefore entitled both to land rights in the territories that they have been traditionally occupying and in the territories where they have historically had access. As regards to the rights to natural resources, within the Norwegian legal system, Sami hold *in abstracto* full rights on the exploitation of national

---

<sup>979</sup> In the wording of the article: “1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect. 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned”. Furthermore, Art. 13 of the Convention recognizes the spiritual relationship between indigenous people and the land they inhabit and it defines “lands” in terms of “territories which covers the total environment of the areas which the people concerned occupy or otherwise use”.

<sup>980</sup> G. Ulfstein, "Indigenous Peoples Right to Land," *Max Planck United Nations Yearbook* 8, no. 1 (2004).

<sup>981</sup> *Ibid.*

resources pertaining to his/her property, with some exceptions of certain minerals and surface resources.

In the case of Sami's reindeer husbandry, the Norwegian legal system does not foresee any specific right at the statutory level. Nonetheless, especially under the influence of the ratification of the ILO Convention No.169, in the last years the Norwegian Supreme Court has played a key role in promoting this set of rights for Sami through jurisprudential developments. Historically, the use of natural resources in Norway has been a source of tensions between farmers and Sami. On the one hand, farmers claimed liability for reindeer herders whenever grazing animals were causing damages to their fields. On the other, Sami were frequently unable to identify the specific owner of the animal causing damages while freely pasturing and, consequently, the precise reindeers' owner liability. Until the 1990s, several legislative interventions were made to regulate this kind of dispute, by assigning districts where Sami could pasture, which however did not coincide with customary herding areas and were consequently not always accepted by the reindeer herders.

Starting from the *Selbu* case, the Court recognized "Sami" to conform to the notion of indigenous peoples as defined by the ILO Convention No.169 and "reindeer husbandry" not just in terms of a tolerated use of the land but rather as an independent right, whose legal basis was to be understood as deriving from time immemorial.<sup>982</sup> The Court concluded its reasoning, by stating that Sami reindeer herders had common pasture rights in the disputed areas in the light of their immemorial use of land.<sup>983</sup>

---

<sup>982</sup> Judgment of 21<sup>st</sup> June 2001 serial number 4B/2001. The Court interpreted the acquisition of right from a time immemorial consisting of three elements: (a) there must be a certain amount of use, (b) which must take place during a long period of time, (c) this use had to be exercised in good faith. See also E. Josefsen, "Sami Landrights, Norwegian Legislation and Administration "(2003).

<sup>983</sup> For an analysis of the jurisprudence of the Norwegian Supreme Court see Fitzmaurice, "The New Developments Regarding the Saami Peoples of the North," 95-99.

In the following *Svartskogen* case, decided by the Unenclosed Land Commission (ULC),<sup>984</sup> it was found that Sami failed to prove to use the land from time immemorial, since there was neither unanimous understanding of the existence of the collective right to ownership advanced by the residents of the disputed areas, nor had there been a proof of the use of land exercised during a sufficient period of time. Hence, while on the one hand the Norwegian legal system developed a jurisprudential recognition of Sami land rights, on the other, the ULC made clear that such a recognition could not be provided in each and every case, but only under the concrete evidence of an immemorial and continuing usage of the land at dispute in the specific case.

A further development in recognition of Sami land rights and right to natural resources has arisen in 2005 through the adoption of the Finnmark Act (entered into force in 2007) which now regulates almost the entire territory of Finnmark (almost 95%) by putting this area under a common administrative regime called the Finnmark Estate (*Finnmarkseiendommen/Finnmárkkkuopmodat*). This Act does not change the existing rights neither of Sami (acquired through prescription or immemorial usage) nor of any other legal subjects. In other words, this Act neither establishes the content and the scope of any other “new” rights of Sami nor of any other persons through a special commission and a special court.

The purpose of the Act is in fact, in the wording of Chapter 1, Section 1, that to facilitate “the management of land and of natural resources in the country of Finnmark in a balanced and ecologically sustainable manner for the benefit of the residents of the county and particularly as a basis for Saami culture, reindeer husbandry, use of non cultivated areas, commercial

---

<sup>984</sup> Judgment of 5<sup>th</sup> October 2001 Serial No. 5B/2001, No. 340/1999. The ULC is entitled to decide cases between the State and other legal subjects in the realm of high mountain areas and other unenclosed lands in Nordland and Troms.

activity and social life”.<sup>985</sup> According to the Act, all residents of Finnmark are in fact guaranteed the right to exploit all natural resources belonging to the Estate such as hunting, fishing and cloudberry picking.<sup>986</sup>

Any decision concerning changes of the use of uncultivated land has to be taken by the simple majority of the Board members who are elected in equal number by the Finnmark County Council and the Sami Parliament (each part elects three members). Although the whole Finnmark legal system has not been accomplished yet, since it has to be complemented by additional legislative acts (Mineral Resources Act and Fisheries Act), Graver and Ulfstein critically commented that Sami do not receive any “special land right” from the Act, rather the contrary. In particular, both the composition and the voting procedure of the Estate jeopardize the effective and genuine enjoyment of Sami rights.<sup>987</sup>

In **Sweden**, although some steps have been undertaken by Governmental authorities in order to align the Swedish legal system to the requirements of the ILO Convention No. 169, in a future ratification perspective, none substantive measure aimed at ensuring Sami land rights has been taken so far. Indeed, the question of land rights in Sweden mostly relates to a question of reindeer herding rights. Yet, the legal identification of the lands and borders where Sami possess these rights, together with the precise scope of the Sami hunting and fishing rights in the land they have been traditionally occupying, is still far from meeting the minimum requirements of Art. 14 of the ILO Convention No. 169.<sup>988</sup>

Within the Finnish legal system, Sami land rights are expressed on a less promotional foot than in the Swedish legal system. Indeed, the understanding of Sami lands rights has mostly

---

<sup>985</sup> The Act No. 85 relating to “Legal Relations and Management of Land and Natural Resources in the County of Finnmark” (the Finnmark Act), 17 June 2005.

<sup>986</sup> The Act, however, does not cover oil rights and fishing rights in salt water.

<sup>987</sup> H.P. Graver and G. Ulfstein, “The Sami People’s Right to Land in Norway,” *International Journal of Minority and Group Rights* 11, no.4 (2004). Cited in Fitzmaurice, “The New Developments Regarding the Saami Peoples of the North,” 109.

<sup>988</sup> Fitzmaurice, “The New Developments Regarding the Saami Peoples of the North,” 113-14.

been confined to the territory of the Sami Homeland where Sami are guaranteed a certain degree of cultural and linguistic autonomy. However, according to their customary perspective, Sami land rights extended much beyond the current Sami Homeland. For this reason, Fitzmaurice suggests that a more in-depth historical and legal research should be undertaken in **Finland** in order to understand the exact territory where Sami land rights should possibly extend.<sup>989</sup>

In **Russia**, the current legal framework concerning land rights appears even less clear. According to the Russian Constitution, the issues of possession and management of land and of natural resources are jointly regulated by the Russian Federation and the subjects of the Russian Federation (Art.72). Yet, no data has been found regarding the separation of competences concerning land rights between the federal and the regional authorities. Although the new Land Code provides the opportunity to acquire land as private property, according to Xanthaki,

indigenous communities often cannot take advantage of this provision: many are dispersed across vast areas, cut off from administrative centers, and left uninformed of the legal developments concerning their lands.<sup>990</sup>

At the same time, private companies that also hold some rights to indigenous lands and have a more in-depth knowledge on the legislation take advantage of this priority clause.<sup>991</sup>

---

<sup>989</sup> Ibid.

<sup>990</sup> Xanthaki, "Indigenous Rights in the Russian Federation: The Case of Numerically Small Peoples of the Russian North, Siberia, and Far East," 90.

<sup>991</sup> After the collapse of the Soviet Union land privatization policies started to threaten the rights of Russian indigenous peoples in Russia, particularly of those indigenous communities living in the Northern part of the country. Indeed, both national and international extraction companies have raised the issue of what rights native people can effectively enjoy facing the future economic exploitation of their lands. So far, public authorities have done very little to remedy this situation since national industrial production is strongly benefiting from the activities of these private companies. See <http://www.unhcr.org/refworld/country,,COUNTRYPROF,RUS,,4954ce18c,0.html> (last accessed on 11<sup>th</sup> November, 2012).

## **8.9. Towards a trans-national recognition of Sami: the 2005 Sami Draft Convention**

Between 2003 and 2005 Norway, Sweden and Finland undertook the joint effort of drafting a transnational legal instrument guaranteeing the rights of Sami living within (and across) their territories.<sup>992</sup> The Convention was drafted by an Expert Group in equal partnership among four peoples: the Norwegian, the Swedish and the Finnish state-forming people on the one hand, and the Sami people on the other.<sup>993</sup> At the beginning, the Sami members of the Expert Group pushed for the inclusion of Russia in the drafting process of the Convention in order to encompass Sami people living in the Kola peninsula as well. Soon after, the political situation of the Russian Federation was deemed to be too “distant” from the political situation of the other Nordic States. As a result, the drafting process was not eventually enlarged to this fourth Member State.<sup>994</sup>

The Sami Convention is rights-based.<sup>995</sup> its purpose is to protecting and promoting Sami human and minority rights and fundamental freedoms by obliterating – to the largest possible extent – the problems caused to the Sami population by the division of their traditional territory. The preamble of the Convention reflects the good spirit of cooperation which has accompanied the drafting process among the four peoples involved. In one section the three

---

<sup>992</sup> Already in 1986, the Sami Council (the umbrella organization established in 1953 and representing internationally Sami living in Norway, Sweden, Finland and Russia) proposed the drafting of a similar document among the four countries where the Sami population was living. Only in 1996 Norway, Sweden and Finland eventually appointed a committee to investigate the need for a Sami Convention. Following the positive answer of the Committee, an Expert Group was therefore invested in 2001 with the task of drafting such a treaty. See Åhrén, "The Saami Convention ": 10.

<sup>993</sup> More specifically, the Expert Group totally consisted of six members: three members appointed by each national Government involved (Norway, Sweden and Finland) and three members appointed by each of the Sami Parliaments. On a subsequent stage, the Expert Group included also four highly distinguished members serving on their individual capacity. For further details see Ibid. Footnote 6.

<sup>994</sup> In particular, the Expert Group was afraid that diplomatic negotiations with Russia (together with the representatives of the Russian Sami) would have drastically extent the duration of the drafting-process. Nevertheless, it is worth highlighting that once the drafting process was concluded, some of the individual rights contained (such as the right to education, health and social services) in the Convention were also devised as to include Sami who are citizens of the Russian Federation but resident in one of the three contracting States.

<sup>995</sup> At the drafting stage, the Expert Group wondered whether the Sami Convention should have been shape as a rights convention or as a framework convention. The members of the Expert Group agreed on a rights convention since they wanted this international instrument to be directly implementable through concrete provisions.

State-forming peoples (represented by their respective governments of Norway, Sweden and Finland) outline what they believe constitute the foundation for the Sami Convention, whereas in another section the Sami people (represented by the Sami Parliaments) do the same.<sup>996</sup>

The Convention opens its operative part by clarifying the criteria identifying a Sami person (Art. 4). Besides the subjective criterion of self-identification, at the objective level the Convention recognizes language knowledge as one of the core criteria identifying a Sami person.<sup>997</sup> However, also individuals that are not able to meet this linguistic requirement can be identified as Sami, if they are active in reindeer husbandry in Norway and Sweden or if they have been recognized eligibility to vote in elections to the Sami Parliament in Norway, Sweden or Finland.<sup>998</sup>

One of the key aspects covered by the Convention is the right to self-determination for Sami people. Legal doctrine has considered this right to be the most central right of indigenous peoples' collective rights.<sup>999</sup> This Convention embodies the competing idea of "one country, two peoples" through a peculiar legal device which has ensued out of the necessity that a substantial part of the Sami's traditional territory is nowadays inhabited by a mixed

---

<sup>996</sup> In particular, on the one hand the State forming people recognize, *inter alia*, that: the three States have a national as well as an international responsibility to provide adequate conditions for Sami's culture and society; lands and waters constitute the foundation for the Sami culture and Sami must have access to such and that in determining the legal status of the Sami people; particular regard shall be paid to the fact that during the course of history Sami have not been treated as people of equal value, and have thus been subjected to injustice. On the other hand, Sami recognize, *inter alia*, that: the vision that the national boundaries of the states shall not obstruct the community of the Sami people and Sami individuals; Sami shall live as one people within the three States and will assert the Sami people's rights and freedoms in accordance with international human rights law and other international law.

<sup>997</sup> This implies either the direct knowledge of the Sami language of the person that wants to be recognized as Sami or the familiarity with the Sami language by at least one parent or grandparent who has or has had Sami as his or her domestic language.

<sup>998</sup> Art. 4 of the Convention in fact reads "the Convention applies to persons residing in Finland, Norway or Sweden that identify themselves as Saami and who 1. have Saami as their domestic language or have at least one parent or grandparent who has or has had Saami as his or her domestic language, or 2. have a right to pursue Saami reindeer husbandry in Norway or Sweden, or 3. fulfil the requirements to be eligible to vote in elections to the Saami parliament

in Finland, Norway or Sweden, or 4. are children of a person referred to in 1, 2 or 3".

<sup>999</sup> M. Scheinin, "The Rights of an Individual and a People: Towards a Nordic Sámi Convention-" *Gáldu Čála – Journal of Indigenous Peoples Rights* 3(2007): 64.



population. This means that two peoples (State forming people and Sami) at the same time hold a legitimate claim for self-determination within the territory of *Sápmi*.<sup>1000</sup> The Convention disentangles this competing claim for self-determination, by reserving a “varying degree of influence” over the decision-making process to Sami on all issues affecting their specific interests.<sup>1001</sup>

This system of “*sui generis*” Sami self-determination which stands in between external self-determination and internal self-determination<sup>1002</sup> hinges on Sami Parliaments. The Convention recognizes Sami Parliaments as the highest representative bodies of Sami people that are entitled to act on their behalf in each of the States where Sami are living.<sup>1003</sup> To achieve this purpose, the Convention guarantees to Sami Parliaments the right of independence in the decision-making process (Art.15)<sup>1004</sup> and the right to negotiations in matters of major importance for Sami (Art. 16). Sami Parliaments are also entitled to report to the respective national parliaments on matters of importance to Sami (Art. 17) and to form joint Sami organizations to which a certain degree of transfer of public authority may be extended (Art.20). At the same time, Sami Parliaments shall also promote the representation of Sami in international institutions and in international meetings (Art.18).

---

<sup>1000</sup> In other words, since it is not possible to precisely circumscribe the Sami social group within a distinct and exclusive area of inhabitation, the right to self-determination has been devised on a personal perspective which departs from each single competence.

<sup>1001</sup> This “varying degree of influence” on which the Sami’s right to self-determination is based has been efficiently summarized by Åhrén as follows: “the more significant an issue is to the Saami people, the more influence the Saami people have over the matter, ranging from a complete and exclusive decision right where no consideration has to be made to the non-Saami peoples to a right merely to be informed and briefed about a decision-making process by the non-Saami decision making bodies”. Åhrén, “The Saami Convention”: 16.

<sup>1002</sup> From the external point of view, the Convention recognizes in fact – to a certain extent – Sami as a “nation” by recognizing it as a Party to the Treaty. From an internal point view, the Convention recognizes Sami the cultural/political rights to representation on issues that directly concern them.

<sup>1003</sup> As Art. 14 specifies “Saami parliaments shall have such a mandate that enables them to contribute effectively to the realization of the Saami people’s right of self-determination pursuant to the rules and provisions of international law and of this Convention”.

<sup>1004</sup> Although Art.15 does not clearly specify the concrete meaning of “independent decisions”, according to the current experience of Sami Parliaments discussed at section 8.7.2., it can be reasonably supposed that such an “independency” refers to a free and fair decision-making process unbound from any political interference from the majority.

Besides self-determination, the Convention protects and promotes other categories of rights as well.<sup>1005</sup> Specifically, the Convention addresses linguistic rights, cultural rights, economic and social rights and land rights. Linguistic and cultural rights are enshrined within the same chapter III, as they are implicitly considered being mutually interdependent. Sami are in fact guaranteed not only the right to use their language, but also the right to disseminate Sami culture by using the autochthonous linguistic vehicle in personal and geographical names, literature and media. Moreover, Art. 6 guarantees that Sami population residing in the Sami areas shall have access to education both in through the medium of the Sami language. In parallel, Art. 28 provides for information and for education on Sami culture to the mainstream society.

As regards to the rights belonging to the economic and social sphere, it is worth recalling: the right to health and social services which shall be provided in a way that is compatible with Sami linguistic and cultural background (Art.29); the preservation of Sami cultural identity for children and adolescents (Art. 30) and the preservation of “Sami traditional knowledge” and cultural expression in decisions affecting them (Art.31).

In the sphere of land rights and rights to natural resources, it is interesting to highlight that the Convention has modeled these sets of rights on the scheme provided by ILO Convention No. 169, although tailoring them according to the specific needs of Sami.<sup>1006</sup> Specifically, the Convention requires States Parties to identify the land and the water areas traditionally used by Sami and to provide them with the necessary financial support to guarantee their access to such resources (Art.35). The Sami Parliaments have the right to co-determine land and natural

---

<sup>1005</sup> In particular, the Convention requires Member States to promote its rights against the background of the non-discrimination principle which can also find implementation through positive measures (Art.7). Moreover, the Convention requires States Parties to implement these rights by paying duly respect to Sami’s legal customs (Art.9). Nonetheless, the rights enshrined within the Convention have to be considered only as “minimum rights”. In other words, according to the wording of Art.8 “they shall not be construed as preventing any state from extending the scope of Saami rights or from adopting more far reaching measures than contained in this Convention. The Convention may not be used as a basis for limiting such Saami rights that follow from other legal provisions”.

<sup>1006</sup> Åhrén, "The Saami Convention ": 27.

resources management (Art.39) as well as the right to compensation whenever damages to Sami's activities may occur (Art. 37). Moreover, the Convention protects Sami livelihoods (Art.41) together with reindeer husbandry as livelihood (Art.42).

After approval of the first version of the Sami Draft Convention, in 2008 this version of the text had to be revised on the basis of the existing domestic legislation. In autumn 2010, the ministers of Norway, Sweden and Finland started the negotiations in order to have the Convention ratified by the three national Parliaments and the three Sami Parliaments. At the moment, the negotiations for the ratification of the draft instrument are still under way. A common Sami position on the evolution of the Draft Convention is currently under drafting in particular with regard to the issues of land rights and reindeer herding.<sup>1007</sup>

Interesting enough, once again a parallel can be noted between the historical development in the recognition of Sami rights in the Nordic area and the increasing evolution of indigenous peoples rights at the global level. While in 2005 the Expert Group closed the draft text of the Sami Convention, the World Summit (and later in 2006 the Fifth Session of the UN Permanent Forum on Indigenous Issues) called for the adoption of a Declaration on the Rights of Indigenous Peoples.

### **8.10. Learning from the experience of Sami. Critical remarks**

This chapter has analyzed the legal status of Sami of Northern Europe in order to draw – from a similar European experience – some inspiration for the future enhancement of Roma rights. By the same way of Roma, Sami are a social group that has historically been living in Europe in a trans-national dimension. Sami represent in fact a dispersed social group that has been living from “time immemorial” in the European Nordic area which nowadays coincides with the national territories of Norway, Sweden, Finland and Russia. As Roma, Sami have been

---

<sup>1007</sup>See [http://ips.articportal.org/index.php?option=com\\_k2view=item&id=373:the-nordic-saami-convention&itemid=2](http://ips.articportal.org/index.php?option=com_k2view=item&id=373:the-nordic-saami-convention&itemid=2) (last accessed on 4<sup>th</sup> October 2012).

experiencing a past of deprivation and rights denial, deriving from an economic and social inferior position, which has been relegating them to a non-dominant position in societies where they have been living. As Roma, the trans-national link between the (national) Sami communities is still existent, given that the “community of memory” of a common past is still vivid.

In contrast to Roma, Sami benefit of a different legal status that derives from their ancestral tie with *Sápmi* (their traditional territory). In the last decades, Sami have been legally recognized at international and national levels as indigenous peoples. More specifically, Sami have been officially recognized as indigenous peoples in two out of the four countries where they reside (Finland and Russia). In the other two countries not officially recognizing their indigenous status they are recognized them as an autochthonous minority group (Norway and Sweden). The international recognition of Sami’s entitlement to indigenous rights has propelled a stronger recognition of Sami rights at the national level, at different promotional extents though.

The analysis has shown that both international and European disciplines of indigenous rights are overall less developed than international and European disciplines of minority rights. At international level, the only binding document protecting and promoting indigenous rights is, at the moment, the ILO Convention No.169. However, in 2006 the UN have further developed the international legal framework on indigenous rights by adopting the UN Declaration on the rights of indigenous peoples. At the European level instead, no specific legal instrument has been adopted in the field of indigenous rights.<sup>1008</sup>

---

<sup>1008</sup> Indeed, for a long time the “salt water doctrine” (elaborated after the adoption of the UN Resolution 637 in 1952) was interpreted as applying the principle of self-determination only to peoples living in enclave territories (in particular to peoples subject to Western colonization in overseas territories, such as to indigenous peoples of Latin America and of Africa). International indigenous law that was thus elaborated as a sort of “response” to uphold the self-determination principle for people living in enclave territories, initially produced a rather “narrow view” on indigenous rights by excluding for a long time other “colonized” peoples living outside enclave territories, such as Sami living in Northern European countries. As the analysis has shown, since the 80s

Yet, the existence of an international legal framework for the protection of indigenous rights has undoubtedly contributed to promote the rights of Sami at the domestic level in a more uniform and comprehensive way. Sami are in fact not living, as Roma are, in a legal limbo. The fact that not every legal system has aligned its domestic provisions to international standards yet does not mean that a common legal framework of reference does not exist to uphold Sami rights. In contrast with Roma, in the case of Sami the existing framework of indigenous law represents in fact a certain “guide-line” for future developments of indigenous rights within Northern domestic systems.

At the moment, the domestic discipline of Sami rights is mostly focused on the dimensions of linguistic rights, cultural rights, political rights and land rights. For the purposes of comparison with Roma, the most interesting dimensions to consider at this critical stage of discussion are those of linguistic, cultural and political rights. As previously debated, Roma are not currently advancing any territorial claim and even if they would do so in a future stage, the international discipline on land rights is one of the exclusive area of protection of indigenous law, thus it would not apply to Roma in any case. In the areas of linguistic, cultural and political rights the parallelism with Roma appears instead more interesting to be drawn starting from the experience of the States where these sets of rights have been particularly developed: Norway, Finland and Sweden.<sup>1009</sup>

More specifically, in the area of linguistic rights these legal systems structured the recognition of Sami linguistic rights on a personal perspective with a strong territorial implementation. Indeed, the analysis has shown that in the case of Sami, linguistic rights are generally

---

the “indigenous movement” became globalized and Sami started to be aware of their “indigenous status”. As a consequence, Sami started to claim the recognition of their indigenous rights under the ILO’s framework which influenced more or less explicitly the overall recognition of Sami rights in the Northern area. However, as section 8.2. has emphasized, since no European legal instrument has been adopted on the rights of indigenous people yet, the Advisory Committee of the FCNM has clarified that in the light of the subtle continuum existing between indigenous and minority rights, Sami rights are understood as being protected by the rights enshrined in the FCNM in the light of the “subtle continuum” linking “old” minorities to indigenous peoples.

<sup>1009</sup> The analysis developed in this chapter has shown that in the case of Russia, the rights of Sami are very less promoted not only at the substantial but at the formal levels as well.

expressed in a personal perspective since linguistic legal entitlements explicitly refer to Sami people and not to Sami territory. However, as outlined at section 8.3., on the practical level, the implementation of Sami rights is generally limited to Sami administrative areas (in the cases of Norway and Sweden) and to Sami Homeland (in the case of Finland).

According to the doctrinal classification of linguistic rights outlined at section 4.4. while analyzing the linguistic rights of Roma, in the case of Sami, linguistic rights can be generally ascribed to the third doctrinal categorization identified by Poggeschi. As already discussed, this category of linguistic rights is generally attributed to “new” minorities, particularly to migrants of second generation who have been recognized as citizens of the State. Indeed, this category addresses linguistic rights through a combination of private and individual entitlements (deriving from the first doctrinal category) together with a combination of public and collective entitlements (deriving instead from the second doctrinal category).

The versatile nature of this doctrinal categorization has already shown to be particularly suitable to address Roma rights at the theoretical level (see section 4.6.), and the application in the case of Sami can help to frame its possible declination at the substantial one. Although the current legal practice on the linguistic promotion of Sami indigenous rights has shown to be still perfectible since it is unable to comprehensively address the whole group, its partial territorial application can be taken into consideration in the case of Roma, particularly in those areas where this social group is living on a more sedentary stance (such as in Central-Eastern Europe).

In other words, the general principle can be expressed in personal terms while its concrete implementation can follow a partial territorial application when the percentage of Romani population allows to do so.<sup>1010</sup> While few States have already started to follow this path

---

<sup>1010</sup> While *in abstracto* the personal formulation of Roma rights can help to embrace the entire social group, on a substantial level the feasibility for the implementation of any sets of rights should also be considered. In other

(especially the multi-ethnic States created after the collapse of the Socialist Republic of Yugoslavia) particularly in the area of education, as the ECtHR has repeatedly highlighted after the case *D.H. and Others vs. Czech Republic*, linguistic promotion of Roma rights should not reiterate segregationist models based on “special classes” or “special schools” for Romani pupils.

At the same time, the Nordic experience on the promotion of Sami linguistic rights has shown that the current legal practice is evolving as to embrace other linguistic areas of the public sphere such as health and local administration.<sup>1011</sup> This again can be an interesting legal evolution that might be taken as “good legal practice of reference” also in the case of Roma (particularly in those States with a strong percentage of sedentary Romani population) since the linguistic promotion can indirectly help to foster the overall application of economic and social areas by facilitating the intercultural dialogue/mediation between Romani communities and the mainstream society.<sup>1012</sup>

In the case of cultural rights, the legal analysis of Sami rights has shown that these rights are expressed and implemented through a strong reliance on means of personal autonomy and on the personal principle. This set of rights which, as seen, strongly transcends into the sphere of political representation, is mostly embodied by Sami Parliaments and it applies in fact to each Sami person, in spite of his/her territorial area of residence.

Sami Parliaments do not only embody the role of “legal guardian” entitled to monitor and promote Sami cultural identity *vis-à-vis* any possible interference (and assimilationist attack)

---

words, while the personal application of cultural and political rights has demonstrated to be already applicable both in the case of Roma and in the case of Sami, the personal application of linguistic rights appears instead more difficult to be applied as the financial resources necessary to activate the linguistic set of rights needs at least some minimum numerical pre-requisites.

<sup>1011</sup> See, *infra* section 8.4.

<sup>1012</sup> As seen in section 8.6., a specific discipline focusing on the promotion of economic and social rights of Sami is still

very limited for Sami. Moreover, it is generally very difficult to draw a parallelism between Sami and Roma socio-economic situation since the two cases appear hardly comparable on the practical level.

from the majority of the population, but also that of an “indirect channel of influence” (according to Josefsen’s definition) of Sami’s political claims on the public sphere. Although in the case of Roma, some examples of cultural/political autonomy and/as consultative bodies have been developed especially in Central Eastern Europe,<sup>1013</sup> this effective degree of influence of the institutional devices activated to this purpose is far from being comparable to the experience of Sami.<sup>1014</sup>

The strength of Sami Parliaments rely on the “indirect channel of influence” (according to Josefsen’s definition) that they can exercise at the domestic level particularly when performing their role of advisory bodies vis-à-vis governmental authorities. Moreover, their strength rely on the trans-national relations which mutually support their action at the domestic as well at the international levels.

The main achievement of this action is unquestionably the role that the Sami Parliament have played in the drafting process of the 2005 Sami Convention which, although not formally adopted yet, can be considered being an outstanding framework of reference for the future development of Sami indigenous rights at the domestic level. As seen, Sami Parliaments have been actively contributing to draft Sami Convention and once the Convention will be ratified by the three participating Member States, Sami Parliaments will see their role of “legal guardian” at the trans-national level reinforced through their future task of monitoring the effective implementation of Convention’s rights.

The investigation on the experience of Sami has thus shown that notwithstanding the Westphalian conception of “State” and “nation”, a joint trans-national action can facilitate the process of trans-cending current legal categories and the parallel advancement of the

---

<sup>1013</sup> The most developed example in the case of cultural/political autonomy in the case of has shown is Hungary (see section 7.5.4.). However, the cases of Austria, Russia, Slovenia, Croatia, Serbia and Finland constitute some examples where the dimension of cultural autonomy has also been strongly emphasized although not to the extent that it can be considered as trans-cending political autonomy as well (see section 6.6.2.).

<sup>1014</sup> Although even the latter experience has shown to be far from perfect.



recognition of Roma rights and its legal trans-national from which recognition of rights follow. In other words, although the legal status of Roma will always depend on the (Westphalian) conception of “State” and “nation” characterizing the legal system where they are residing, a trans-national recognition of a common minimum set of rights could constitute a minimum common denominator to provide recognition to Roma cultural identity and to guarantee the existence of this social group survival together with the respect of its fundamental rights at the domestic level (just like international indigenous law and the 2005 Draft Convention in the case of Sami).



## Chapter 9

### A European transnational people?

**Summary:** **9.1.** Romani participation in the public sphere. A socio-political perspective. – **9.1.1.** At the origin of representation: first wave of Romani leaders. – **9.1.2.** The development of a Romani representation at the national level: second wave of Romani leaders. – **9.1.3.** Modern forms of Romani representation: third wave of leaders. – **9.1.4.** Seeds of trans-national Romani participation **9.1.5.** Political rights of Roma in a transnational perspective. – **9.1.6.** A trans-national Romani movement. – **9.2.** European trans-national representation of Roma Rights. – **9.2.1.** Institutional recognition of Roma as a pan-European minority. – **9.2.2.** European trans-national programs. – **9.3.** Critical remarks.

#### **9.1. Romani representation in the public sphere. A socio-political perspective**

Even if Roma have historically been subjected to the politics of the countries where they have been residing, they always had their own political actors representing their rights and interests.<sup>1015</sup> While chapter 7 has accounted for the legal devices that each legal system provides for the political representation of Roma in Europe, this chapter considers – mostly from a socio-political perspective – the evolution of Romani political representation in Europe. The goal is understanding the ground on which the current transnational dimension for the promotion of Roma rights in Europe is funded both from a Romani and from a non-Romani standpoint.

The analysis of the traditional forms of Romani representation are mostly rooted in anthropological studies which have shown that Romani communities had internal forms of

---

<sup>1015</sup> J. Nirenberg, "Romani Political Mobilization from the First International Romani Union Congress to the European Roma, Sinti and Travellers Forum," in *Romani Politics in Contemporary Europe. Poverty, Ethnic Mobilization and the Neoliberal Order* ed. N. Sigona and N. Trehan (Houndmills, Basingstoke, Hampshire ; New York Palgrave Macmillan 2010).

self-government already when they left India, but only once they arrived to Europe they developed external forms of representation. According to Klímová-Alexander,<sup>1016</sup> who has accurately reconstructed the evolution of Romani structures of representation and participation in public life,

The base of Romani social control is a shared legal code or rules of conduct (mainly focusing on cleanliness and the concept of purity) which varies between different Romani groups.<sup>1017</sup>

In some communities, this shared legal code of rules has been crystallizing in the *Kris*, the formal mechanism administering justice,<sup>1018</sup> whereas in other communities lacking this “judicial” mechanism, internal cohesiveness has been assured through the intensification of informal social norms. The traditional form of social organization of Romani communities derived from their nomadic life-style and was maintained in those communities that, during the centuries, continued to wholly or partially perform such a life-style.

This is especially the case of Romani communities living in Western Europe where Romani leaders have historically been able to maintain their traditional community leadership. Romani communities living in Central Eastern European countries instead, have historically been less nomadic and thus more integrated into the socio-political structures of the mainstream society. Traditionally, the internal organization of Romani communities has not

---

<sup>1016</sup> Most of this section relies on the study proposed by Klímová-Alexander in a series of articles published in *Nationalities Papers*. Where not differently cited the historical reconstruction presented in this section shall be considered as taken from the following articles: I. Klímová-Alexander, "Development and Institutionalisation of Romani Representation and Administration. Part 1," *Nationalities Papers: The Journal of Nationalism and Ethnicity* 32, no. 3 (2004). ———, "The Development and Institutionalization of Romani Representation and Administration. Part 2: Beginnings of Modern Institutionalization (Nineteenth Century—World War II)," *Nationalities Papers: The Journal of Nationalism and Ethnicity* 33, no. 2 (2005); ———, "The Development and Institutionalization of Romani Representation and Administration. Part 3a: From National Organizations to International Umbrellas (1945–1970) - Romani Mobilization at the National Level," *Nationalities Papers: The Journal of Nationalism and Ethnicity* 34, no. 5 (2006); I. Klímová-Alexander and K. Milady Horá, "The Development and Institutionalization of Romani Representation and Administration. Part 3b: From National Organizations to International Umbrellas (1945–1970)—the International Level," *Nationalities Papers: The Journal of Nationalism and Ethnicity* 35, no. 4 (2007); I. Klímová-Alexander, "The Development and Institutionalization of Romani Representation and Administration. Part 3c: Religious, Governmental, and Nongovernmental Institutions (1945–1970)," *Nationalities Papers: The Journal of Nationalism and Ethnicity* 38, no. 1 (2009).

<sup>1017</sup> Klímová-Alexander, "Development and Institutionalisation of Romani Representation and Administration. Part 1," 4.

<sup>1018</sup> On the structure of the *Kris* see, *infra*, section 6.1.

been relying on any notion of “leadership” rather on a notion of “responsibility” which was very much connected to the community assent.

When Roma entered the European continent and got their first contacts with autochthonous non-Romani communities, they began to structure their social organization around more hierarchical arrangements, at least as far as their external relations were concerned. While nomadic communities started to manage their relationships with the mainstream society mostly by means of a Romani chieftain, sedentary communities were instead generally represented by non-Romani authorities whose “political legitimacy” did not always derive from Romani communities themselves.

As the following sections discuss more in detail, the political representation of Roma in the European public sphere developed through “subsequent waves” of Romani leaders. While the first “waves” of Romani leaders represented Romani communities at the local/national levels, especially after the Second World War, Romani leaders started to progressively structure Romani representation as part of a holistic movement which trans-cended national borders by increasingly representing Roma on a trans-national dimension. In recent years, this trans-national dimension of Roma’s representation has been upheld by European institutions as well, at different extents and at different levels though.

### **9.1.1. At the origin of representation: first wave of Romani leaders**

At the beginning of their European settlements before in the Ottoman and subsequently in the Byzantine Empires, Romani representatives entered in relation with the non-Roma world especially to fulfil the duty of tax-collection. When Roma spread along the Balkans and in Central and Eastern Europe during 14<sup>th</sup> and 15<sup>th</sup> centuries, their cover-story of Christian pilgrims often contributed to facilitate their relations with the non-Roma world. In some cases, Roma received pilgrims subsidies from local noblemen (according to the customary

rules regulating the hosting of pilgrims at that time) while in others, Roma directly offered their services to local noblemen. In both cases, however, a primordial political conduct can be envisaged in the negotiation bargain of Romani leaders with non-Romani authorities for the collection of these subsidies.

This primordial political conduct, subsequently developed in new forms of administration of Romani taxation and law enforcement especially between the 15<sup>th</sup> and the 16<sup>th</sup> century in Central Eastern Europe where some institutional devices were created to “unite” all Romani communities living within a certain territorial area. These forms of administrative organization preserved the internal political organization of Romani communities but, at the same time, subject these Romani communities to local noblemen. Among the various forms of administrative organizations that developed in Central Eastern Europe, it is worth recalling the authority of *bulibasha*, the office of the King of Gypsies, and the “experiment” of the Gypsy State in Bessarabia.

During the 18<sup>th</sup> century, in Wallachia and Moldova, governmental authorities united in districts all Romani communities living within their jurisdiction on the basis of their profession, under the coordination and supervision of the *bulibasha*: a Romani overseer who was in charge of controlling local Romani chieftains. It seems that *bulibasha* were firstly elected by Romani communities and after election, they were “accredited” before non-Romani authorities: their political authority and their social legitimacy was recognized by both sides. Accordingly, *bulibasha* were entrusted with a high degree of political and judicial power (in cases controversies arose) before Romani as well as before non-Romani authorities.

The office of the King of Gypsies was instead established in the mid of the 16<sup>th</sup> century in Poland with the mandate to prevent lawlessness and criminality of Roma and, at the same time, force them to pay taxes. However, historical sources are still unable to provide accurate information on the jurisdiction of this office. Indeed, it still unclear whether the first “Gypsy

Kings” were elected within Romani communities or within non-Roma society and whether only one person or a multiplicity of people were entrusted with full powers in the administration of this office.<sup>1019</sup> Moreover, it is still unclear whether the institute of the “Gypsy King” ensued from a previous Romani custom “legalized” by non-Roma, or whether it was instead an externally imposed institution. What is certain, is that after the first (supposedly) “genuine” Gypsy Kings, the office was subsequently managed by the Polish gentry.

Between 18<sup>th</sup> and 19<sup>th</sup> centuries, Romani communities living in the territories of Ukraine and Bessarabia were increasingly provided with a high degree of autonomy which in some cases included also the right to administer justice. In Bessarabia, a unique “experiment” of Romani autonomy took place, whereby the national authorities provided Romani communities with a territorial area with separate offices in order to run their own government. These offices comprised the office for registration of births, deaths and marriages, passports, taxes and a court to settle minor disputes. This experiment lasted less than twenty years and, according to some authors, it was done with the purpose to employ Roma in agriculture in order to sedentarize them.

### **9.1.2. The development of a Romani representation at the national level: second wave of Romani leaders**

While until the end of the 18<sup>th</sup> century, the participation of Roma in the public sphere mostly derived from an “imposition” of non-Romani authorities (also in the most promotional cases of Central-Eastern Europe), since the beginning of the 19<sup>th</sup> century some modern and autonomous forms of Romani representation started to develop. The first examples of this independent Romani leadership can be found in the Ottoman Empire where Romani

---

<sup>1019</sup> Klímová-Alexander reports some sources which attribute the co-existence of different “Gypsy Kings” at the same time in the same region, each one was likely to be entrusted with the administration of different communities by profession. See Klímová-Alexander, "Development and Institutionalisation of Romani Representation and Administration. Part 1."

communities living in urban areas started to create separate organizations to promote their professional interests. These organizations were in fact organized by profession (through a sort of corporations) and in this context, single individuals started to assume prominent activist roles to promote the interests of their communities.

At the end of the 19<sup>th</sup> century, the *London Times* recorded some attempts of institutionalization of Romani communities which took the form of a regularly meeting permanent body in Central Eastern Europe and of a Gypsy Parliament in Germany. Some Romani scholars raise some doubts especially in relation to the real existence of a German Gypsy Parliament, whereas some Romani activists have envisaged in the creation of that (supposedly first and trans-national) participatory Romani mechanism the roots of the Romani pan-European movement.

The first unquestionable Romani attempt of political organization at the national level took place in Bulgaria in 1901 and in 1905 where a national Romani Congress was organized to protest against the issuing of the electoral law denying electoral rights to Roma. At international level, the first real attempt of Romani political organization took instead place in Bucharest in 1933 with the creation of the international pan-Romani Congress: an independent permanent institutional body. Delegates from nine European countries participated to this Congress to discuss the problems faced by Romani population in Europe in order to find out a strategy of survival.

In the interwar period, a number of independent Romani organizations were created in Serbia, Romania, Poland and Greece. In Serbia, the “Bibi society” represented the first modern self-sufficient Romani organization with a religious vocation. This organization hold land and property with a chapel and a monument dedicated to Romani victims and heroes of the First World War. In Romania, the Society of the New Peasant Brotherhood was an organization founded by a wealthy Romani peasant to improve the life conditions of Roma in the lack of



the governmental aid. In Poland, some of the offices of the Gypsy Kings established independent Romani bodies such as the Gypsy Tribunal of Michal II. On the Western European side, only Greece created an independent Romani organization: the Panhellenic Cultural Association of Greek Gypsies which, interesting enough, was funded by two Romani women.

Some other attempts of creation of Romani organizations can be envisaged under the patronage of non-Roma authorities, always in the interwar period. In the cases of Bulgaria and especially in the case of Russia, the Communist Party supported for instance some forms of cultural expression for Roma (especially in the field of publication) together with some initiatives of Romani foodstuff cooperatives and civil rights organizations particularly with regard to the Egypt/Istikbal community. In Romania, a number of Romani organizations cooperated with the Orthodox Church.

In Slovakia and Ruthenia, Romani organizations operated within the framework of national cultural societies and they promoted in particular theatre, dance and music activities. In Serbia, the creation of the newspaper “*Romani Lil*” represented a hybrid case of Romani/non-Romani organization. Indeed, while this publication was initiated by a Serbian non-Romani intellectual it was subsequently received and enthusiastically supported by Romani intellectuals thus holding a greater Romani autonomy.

### **9.1.3. Modern forms of Romani representation: the third wave of leaders**

At the end of the Second World War, the participation of Roma in the public sphere evolved into a new wave of leadership. This new phenomenon involved especially Central Eastern European countries, since in the majority of Western States Romani communities were generally living nomadically (with the Spain exception) and were characterized by a low level of education which made them unable to entertain complex relationships with mainstream

societies.<sup>1020</sup> In Central Eastern Europe instead, Romani communities were mostly living sedentarized and since they were also participating to the majority institutions of higher learning they were able to negotiate with national authorities through an excellent command of the national language and through manners acceptable by majority institutions. Accordingly, these modern Romani leaders were increasingly accepted as representatives of Roma by public authorities.

Nonetheless, these modern leaders gradually started to be more alienated by traditional communities since they were perceived as governmental collaborators. This separation (and conflict) between modern and traditional leaders weaken the incisiveness of the claims presented by the Romani community as a whole. With the rise of Communism in Eastern Europe, traditional Romani leaders progressively lose their overall political authority as their communities were destroyed either through incentives for corruption or through coercion.

It is interesting to highlight that the modern form of Romani leadership did not develop in direct continuity with pre-WWII national organizations,<sup>1021</sup> as during and immediately after the Romani *Porrajmos*, Romani communities escaping extermination were afraid to continue to declare themselves as Roma. In the post WWII period, the first Romani organizations started to develop in the European territory where Romani representation traditionally was more active: Central Eastern European countries. Particularly in some of these countries, Communist policies did not immediately develop in an assimilationist perspective which emphasized the equality principle, but they left some space to the promotion of different cultural identity of social groups historically living within their borders.

---

<sup>1020</sup> Some examples of modern Romani leadership have been registered in Western Europe. Nonetheless, in the lack of an organizational basis they are not comparable with the Central Eastern European experience.

<sup>1021</sup> The only example that survived in the post WWII period was the Panhellenic Cultural Association of Greek Gypsies.

These were especially the cases of Macedonia and Bulgaria. In Macedonia in fact, the emphasis on the harmonic equilibrium of a multicultural State was deemed to be one of the major goals of the national Communist policy. In this framework, Romani communities were guaranteed a high degree of autonomy and consistent support to their cultural as well as to their political activities. In Bulgaria instead, before new assimilationist policies started in the 1960s, Roma were very favourably threatened as they were perceived as an ethnic community with equal rights and their own identity.

At the end of the 50s in both cases, more assimilationist policies started to be embraced and the general attitude towards Roma changed. In Yugoslavia, the new national policies increasingly promoted the “flattening” of the ethnic differences existing among the various groups, in order to emphasize the common “Yugoslavness” as a national unifying factor. In Bulgaria, Romani leaders were progressively excluded from public life and Romani organizations were required to merge with Bulgarian organizations or to close down.

In the cases of Poland and Hungary, although Romani communities were not provided with the same high degree of autonomy as in the cases of Macedonia and Bulgaria, they were nonetheless allowed to maintain a certain degree of autonomy. In Poland, Romani activism was carefully monitored by the Ministry of Internal Affairs, but it was nonetheless guaranteed the freedom to create cultural organizations and folk assemblies. Romani organizations were officially registered, State-financed and supported. In Hungary, the Ministry of Culture allowed the establishment of the Cultural Alliance of the Hungarian Gypsies in 1957. This organization was partly a state organization and partly a mass Romani organization for the resolution of their problems. Yet, the increasing distrust against Roma made the Alliance close already in 1961 to avoid their further institutional mobilization.

In other Central Eastern European countries where Communist assimilationist policies started to develop immediately after WWII, Romani organizations were quickly banned (as in the

case of Romania and in Czechoslovakia) or deprive of any effective representative power (as in the case of Russia). It is interesting to note that in the case of Czechoslovakia, Romani intellectuals were promoting the idea of establishing Romani self-governments in some villages or regions but assimilationist policies trumped over any good intention.

In Western Europe some examples of Romani activism only involved Germany, Spain, Finland and to some extent Great Britain and Switzerland as well. In Germany, Romani survivors organized in associations especially with the aim of challenging the administrative decisions to see recognized the Nazi persecutions against German Roma and Sinti. Although these organizations were created according to modern criteria, they were generally based on traditional Romani structures of power which promoted the interests of the clan before than the interest of the Romani community as a whole.

In Spain, the Secretariado Gitano, established in Barcelona at the end of the 1960s, was the first Western Romani Committee run by Roma themselves. In cooperation with the Catholic organization *Caritas*, the Secretariado Gitano created secretariats in almost all Spanish towns. In the same period, the Finnish Romani Society was created with the aim of acting as a special interest group to lobby Romani interests before national authorities. In Great Britain and Switzerland Romani activism was mostly promoted by non-Romani individuals or associations, and especially in the Swiss case, it did not turn to genuinely promote Romani rights and interests.<sup>1022</sup>

---

<sup>1022</sup> In Great Britain, few Romani activists started to mobilized at the beginning of the 1940s through the efforts of a non-Romani Parliamentary representatives. This mobilization mostly aimed at initiating parliamentary inquiries on the living conditions of Roma, particularly in the field of housing. Notwithstanding the activity of national lobbying which continue to develop during the 1960s as well, this (partial) Romani activism produced only some limited benefits at the local level but any at the significant effects at the national one which could translate into national policy planning. Indeed as seen in the jurisprudence of the ECtHR, Roma and Travellers continue to face evictions in United Kingdom. In Switzerland the organization “Pro Tzigania Svizzera” was found in 1959 through the financial support of cantonal and national grants. This organization was forcibly taking children from Romani families. This practice was abolished only at the beginning of 1970s.

#### **9.1.4. Seeds of transnational Romani participation**

After the last international pan-Romani Congress held in Bucharest in 1933, the participation of Roma at the international level started to reorganize only at the beginning of the 1960s when Ionel Rotaru a Romani intellectual was nominated the “Supreme Chief of Romani people” under the name of “Vaida Voivod III” in an open-air ceremony at Enghien-les-Bains in France in 1959. Soon after, Rotaru founded the National Gypsy Organization and the World Gypsy Community. In particular, the World Gypsy Community aimed at becoming an international umbrella for Romani organizations worldwide. This organization, however, could not count on a solid international basis since it was able to gather only three national bodies plus some single Romani activists acting on an individual basis.

Rotaru’s dream was that of creating a *Romanestan*: a Romani State following the example of Israel. According to the patriotic dream of Rotaru, the Romanestan should have taken place in Somalia in order to reconnect to the first Romani communities settled in that country after having passed by Mesopotamia. Besides the international movement, Rotaru was also interested in promoting Romani cultural identity at the national level. Through the creation of the National Gypsy Organization, Rotaru worked extensively for the enhancement of schooling and for the development of vocational training of Romani communities living in France.

At the end of the 60s, a dissident group led by Vanko Rouda, a Romani activist helping Rotaru in funding both the National Gypsy Organization and the World Gypsy Community, separated from Rotaru’s organizations and created the International Gypsy Committee which became the International Romani Committee (IRC), after the First World Romani Congress of 1971. This organization decided to leave the “*Romanestan* project” aside, in order to deal with more contingent issues affecting Romani daily-life. In particular, Vanko aimed at obtaining

war reparations for Roma and at creating a platform where all Romani European organizations could find coordination and support for their activities.

At the international level, the IRC became the first international Romani organization which started to cooperate with the UNESCO, the CoE and the Vatican's Pontifical Commission for Justice and Peace. At the national level, the IRC counted on the support of Romani organizations coming from at least ten countries, most of which were Central and Eastern European.<sup>1023</sup> Although the participation of Roma was historically more developed in Eastern Europe, at that time, Romani organizations created within the framework of the Eastern Bloc were not as much independent as Romani organizations created within the Western Bloc.

Indeed, Eastern European Romani organizations were not provided – even in the most promotional cases –<sup>1024</sup> with substantial political powers or with financial resources that allow them to carry out an independent and incisive political activity. In Western Europe instead, all Romani organizations virtually functioned independently from non-Romani structures since the end of the Second World War.

### **9.1.5. Political rights of Roma in a transnational perspective**

This socio-political excursus has shown that national and transnational perspectives as well as participation and representation dimensions are inextricably linked in the analysis of Roma political rights. Although Romani communities still suffer from a vicious cycle of political under-representation all along Europe,<sup>1025</sup> an increasing awareness of their transnational identity, rights and claims has started to arise especially in the last decades. Even if this process of “transnational consciousness” has started from and developed within Romani

---

<sup>1023</sup> Among Western countries, the IRC was supported especially by Romani organizations of United Kingdom and Ireland.

<sup>1024</sup> These were the cases of Yugoslavia and Czechoslovakia where there were the most active Romani organizations of the Eastern Bloc. The Yugoslav organizations were mostly co-operative while the Czech and Slovak were nationally controlled, even though sometimes they managed to carry out some independent activities.

<sup>1025</sup> A. McGarry, *Who Speaks for Roma?* (New York/London Continuum 2010), 33.

communities, it has progressively involved the non-Roma society as well. Accordingly, nowadays Roma political rights and interests are promoted not only by Romani organizations themselves but, as seen, also by non-Romani organizations speaking on their behalf.

#### **9.1.6. A transnational Romani movement**

After the first transnational Romani attempts flooded into the First World Romani Congress in 1971, by the time of the Second World Romani Congress the transnational Romani activism structured into the first durable global Romani organization: the International Romani Union (the IRU) which was founded in 1976. The IRU was created as the alleged successor of the IRC, the executive body of the International Romani Congresses. It is structured as a the main Romani umbrella organization<sup>1026</sup> and each of its Congresses have been characterized by an increasing attempt towards professionalization and towards the elaboration of more democratic procedures. During the fifth World Romani Congress of 2000, the IRU tried to structured itself into a semi-governmental body with its own parliament, commissars, responsible for various issues, a court of justice, etc.<sup>1027</sup>

While at the beginning, the action of the IRU mostly took over the legacy of the IRC and continued to pursue the question of collective reparations for war crimes, gradually the IRU started to lobby and to negotiate also on in other fields on the basis of the demands arising from the Romani community. These requests emerged in particular during the World Congresses and mostly amounted to language standardization, protection of culture and promotion social affairs. Among these areas, especially the standardization of Romanes has been achieved through the support of the CoE. In 1978, the IRU submitted the application for

---

<sup>1026</sup> Nowadays, the IRU claims to have thirty-three members and nineteen candidate countries. However, no country is truly IRU member: rather local and/or nation-wide Romani organizations and individuals are. IRU is the main organization promoting the concept of the Romani nation and its symbols, used as tools for unification and political mobilization, are the umbrella term “Roma”, the Romani flag, the slogan *Opre Roma!* (Roma Arise!), the anthem (*Djelem djelem*) and the national day (8<sup>th</sup> April) which were all adopted at the first congress (1971). I. Klímová-Alexander, *The Romani Voice in World Politics: The United Nations and Non-State Actors* (Aldershot: Ashgate, 2005), 18.

<sup>1027</sup> *Ibid.*, 17.

consultative status at the ECOSOC. In 1979, the IRU was firstly recognized with the roster status<sup>1028</sup> and only in 1993 it was upgraded to special consultative status at the ECOSOC.<sup>1029</sup>

Besides the IRU, which nonetheless remains the most important international Romani organization promoting the interests of Roma at the transnational level, the transnational activity of Romani activism has further developed after the collapse of the Soviet Bloc. In particular after the migrations of Roma to Western countries which reinvigorated Romani relations among the two European sides, leading to the creation of new organizations such as the Trans-European Roma Federation (TERF) and the Roma National Congress (RNC). The TERF is an organization that unites UK-based organizations, self-appointed Romani leaders and Romani asylum-seekers from Czech Republic, Romania, Bulgaria and Poland.<sup>1030</sup> The RNC is based in Hamburg and was created to promote Romani identity firstly at the German level and subsequently at the international one. The activity of the RNC somehow echoes that of the IRU in that it calls for Roma to be recognized as a “nation”. As McGarry explains,

The cornerstone of the RNC ideology is that Roma should not be treated as a “social problem” by states and international organizations which can be remedied through education, rather it maintains that addressing anti-Gypsism is the most important factor in improving the situation of Roma.<sup>1031</sup>

In the last years, the transnational activity of Romani organizations together with some national cases of ethnic mobilization have given rise, to what has been defined the Romani Movement.<sup>1032</sup> This social movement has been created around the idea of “Romani identity”. This notion of “Romani identity” has been considered among the most important factors for

---

<sup>1028</sup> Roster status is reserved for NGOs that occasionally make useful contributions to the ECOSOC’s work (see UN Doc.E/RES/1296 (XLIV): § 16 and 19; UN Doc. E/RES/1996/31: § 22-24).

<sup>1029</sup> This status has allowed IRU to participate to ECOSOC meetings and ECOSOC-related bodies meetings (commissions, sub-commissions and working groups); to deliver written and oral interventions during these meetings and to designate permanent representatives to the UN headquarters in New York, Geneva and Vienna. Furthermore, the IRU is entitled to provide technical aid to the Special Rapporteurs of the Commission and Subcommission and to propose agenda items for the ECOSOC and subsidiary bodies.

<sup>1030</sup> Klímová-Alexander, *The Romani Voice in World Politics: The United Nations and Non-State Actors*, 16.

<sup>1031</sup> McGarry, *Who Speaks for Roma?* , 144.

<sup>1032</sup> P. Vermeersch, *The Romani Movement. Minority Politics and Ethnic Mobilization in the Contemporary Central Europe* (New York/Oxford Bergham Books, 2006).



ethnic mobilization and interest articulation. By and large, Romani social movement does not demand a territory or a State. While the idea of “*Romanestan*” still remains at the foundation of the initiative of many Romani political activists, this idea is just utopian since Roma have never made irredentist claims or demanded any form of autonomy as a non-territorial minority.<sup>1033</sup>

## **9.2. European transnational representation of Roma rights**

The increasing claims for a trans-national recognition of Roma have started to produce, especially at European level, some institutional outcomes only in the last decade when Roma have been recognized as a “pan-European minority” in each of the three European geo-legal spheres. Once this recognition has been provided, European institutional programs seem to more consistently address Romani needs and rights – especially at the EU level – from a holistic perspective thus emphasizing once again “a trans-national dimension” of Roma belonging as well as a “trans-national opening” towards Romani social inclusion.

### **9.2.1. Institutional recognition of Roma as a pan-European minority**

In 2005, the European Parliament Resolution on the situation of Roma in the European Union, while condemning the widespread phenomenon of “Anti-Gypsies” attacks, defined Roma as a “pan-European community” requiring “a comprehensive approach” at the European level to efficiently combat discrimination against this social group.<sup>1034</sup> In 2007, the same definition of Roma as a “pan-European minority” was progressively embraced also in the geo-legal spheres of the CoE and the OSCE.

More specifically, in the “Statement on Roma and Sinti” presented at the Working Sessions 6 and 7 of the Annual Human Dimension Implementation Meeting of the OSCE-ODIHR held

---

<sup>1033</sup> McGarry, *Who Speaks for Roma?*, 141.

<sup>1034</sup> European Parliament Resolution on the situation of Roma in the European Union, 28<sup>th</sup> April 2005, P6\_TA(2005)015, point 27.

in Warsaw in September 2007, the European Roma and Traveller Forum (ERTF),<sup>1035</sup> created under the framework of the CoE as “the first democratically elected pan-European body representing “the voice of Roma in 46 countries”<sup>1036</sup> openly referred to Roma as a “pan-European minority” by emphasizing that Roma are “the most disadvantaged ethnic minority group in Europe, suffering of human rights violations and being a particular target of racism throughout Europe”.<sup>1037</sup>

This holistic definition of Roma which opens to a “European trans-national recognition” has only appeared – for the time being – in the above-mentioned *soft-law* documents, without being further legally developed, for instance in terms of rights recognition. Nonetheless, this official recognition of Roma as “pan-European minority” has strongly contributed to pave the way for a more systemic consideration on the life conditions of Roma as a historical social group living disperse in the whole European territory. In particular, targeted programs on the social inclusion of Roma have started to develop both on non-governmental and governmental levels, involving both Romani leaders themselves and non-Romani individuals and organizations claiming to speak on behalf of Roma.

### **9.2.2. European trans-national programs**

At the non-governmental level, some international non-Romani organizations have increasingly started to lobby European institutions and national governments to advocate for the effective implementation of human and minority rights for Roma at all legal levels. The activity of these organizations does not overlap but complements that of international Romani organizations. The major non-Romani organizations promoting the trans-national representation of Roma at the non-governmental level in the European public sphere are: the

---

<sup>1035</sup> The following section describes more in detail the activity of the ERTF.

<sup>1036</sup> European Roma and Travellers Forum (ERTF), Statement on Roma and Sinti at the Working Sessions 6 and 7 of the Annual Human Dimension Implementation Meeting of the OSCE - ODIHR, Warsaw, 27<sup>th</sup> September 2007, HDIM.IO/205/07.

<sup>1037</sup> Ibid.

Open Society Institute through the Roma Participation Program (OSI-RPP), the European Roma Rights Centre (ERRC) and the European Roma Information Office (ERIO).

The Open Society Institute is the biggest non-Romani transnational organization which provides, especially through the Roma Participation Programme (OSI-RPP), training and internship opportunities to promote civic advocacy for young Romani activists. The OSI supports projects defined by Romani leaders and provides funding to national and local Romani NGOs. The European Roma Rights Centre (ERRC) instead works for guaranteeing the effective implementation of the human and minority rights for Roma. More specifically, the ERRC produces documentation and reports on the cases of systematic abuses of Roma rights. In parallel, this organization sends letters of protest to governments where these abuses occur. The ERRC provides also legal support to promote “strategic litigations” before the ESC and before the ECtHR as a tool to focus public attention on social and legal realms where legislators are still unable (or unwilling) to effectively intervene.<sup>1038</sup>

The European Roma Information Office (ERIO) is an international advocacy network which cooperates with a large number of organizations and acts to combat anti-discrimination in the fields of education, employment, health care and housing. ERIO does not claim to represent the Romani community but to advocate on its behalf.<sup>1039</sup> It promotes participation of Roma at various institutional levels by directly targeting EU institutions and – by extension – EU Member States.

At governmental level instead, the trans-national representation of Roma is more chiefly promoted by the ERTF: an international forum where Romani people directly participate at European level – for the first time in history – to decision-making processes affecting them. The ERTF derives from an informal exploratory group created at non-governmental level by

---

<sup>1038</sup> Section 5.2.1. and section 6.3.2.1. have discussed more in detail the litigation on Roma rights promoted by the ERRC especially before the ECtHR and the ESC.

<sup>1039</sup> McGarry, *Who Speaks for Roma?*, 152.

Romani leaders and personalities. It currently brings together more than 20 ethnic Romani groups. In 2004, the Forum started privileging relations with the CoE through a Partnership Agreement. By virtue of this agreement, the Forum receives assistance in terms of financial and human resources and has a privileged access to the various bodies and organs of the Council of Europe which deal with matters concerning Roma.

In February 2005, the Forum opened its Secretariat in Strasbourg within the CoE's premises. Among the principal objectives of the ERTF it is worth recalling: the establishment of fair and democratic representation of Roma in Europe; the achievement of a fair and equal participation of Roma at all levels of policy-making at national and international levels; the achievement of official recognition of Roma as European people and of *Romanes* as a European language.<sup>1040</sup>

Other governmental programs addressing Roma from a trans-national perspective have been developed at EU level, mostly since 2008, when the Commission established the "Roma Action Group" within the DG Employment, Social Affairs and Inclusion. The "Roma Action Group" was created with the mandate of bringing together mostly the European desks responsible for the implementation of the European Social Fund in order to more efficiently coordinating employment, equal opportunities and social inclusion for Roma.<sup>1041</sup> In 2008, the EURoma learning network, gathering 12 Member-States was fund to promote the use of structural funds with the goal of enhancing the effectiveness of policies targeting Roma and promoting their social inclusion.<sup>1042</sup>

---

<sup>1040</sup> More information are available at <http://www.ertf.org/>

<sup>1041</sup> See Political Groups which tabled the resolution pursuant to Rule 108(5) of the European Parliament's Rules of procedure: PPE-DE, PSE, ALDE, Verts/ALE, GUE/NGL B6-0050/2008 / P6\_TA-PROV(2008)0035. See §8-10.

<sup>1042</sup> The Member States involved in the EURoma Network include: Bulgaria, the Czech Republic, Finland, Greece, Italy, Hungary, Poland, Portugal, Romania, Spain, Slovakia and Sweden. For further information on the activities promoted by the EURoma Network, see <http://www.euromanet.eu/about/index.html> (last accessed on 4th December 2012).

Always in 2008, during the first European Roma Summit, EU Member States created the “European Roma Platform” whereby Member States, Romani civil society, policy-makers from EU institution and independent experts exchange good practice and experience in the sphere of Roma’s social inclusion.<sup>1043</sup> In 2011, the European Commission promoted a Framework for National Roma Integration Strategies up to 2020 which set the basis for the adoption of National Roma Strategies up to 2020.<sup>1044</sup> As seen, these strategies focus on Member States’ primary responsibility to ensure the effective enjoyment of the economic and social rights for Roma particularly in the areas of education, employment, health and housing.

### 9.3. Critical remarks

This chapter has provided a short insight – mostly from a socio-political dimension – in the evolution of Romani trans-national representation in Europe. The purpose has been that of providing a *complementary perspective* to the legal comparative analysis developed by this research in general and, by chapter 7 on political rights, in particular. Indeed, the issue of Roma’s representation in Europe cannot be reduced to a mere legal analysis as intrinsic multi-dimensionality also involves a multiplicity of actors who, as seen, are often but not necessarily always, Roma. The multiplicity of Romani and non-Roma actors strongly questions not only the protection and the promotion of Romani cultural identity, but also the idea of *Romani identity* per se. Especially in the last years, the discourse on Romani identity has progressively encompassed a trans-national level as well, thus considering Roma as a

---

<sup>1043</sup> From 2008 six regular meetings have been organized under the framework of the “Roma Platform” 16862/08 (Presse 359), Press Release, 2914th Council meeting General Affairs and External Relations, Brussels, 8 December 2008, point 14 available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/gena/104617.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/104617.pdf) (last accessed on November, 29<sup>th</sup> 2012). For further information on the Roma Platform see [http://ec.europa.eu/justice/discrimination/roma/roma-platform/index\\_en.htm](http://ec.europa.eu/justice/discrimination/roma/roma-platform/index_en.htm) (last accessed on 4th December 2012).

<sup>1044</sup> Section 5.6. has more deeply discussed both the adoption of the European Framework and National Roma Strategies.

“national minority” (in the respective State) and as a “trans-national people” (throughout Europe) at the same time.<sup>1045</sup>

In particular, the claims for such a twofold recognition have been advanced mostly by individuals and by organizations from Central-Eastern Europe, both of Romani and of non-Romani origin. In Central Eastern Europe Romani presence is numerically much more conspicuous than in Western Europe. In addition, the different processes of socio-historical “sedimentation” underlying the creation of different institutional structures for Roma’s political representation and thus for Roma’s overall stronger participation to the public sphere matter for the difference.

The analysis developed in this chapter has in fact highlighted how the first settlements of Roma in Europe have contributed to set the social basis for the development of different “political infrastructures” for Roma’s political representation at various institutional levels. More specifically, in Central Eastern Europe, where Romani communities generally settled on a more sedentary stance, the institutional structures for the political representation of Roma developed more extensively than in Western Europe where Romani communities were generally (and partially still are) following a nomadic life-style.

Indeed in Central Eastern Europe, as the creation of the political institutions of *bulibasha* (Walachia and Moldova), the King of the Gypsies (Poland) and the Gypsy State (Bessarabia) have by and large shown, Romani communities were usually integrated to the socio-political structures of the mainstream society on a more permanent stance. On these “first institutional foundations” of 15<sup>th</sup> – 18<sup>th</sup> centuries for favoring the representation of Roma in the public sphere, developed between the 19<sup>th</sup> and the 20<sup>th</sup> centuries more organized political structures progressively developed (especially within the Ottoman Empire and the Balkan area) until

---

<sup>1045</sup> M. Cermel, "Rom E Sinti: Cittadini Senza Patria O Popolo Europeo Transnazionale? ," in *La condizione giuridica di Rom e Sinti in Italia*, ed. P. Bonetti, A. Simoni, and T. Vitale (Milano : Giuffr  Editore 2011).

the Soviet assimilationist policies trumped over any claim for recognition of a “different” social belonging and thus of a different cultural identity other than the Communist “egalitarian” one.

While in Western Europe the political representation of Roma in the public sphere remained *by and large* very limited, in Eastern Europe, the “political consciousness of Roma” did not completely disappear during the Soviet Regime. Indeed, in the years anticipating the fall of the Soviet Bloc, Romani communities continued to participate in the public sphere at the domestic as well as at trans-national levels, as seen especially in the cases of the National Gypsy Organization and of the International Romani Committee.

After the fall of the Soviet Bloc, the socio-historical divide characterizing the development of institutional structures for the political representation of Roma within the two European spheres continued to persist even some years after the fall of the Berlin wall. During the 1990s, Romani participation in Europe started to develop through national and international advocacy networks, especially in the Central Eastern European area (with the exception of the *Secretariado Gitano* in Spain) where a “political consciousness” for Roma’s representation was more consolidated.

Moreover, in Central Eastern Europe, the Copenhagen criteria of 1993 further pushed for the creation of institutional structures of political representation of Roma in Central-Eastern Europe as they advocated for a more inclusive development of minority rights standards. Accordingly, together with institutional Romani consultative bodies, the participation of Roma within Eastern European countries has started to develop through a number of non-governmental organizations as well.

Nonetheless, it has been noted that while the conditionality of the Copenhagen criteria for EU accession have put a strong external pressure on Central-Eastern European governments to

adopt programs and reforms, the implementation and effectiveness of such programs has seriously lagged behind.<sup>1046</sup> At the same time, both at the governmental and non-governmental levels, issues of accountability arise both in organizations created *by* Roma and in organizations created *for* Roma. Indeed, these organizations do not generally represent the Roma constituency “per se” but often the interests of an *élite* which are shifting and multiple.<sup>1047</sup>

These issues of effective participation, transparent accountability and democratic representation highlighted above, do not only involve Central Eastern European institutions and organizations at the national level but also at the trans-national one. Indeed, individuals and organizations represented by and working for Roma rights at the European level mostly originate from the Central Eastern European area where Romani political representation has traditionally been more significant than in the Western European area, for the socio-historical reasons discussed in the whole chapter. Thus, the tendency of framing the European Roma discourse around the new category of “trans-national people” offers potential for future development of Roma rights as a non-territorial and diffuse minority. However, it also entails some inherent pitfalls which can lead to the opposite tendency of promoting “Roma exclusion” rather than “Roma inclusion”.

According to Kovats, framing Roma as a non-territorial European minority with a common culture risks to represent Roma as a separate nation without a State, totally immune from the processes of nationalization developing in Europe.<sup>1048</sup> On the one hand, this approach

---

<sup>1046</sup> P. Vermeersch, "Reframing the Roma: EU Initiatives and the Politics of Reinterpretation," *Journal of Migration Studies* 38, no. 8 (2012): 1199.

<sup>1047</sup> McGarry, *Who Speaks for Roma?*, 107.

<sup>1048</sup> M. Kovats, "The Politics of Roma Identity: Between Nationalism and Destitution " (www.opendemocracy.net: Open Democracy 2003).



unintentionally supports the nationalisms that have expelled Roma out of the other national communities in Europe.<sup>1049</sup> And on the other, in the words of Kovats, this approach

further undermine[s] the development of a democratic, grassroots Roma politics by forcing activists to direct their activities toward Europe and other Roma, rather than on the far more difficult task of establishing more effective relationships within national and local authorities, as well as reliable support from fellow citizens on the basis of common interests.<sup>1050</sup>

However, the Commission seems to be aware of this potential risk of “Europeanization” of both Romani “identity” and Romani “policies” .<sup>1051</sup> Notwithstanding this risk, the recognition of a Romani trans-national identity has already occurred not only in soft-law documents but also in specific programs of action. Thus, the concluding chapter considers, besides the pitfalls also the potentialities inherent to this approach.

---

<sup>1049</sup> See the comment of Vermeersch to the article of Kovats in Vermeersch, "Reframing the Roma: EU Initiatives and the Politics of Reinterpretation," 1204.

<sup>1050</sup> Kovats, "The Politics of Roma Identity: Between Nationalism and Destitution ", 5.

<sup>1051</sup> Vermeersch, "Reframing the Roma: Eu Initiatives and the Politics of Reinterpretation," 1204.



## Conclusions

### Towards trans-national recognition and a Roma Framework Convention?

This research has examined, mostly from a comparative legal perspective, the legal status of Roma in Europe at international, European and domestic levels. Roma are the largest non-territorial minority living in Europe whose presence dates more than ten centuries and it is currently estimated around 10 to 12 million people. For the most part, Roma are citizens of the EU and of the CoE Member States. Notwithstanding the social differences characterizing the various Romani communities living within Europe, there still persists a strong *fil rouge* which “trans-nationally” links all individuals of Romani ethnicity in a “polythetic” perspective.<sup>1052</sup>

This *fil rouge* has shown to be mostly represented by a culture, language and, even more important, by common traditions. Moreover, although the social situation and the living conditions of Roma vary from one country to another (some of them are still following a nomadic lifestyle whereas a consistent percentage of them has been settling on a more sedentary stance) they are, by and large, still highly discriminated and strongly marginalized.

The status of Roma in Europe is thus generally precarious not only from a social perspective but also from a legal one. In fact, as Bonetti has emphasized, particularly in the case of Roma the two dimensions appear mutually interdependent since the legal status attributed to any social group does not only influence the legal recognition of its rights, but it also (and inevitably) determines the daily coexistence with other social groups.<sup>1053</sup>

---

<sup>1052</sup> As seen in Chapter 1, in anthropological terminology the “polythetic” category describes a social group that cannot be defined on the basis of every single character but through a combination of characters. See footnote 40.

<sup>1053</sup> P. Bonetti, “I nodi giuridici della condizione di Rom e Sinti in Italia,” in *La condizione giuridica di Rom e Sinti in Italia*, ed. P. Bonetti, A. Simoni, and T. Vitale (Milano: Giuffr  Editore, 2011), 20.

However, as it is well known, at the level of international law a binding definition of “minority” in general and of “non-territorial minority” in particular, is still missing. In addition, the current legal framework for minority rights strongly hinges on a territorial dimension which ensues from the Westphalian conception of State and Nation.

In the framework of international and European legal standards for minorities, two macro-categories of minority rights have been identified in doctrine: the so-called “historical, traditional, autochthonous minorities” and the “new minority groups stemming from migration”. These categories define the concept of “minority” in response to State’s sovereignty over one territory and one people. The first category refers to – usually territorially concentrated – communities that became minorities as a consequence of the process of re-drawing of international borders which included and/or excluded part of the population during the processes of (Nation-)State-building. By contrast, the second category, “new” minorities, refers to groups and individuals that left their original homeland to emigrate to another country. In terms of rights recognition, “old” minorities are usually recognized religious, linguistic and cultural rights. “New” minorities are instead usually recognized economic and social rights and some sets of rights related to their representation in public life (cultural and political rights). Given their historical and non-territorial features, Roma fall in between these two legal categorizations,<sup>1054</sup> thus in any case they can – at least *de jure* – comprehensively benefit from a wide-ranging spectrum of minority rights.

---

<sup>1054</sup> Roma can in fact be considered as belonging to the first doctrinal categorization of minority groups given their historical tie within the European territory. At the same time, when considering their diffuse presence and their traditional nomadic life-style, Roma can be considered as belonging to the second doctrinal categorization. Hence, on the one hand their cultural identity can be protected and promoted by minority rights traditionally devised for “old minorities” (mostly linguistic rights and cultural rights), whereas on the other hand their cultural identity can be protected and promoted by minority rights generally devised for “new minorities” (mostly socio-economic rights and representation in the public sphere).

## The legal status of Roma in Europe

At domestic level, the analysis has shown that CoE Member States have not always legally recognized Roma.<sup>1055</sup> Those legal systems legally recognizing Roma have identified their non-territorial feature of Roma, mostly in the frame of their domestic conception of State and Nation. As a result, the legal status in Europe has been identified by each State through different legal definitions and at different legal levels. Among the 47 CoE Member States, only 30 legal systems currently provide a legal definition of Roma.

While only Macedonia, in the light of its intrinsic multi-ethnic nature, recognizes Roma as a “constitutive nationality” of the State, i.e. formally on the same level of other ethnic groups living within its domestic jurisdiction. The vast majority of countries legally recognizing Roma, define them as a “minority” group. More specifically, Roma are recognized as a “national minority” in fifteen States,<sup>1056</sup> as an “ethnic minority” in six States,<sup>1057</sup> as a social group which stands in between “national/ethnic minority” in two States<sup>1058</sup> and as a “linguistic minority” in one State.<sup>1059</sup> Additionally, two States have legally identified Roma through the National Cultural Autonomy (NCA) model<sup>1060</sup> and in three States Roma have been defined by means of other legal definitions.<sup>1061</sup> Finally, in one case the Romani

---

<sup>1055</sup> Among the States that do not legally recognize Roma are seven “micro-States” (Andorra, Iceland, Lichtenstein, Luxembourg, Malta, Monaco and San Marino) with an almost homogenous population. As for the ten remaining countries no legal definition of Roma has been found in: Armenia, Azerbaijan, Belgium, Bulgaria, Cyprus, Denmark, Georgia, Greece, Switzerland and Turkey.

<sup>1056</sup> Croatia, Bosnia-Herzegovina, Serbia, Germany, Austria, Romania, Slovakia, Moldova, Ukraine, Latvia, Lithuania, Finland, Norway, Sweden and partially Greece (recognizing only the Muslim community of Western Trace).

<sup>1057</sup> Poland, Hungary, Montenegro, United Kingdom, Portugal and the Netherlands.

<sup>1058</sup> Czech Republic uses both definitions to distinguish between historic Roma (identified in terms of “national minority”) and “new” immigrant Roma (identified in terms of “ethnic minority”). In Slovenia the definition “Romani community” stands in-between the categories of “national” and “ethnic” minorities.

<sup>1059</sup> Albania.

<sup>1060</sup> Russia and Estonia. The NCA model, as originally devised by Renner and Bauer, aimed at providing a complementary tool to implement cultural autonomy in a non-territorial perspective. In particular, according to this model, the central power of the State is devolved, in relation to specific legal areas, to sub-national entities by means of personal institutional arrangements. In other words, within non-territorial national autonomy arrangements, the recognition of minority rights shifts from the *territory* where the minority group lives to the *person* belonging to the minority group. See section 6.4.

<sup>1061</sup> In France Roma are identified as “*gens de voyage*”, in Spain as “*gitanos*” and in Italian Roma have been defined at the regional level mostly through the categories of “*zingari*” (gypsies) or “*nomadi*” (nomadic).

community of Travellers (and not the entire Romani group) has been defined in terms of “indigenous people”.<sup>1062</sup>

The analysis has shown that the different legal definitions have played a crucial role in “performing” (i.e. in forming *a priori* according to the performative theory of Austin)<sup>1063</sup> the representation of the Romani social group in social as well as in legal systems where the different Romani communities have been living. As previously mentioned, the legal definition determines the different legal recognition of minority rights entitlements. By and large, it can be argued that the most promotional legal categories identifying Roma – besides that of “constitutive nationality” – are those of “national” and “ethnic” minority.

Generally, the legal category of “national minority” refers to kin-State groups while the legal category “ethnic minority” refers to non kin-State groups. However, in the case of Roma, the use of these categories is very much connected to the idea of State and Nation and not (only) to the “socio-legal” characteristics of the group. Indeed, by following the above-mentioned distinction, Roma should *in abstracto* be identified as an “ethnic” rather than as “national” minority precisely in the light of their non-territorial feature as well as in the light of the fact that they do not constitute a (State-building) majority population anywhere. In contrast with any theoretical speculation, “national minority” is the most widespread legal category identifying Roma at the practical level. Such a category is, by and large, the most promotional in identifying Roma rights at the domestic level, since it usually embraces the whole spectrum of minority rights.

This legal category has generally been adopted in those legal systems where Roma are traditionally living on a more sedentary stance namely in those geographical areas that Piassere

---

<sup>1062</sup> Ireland.

<sup>1063</sup> See J.L. Austin, *Philosophical Papers* (London : Oxford University Press, 1970 ).

has identified as the “First Gypsy Europe”<sup>1064</sup> and the “Third Gypsy Europe”.<sup>1065</sup> When the legal category “national minority” has been adopted, it has quite often turned – at least formally – into the legal recognition of each of the four sets of rights (linguistic, cultural, socio-economic and political) identified for protection and promotion of minority rights in general, and of Roma rights in particular.

In other cases, the recognition of Roma rights generally appears less promotional. It comprehends just some sets – and not the whole spectrum – of minority rights. In strictly legal terms, it can be argued that the legal recognition of Roma, and consequently the legal attribution of minority rights, progressively decreases when considering the legal categories of “ethnic minority”, “linguistic minority”, “NCA model” and “other legal definitions”. Such a “decrease” in the promotion of Roma rights refers to the “extension of the minority rights spectrum” covered, not to the “depth” of the promotion of a particular set of rights (linguistic rights, economic and social rights, cultural rights and political rights). Indeed, when considering the single rights dimensions, the analysis has shown that sometimes the “most promotional” legal practices are not always and necessarily attached to the highest promotional legal definition.<sup>1066</sup>

### **The recognition of Roma rights at domestic level**

The comparative legal study on the content of Roma rights has highlighted the legal recognition of four main sets of rights: linguistic rights, economic and social rights, cultural rights and political rights.

---

<sup>1064</sup> According to Piasere, this “Gypsy Europe” covers the area of Central Eastern Europe and particularly the Carpathic-Balkan area.

<sup>1065</sup> This “Gypsy Europe” covers the area of Scandinavia.

<sup>1066</sup> See for instance the cases of Spain and Bulgaria where Roma are not recognized as “minority” but have nonetheless been entitled to political rights. In Spain, Roma have been recognized as “*Gitanos*” and have been recently entitled to specific political rights both at regional and at national level through the establishment of *ad hoc* Romani councils (see section 7.5.4.). In Bulgaria, instead, Roma have not been recognized through any specific legal definition but are nonetheless entitled to multi-level political participation (see section 7.5.5.).

(1) As for linguistic rights, the analysis has shown that although all Roma speaking *Romanes* formally belong to the same linguistic minority, their linguistic rights are very heterogeneously recognized at domestic level as a consequence of the different legal recognition provided by each domestic jurisdiction. As critically discussed, the peculiarity of *Romanes* as a *diaspora* language, fundamentally oral, functionally limited, subordinate, stateless, and used by pluri-language speakers<sup>1067</sup> can be better encompassed by a doctrinal scheme comprehending both private/public dimensions and public/private approaches (the third doctrinal scheme identified by Poggeschi).<sup>1068</sup> On the practical level, this idea has already been implemented (only partially though) by those legal systems recognizing *Romanes* under the scope of the European Charter on Regional and Minority Languages (ECRML).<sup>1069</sup>

In line with Art.9 of the ECRML, some legal systems have recognized for individuals of Romani ethnic origin, the freedom of expression in their own language in the private sphere as well as in the public one, by accessing mass-media under the national regulations in this field.<sup>1070</sup> In some cases, where the percentage of Romani population within a given territorial area allows to do so, the promotion of linguistic rights in the public sphere has also articulated on some general provisions which, for instance, provide (at least *de jure*) for education and, more sporadically, for administrative as well as for judicial services in *Romanes*.<sup>1071</sup>

(2) As for socio-economic rights, the analysis has shown that Romani individuals are still broadly caught in the so-called “socio-economic trap”: their substantial exclusion from

---

<sup>1067</sup> D.W. Halwachs, "Possiamo dire che Roma, Sinti, Calé, ecc. siano un'unica minoranza linguistica?" in *La condizione giuridica di Rom e Sinti in Italia*, ed. P. Bonetti, A. Simoni, and T. Vitale (Milano: Giuffré Editore, 2011), 140.

<sup>1068</sup> G. Poggeschi, "Diritti linguistici dei Rom e dei Sinti " in *La condizione giuridica di Rom e Sinti in Italia*, ed. P. Bonetti, A. Simoni, and T. Vitale (Milano: Giuffré Editore 2011).

<sup>1069</sup> Austria, Bosnia and Herzegovina, Czech Republic, Finland, Germany, Hungary, Montenegro, the Netherlands, Poland, Romania, Serbia, Slovenia, Sweden and Ukraine.

<sup>1070</sup> These are especially the cases of Sweden, Finland, Slovakia, Romania, Austria, Serbia, Bosnia and Herzegovina, Slovenia, Macedonia, Montenegro and Hungary where national legislation recognizes linguistic rights at different extents though.

<sup>1071</sup> These are the cases of Slovakia, Romania and Austria.



education produces a causal chain of social marginalization in the areas of employment, health and housing.<sup>1072</sup> Notwithstanding international legal provisions requiring Member States to adopt “positive measures” to improve the socio-economic inclusion of Roma, even in the most promotional domestic legal guarantees still appear quite weak in terms of substance. Thus, recently the European Commission has called EU Member States to prepare National Roma Strategies to further enforce the effective implementation of economic and social rights for Roma within their domestic jurisdictions.

In the area of education, the Commission has identified – from a political standpoint – among the “best practices” designed at domestic level: the introduction of tailor-made measures and the fostering of the effective enjoyment of education rights for children as well as for adults. In the area of employment, the Commission has highlighted the need of introducing special mentors as “bridge builders” between employers and employees. In the area of healthcare, the Commission has recommended to consider Romani culture and the role of civil society to foster the access to the right to health by Romani population. In the area of housing, the Commission has, *inter alia*, condemned the “systems of camps” and advocated for the eradication of slums and sub-standard housing in order for Roma to fully benefit of the related set of rights in respect to their dignity.<sup>1073</sup>

(3) As for cultural rights, the protection and the promotion of Romani cultural identity within European legal systems has generally been articulated both, in a territorial as well as in a personal perspective. While neither of these two dimensions can be raised to the level of “best legal practice”, since both entail some pitfalls and drawbacks at the implementation stage, the personal perspective (which has mostly been shaped on the NCA model) entails a collective

---

<sup>1072</sup> European Parliament, "Measures to Promote the Situation of Roma EU Citizens in the European Union. Study," ed. Citizens' Rights and Constitutional Affairs Policy Department (Bruxelles : European Parliament, 2011), 41.

<sup>1073</sup> Commission Staff working document accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. National Roma Integration Strategies: a first step in the implementation of the EU Framework SWD(2012) 133 final.

opening to the enjoyment of cultural rights, which in some cases has shown to enshrine a good potential to improve the overall participation of Roma in the public sphere.<sup>1074</sup>

(4) As for political rights, the legal practice of some domestic systems has shown the coexistence of different institutional devices to guarantee a “political space” to Roma. In particular, apart from the “traditional” minority devices designed to assure minority political representation by means of “reserved seats” or through the channel of political parties, institutional devices of “power-sharing” offer a complementary channel to the political representation of Roma with diverse degrees of political influence. These devices of “power-sharing” often develop within legal systems that have tailored the cultural rights for Roma in a personal and collective perspective, thus already highlighting a stronger “promotional opening” towards the participation of Roma in the public sphere.

### **“Strategic litigations”: the leading role of the ECtHR’s jurisprudence in the development of Roma rights**

The analysis has further shown that the development of Roma rights at domestic level has evolved especially in the last two decades through an “osmotic process” whereby the guarantees enshrined at international and at European levels have been reinforcing the constitutional level and vice versa.<sup>1075</sup> Such an “osmotic process” has been particularly fostered by the action of advocacy groups that have increasingly challenged international bodies (particularly the ECtHR) through the tool of “strategic litigation”, in order to focus public attention on social and legal realms involving Roma rights where legislators are still

---

<sup>1074</sup> This is, for instance the case of Hungary, where minority councils have been devised, at least *de jure*, as institutional mechanisms promoting minority cultural participation at such a promotional level which somehow overlap with political participation.

<sup>1075</sup> On the mutual influence among the various legal levels of minority law see F. Palermo, “Internazionalizzazione del diritto costituzionale e costituzionalizzazione del diritto internazionale delle differenze,” *European Diversity and Autonomy Papers*, no. 2 (2009).

unable or unwilling to effectively intervene.<sup>1076</sup> Notwithstanding the evolution of Roma rights that has taken place at the formal level, a recent study of the European Roma Rights Centre of in Budapest has shown,<sup>1077</sup> at substantial level, that the implementation of the ECtHR's decisions is far from having concretely changed the situation of racial segregation which Roma are still experiencing on a daily basis.<sup>1078</sup>

At domestic level in fact, the judgments of the ECtHR are not immediately executive *vis-à-vis* States Parties.<sup>1079</sup> And also regarding access to the ECtHR, domestic courts remain pivotal in monitoring and implementing human rights since, as a general rule, international remedies are accessible only after all domestic remedies are fully exhausted. In terms of substance of the claims, individuals can bring action before international and European Courts *only* if they can effectively prove that national governments may violate international/European human and minority rights law. Nonetheless, if governments do not engage at all in “positive actions” even with regard to the most excluded and discriminated groups, judicial action results very difficult. Accordingly, governments are free to adopt programs and policies for the social inclusion of Roma, yet Romani communities have no legal means to force governments to do so.

The heterogeneity of legal treatment in devising not only “positive” but also “negative” measures for Roma, discussed during the analysis of domestic legal practices has highlighted, once again, the “short-circuit” briefly recalled at the beginning of this chapter: the lack of a

---

<sup>1076</sup> The use of “strategic litigation” derives from the U.S. constitutional experience of cases of racial segregations against Black Americans in the 50s and in 60s. This tool has recently been adopted at the European level to enhance Romani rights in Europe see, *inter alia*, G.J. Garland, "The Use of Strategic Litigation as a Tool for Social Change: A Roma Rights Perspective," in *Stato di diritto e identità Rom* ed. A. Simoni (Torino: L'Harmattan Italia, 2005). See also J.A. Goldston, "The Struggle for Roma Rights: Arguments that Have Worked" *Human Rights Quarterly* 32, no. 2 (2010).

<sup>1077</sup> Amnesty International and ERRC, "Five More Years of Injustice Segregated Education for Roma in the Czech Republic," (London/Budapest : Amnesty International the European Roma Rights Centre 2012).

<sup>1078</sup> The study involved one of the leading cases of the Romani jurisprudence *D.H. and Others v. Czech Republic* which has shown that after five years from the Court's decision, Romani pupils are still experiencing racial segregation within the national school system of the Czech Republic.

<sup>1079</sup> K. Kanev, "Non Execution of European Court Judgments Involving Romani Victims in Bulgaria," *Roma Rights Quarterly*(2010 ).

comprehensive legal framework at the international level to address the specificities of the Romani group as a historical group and, at the same time, as a non-territorial minority without a kin-state. Accordingly, Roma can neither be comprehensively encompassed by the legal guarantees devised for “old” minorities nor by those devised for “new” minorities. Thus, as long as these legal guarantees continue to be rooted in a “Westphalian” legal framework, the legal recognition of Roma will remain constrained in a “territorial trap” as far as both the formal entitlement and the substantial enjoyment of their fundamental rights are concerned.

### **Transcending national borders and classifications: releasing Roma from the territorial trap**

The brief comparison with the experience of Sami living in Northern Europe has helped to indicate a possible way out of this trap. Sami share with Roma the feature of trans-nationality and of historical rights denial and social exclusion. In contrast with Roma, Sami however, benefit from the status of indigenous peoples which has allowed them to frame their claims for recognition within the global discourse of indigenous rights.

This “international framing” has recently allowed Sami to be actively involved in equal partnership with the three Nordic State-forming peoples (the Norwegian, the Swedish and the Finnish) in the drafting process of the 2005 Sami Convention. This Convention, which is still under the process of negotiations for ratification, covers most sets of linguistic and cultural rights entrusting Sami Parliaments with, *inter alia*, a monitoring activity as well as with the political representation of Sami at international level.

In the case of Roma, Chapter 9 has highlighted the emergence of a new political trend, both at international advocacy level and at European institutional level, which increasingly addresses Romani cultural identity in terms of “trans-national people”. However, the recognition of such a “trans-national” identity risks to be void, or even dangerous, if it is not able to promptly

converge its potential into a European legal instrument which guarantees binding Roma rights also in a non-territorial perspective.

Indeed, as Kovats and Vermeersch have emphasized, when the political discourse addresses Romani communities in terms of a “European trans-national people”, the risk that Romani individuals become further excluded is quite concrete.<sup>1080</sup> When Romani identity is in fact framed merely in “European trans-national” political terms, Roma are in danger of being represented as “outsiders” in national States where they have historically been living. In this scenario, the legal protection of Roma become totally demanded to the European level.

In contrast, Romani “trans-national identity” should not be understood as “separate” from Romani national identity but as complementary to it. In other words, exactly as the European citizenship is strictly linked to and dependent from the citizenship of a EU Member State, the legal recognition of a Romani “trans-national identity” should be understood as “derived from” not as “substituting” the recognition of Roma as a “minority group” at domestic level. As the analysis has shown, the recognition of Roma at domestic level cannot but being left to Member States which shape the concrete legal recognition of any minority group according to their conception of State and Nation.<sup>1081</sup> Nonetheless, such a national legal recognition might be politically easier if a European frame exists with a minimum Roma rights standards set.

### **Towards a CoE Framework Roma Convention?**

Since Roma population, as seen, extend all over the CoE area, it is at this level that a legal instrument framing Roma rights would be most effective. As the 2005 Draft Sami Convention

---

<sup>1080</sup> P. Vermeersch, "Reframing the Roma: EU Initiatives and the Politics of Reinterpretation," *Journal of Migration Studies* 38, no. 8 (2012).

<sup>1081</sup> So that, for instance, in Italy where the Constitution recognizes at Art.6 only “linguistic minorities” within the Italian institutional framework, a possible future recognition of Roma can only translate through the legal category “linguistic minority” (and not through any other legal category, such as “ethnic” or “national” minority). It is not by chance that such a possible recognition has also been suggested in the provisional bill attached to the acts of the international conference collected in the book P. Bonetti, A. Simoni, and T. Vitale *La condizione giuridica di Rom e Sinti in Italia*, ed. (Milano : Giuffrè Editore 2011), 1295 and in the recent proposal presented before the Italian Parliament, see footnote 432.

expresses the idea of “one country, two peoples”, similarly a “CoE Roma Convention” could be based upon a multi-ethnic principle, in line with the CoE Recommendation 1735 (2006) which “invites the Member States... to stop defining and organising themselves as exclusively ethnic or exclusively civic states” (art. 16.4). Additionally, as paragraph 7 of the same Recommendation emphasizes,

the general trend of the nation-state’s evolution is towards its transformation depending on the case, from a purely ethnic or ethnocentric state into a civic state and from a purely civic state into a multicultural state where specific rights are recognised with regard not only to physical persons but also to cultural or national communities.

However, the ways through which the idea of “multicultural” State can articulate, should again be left, in a “margin of appreciation” implementation, to the domestic jurisdiction of Member States. Thus, in contrast with the experience of Sami, a “CoE Roma Convention” should be drafted as a framework rather than as a right-based Convention, in order for this international instrument to adapt more flexibly both to the peculiar needs of the different Romani communities living in such a broad territory and to the different institutional structures of Member States.

The choice of articulating this “Draft CoE Roma Convention” through a framework instrument can also respond, in a more versatile way, to the intrinsic need of updating the rules of the “law of diversities” which as Palermo clarifies,

are thus inevitably subject to constant revision, in terms of their proportionality, their efficiency and their sustainability, and directly linked to the changes of the societal reality which they regulate. In simple words: what is legitimate today might not be tomorrow.<sup>1082</sup>

As for the content of this Convention, being hypothesized within the CoE legal framework, it can possibly build on the general principles set by the Framework Convention on National Minorities and the European Charter on Regional and Minority Languages. Yet, in order to

---

<sup>1082</sup> F. Palermo, “Legal Solutions to Complex Societies: The Law of Diversity,” in *Human Rights and Diversity: New Challenges for Plural Societies*, ed. E. Dunbar Ruiz Vieytez, R. (Bilbao: University of Deusto, 2007), 75-76.

avoid the risk of falling again in the “territorial trap”, these general principles should be tailored on the needs and on the claims of the Romani population also on the basis of the current legal practice developed at the domestic level for each set of rights. More specifically, this international treaty should develop on the four rights dimensions identified in the comparative study of Roma rights: linguistic rights, economic and social rights, cultural rights and political rights.

As a general principle, after Romani cultural identity has been recognized to be non-territorial, also some sets of rights can be complementary devised on a personal rather than merely on a territorial basis, as the experience of the National Cultural Autonomy has shown in the sphere of cultural rights. Yet, as already seen in the case of Sami, Roma communities themselves should be actively involved already at the drafting stage of this CoE Roma Framework Convention.

Accordingly, for the time being, the content of Roma rights cannot be precisely outlined in order to avoid any hetero-directive attempt of drafting process.<sup>1083</sup> On the same token, Roma should also be involved in the task of monitoring the implementation of the rights enshrined in this legal instrument either by means of the guarantee of “reserved seats” within the treaty Monitoring Body or by further fostering the role of the European Roma and Travellers Forum.

Framed in these legal terms, the recognition of Romani cultural identity as a “European trans-national people” fulfills, in line with Honneth’s thought, a need of recognition of human dignity which comprises a central principle of social justice. In Honneth’s words,

The bestowal of social rights, i.e. above all economic safeguards for the individual in case of need through no fault of one’s own, is gauged primarily

---

<sup>1083</sup> Nonetheless, by highlighting the legal pitfalls of the overall legal framework as well as the gross violations of human and minority rights suffered by Roma, this comparative analysis has already provided, *ex negativo* though, some possible articulations of Roma rights for each set of rights.

according to the idea of affording every member of a society the measure of social recognition that makes him or her a full citizen ... [S]tate welfare is then subject to the requirement that every individual be given the chance to participate in an elementary manner in the cooperative context of society by making his or her own contribution. It is only then, such would be the conclusion, that every individual is in a position to grasp his or her self as a full member of a society.<sup>1084</sup>

---

<sup>1084</sup> A. Honneth, "Recognition of Justice: Outline of a Plural Theory of Justice " *Acta Sociologica* 47, no. 4 (2004): 352.



## **References**

### **I. Table of statutory legislation**

#### **International treaties**

ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169).

ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)

ILO Migration for Employment Convention (Revised), 1949 (No. 97)

ILO Convention, 1957 (No.107).

ILO Minimum Age Convention, 1973 (No. 138)

ILO Worst Forms of Child Labour Convention, 1999 (No. 182).

International Convention on the Elimination of All Forms of Discrimination Against Women, 1967.

International Convention on the Elimination of All Forms of Racial Discrimination, 1965.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1999.

International Convention on the Rights of the Child, 1989.

International Covenant on Civil and Political Rights, 1966.

International Covenant on Economic and Social Rights, 1966.

United Nations Educational, Scientific and Cultural Organization Convention on the Elimination of Discrimination in Education, 1960.

United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992.

Universal Declaration of Human Rights, 1948 .

#### **EU legislation**

Council Directive 79/7/EEC of 19<sup>th</sup> December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

Council Directive on Family Reunification (2000/86/EC).

Employment Framework Directive (2000/78/EC).

Long-Term resident Directive (2003/109/EC).

Racial Equality Directive (2000/43/EC).

## **Domestic legislation**

**Austria:** Federal Act 396 dated 7th July 1976 on the legal status of ethnic groups in Austria (Ethnic Groups Act).

**Bosnia and Herzegovina:** Law on National Minorities of 12 April 2003 Bosnia and Herzegovina Official Gazette, 12/03.

**Czech Republic:** Act on the Rights of Members of National Minorities No.273/ 2001 Coll. 2<sup>nd</sup> August 2001.

**Estonia:** National Minorities Cultural Autonomy Act No.71/1001 of October, 26<sup>th</sup> 1993.

**Finland:** The *Sámi Parliament Act* (Laki saamelaiskäräjistä) No.974 of July, 17<sup>th</sup> 1995.

Language Act No. 423 of 2003.

**France:** “*Loi n°69-3 du 3 janvier 1969 relative à l’exercice des activités ambulantes et au régime applicable aux personnes circulant en France sans Domicile ni résidence fixe*”, Journal Officiel de la République Française, N. 42, 1969.

**Germany:** Federal Act adopted on 7<sup>th</sup> July 1976, *Volksgruppengesetz* BGBI. [Federal Law Gazette] 396/1976.

**Hungary:** Act LXXVII of 1993 on the Rights of National and Ethnic Minorities, adopted by the National Assembly of the Republic of Hungary, 7<sup>th</sup> July 1993.

**Italy:** Legge 15 Dicembre 1999, n. 482 "Norme in materia di tutela delle minoranze linguistiche storiche", pubblicata nella Gazzetta Ufficiale n. 297 del 20 dicembre 1999.

### **Italian Regional legislation:**

Legge provinciale n. 12 del 29/10/2009 “Misure per favorire l’integrazione dei gruppi sinti e rom residenti in provincia di Trento”

Legge regionale 25/02/1993 Regione Piemonte “Interventi a favore della popolazione zingara”

Legge regionale N. 11/88 Regione Friuli Venezia Giulia “Norme a tutela della cultura rom”

Legge regionale N. 2/2000 Regione Toscana “Interventi per i popoli rom e sinti”

Legge regionale N. 26/93 Regione Piemonte “Interventi a favore della popolazione zingara”

Legge regionale N. 3/94 Regione Marche “Interventi a favore degli emigrati, degli immigrati, dei rifugiati, degli apolidi, dei nomadi e delle loro famiglie”.

Legge regionale N. 32/90 Regione Umbria “Misure per favorire l’inserimento dei nomadi nella società e per la tutela della loro identità e del loro patrimonio culturale”

Legge regionale N. 47/88 Regione Emilia Romagna “Norme per le minoranze nomadi in Emilia-Romagna”

Legge regionale N. 54/89 Regione Veneto “Interventi a tutela della cultura dei rom e dei sinti”

Legge regionale N. 6/92 Regione Liguria

Legge regionale N. 77/89 Regione Lombardia “Azione Regionale per la Tutela delle Popolazioni appartenenti alle etnie tradizionalmente nomadi o semi-nomadi”

Legge regionale N. 82/85 Regione Lazio “Norme a favore dei rom”

Legge regionale N. 9/88 Regione Sardegna “Tutela dell’etnia e della Cultura dei nomadi”

**Ireland:** Employment Equality Act No.21 of 1998,

Equal Status Act No.8 of 2000

Equal Status Act No. 24 of 2004

Housing (Miscellaneous Provisions) Act No. 9 of 2002.

**Kosovo:** Law on the Promotion and protection of the Rights of Communities and their Members in Kosovo No. 03/L-047 of 13<sup>th</sup> March, 2008.

**Latvia:** Law about the Unrestricted Development and Right to Cultural Autonomy of Latvia's Nationalities and Ethnic Groups adopted on 3<sup>rd</sup> March 1991 and amended on the 15<sup>th</sup> of June 1994. No XI-3412

**Moldova:** Law of the Republic of Moldova on the Rights of Persons Belonging to National Minorities and the Legal Status of their Organizations No. 382-XV, 19<sup>th</sup> July 2001.

**Montenegro:** Law on Minority Rights and Freedoms Law of the Republic of Montenegro, Official Gazette of the RMN, No. 31/06, 51/06, 38/07.

**Norway:** *The Sami parliament Act* relating to the *Sameting*, No. 56 of June, 12<sup>th</sup> 1987.

The Act No. 85 relating to “Legal Relations and Management of Land and Natural Resources in the County of Finnmark” (the Finnmark Act), 17 June 2005.

**Poland:** Act of 6<sup>th</sup> January 2005 on national and ethnic minorities and on the regional languages. (Dziennik Ustaw No. 17, item. 141, with the amendment of 2005, No. 62, item 550)

Regulation of the Minister of National Education and Sport of 3 December 2002 on conditions and methods of performing tasks allowing to sustain the sense of national, ethnic, linguistic and religious identity of students from national minorities and ethnic groups by public schools and educational facilities. (Journal of Laws No 220, item 1853).

**Russia:** Federal Law on National Cultural Autonomy No. 212 adopted by the State Duma 15 April 1996.

The Federal Law on General Principles of the Organization of Communities of Indigenous Peoples of the North, Siberia, and the Far East No. 104, F3 of July, 20<sup>th</sup> 2000.

The Federal Law on the Territories of Traditional Nature Use by Indigenous Numerically Small Peoples of the North, Siberia, and the Far East No. 49 FZ July, 6<sup>th</sup> of 2001.

**Serbia:** Law on Protection of Rights and Freedom of National Minorities, Official G Gazette of FRY No. 11 of 27<sup>th</sup> February 2002.

Decree on the Establishment of the Council for National Minorities of the Republic of Serbia, Republic of Serbia Official Gazette no. 61/2006.

Law on Local Elections Official Gazette of the Republic of Serbia No. 33 of 13<sup>th</sup> June 2002.

Law on Local Self-government, Republic of Serbia Official Gazette, nos. 9/2002, 33/2004 and 105/2004.

Law on Protection of Rights and Freedom of National Minorities, adopted on 27<sup>th</sup> February 2002, Official Gazette of FRY No. 11.

Law on Protection of Rights and Freedom of National Minorities, Official Gazette of FRY No. 11 of 27<sup>th</sup> February 2002.

**Slovakia:** Act of the National Council of the Slovak Republic on the State Language of the Slovak Republic No. 270/1995 Coll. 15<sup>th</sup> November 1995.

**Slovenia:** The Roma Community in the Republic of Slovenia Act Official Gazette of the Republic of Slovenia, No. 33/07, 13<sup>th</sup> April 2007.

**Spain:** *Real Decreto 891/2005, de 22 de julio, por el que se crea y regula el Consejo Estatal del Pueblo Gitano.*

**Sweden:** Saami Parliament Act (Sametingslagen) No.1433 of December, 17<sup>th</sup> 1992;

Reindeer Husbandry Act, No. 437 of July, 1<sup>st</sup> 1971.

Sami Language Act No.1086 of 2003.

**Ukraine:** Art.6 of the Law on National Minorities. No. 2494-12 of June 25<sup>th</sup>, 1992 (Supreme Executive Council, No. 36, Art. 529).

**United Kingdom:** The Race Relations Act 1976 and the Race Relations Amendment Act 2000, Human Rights Act 1998 (“Equality Legislation”).

## **II. Table of recommendations and legal guidance**

### **International documents**

UN Doc.E/RES/1296 (XLIV)

UN Doc. E/RES/1996/31.

UN Doc. E/CN.4/Sub.2/1986/7 and Add. 1-4. The conclusions and recommendations of the study, in Addendum 4, are also available as a United Nations sales publication (U.N. Sales No. E.86.XIV.3)

Deschênes, J. *Proposal Concerning a Definition of the Term 'Minority'*. U.N. Doc. No. E/CN.4/Sub.2/1985/31.1985.

### **CERD Recommendations**

CERD General Recommendation XXIII on the Rights of Indigenous Peoples, UN doc. CERD/C/51/Misc.13/Rev.4, 1997

CERD General Recommendation XXVII on Discrimination against Roma, UN doc. A/55/18, annex V, 2000.

### **OSCE recommendations**

Bolzano/Bozen Recommendations on National minorities in Inter-State relations and Explanatory Note, 2008.

Lund Recommendations on the Effective Participation of National Minorities, and Explanatory Note, 1999.

Oslo Recommendations regarding the Linguistic Rights of National Minorities, and Explanatory Note, 1998.

### **OSCE legal guidance**

Address by Max van der Stoep to the OSCE/ODIHR Supplementary Meeting on Roma and Sinti Issues, Vienna, September 6, 1999

Budapest Document, "Towards a Genuine Partnership in a new Era" (Budapest, 1994)

Charter for European Security (Istanbul, SUM/DOC/1/99, 19<sup>th</sup> November 1999) Istanbul Summit Declaration (SUM.DOC/2/99, 19<sup>th</sup> November 1999).

Concluding Document of the Human Dimension meeting in Copenhagen on the 29<sup>th</sup> June 1990.

CSCE Meeting of Experts on National Minorities (1<sup>st</sup>-19<sup>th</sup> July, Geneva)

Decision No. 4/03 Tolerance and Non-Discrimination.

Document of the Maastricht Ministerial Council, 2003, Annex to Decision No. 3/03: Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area.

Helsinki Document, "the Challenges of Change" (12<sup>th</sup> June, 1992 Helsinki)

Moscow Meeting of the Conference on the Human Dimension of the CSCE (10<sup>th</sup> September-4<sup>th</sup> October 1991)

Ninth Meeting of the Ministerial Council, Ministerial Declaration, 3<sup>rd</sup> and 4<sup>th</sup> December 2001

OSCE/ODIHR Supplementary Human Dimension Meeting, Roma and Sinti Issues, Vienna, 6<sup>th</sup> September 1999.

Report of the Chair-in-Office to the Lisbon Summit (including the Reports of the Rapporteurs of the Working Group), (Lisbon, 29<sup>th</sup> November, 1996),

Seventh Meeting of the Ministerial Council, Declaration on Kosovo, 2<sup>nd</sup>-3<sup>rd</sup> December 1998, Oslo “Enhancement of the OSCE’s Operational Capabilities Regarding Roma and Sinti Issues”

Seventh Ministerial Council Meeting, 2<sup>nd</sup> and 3<sup>rd</sup> December 1998

The Document of the Moscow Meeting of the Conference of the Human Dimension of the CSCE 1991.

### **CoE recommendations**

Council of Europe Committee of Ministers Recommendation (2009)4 on the education of Roma and Travellers in Europe. See also Recommendation No R (2000) 4 of the Committee of Ministers to Member States on the education of Roma/Gypsy children in Europe.

Council of Europe High Level Meeting on Roma, Strasbourg, 20 October 2010, “The Strasbourg Declaration on Roma”, CM(2010)133 final

Council of Europe, Committee of Ministers, Recommendation Rec(2006)10 of the Committee of Ministers to member states on better access to health care for Roma and Travellers in Europe.

Council of Europe, Committee of Ministers, Recommendation Rec(2001)17 on improving the economic and employment situation of Roma/Gypsies and Travellers in Europe.

Council of Europe, Committee of Ministers, Recommendation Rec(2004)14 of the Committee of Ministers to member states on the movement and encampment of Travellers in Europe.

Council of Europe, Committee of Ministers, Recommendation (2005)4 of the Committee of Ministers to member states on improving the housing conditions of Roma and Travellers in Europe.

### **CoE legal guidance**

“Legal Situation of the Roma in Europe” of the Parliamentary Assembly of the Council of Europe see Doc. 9397 revised Legal situation of the Roma in Europe Report of the Committee on Legal Affairs and Human Rights (19 April 2002).

CoE, 3rd Summit of Heads of State and Government (Warsaw, 16-17 May 2005), Part III “Building a more humane and inclusive Europe”, Points 1 and 5.

Council of Europe Round Table On the situation of the Roma in the Russian Federation, 2001. Strasbourg, 6 November 2001 MG-S-ROM (2001) 14 rev. available at <http://www.coe.int/t/dg3/romatravellers/archive/documentation/fieldvisit>

European Roma and Travellers Forum (ERTF), Statement on Roma and Sinti at the Working Sessions 6 and 7 of the Annual Human Dimension Implementation Meeting of the OSCE - ODIHR, Warsaw, 27<sup>th</sup> September 2007, HDIM.IO/205/07.

### **EU legal guidance**

*Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. An EU Framework for National Roma Integration Strategies up to 2020, COM(2011) 173 final.*

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. An EU Framework for National Roma Integration Strategies up to 2020. COM(2011) 173 final.

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. National Roma Integration Strategies: a first step in the implementation of the EU Framework COM(2012) 226 final.

European Framework for National Roma Integration Strategies up to 2020 COM(2011) 173 final setting the foundations for the adoption of European National Strategies at the domestic level.

European Parliament Resolution on the situation of Roma in the European Union, 28<sup>th</sup> April 2005, P6\_TA(2005)015.

Questions and answers presented before the European Parliament C 192/97, No.84/84 (84/C 213/24), No.1141/87 (88/C 93/73), and the CoE Resolution No. (75) 13 “Social Situation of Nomads in Europe”.

### **III. Table of cases**

#### **International cases**

*Koptova v. Slovak Republic* (2000) CERD/C/57/D/13/1998.

*L.R. et al v. Slovak Republic* (2003) CERD/C/66/D/31/2003.

*Lacko v. Slovak Republic* (1998) CERD/C/59/D/11/1998

*Durmic v. Serbia and Montenegro* (2003) CERD/C/68/D/29/2003.

*A.S. v. Hungary* (2004) CEDAW/C/36/D/4/2004.

#### **European Court of Justice (ECJ)**

*Bickel/Franz*, Case C-274/96 [1998] ECR I-7637.

*Gravier v. Ville de Liège and Others*, Case 293/83 [1985] ECR 593.

*Groener v. Minister for Education and the City of Dublin*, Case C-379/87 [1989] ECR 3967.

*Meyers v. Adjudication Officer* (Case C-116/94 [1995] ECR I-2131.

*Mutsch* Case 137/84 [1985] ECR 2681.

#### **European Court of Human Rights (ECtHR)**

*Aksu v. Turkey*, Application nos. 4149/04 and 41029/04 European Court of Human Rights decision of 15<sup>th</sup> March 2012.

*Angelova and Iliev v. Bulgaria*, Application No. 55523/00, European Court of Human Rights, decision of 26<sup>th</sup> July 2007.

*Anguelova v Bulgaria*, Application No. 38361/97 European Court of Human Rights decision of 13<sup>th</sup> June 2002.

*Assenov and Others v. Bulgaria*, Application No. 90/1997/874/1086, European Court of Human Rights, decision of 28<sup>th</sup> October 1998.

*Beard v. the United Kingdom*, Application No. 24882/94, European Court of Human Rights decision of 18<sup>th</sup> January 2001;

*Bekos and Koutropoulos v Greece*, Application No. 15250/02, European Court of Human Rights decision of 13<sup>th</sup> December 2005.

*Buckley v. the United Kingdom*, Application No. 20348/92, European Court of Human Rights, decision of 25<sup>th</sup> September 1996, Reports of Judgements and Decisions 1996-IV, no.16.

*Chapman v. the United Kingdom*, Application No. 27238/95, European Court of Human Rights, decision of 18<sup>th</sup> January 2001.

*Cobzaru v. Romania*, Application No. 48254/99, European Court of Human Rights, decision of 26<sup>th</sup> July 2007.

*Connors v. the United Kingdom* Application No. 66746/01 European Court of Human Rights decision of 27<sup>th</sup> May 2004.



*Coster v. the United Kingdom*, Application No. 24876/94 European Court of Human Rights decision of 18<sup>th</sup> January 2001;

*D.H. and Others v. Czech Republic*, Application No. 57325/00, Chamber decision of 7 February 2006 Grand Chamber decision of 13<sup>th</sup> November 2007.

*Eremiášová and Pechová v. the Czech Republic*, European Court of Human Rights, Application No.23944/04, decision of 16<sup>th</sup> February 2012.

*Freedom and Democracy Party (Özdep) v. Turkey*, European Court of Human Rights, Application No. 23885/94, decision of 8<sup>th</sup> December 1999.

*Gergerly and Others v. Romania* Application No. 57885/00, European Court of Human Rights, decision of 26<sup>th</sup> April 2007.

*I.G. and Others v. Slovakia*, Application No. 15966/04, European Court of Human Rights, decision of 13 November 2012.

*Jane Smith v. the United Kingdom*, Application No. 25154/94 European Court of Human Rights decision of 18<sup>th</sup> January 2001.

*Kalanyos and Others v. Romania* Application No. 57884/00, European Court of Human Rights, decision of 26<sup>th</sup> April 2007.

*Koky and Others v. Slovakia* Application No. 13624/03, European Court of Human Rights, decision of 12<sup>th</sup> June 2012.

*Lee v. the United Kingdom*, Application No. 25289/94 European Court of Human Rights decision of 18<sup>th</sup> January 2001;

*Malone v. the United Kingdom*, Application No. 8691/79, European Court of Human Rights, decision of 2<sup>nd</sup> August 1984.

*Metropolitan Church of Bessarabia and Others v. Moldova*, European Court of Human Rights, Application No. 45701/99 decision of 13<sup>th</sup> December 2001.

*Moldovan and Others v Romania*, Application Nos. s nos. 41138/98 and 64320/01 European Court of Human Rights decision of 30<sup>th</sup> November 2005.

*Muñoz Díaz v Spain* Application No. 49151/07, European Court of Human Rights decision of 8<sup>th</sup> December 2009.

*N.B. v. Slovakia*, Application No. 29518/10, European Court of Human Rights, decision of 12<sup>th</sup> June 2012.

*Nachova and Others v. Bulgaria*, Application Nos. 43577/98 and 43579/98, European Court of Human Rights Grand Chamber decision of 6<sup>th</sup> July 2005.

*Oršuš v. Croatia*, Application No. 15766/03, European Court of Human Rights Chamber decision of 17<sup>th</sup> July 2008, Grand Chamber decision of 16<sup>th</sup> March 2010.

*Petropoulou-Tsakiris v. Greece* Application No. 44803/04, European Court of Human Rights, decision of 6<sup>th</sup> December 2007.

*Podkolzina v. Latvia*, European Court of Human Rights, Application No. 46726/99 decision of 9<sup>th</sup> April 2002.

*Sampanis v. Greece*, Application No. 32526/05, European Court of Human Rights, decision of 5<sup>th</sup> September 2008.

*Secic v. Croatia*, Application No. 40116/02, European Court of Human Rights, decision of 31<sup>st</sup> August 2007.

*Sejdić and Finci v. Bosnia and Herzegovina*, Application Nos. 27996/06 and 34836/06, European Court of Human Rights Grand Chamber decision of 22<sup>nd</sup> December 2009.

*Sidiropoulos and Others v. Greece*, European Court of Human Rights, Application No. 26695/95 decision of 10<sup>th</sup> July 1998.

*Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, European Court of Human Rights, Application Nos. 29221/95 and 29225/95, decision of 2<sup>nd</sup> October 2001.

*Stoica v. Romania*, Application No. 42722/02, European Court of Human Rights, decision of 4<sup>th</sup> March 2008.

*Tanase and Others v. Romania* Application No. 5269/02, European Court of Human Rights, decision of 12<sup>th</sup> August 2009.

*Thlimmenos v. Greece* (Application No. 34369/97, European Court of Human Rights, decision of 6<sup>th</sup> April 2000)

*V.C. v. Slovakia*, Application No. 18968/07, European Court of Human Rights, decision of 8<sup>th</sup> November 2011.

*Velikova v. Bulgaria*, Application No. 41488/98, European Court of Human Rights, decision of 18<sup>th</sup> May 2000.

*Yordanova and Others v. Bulgaria* Application No. 25446/06 European Court of Human Rights decision of 24<sup>th</sup> September 2012.

### **European Committee of Social Rights (ECSR)**

*COHRE v. France*, Complaint No. 63/2010, Decision on the Merits 28 June 2011. In particular in this case the Committee found violations of Arts. E in conjunction with Arts 31.2 and 19.8.

*COHRE v. Italy*, Complaint No. 58/2009, Decision on the Merits 25 June 2010. In particular in this case the Committee found a breach of Art. 19 paragraphs 1,2 and 8 (besides Arts 31.1, 31.2, 31.3, 30 and 16).

Decision on the merits of 28 June 2011, *Centre on Housing Rights and Evictions v. France*, Complaint N° 63/2010

*ERRC v. Bulgaria*, Complaint No. 31/2005, decision on the Merits 18 October 2006.

*ERRC v. Bulgaria*, Complaint No. 46/2007, decision on the Merits 3 December 2008.

*ERRC v. Bulgaria*, Complaint No. 48/2008, decision on the Merits 18 February 2009.

*ERRC v. France*, Complaint No. 51/2008, Decision on the Merits 19 October 2009.

*ERRC v. Greece*, Complaint No. 15/2003, decision on the Merits 8 December 2004.

*ERRC v. Italy*, Complaint No. 27/2004, decision on the Merits 7 December 2005.

*ERRC v. Portugal*, Complaint No. 61/2010, Decision on the Merits 30 June 2011, In this case the Committee found in fact only violation of Arts. 16, 30 and 31.1.

*European Roma and Travellers Forum v. France*, Complaint No. 64/2011, Decision on the Merits 24 January 2012.

*International Federation of Human Rights (FIDH) v. Belgium*, Complaint No. 62/2010, Decision on the Merits 21 March 2012.

### **Norway domestic jurisprudence**

*Selbu* Case, Judgment of 21 June 2001 serial number 4B/2001.

*Svartskogen* case, Judgment of 5 October 2001 Serial No. 5B/2001, No. 340/1999.

#### **IV. Table of international reports**

##### **Advisory Committee on the Framework Convention for the Protection of National Minority (FCNM)**

Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Norway, ACFC/INF/OP/I(2003)003 received on 12<sup>th</sup> September 2012.

Advisory Committee on the Framework Convention for the Protection of National Minorities, Comments of the Government of Finland on the Third Opinion of the Advisory Committee on the implementation of the Framework Convention for the Protection of National Minorities by Finland, GVT/COM/III(2011)002, received on 13<sup>th</sup> April 2011.

Advisory Committee on the Framework Convention for the Protection of National Minorities, “The effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs” ACFC/31DOC(2008)001, adopted on 27<sup>th</sup> February 2008.

Advisory Committee on the Framework Convention for the Protection of National Minorities. Comments of the Government of Montenegro on the first opinion of the Advisory Committee on the implementation of the Framework Convention for the protection of National Minorities by Montenegro. GVT/COM/I(2008)001 received on 18<sup>th</sup> November 2008.

Advisory Committee on the Framework Convention for the Protection of National Minorities. Third Opinion on Croatia ACFC/OP/III(2010)005, adopted on 27<sup>th</sup> May 2010.

Advisory Committee on the Framework Convention for the protection of national minorities, Third Opinion on Poland, adopted on 1<sup>st</sup> July 2011, ACFC/OP/III(2011)008.

Advisory Committee on the Framework Convention for the protection of national minorities, Opinion on Montenegro, Adopted on 28<sup>th</sup> February 2008, ACFC/OP/I(2008)001.

Advisory Committee on the Framework Convention for the protection of national minorities, Third Opinion on Austria, Adopted on 28<sup>th</sup> June 2011, ACFC/OP/III(2011)005.

Advisory Committee on the Framework Convention for the protection of national minorities, Third Opinion on Slovak Republic, adopted on 28<sup>th</sup> May 2010, ACFC/OP/III(2010)004.

Advisory Committee on the Framework Convention for the protection of national minorities, Second Opinion on Poland, Adopted on 20<sup>th</sup> March 2009, ACFC/OP/II(2009)002.

Advisory Committee on the Framework Convention for the protection of national minorities, Second Opinion on Bosnia and Herzegovina, Adopted on 9<sup>th</sup> October 2008, ACFC/OP/II(2008)005.

Advisory Committee on the Framework Convention for the protection of national minorities, Third Opinion on Croatia, Adopted on 28<sup>th</sup> June 2011, ACFC/OP/III(2010)005.

Advisory Committee on the Framework Convention for the Protection of National Minorities Opinion on Latvia adopted on 9<sup>th</sup> October 2008 (ACFC/OP/I(2008)002).

Advisory Committee on the Framework Convention for the protection of national minorities, Third Opinion on Croatia, ACFC/OP/III(2010)005, adopted on 27<sup>th</sup> May 2010.

Advisory Committee on the Framework Convention for the protection of national minorities, Opinion on Latvia, ACFC/OP/I(2008)002, adopted on 9<sup>th</sup> October 2008.

Advisory Committee on the Framework Convention for the protection of national minorities, Second Opinion on Bosnia and Herzegovina, ACFC/OP/II(2008)005, adopted on 27<sup>th</sup> April 2009.

Advisory Committee on the Framework Convention for the protection of national minorities, Opinion on Montenegro, ACFC/OP/I(2008)001, adopted on 28<sup>th</sup> February 2008.

Advisory Committee, in the case of Roma the Polish Government has given practical implementation to this provision. See Advisory Committee on the Framework Convention for the protection of national minorities, Second Opinion on Poland, Adopted on 20<sup>th</sup> March 2009, ACFC/OP/II(2009)002.

Comments of the Government of “The Former Yugoslav Republic of Macedonia” on the Third Opinion of the Advisory Committee on the implementation of the Framework Convention for the protection of national minorities by “The Former Yugoslav Republic of Macedonia” GVT/COM/III(2011)007 received on 1<sup>st</sup> December 2011.

Council of Europe Committee of Ministers, Resolution ResCMN(2006)2 on the implementation of the Framework Convention for the Protection of National Minorities by the Czech Republic (Adopted by the Committee of Ministers on 15<sup>th</sup> March 2006 at the 958<sup>th</sup> meeting of the Ministers' Deputies).

First Report submitted by Finland pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2010)001 received on 17<sup>th</sup> February 2010.

Report submitted by Albania pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR(2001)005 received on 26<sup>th</sup> July 2001.

Report submitted by Albania pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities, ACFC/SR/III(2011)001, received on 10<sup>th</sup> January 2011.

Report submitted by Estonia pursuant to Article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities submitted on 13<sup>th</sup> April 2010, ACFC/SR/III(2010)006.

Report submitted by Finland pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR(1999)003 received on 16<sup>th</sup> February 1999.

Report submitted by Germany pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR(2000)001 received on 24<sup>th</sup> February 2000.

Report submitted by Ireland pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR(2001)006 received on 13<sup>th</sup> November 2001.

Report submitted by Norway pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR(2001)001 received on 2<sup>nd</sup> March 2001.

Report submitted by Portugal pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/II(2009)001 received on 14<sup>th</sup> January 2009.

Report submitted by Serbia pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities, ACFC/SR/II(2008)001, received on 4<sup>th</sup> March 2008.

Report submitted by Slovenia pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2010)007 received on 28<sup>th</sup> April 2010.

Report submitted by Sweden pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR(2001)003 received on 8 June 2001.

Report submitted by the “Former Yugoslav Republic of Macedonia” pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities, 2006ACFC/SR/II(2006)004, received on 16<sup>th</sup> June.

Report submitted by the Former Yugoslav Republic of Macedonia pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR(2003)002 received on 23<sup>th</sup> September 2003.

Report submitted by the Republic of Moldova pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR(2000)002 received on 29<sup>th</sup> June 2000.

Report submitted by the Republic of Montenegro pursuant to Article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR(2007)002 received on 25<sup>th</sup> July 2007.

Report submitted by the Slovak Republic pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/II(2005)001 received on 3<sup>rd</sup> January 2005.

Second Report submitted by Bosnia and Herzegovina pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/II(2007)005 received on 2<sup>nd</sup> August 2007.

Second Report submitted by Lithuania pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities, ACFC/SR/II(2006)007, adopted on 3<sup>rd</sup> November 2006.

Second Report submitted by Poland pursuant to Article 25, Paragraph 1 of the Framework Convention for the protection of National minorities, Annexes 1-9 ACFC/SR/II(2007)006, received on 8<sup>th</sup> November 2007.

Second Report submitted by Serbia pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/II(2008)001 received on 4<sup>th</sup> March 2008.

The UNMIK (United Nations Interim Administration Mission in Kosovo) progress report on the implementation of the Framework Convention for the Protection of National Minorities (FCNM) in Kosovo, third edition, received on 13<sup>th</sup> September 2012.

Third Report submitted by “The Former Yugoslav Republic of Macedonia” pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2010)002 received on 11<sup>th</sup> March 2010.

Third Report submitted by Albania pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2011)001 received on 10<sup>th</sup> January 2011.

Third Report submitted by Austria pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2010)010 rev received on 23<sup>rd</sup> August 2010.

Third Report submitted by Croatia pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2009)009 received on 12<sup>th</sup> October 2009.

Third Report submitted by Croatia pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/II(2004)002 received on 13<sup>th</sup> April 2004.

Third Report submitted by Finland pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2012)003 received on 22<sup>nd</sup> May 2012.

Third Report submitted by Germany pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2009)003 received on 9<sup>th</sup> April 2009.

Third Report submitted by Hungary pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2009)007 received on 4<sup>th</sup> June 2009.

Third Report submitted by Romania pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2011)002 received on 16<sup>th</sup> May 2011.

Third Report submitted by Slovak Republic pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2009)008 received on 22<sup>nd</sup> July 2009.

Third Report submitted by Slovenia pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2010)007 received on 28<sup>th</sup> April 2010.

Third Report submitted by Sweden pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2011)003 received on 1<sup>st</sup> June 2011.

Third Report submitted by the “Former Yugoslav Republic of Macedonia” pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2010)002, received on 11<sup>th</sup> March 2010.

Third Report submitted by the Russian Federation pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2010)005 received on 9<sup>th</sup> April 2010.

Third Report submitted by the Slovenia pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2010)007 received on 28<sup>th</sup> April 2010.

Third Report submitted by the United Kingdom pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2010)003 received on 23<sup>rd</sup> March 2010.

Third Report submitted by Ukraine pursuant to Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2009)006 received on 7<sup>th</sup> May 2009.

### **Committee of Experts on the European Charter for Regional or Minority Languages (ECRML)**

European Charter for Regional or Minority Languages presented by Sweden in accordance with Article 15 of the Charter, fourth Periodical Report submitted on 14<sup>th</sup> September 2010.

European Charter for Regional or Minority Languages, Initial periodical report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter, Romania, MIN-LANG/PR (2010) 11, submitted on 26<sup>th</sup> October 2010.

European Charter for Regional or Minority Languages, Fifth periodical report presented to the Secretary General of the Council of Europe, Norway, MIN-LANG/PR (99) 5, submitted on 31<sup>st</sup> May 1999.

European Charter for Regional or Minority Languages, Fifth periodical report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter, Norway, MIN-LANG/PR (2012) 1 submitted on 5<sup>th</sup> January 2012.

European Charter for Regional or Minority Languages, Fifth periodical report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter, Hungary, MIN-LANG/PR (2012) 4 submitted on 5<sup>th</sup> March 2012.

European Charter for Regional or Minority Languages, Fourth monitoring cycle, A. Report of the Committee of Experts on the Charter, B. Recommendation of the Committee of Ministers of the Council of Europe on the application of the Charter by the Finland, ECRML (2012) 1 submitted 14<sup>th</sup> March 2012.

European Charter for Regional or Minority Languages, Fourth monitoring cycle, A. Report of the Committee of Experts on the Charter, B. Recommendation of the Committee of Ministers of the Council of Europe on the application of the Charter by the Slovak Republic, ECRML (2009) 8 submitted 18<sup>th</sup> November 2009.

European Charter for Regional or Minority Languages, Fourth periodical report presented to the Secretary General of the Council of Europe, Finland, submitted in September 2010.



European Charter for Regional or Minority Languages, Fourth periodical report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter, Netherlands, MIN-LANG/PR (2011) 5, submitted on 15<sup>th</sup> September 2011.

European Charter for Regional or Minority Languages, Fourth periodical report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter, Hungary, MIN-LANG/PR (2009) 1 submitted on 22<sup>nd</sup> January 2009.

European Charter for Regional or Minority Languages, Initial periodical report presented to the Secretary General of the Council of Europe, Norway, MIN-LANG/PR (99) 5, submitted on 31<sup>st</sup> May 1999.

European Charter for Regional or Minority Languages, Second periodical report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter, Czech Republic, MIN-LANG/PR (2011) 4 submitted on 19<sup>th</sup> July 2011.

European Charter for Regional or Minority Languages, Second periodical report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter, Serbia, MIN-LANG/PR (2010) 7 submitted on 23<sup>rd</sup> September 2010.

European Charter for Regional or Minority Languages, Second periodical report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter, Montenegro, submitted on 4<sup>th</sup> April 2011 MIN-LANG MIN-LANG/PR (2011) 2.

European Charter for Regional or Minority Languages, Third periodical report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter, Austria, submitted in July 2011.

Fourth Report of the Federal Republic of Germany in accordance with Article 15 (1) of the European Charter for Regional or Minority Languages, 2010.

### **European Commission Against Racism and Intolerance (ECRI)**

General Policy Recommendation N° 13 on Combating Anti-Gypsyism and Discrimination against Roma, adopted on June, 24<sup>th</sup> 2011.

ECRI the Fourth Report on Estonia adopted on ECRI the second Report on Austria adopted on 16<sup>th</sup> June 2009

European Commission against Racism and Intolerance, Third Report on Albania, CRI(2005)23, adopted on 17<sup>th</sup> December 2004, 11.

ECRI Report on the Czech Republic (fourth monitoring cycle) CRI(2009)30, adopted on 2<sup>nd</sup> April 2009

ECRI the second Report on Austria adopted on 16<sup>th</sup> June 2000.

## V. Bibliography

Ahmed, T. "A Critical Appraisal of EU Governance for the Protection of Minority Rights." *International Journal of Minority and Group Rights*, 17 no. 1 (2010): 265-85.

Ahmed, T. *The Impact of EU Law on Minority Rights*, Oxford and Portland Oregon: Hart Publishing

Åhrén, M. "The Saami Convention" *Gáldu Čála – Journal of Indigenous Peoples Rights* 3 (2007): 8-39.

Anaya, S.J. "Indigenous Peoples in International Law." *Cultural Survival* 21, no. 2 (1997): available at <http://www.culturalsurvival.org/ourpublications/csq/article/indigenous-peoples-international-law>.

Allen, S. and Xanthaki A., *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Hart Publishing: Oxford, 2011.

Ancel, M. "Quelques considérations sur les buts et les méthodes de la recherche juridique comparative." In *Inchieste Di Diritto Comparato*, edited by M. Rotondi, 3-13. Padova CEDAM 1973.

Ándde, S. "Regional Characteristics of Sapmi and the Sami People." In *The Regional Identity of Ethnic Groups in Europe*, edited by Ándde (Anders) S., 1-34. Nordic Sami Institute, Guovdageaidnu, Norway: Sámi Instituhtta Nordisk Samisk Institutt, 2002.

Arzoz, X. *Respecting Linguistic Diversity*. Amsterdam/Philadelphia: John Benjamins Publishing Company 2008.

Austin, J.L. *Philosophical Papers*, London Oxford University Press, 1970.

Bakker, P. and Rokker, M. "The Political Status of the Romani Language in Europe." *Mercator Working Paper* 3 (2001): 1-38.

Baldin, S. "Il Consiglio d'Europa e l'inclusione sociale dei Rom e dei viaggianti." In *Il Mosaico Rom. Specificità Culturali e Governance Multilivello* edited by S. Baldin and M. Zago, 161-73. FrancoAngeli: Milano, 2011.

Barton, S. and Willers, M. "Race Discrimination." In *Gypsy and Traveller Law* edited by C. Johnson and Willers, M. 277-312. London Legal Action Group, 2007.

Basta Fleiner, L. "The Principle of Equality and Non-Discrimination under the Framework Convention for the Protection of National Minorities: Also a Tool Fostering the Integration of Migrants' Children in the Field of Education?" In *Unidem Campus Trieste Seminar "Policies on the protection and social integration of immigrants and their implementation at the international, national and local level"* Trieste, Italy. 29 June – 2 July 2009, edited by CDL-UDT(2009)002. Engl. only. Strasbourg : Council of Europe, 2009.

Beach, H. "The Saami of Lapland" in *Polar Poles: Self-Determination and Development*, edited by Minority Rights Group, 147-205, 1994.

Benoît-Rohmer, F. "La Cour Européenne des Droits de l'Homme et la Défense des Droits des Minorités Nationales". *Revue Trimestrielle des Droits de l'Homme* 13, no. 51 (2002).

- Benoît-Rohmer, F. and Klebes, H. *Le Droit du Conseil de l'Europe - Vers en espace juridique paneuropéen* Strasbourg: Editions du Conseil de l'Europe, 2005.
- Bhopal, K., Myers, M. *Insiders, Outsiders and Others Gypsies and Identity*. Hatfield: University of Hertfordshire Press, 2008.
- Bieber, F., "Power-Sharing at the Governmental Level." In *Political Participation of Minorities. A Commentary on International Standards and Practice*, edited by M. Weller and K. Nobbs, 414-33. Oxford/New York: Oxford University Press, 2010.
- Bloch, A., and Schuster, L. "Asylum and Welfare: Contemporary Debates." in *Critical Social Policy* 22 (2002).
- Bobbio, N. *L'età dei Diritti*, Torino: Einaudi, 2005.
- Bonetti, P. "I nodi giuridici della condizione di Rom e Sinti in Italia." In *La Condizione Giuridica di Rom e Sinti in Italia*, edited by P. Bonetti, A. Simoni and T. Vitale, 15-124. Milano: Giuffrè Editore, 2011.
- Borgonovo Re, D. "La scolarizzazione di Rom e Sinti fra l'Europa e il Trentino" In *Tutela delle identità culturali, diritti linguistici e istruzione: dal Trentino-Alto Adige Sudtirolo alla prospettiva comparata*, edited by E. Ceccherini and M. Cosulich, 223-45. Padova : CEDAM, 2012.
- Bottomore, T. "Citizenship and Social Class, Forty Years On" In *Citizenship as Social Class*, edited by T.H. Marshall. London: Pluto Press, 1992.
- Brand, O. "Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies" *Brooklyn Journal of International Law* 32, no. 2 (2007): 409-21.
- Brett, R. and Eddison, E. "The CSCE Human Dimension on National Minorities. Can National Minorities Be Considered Positively?" *Helsinki Monitor Quarterly on Security and Cooperation in Europe* 4, no. 3 (1993): 39-43.
- Brubaker, R. *Citizenship and Nationhood in France and in Germany*. Cambridge: Harvard University Press, 1992.
- Brubaker, R. *Nationalism Reframed: Nationhood and the National Question in the New Europe*. Cambridge: Cambridge University Press, 1996.
- Brunnbauer, U. "The Implementation of the Ohrid Agreement: Ethnic Macedonian Resentments." *JEMIE* no. 1 (2002): 1-24.
- Byrne, I. "Housing Rights." In *Economic, Social and Cultural Rights: A Guide for Minorities and Indigenous Peoples* edited by M.E. Salomon, 29-39. available at [www.minorityrights.org/download.php?id=50](http://www.minorityrights.org/download.php?id=50): Minority Rights Group 2005.
- Calabrò, A.R. *Zingari. Storia di un'emergenza annunciata*. Napoli: Liguori Editore, 2008.
- Carmona, S. "Memory, History and Rromanipen: Reflection on the Concept of Trace." In *Roma Identity* edited by H. Kyuchuvok, Hancock, I. , 86-99. Prague NGO Slovo 21, 2010.
- Cassin, M.R. "Droits de l'homme et méthode v comparative." *Revue Internationale de Droit Comparé* 20, no. 3 (1968): 449-92.

Cermel, M. "Rom e Sinti: cittadini senza patria o popolo europeo transnazionale?" In *La Condizione Giuridica di Rom e Sinti in Italia*, edited by P. Bonetti, A. Simoni and T. Vitale, 1185-211. Milano: Giuffr  Editore, 2011.

Chaliand, G. *Minority Peoples in the Age of Nation States*. London Pluto Press, 1989.

Coakley, J. "Approaches to Resolution of Ethnic Conflict: The Strategy of Non-Territorial Autonomy." *International Political Science Review* 15, no. 3 (1994): 297-314.

CoE, Commissioner for Human Rights "Example from Finland 'a Good Practise for Participative Structures on Roma Inclusion: The Advisory Board on Romani Affairs in Finland'" <http://www.coe.int/t/commissioner/Activities/GoodPractices/>, 2012.

CoE, "Supervision of the Execution of Judgements of the European Court of Human Rights" Strasbourg: Directorate General of Human Rights and Legal Affairs, 2010.

CoE, "The Situation of Roma in Europe and Relative Activities of the Council of Europe" *AS/Jur* (2008) 29 rev (2008).

CoE, *Human Rights of Roma and Travellers in Europe*. Strasbourg Council of Europe Publishing, 2012.

CoE, *Minority Language Protection in Europe: Into a New Decade. Vol. Regional or Minority Language* No.8. Strasbourg: The Council of Europe Publisher, 2010.

Cojacariu, C. "Improving the Effectiveness of the Implementation of Strasbourg Court Judgments in Light of Ongoing Reform Discussions." *Roma Rights Quarterly* (2010).

Coomans, F., Gr nfeld, F., and Kamminga, M.T. "A Primer." In *Methods of Human Rights Research*, edited by and Gr nfeld Coomans F. and Kamminga, M.T., 11-17. Antwerp/Oxford/Portland: Intersentia, 2010.

Costantin S. and Rautz G. "Culture and Identity" in *European Integration* 25, no. 3 (2003): 189-205.

Costantinesco, L.J. *La Scienza dei diritti comparati*. Torino: Giappichelli Editore, 2003.

Costantinesco, L.J. *Il metodo comparativo* Torino: Giappichelli, 2000.

Cotterrell, R. "Comparatists and Sociology" In *Comparative Legal Studies: Traditions and Transitions*, edited by P. Legrand, Munday, R. , 131-53. Cambridge: Cambridge University Press, 2003.

Courthiade, M. "Who is afraid of the Rromani Language?" In *Roma in Europe. From Social Exclusion to Active Participation*, edited by P. Theilen, 93-116. Skopje: Friedrich Elbert Stiftung, 2005.

Craig, E. "The Framework Convention for the Protection of National Minorities and the Development of A "Generic" Approach to the Protection of Minority Rights in Europe?" *International Journal of Minority and Group Rights* 17, no. 2 (2010): 307-25.

Danbakli, M. *On Gypsies: Texts Issued by International Institutions*. Hatfield: University of Hertfordshire Press, 1994.

- De Feyter, K. "Treaty Interpretation and Social Sciences." in *Methods of Human Rights Research*, edited by Coomans, F., Grünfeld, F. and Kamminga, M.T., 213-31. Antwerp/Oxford/Portland: Intersentia, 2010.
- De Varennes, F. "The Existing Rights of Minorities in International Law" in *Language: A Right and a Resource. Approaching Linguistic Human Rights*, edited by Kontra, M. Phillipson, R. Skutnabb-Kangas, T. and Varady, T. 118-46. Budapest : Central European University Press, 1999.
- De Vos, G.A. "Conflict and Accommodation - the Role of Ethnicity in Social History" In *Ethnic Identity: Creation, Conflict and Accommodation* edited by Romanucci-Ros, L., De Vos, G.A. Walnut Creek, CA: Altamira Press, 1995.
- Deirdre, F. and Bowring, B. *Minority and Group Rights in the New Millennium* The Hague : Martinus Nijhoff Publishers, 1999.
- Demirovski, M. "Roma in Sredorek Settlement" In *Managing Multiethnic Roma Communities in the Countries of Former Yugoslavia* edited by Dimitrijević, N. 151-63. Budapest: Open Society Institute, 2000.
- Devroye, J. "The Case of D.H. And Others V. The Czech Republic." *Northwestern Journal of International Human Rights* 7, no. 1 (2009): 81-101.
- Dicosola, M. "Strumenti di protezione giuridica delle Comunità Rom negli Stati dell'ex-Jugoslavia." In *La Condizione giuridica di Rom e Sinti in Italia*, edited by P. Bonetti, A. Simoni and T. Vitale. Milano: Giuffrè Editore, 2011.
- Dinstein, Y. "Collective Human Rights of People and Minorities" *International and Comparative Law Quarterly* 25, no. 1 (1976): 102-20.
- Djuric, R. "A Standard Rromany Language - a Pre-Condition and Basis for a National and Cultural Identity for the Rroma." In *Roma in Europe. From Social Exclusion to Active Participation*, edited by P. Theilen, 79-92. Skopje: Friedrich Elbert Stiftung, 2005.
- Donders, Y. *Towards a Right to Cultural Identity?* . Antwerpen/Oxford/New York: Intersentia, 2002.
- Duhaime, G., and Caron, A. "Economic and Social Conditions of Arctic Regions" in *The Economy of the North 2008*, edited by S. Glomsrød and I. Aslaksen. Oslo/Kongsvinger: Statistisk Sentralbyrå-Statistics Norway, 2009.
- Dunbar, R. "Minority Rights in International Law" *The International and Comparative Law Quarterly* 50, no. 1 (2001): 90-120.
- Dunne, T., Wheeler, N.J. *Human Rights in Global Politics* Cambridge Cambridge University Press, 1999.
- Eide, A. "Cultural Rights and Minorities: On Human Rights and Group Accommodation" In *Legal Cultures and Human Rights. The Challenge of Diversity*, edited by K. Hastrup, 25-42. The Hague/London/New York: Kluwer Law International, 2001.
- Eide, A. "Legal and Normative Bases for Saami Claims to Land in the Nordic" *International Journal of Minority and Group Rights* 8, no. 2 (2001): 127-49.

Eide, A. "The Oslo Recommendations Regarding the Linguistic Rights of National Minorities: An Overview." *International Journal of Minority and Group Rights* 6, no. 3 (1999): 319-28.

Eide, A., and Tørkel, O. Edited by, *Equality and Non-Discrimination*. Publication No.1. Oslo: Norwegian Institute of Human Rights, 1990.

ENAR/ERIO, "*Debunking Myths & Revealing Truths About the Roma*" Bruxelles: ENAR/ERIO, 2011.

ENAR/ERIO, "*Political Participation of Roma, Traveller and Sinti Communities*" Fact Sheet 32 (2007).

Epstein, L., Martin, A.D. "Quantitative Approaches to Legal Research" In *Empirical Legal Research*, edited by Cane, P. and Kritzer, H.M. , 901-26. Oxford: Oxford University Press, 2010.

European Commission. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. An EU Framework for National Roma Integration Strategies up to 2020*. COM(2011) 173 final.

European Commission. "*Ethnic Minority and Roma Women in Europe: A Case for Gender Equality?*". Bruxelles: DG Employment, Social Affairs and Equal Opportunities, 2008.

European Parliament, "*Measures to Promote the Situation of Roma EU Citizens in the European Union. Study*" edited by Citizens' Rights and Constitutional Affairs Policy Department. Bruxelles: European Parliament, 2011.

European Parliament, "*Measures to Promote the Situation of Roma EU Citizens in the European Union. Country Reports.*" edited by Citizens' Rights and Constitutional Affairs Policy Department. Bruxelles: European Parliament, 2011.

European Parliament, "*Protection of the Roma in Croatia*" (available at <http://www.Europarl.Europa.Eu/Document/Activities/Cont/201011/20101124att00191/20101124att00191en.Pdf>). European Parliament, 2010.

Farget, D. "Defining Roma Identity in the European Court of Human Rights" *International Journal on Minority and Group Rights* 19, no. 3 (2012): 291-316.

Feldbrugge, F.J.M. . "Sociological Research Methods and Comparative Law" in *Inchieste di Diritto Comparato*, edited by M. Rotondi, 211-24. Padova: CEDAM, 1973.

Ferri, D. *La Costituzione culturale dell'Unione Europea*. Padova : CEDAM, 2008.

Fitzmaurice, M. "The New Developments Regarding the Saami Peoples of the North." *International Journal on Minority and Group Rights* 16, no. 1 (2009): 67–156.

Forsythe, D.P. . "Human Rights Studies: On the Dangers of Legalistic Assumptions" in *Methods of Human Rights Research*, edited by Coomans, F. and Grünfeld, F., and Kamminga, M.T. Antwerp, Oxford, Portland: Intersentia, 2010.

FRA and UNDP. "*The Situation of Roma in 11 EU Member States. Survey Results at a Glance.*" Luxembourg: European Union Agency for Human Rights, 2012.

FRA, “*Handbook on European non-Discrimination Law*” In Publications Office of the European Union: Luxembourg, 2011.

FRA, “*Housing Conditions of Roma and Travellers in the European Union. Comparative Report*” Luxembourg: Office for Official Publications of the European Communities, 2009.

FRA, “*The Situation of Roma EU Citizens Moving to and Settling in Other EU Member States*” edited by Office for Official Publications of the European Communities. Luxembourg, 2009.

Fraser, A. *Gypsies*. Oxford: Blackwell, 1992.

Fraser, A. *Gypsies: from India to the Mediterranean*, Gypsies Research Centre CRDP, Toulouse : Midi-Pyrenees Interface Collection, 1994.

Freeman, M.A. *Human Rights: An Interdisciplinary Approach*. Cambridge/Malden: Polity Press, 2011.

Furlan, F. “Rom e Sinti nelle legislazioni regionali” in *La condizione giuridica di Rom e Sinti in Italia*, edited by P. Bonetti, A. Simoni and T. Vitale, 703-37. Milano: Giuffr  Editore, 2011.

Garo, M. “La Langue Rromani au Coeur du processus d’affirmation de la Nation Rrom” *H rodote* 105 (2002): 154-65.

Gayin, E. *The Concept of Minority in International Law: A Critical Study of the Vital Elements*. Rovaniemi : University of Lapland, 2001.

Geschier, P. *Inclusi/Esclusi. Prospettive Africane Sulla Cittadinanza* Torino: UTET, 2009.

Ghai, Y. “Participation as Self-Governance.” In *Political Participation of Minorities. A Commentary on International Standards and Practice* edited by M. Weller and K. Nobbs, 613-33. Oxford/New York: Oxford University Press, 2010.

Gheorge N. and Liegeois, J., *Roma/Gypsies: A European Minority*, ed. Minority Rights Group International, 95/4 vols. (1995).

Gilbert, G. “The Council of Europe and Minority Rights” *Human Rights Quarterly* 18, no. 1 (1996): 160-89.

Gilbert, J. “Nomadic Territories: A Human Rights Approach to Nomadic Peoples’ Land Rights” *Human Rights Law Review* 7, no. 4 (2007): 1-36.

Gil-Robles, A. “*Final Report by Mr Alvaro Gil-Robles Commissioner for Human Rights on the Situation of the Roma, Sinti and Travellers in Europe for the Attention of the Committee of Ministers and the Parliamentary Assembly*”. Strasbourg CoE, 2006.

Glenn, P.H. *Legal Traditions of the World. Sustainable Diversity in Law*. Oxford: Oxford University Press, 2010.

Goio, F. and Marceta, I. “The Pre-Conditions for Power Sharing, Inter-Ethnic Conflict and Democracy: Macedonia and Bosnia.” In *Congresso Nazionale della Soci t  Italiana di Scienza Politica*. Roma: available at <http://www.sisp.it/files/papers/2009/franco-goio-e-irena-marceta-440.pdf>, 2009.

- Goldston, J.A. and Hermanin, C. "Corti Europee e cause pilota: una finestra di opportunità per combattere la discriminazione dei Rom in Italia?" In *La condizione giuridica di Rom e Sinti in Italia*, edited by Bonetti, P. Simoni, A. and Vitale, T. 303-20. Milano: Giuffré Editore, 2011.
- Gramstad, S. "The Charter's Monitoring Mechanism: A Practical Perspective" In *Minority Language Protection in Europe: Into a New Decade*, edited by CoE, 29-34. Strasbourg : Council of Europe Publishing, 2010.
- Grandholm, P. and Tomaselli, A. "The Frustration of the Right to Political Participation of Minorities: Practical Limitations in the Case of the Nordic Sami and the Roma." In *European Yearbook of Minority Issues* 149-85: Martinus Nijhoff Publishers, 2010.
- Graver, H.P. and Ulfstein, G. "The Sami People's Right to Land in Norway." *International Journal of Minority and Group Rights* 11, no.4 (2004): 337-77.
- Graveson, R.H. "Methods of Comparative Law in Common Law Systems" in *Inchieste di Diritto Comparato*, edited by M. Rotondi, 299-316. Padova CEDAM, 1973.
- Guiraudon, V., Phalet, K. and Ter Wal, J. "Monitoring Ethnic Minorities in the Netherlands." *International Social Science Journal* 183 (2005): 75-87.
- Gunther, T.C. "France's Repatriation of Roma: Violation of Fundamental Freedoms?" *Cornell International Law Journal* 45, no. 1 (2012): 205-25.
- Halwachs, D.W. "Possiamo dire che Roma, Sinti, Calé, ecc. siano un'unica minoranza linguistica?" In *La Condizione Giuridica di Rom e Sinti in Italia*, edited by Bonetti, P. Simoni, A. and Vitale, T. 127-50. Milano: Giuffré Editore, 2011.
- Hancock, I. "Gypsy Languages" *RADOC* (2007): available at <http://www.radoc.net/radoc.php?doc=news&lang=en>.
- Hancock, I. "Roma Today: Issues and Identity " *In Memory, History and Rromanipen: Reflection on the Concept of Trace*, edited by H. Kyuchuvok, Hancock, I. , 13-25. Prague : NGO Slovo 21, 2010.
- Hancock, I. "Romance Vs. Reality: Popular Notions of the Gypsy." *Roma* 2, no. 1 (1976): 7-23.
- Hancock, I. "The Struggle for the Control of Identity" *RADOC* (2007). available at [http://www.radoc.net/radoc.php?doc=art\\_d\\_identity&lang=en&articles=true](http://www.radoc.net/radoc.php?doc=art_d_identity&lang=en&articles=true)
- Hancock, I. *We Are the Romani People. Ame Sam E Rromane Džene*. Hertfordshire: Centre de Recherches Tsiganes - University of Hertfordshire Press, 2002.
- Henrard, C. "The European Convention on Human Rights and the Protection of the Roma as a Controversial Case of Cultural Diversity." *European Diversity and Autonomy Papers* 5 (2004): 1-25.
- Henrard, C. *Devising an Adequate System of Minority Protection. Individual Human Rights, Minority Rights and the Right to Self-Determination* The Hague/Boston/London: Martinus Nijhoff Publishers, 2000.
- Henrard, C. *Double Standards Pertaining to Minority Protection* Leiden/Boston: Martinus Nijhoff Publishers, 2010.



Henrard, K. "The EU, Double Standards and Minority Protection" in *Double Standards Pertaining to Minority Protection*, edited by Henrard, K. 21-70. Leiden/Boston : Martinus Nijhoff Publishers , 2010.

Henriksen, B.J. Scheinin, M. and Åhrén, M. "The Saami People's Right to Self-Determination" *Gáldu Čála – Journal of Indigenous Peoples Rights* 3 (2007): 52-96.

Hersant, J. "Réflexion sur les Catégories du Droit International à Partir du Traité de Lausanne". *Minorités Ethniques ou Catégories Normatives ?* *Labyrinthe* 21 (2005): 65-66.

Heywood, A. *Key Concepts in Politics*. London: Macmillan, 2000.

Horáková, M. and P. Bareš. "The Aspect of Culture in the Social Inclusion of Ethnic Minorities. Evaluation of the Impact of Inclusion Policies under the Open Method of Coordination in the European Union: Assessing the Cultural Policies of Six Member States. Final Report Czech Republic", MEU Programme, Minorities in the EU, Prague: European Centre for Minority Issues, 2000.

Horn, F. *Linguistic Rights of Minorities*. Rovaniemi: The Northern Institute for Environmental and Minority Law at the University of Lapland, 1994.

Ignatieff, M. *Human Rights as Politics and Idolatry* Princeton: Princeton University Press, 2001.

II Mercator International Symposium, edited by, *Europe 2004: A new framework for all languages?*, available at <http://www.ciemen.cat/mercator/pdf/simp-trifunovska.pdf>, 1-12. Tarragona – Catalunya, 2004.

Jacques, J.P. "Les Roms et l'Union Européenne" In *Les Roms face au droit en Belgique* edited by Fierens, J. 23-49. Bruxelles la Charte, 2012.

Janković, M.D., Čobaj, E.H. "Minorities in Montenegro Legislation and Practice." edited by *Youth Initiative for Human Rights*. Podgorica: Swedish Helsinki Committee for Human Rights, 2007.

Josefsen, E. "The Saami and the National Parliaments: Channels for Political Influence." *Promoting inclusive parliaments: The representation of minorities and indigenous peoples in Parliament* Geneva/New York: IPU/UNDP (2010).

Josefsen, E. "Sami Landrights, Norwegian Legislation and Administration" Resource Centre for the Rights of Indigenous Peoples: Kautokeino, 2003.

Jovanovic, A.M. "Are There Universal Collective Rights?" *Human Rights Review* 11, no. 4 (2010): 17-44.

Kallai, E. *Report on the Activity of the Parliamentary Commissioner of the Rights of National and Ethnic Minorities*. 2009. Budapest: Office of the Parliamentary Commissioners, 2010.

Kenrick, D. *From India to the Mediterranean: the Migration of Gypsies*. Toulouse: Gypsy Research Centre CRDP Pirenées, 1993.

Kisch, I. "Droit comparé et terminologie juridique" in *Inchieste di Diritto Comparato*, edited by M. Rotondi, 405-23. Padova CEDAM, 1973.

Klímová-Alexander, I. "The Development and Institutionalization of Romani Representation and Administration. Part 3c: Religious, Governmental, and Nongovernmental Institutions (1945–1970)," *Nationalities Papers: The Journal of Nationalism and Ethnicity* 38, no. 1 (2009).

Klímová-Alexander, I. "The Development and Institutionalisation of Romani Representation and Administration. Part 1," *Nationalities Papers: The Journal of Nationalism and Ethnicity* 32, no. 3 (2004).

Klímová-Alexander, I., "The Development and Institutionalization of Romani Representation and Administration. Part 2: Beginnings of Modern Institutionalization (Nineteenth Century—World War II)," *Nationalities Papers: The Journal of Nationalism and Ethnicity* 33, no. 2 (2005).

Klímová-Alexander, I., "The Development and Institutionalization of Romani Representation and Administration. Part 3a: From National Organizations to International Umbrellas (1945–1970) - Romani Mobilization at the National Level," *Nationalities Papers: The Journal of Nationalism and Ethnicity* 34, no. 5 (2006).

Klímová-Alexander, I. *The Romani Voice in World Politics: The United Nations and Non-State Actors*. Aldershot: Ashgate, 2005.

Klímová-Alexander, I. and Milady Horá, K. "The Development and Institutionalization of Romani Representation and Administration. Part 3b: From National Organizations to International Umbrellas (1945–1970)—the International Level," *Nationalities Papers: The Journal of Nationalism and Ethnicity* 35, no. 4 (2007).

Kostadinova, G. edited by. "*Substantive Equality, Positive Action and Roma Rights in the European Union*". Briefing. London: Minority Rights Group International, 2006.

Kovats, M. "The Politics of Roma Identity: Between Nationalism and Destitution" ([www.opendemocracy.net](http://www.opendemocracy.net): Open Democracy 2003).

Kymlicka, W. and Patten, A. "Introduction. Language Rights and Political Theory: Context, Issues and Approaches" In *Language Rights and Political Theory* edited by Kymlicka, W. and Patten, A. 1-51. Oxford/New York: Oxford University Press, 2003.

Landman, T. "Social Sciences Methods and Human Rights." In *Methods of Human Rights Research*, edited by and Grünfeld Coomans F., F., and Kamminga, M.T., 19-44. Antwerp/Oxford/Portland: Intersentia, 2010.

Laparra, M. , and Macías, A. "Spanish Gitanos, Romani Migrants and European Roma Identity: (Re)Unification or Self-Affirmation?" In *Romani Politics in Contemporary Europe. Poverty, Ethnic Mobilization and the Neoliberal Order* edited by Sigona, N. and Trehan, N. 226-45. Houndmills/ Basingstoke/Hampshire/New York: Palgrave Macmillan, 2010.

Law, D.S. "Constitutions." in *The Oxford Handbook of Empirical Legal Research*, edited by P. Cane, Kritzer, H.M. , 376-98. Oxford : Oxford University Press, 2010.

LCESC. "*The Situation of Roma in Latvia*" Riga: Latvian Centre for Human Rights and Ethnic Studies, 2003.

- Le Berre, C. edited by “Gens de voyage e Rom nel diritto francese” 553-285, Bonetti, P. Simoni, A. and Vitale, T. *La condizione giuridica di Rom e Sinti in Italia*. Milano: Giuffré Editore, 2011.
- Lezertúa Rodríguez, M. “The European Convention on Human Rights and Minority Languages” in *Minority Language Protection in Europe: Into a New Decade*, 13-26. Strasbourg: Council of Europe Publishing, 2010.
- Liebich, A. “Roma Nation? Competing Narratives of Nationhood” *Nationalism and Ethnic Politics* 13, no. 4 (2007): 539-54.
- Liegeois, J. and Gheorge, N. edited by. Roma/Gypsies: A European Minority. *Minority Rights Group International*. 95/4, 1995.
- Liégeois, J. *Le Conseil de l'Europe e les Roms: 40 ans d'actions*. Strasbourg: CoE Publishing Editions, 2010.
- Magga, O. H. *Samisk Språk Og Samisk Språkråds Arbeid. Særtrykk Av Språk I Norden*.1975.
- Malloy, T.H. *National Minority Rights in Europe*. Oxford: Oxford University Press, 2005.
- Mannens, W. “The International Status of Cultural Rights for National Minorities” in *Minority Rights in the "New" Europe* edited by P. and Wheatley Cumper, S., 185-96. The Hague/London/ Boston: Martinus Nijhoff Publishers, 1999.
- Marko, J. “Equality and Difference: Political and Legal Aspects of Ethnic Group Relations” in *Vienna International Encounter of some Current Issues Regarding the Situation of National Minorities* edited by F. Matscher, 67-97. Strasbourg: Arlington, 1997.
- Marotti, O. “Verso una legge Italiana per il riconoscimento delle minoranze Rom e Sinte?” In *La Condizione Giuridica di Rom e Sinti in Italia* edited by Bonetti, P., Simoni, A. and Vitale, T. Milano : Giuffré Editore, 2010.
- Marushiakova, E. and Popov, V. “Roma Culture” in *CoE, Project Education of Roma Children in Europe* available at [http://romafacts.uni-graz.at/images/stories/pdf/c\\_1.1\\_culture-ii.pdf](http://romafacts.uni-graz.at/images/stories/pdf/c_1.1_culture-ii.pdf) CoE, *Project Education of Roma Children in Europe* 1-8.
- Masera, L. “Diritto Penale di fronte a Rom e Sinti” In *La Condizione Giuridica di Rom e Sinti in Italia*, edited by Bonetti, P., Simoni, A. and Vitale, T. Milano: Giuffré Editore, 2011.
- Matras, Y. *Romani a Linguistic Introduction*. Cambridge: Cambridge University Press, 2004.
- McGarry, A. *Who Speaks for Roma?* . New York/London: Continuum, 2010.
- Medda-Windischer, R. *Old and New Minorities: Reconciling Diversity and Cohesion. A Human Rights Model for Minority Integration*. Bozen: EURAC Research, 2009.
- Medda-Windischer, R. “The European Court of Human Rights and Minority Rights” *European Integration* 25, no. 3 (2003): 249–71.
- MEU Programme, “Assessing the Cultural Policies of Six Member States. Final Report Czech Republic” In MEU Programme, *Minorities in the EU*. Prague: European Centre for Minority Issues, 2006.

MEU Programme, "Assessing the Cultural Policies of Six Member States. Final Report Slovakia." In MEU Programme, Minorities in the EU. Bratislava: Center for Research on Ethnicity and Culture, 2006.

Meyer, L.H. "Transnational Autonomy: Responding to Historical Injustice in the Case of the Saami and Roma Peoples" *International Journal of Minority and Group Rights* 8, no. 2-3 (2001): 263-301.

Milano, F. "Unlawful Territorial Situations in International Law", Leiden/Boston: Martinus Nijhoff Publishers, 2006.

Mimi Project, "Legal Country Study: Austria ". In Mimi Project: Practice of Minority Protection in Central Europe Legal-Theoretical Part: available at <http://www.eurac.edu/en/research/institutes/imr/Projects/ProjectDetails.aspx?pid=4688>.

Mimi Project, "Legal Country Study: Romania." In Mimi Project: Practice of Minority Protection in Central Europe Legal-Theoretical Part: available at <http://www.eurac.edu/en/research/institutes/imr/Projects/ProjectDetails.aspx?pid=4688>.

Mimi Project, "Legal Country Study: Slovenia." In Mimi Project: Practice of Minority Protection in Central Europe Legal-Theoretical Part: available at <http://www.eurac.edu/en/research/institutes/imr/Projects/ProjectDetails.aspx?pid=4688>.

Minde, H. "Sami Land Rights in Norway: A Test Case for Indigenous Peoples" *International Journal of Minority and Group Rights* 8, no. 2 (2001): 107-25.

Motta, F., and Geraci, S. "L'accesso di Rom e Sinti al diritto e alla tutela della salute" In *La condizione giuridica di Rom e Sinti in Italia*, edited by Bonetti, P., Simoni, A. and Vitale, T. 1065-79. Milano : Giuffr  Editore, 2011.

Moyers, A. "Linguistic Protection of the Indigenous Sami in Norway, Sweden and Finland." *Transnational Law and Contemporary Problems* 15, no. 1 (2005): 363-87.

Mundall, B. "Insights into Gypsy Culture" *Old Oregon* (1988): 22-25.

Niec, H. "Casting the Foundation for the Implementation of Cultural Rights" In *Cultural Rights and Wrongs, a Collection of Essays in Commemoration of the 50th Anniversary of the Universal Declaration of Human Rights* edited by H. Niec, 176-90. Paris: UNESCO Publishing 1998.

Nielsen, L.B. "The Need for Multi-Method Approaches in Empirical Legal Research" In *The Oxford Handbook of Empirical Legal Research*, edited by P. Cane, Kritzer, H.M. , 951-75. Oxford: Oxford University Press, 2010.

Nimni, E. *National Cultural Autonomy and Its Contemporary Critics*. New York: Routledge, 2005.

Nirenberg, J. "Romani Political Mobilization from the First International Romani Union Congress to the European Roma, Sinti and Travellers Forum," in *Romani Politics in Contemporary Europe. Poverty, Ethnic Mobilization and the Neoliberal Order* ed. N. Sigona and N. Trehan (Houndmills/Basingstoke/Hampshire/New York: Palgrave Macmillan 2010).

Nowak, M. *Introduction to the Human Rights Regime*. Leiden: Martinus Nijhoff Publishers, 2003.

Oeter, S. "The Charter's Monitoring Mechanism: A Practical Perspective" In *Minority Language Protection in Europe: Into a New Decade*, edited by CoE, 187-98. Strasbourg Council of Europe Publishing 2010.

Okely, J. *The Traveller - Gypsies*. Cambridge : Cambridge University Press, 1983.

O'Nions, H. "Roma Expulsion and Discrimination: The Elephant in Brussels" *European Journal of Migration and Law* 13, no. 4 (2011): 361-88.

O'Nions, H. *Minority Rights Protection in International Law. The Roma People in Europe*. Aldershot & Burlington: Ashgate, 2007.

OSCE, "Report on the Linguistic Rights of Persons Belonging to National Minorities in the OSCE Area" The Hague: OSCE High Commissioner on National Minorities.

OSCE-HCNM, "Report on the Situation of Roma and Sinti in the OSCE Area" OSCE-HCNM 2000.

OSCE-ODIHR, "The ODIHR Contact Point for Roma and Sinti Issue" edited by OSCE-ODIHR. Warsaw: OSCE Office for Democratic Institutions and Human Rights Contact Point for Roma and Sinti Issues, 2001.

Osherenko, G. "Indigenous Rights in Russia? Is Title to Land Essential for Cultural Survival?" *Georgetown International Environmental Law Review* 13, no. Spring (2001): 695-734.

Osipov, A. "National Cultural Autonomy in Russia: A Case of Symbolic Law" *Review of Central and East European Law* 35, no. 1 (2010): 27-57.

Open Society Foundation,. "No Data—No Progress. Country Findings" New York: Open Society Foundations 2010.

Packer, J. "On the Definitions of Minorities" in *The Protection of Ethnic and Linguistic Minorities in Europe*, edited by Packer, J. and Myntii, C. , 23-65. Åbo/Turku : Institute for Human Rights, Åbo Akademi University, 1993.

Palermo, F. "Internazionalizzazione del diritto costituzionale e costituzionalizzazione del diritto internazionale delle differenze" *EURAC European Diversity and Autonomy Papers*, no. 2 (2009).

Palermo, F. "Legal Solutions to Complex Societies: The Law of Diversity" In *Human Rights and Diversity: New Challenges for Plural Societies*, edited by E. Dunbar Ruiz R. Vieyetz,. Bilbao: University of Deusto, 2007.

Palermo, F. "Rom e Sinti come minoranza. Profili di diritto italiano e comparato e di diritto Internazionale. " In *La Condizione giuridica di Rom e Sinti in Italia* edited by P. Bonetti, A. Simoni and T. Vitale, 150-74. Milano: Giuffré Editore 2011.

Palermo, F. and Woelk, J. *Diritto costituzionale comparato dei gruppi e delle minoranze* (2nd Edition). Padova: CEDAM, 2011.

Palici di Suni, E. *Intorno Alle Minoranze*. Torino: Giappichelli, 1999.

Pentassuglia, G. *Defining "Minority" In International Law: A Critical Appraisal* Rovaniemi: Lapland's University Press, 2000.

Perin, G. “L'applicazione ai Rom e ai Sinti non cittadini delle norme sull'apolidia, sulla protezione internazionale e sulla condizione degli stranieri comunitari ed extracomunitari” In *La Condizione Giuridica di Rom e Sinti in Italia*, edited by P. Bonetti, A. Simoni and T. Vitale, 1-38. Milano Giuffré Editore, 2011.

Pezzini, B. *La decisione sui diritti sociali. Indagine sulla struttura costituzionale dei diritti sociali* Milano: Giuffré Editore, 2001.

Piasere, L. *I Rom d'Europa. Una Storia Moderna*. Roma-Bari: Laterza, 2004.

Pogge, T.W. “Group Rights and Ethnicity” In *Ethnicity and Group Rights* edited by W. Kymlicka. New York NYU Press, 1997.

Poggeschi, G. “Diritti linguistici dei Rom e dei Sinti” In *La condizione giuridica di Rom e Sinti in Italia*, edited by Bonetti, P., Simoni, A. and Vitale, T., 861-91. Milano: Giuffré Editore, 2011.

Poggeschi, G. *I diritti linguistici. Un'analisi comparata*. Roma: Carocci Editore, 2010.

Pogonyi, S., Kovács, M.M, Körtvélyesi, Z. . “The Politics of External Kin-State Citizenship in East Central Europe” In *EUDO Citizenship Observatory Comparative Reports*, edited by EUDO Citizenship Observatory. Badia Fiesolana: European University Institute, 2010.

Puchala, D. J. “Of Blind Men, Elephants and International Integration” *Journal of Common Market Studies* 10, no. 3 (1972): 267-84.

Quer, G.M. “Pluralismo e diritti delle minoranze. Il Sistema del "Millet” *Quaderni di diritto e politica ecclesiastica* 18, no. 1 (2010): 257-84.

Ramaga, P.V. “The Basis of Minority Identity” *Human Rights Quarterly* 14, no. 3 (1992).

Reiter, B. “The Perils of Empire: Nationhood and Citizenship in Portugal” *Citizenship Studies* 12, no. 4 (2008): 397-412.

Renner, K. . “State and Nation” In *National Cultural Autonomy and its contemporary critics* edited by E. Nimni, 15-47. London and New York Routledge, 2005.

Rey, F. “Propuestas para avanzar en el caso español” *El Globo Internacional, Política y Integración*, no. 37-38 (2007): 47-56.

Rey-Martinez, F., and Giménez-Giménez, S. “Discrimination against a Romani Woman before the European Court of Human Rights” *Roma Rights Quarterly* (2009).

Ringold, D., Orenstein, M. O. and Wilkens, E. “Roma in an Expanding Europe. Breaking the Poverty Cycle” Washington, D.C. : World Bank, 2005.

Roach, S.C. *Cultural Autonomy, Minority Rights and Globalization*, Aldershot: Ashgate, 2005.

Rodotà, S. “Se l'articolo 18 diventa un lusso” *La Repubblica* <http://temi.repubblica.it/micromega-online/se-larticolo-18-diventa-un-lusso/> (2011).

Roma Education Fund, “*Advancing Education of Roma in Bulgaria*” edited by Country Assessment and the Roma Education Fund’s Strategic Directions. Available at <http://www.romaeducationfund.hu/publications/country-assessments-2007>.

- Roossens, E. *Creating Ethnicity: The Process of Ethnogenesis* Oxford: Sage, 1989.
- Rostas, I. "The Romani Movement in Romania: Institutionalization and (De)Mobilization" In *Romani Politics in Contemporary Europe. Poverty, Ethnic Mobilization and the Neoliberal Order* edited by N. Sigona and Trehan, N. 158-85. Houndmills, Basingstoke, Hampshire ; New York Palgrave Macmillan, 2010.
- Saamelaiskäräjät/Sametinget/The Sámi Parliament,. "*The Sámi in Finland.*" Sámi Parliament Publications (2008).
- Salomon, M.E. *Economic, Social and Cultural Rights: A Guide for Minorities and Indigenous Peoples* available at [www.minorityrights.org/download.php?id=50](http://www.minorityrights.org/download.php?id=50): Minority Rights Group 2005.
- Samuel, G. "Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences." in *Epistemology and Methodology of Comparative Law*, edited by Van Hoecke, M. 35-77. Oxford/Portland/Oregon: Hart Publishing, 2004.
- Samuel, G. "Form, Structure and Content in Comparative Law: Assessing the Links." In *Legal Engineering and Comparative Law/L'ingénierie Juridique et le droit comparé. Rapports du colloque du 25e Anniversaire de l'institut Suisse de droit comparé du 29 Août 2008 à Lausanne*, edited by Cashin Ritaine, E. 27-50. Genève/Zurich/Bâle Schulthess, 2009.
- Sandland, R. "Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of the Human Rights" *Human Rights Law Review* 8, no. 3 (2008): 475-516.
- Scheinin, M. "The Rights of an Individual and a People: Towards a Nordic Sámi Convention" *Gáldu Čála – Journal of Indigenous Peoples Rights* 3 (2007): 40-50.
- Schilling, T. "Language Rights in the European Union" *German Law Journal* 9, no. 10 (2008): 1119-42.
- Seriot, P. "Ethnos et Demos : La construction discursive de l'identité collective" *Langages et Société* 79 (1997): 39-52.
- Seurujärvi-Kari, I. Pedersen, S. and Hirvonen, V. *The Sámi: the indigenous people of northernmost Europe. European languages* 5. EBLUL, Brussels, 1997
- Shoraka, K. *Human Rights and Minority Rights in the European Union*. Abingdon: Routledge, 2010.
- Shuibhne, N.N. "The European Union and Minority Language Rights: Respect for Cultural and Linguistic Diversity" *International Journal on Multicultural Societies* 3, no. 2 (2001): 61-77.
- Sigona, N. "The 'Problema Nomadi' vis-à-vis the political participation of Roma and Sinti at the local level in Italy" In *Romani Politics in Contemporary Europe. Poverty, Ethnic Mobilization and the Neoliberal Order* edited by Sigona, N. and Trehan, N. 272-92. Houndmills/Basingstoke/Hampshire/New York : Palgrave Macmillan, 2010.
- Simoni, A. "Il "Problema di una gente vagabonda". Retrospectiva Sulla Percezione Degli "Zingari" Nella Cultura Giuridica Italiana " In *La condizione giuridica di Rom e Sinti in Italia*, edited by P. Bonetti, A. Simoni and T. Vitale, 225-53. Milano: Giuffré Editore 2011.

- Simoni, A. *Stato di Diritto e Identità Rom*. Torino: L'Harmattan Italia, 2005.
- Škaric, S. "Ohrid Agreement and Minority Communities in Macedonia" In *Prospects of Multiculturalism in Western Balkan States* edited by Bašić, G. 94-110. Belgrade : Ethnicity Research Center, Friedrich Ebert Stiftung, 2004.
- Smith, D.J. "The Revival of Cultural Autonomy in Certain Countries of Eastern Europe: Were Lessons Drawn from the Inter-War Period?" In *Science and Technique of Democracy. The participation of minorities in public life* edited by CoE, 87-100. Strasbourg: CoE Publishing, 2011.
- Smits, J.M. "The Europeanisation of National Legal Systems" In *Epistemology and Methodology of Comparative Law*, edited by Van Hoecke, M. 229-43. Oxford/Portland/Oregon: Hart Publishing, 2004.
- Smits, J.M. "Redefining Normative Legal Science: Towards an Argumentative Discipline." In *Methods of Human Rights Research*, edited by Coomans, F., Grünfeld, F. and Kamminga, M.T., 45-58. Antwerp/Oxford/Portland: Intersentia 2010.
- Sobotka, E. "*Political Representation of the Roma: Roma in Politics in the Czech Republic, Slovakia and Poland*" International Policy Fellowship Programme (2003).
- Sobotka, E. "Special Contact Mechanisms for Roma" In *Political Participation of Minorities. A Commentary on International Standards and Practice*, edited by Weller M. and Nobbs, K. 503-23. Oxford/New York: Oxford University Press, 2010.
- Somma, A. *Temi e problemi di diritto comparato Vol.2. Tecniche e valori nella ricerca comparatistica*. Torino : Giappichelli, 2005.
- Stavenhagen, R. "Cultural Rights and Universal Human Rights" In *Economic, Social and Cultural Rights: a Textbook* edited by Eide, A. 63-77. Dordrecht : Martinus Nijhoff Publishers, 1995.
- Stavenhagen, R. *The Ethnic Question. Conflicts, Development, and Human Rights*, Tokio: The United Nations University Press, 1990.
- Steiner, H.J., and Alston, P. *International Human Rights in Context: Law, Politics, Morals*. Oxford: Oxford University Press, 2000.
- Strazzari, D. "C'è un giudice a Strasburgo! La Corte Europea dei Diritti dell'Uomo e la tutela contro la discriminazione degli appartenenti all'etnia rom" In *Il Mosaico Rom. Specificità Culturali e Governance Multilivello* edited by Baldin S. and Zago, M. 192-207. Milano : FrancoAngeli, 2011.
- Surdu, M. , and Surdu, L. "*Broadening the Agenda: The Status of Romani Women in Romania*". New York: Open Society Institute 2006.
- Sweepston, L. "Labour Rights" in *Economic, Social and Cultural Rights: A Guide for Minorities and Indigenous Peoples* edited by Salomon, M.E. 69-81. available at [www.minorityrights.org/download.php?id=50](http://www.minorityrights.org/download.php?id=50): Minority Rights Group 2005.
- Tanasescu, S. "Minoranza Rom nell'ordinamento rumeno" In *La condizione giuridica di Rom e Sinti in Italia*, edited by Bonetti, P., Simoni, A. and Vitale, T. Milano: Giuffrè Editore, 2011.



- The Government of the Republic of Serbia, “*Strategy for Improvement of the Status of Roma in the Republic of Serbia*”. available at <http://www.ljudskaprava.gov.rs/dokumenti/roma/strategija%20za%20web%20en.pdf> 2010.
- Thio, L.A. *Managing the Babel: The International Legal Protection of Minorities in the Twentieth Century*. Leiden/Boston : Martinus Nijhoff Publishers 2005.
- Thornberry, P. *International Law and the Rights of Minorities* Oxford: Clarendon Press 1991.
- Tishkov, Valery A. “Forget the `Nation`: Post-Nationalist Understanding of Nationalism” *Ethnic and Racial Studies* 23, no. 4 (2000).
- Toniatti, R. “Los derechos del pluralismo cultural en la nueva Europa” *Revista Vasca de Administración Pública* 58, no. 2 (2000): 17-48.
- Toniatti, R. “Minoranze e Minoranze Protette. Modelli costituzionali comparati” In *Cittadinanza e diritti nelle città multiculturali*, edited by T. and Dunne Bonazzi, M. Bologna: Il Mulino, 1994.
- Trifunovska, S. "Monitoring of Linguistic Rights of Minorities under the European Charter and the Framework Convention." In *II Simposi Internacional Mercator: Europa 2004: Un nou marc per a totes les llengües?, Il Mercator International Symposium: Europe 2004: A new framework for all languages?* Tarragona – Catalunya, 2004. available at <http://www.ciemen.cat/mercator/pdf/simp-trifunovska.pdf>
- Ulfstein, G. “Indigenous Peoples Right to Land” *Max Planck United Nations Yearbook* 8, no. 1 (2004): 1-47.
- Vašečka, M. “*The Aspect of Culture in the Social Inclusion of Ethnic Minorities Evaluation of the Impact of Inclusion Policies under the Open Method of Co-Ordination in the European Union: Assessing the Cultural Policies of Six Member States. Final Report: Slovakia*” ECMI Working Paper No. 32 (2006).
- Vašečka, M., and Sadovská, M. “The Aspect of Culture in the Social Inclusion of Ethnic Minorities. Evaluation of the Impact of Inclusion Policies under the Open Method of Co-Ordination in the European Union: Assessing the Cultural Policies of Six Member States. Final Report Slovakia” in *MEU Programme, Minorities in the EU Bratislava, Center for Research on Ethnicity and Culture*, 2006.
- Vatta, V. “I gruppi di interesse e la rappresentanza politica dei Rom” In *Il Mosaico Rom. Specificità culturali e Governance multilivello* edited by Baldin S. and Zago, M. 129-42. Milano: Franco Angeli 2011.
- Vermeersch, P. "Reframing the Roma: EU Initiatives and the Politics of Reinterpretation," *Journal of Migration Studies* 38, no. 8 (2012): 1199.
- Vermeersch, P. *The Romani Movement. Minority Politics and Ethnic Mobilization in the Contemporary Central Europe* (New York/Oxford Bergham Books, 2006).
- Verstichel, A. “Special Measures to Promote Minority Representation in Elected Bodies: The Experience of the OSCE High Commissioner on National Minorities” In *Science and Technique of Democracy. The Participation of Minorities in Public Life* edited by CoE. Strasbourg: CoE Publishing, 2011.

Verstichel, A. *Participation, Representation and Identity. The Right of Persons Belonging to Minorities to Effective Participation in Public Affairs: Content, Justification and Limits.* Antwerp/Oxford/Portland: Intersentia, 2009.

Vermeersch, P. "Reframing the Roma: EU Initiatives and the Politics of Reinterpretation," *Journal of Migration Studies* 38, no. 8 (2012): 1199.

Vermeersch, P. *The Romani Movement. Minority Politics and Ethnic Mobilization in the Contemporary Central Europe* (New York/Oxford Bergham Books, 2006).

Watters, L. "Indigenous People and the Environment: Convergence from a Nordic Perspective" *Journal of Environmental Law and Policy* 20 (2001): 237-302.

Weber, M. "What Is an Ethnic Group?" In *The Ethnicity Reader: Nationalism, Multiculturalism and Migration* edited by M. Guibernau and J. Rex. Cambridge: Polity, 1997.

Webley, L. "Qualitative Approaches to Empirical Legal Research" In *The Oxford Handbook of Empirical Legal Research*, edited by P. Cane, Kritzer, H.M. , 926-50. Oxford Oxford University Press, 2010.

Weller, M. "Minority Consultative Mechanisms. Towards Best Practice." In *Political Participation of Minorities. A Commentary on International Standards and Practice*, edited by M. Weller and K. Nobbs, 477-502. Oxford/New York: Oxford University Press, 2010.

Weyrauch, W.O. *Gypsy Law. Romani Legal Traditions and Culture.* Berkeley/Los Angeles/London : University of California Press, 2001.

Willers, M. *Ensuring Access to Rights for Roma and Travellers. The Role of the European Court of Human Rights. A Handbook for Lawyers defending Roma and Travellers.* Strasbourg Council of Europe, 2009.

Williams, P. "L'ethnologie des Tsiganes" In *Des Tsiganes en Europe*, edited by M. Stewart and P. Williams. Paris : Editions de la Maison des Sciences de l'Homme, 2011.

Wilson, D. "Education Rights" In *Economic, Social and Cultural Rights: A Guide for Minorities and Indigenous Peoples* edited by M.E. Salomon, 55-67. available at [www.minorityrights.org/download.php?id=50](http://www.minorityrights.org/download.php?id=50): Minority Rights Group, 2005.

Wirth, L. "The Problem of Minority Groups" In *The Science of Man in the World Crisis*, edited by R. Linton, 347-72. New York : Columbia University Press, 1945.

Woelk, J. *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo stato multinazionale sostenibile?* Padova: CEDAM, 2008.

Wright, J. "The OSCE and the Protection of Minority Rights" *Human Rights Quarterly* 18, no. 1 (1996): 190-205.

Xanthaki, A. "Indigenous Rights in the Russian Federation: The Case of Numerically Small Peoples of the Russian North, Siberia, and Far East." *Human Rights Quarterly* 26, no. 1 (2004): 74-105.

Xanthaki, A., *Indigenous Rights and United Nations Standards*, New York City: Cambridge University Press, 2007.

Yamin, A.E. "Health Rights." In *Economic, Social and Cultural Rights: A Guide for Minorities and Indigenous Peoples* edited by M.E. Salomon, 41-53. available at [www.minorityrights.org/download.php?id=50](http://www.minorityrights.org/download.php?id=50): Minority Rights Group, 2005.

Zagato, L. *Le identità culturali nei recenti strumenti UNESCO. Un approccio nuovo alla costruzione della pace?* . Padova : CEDAM, 2008.

Zweigert, K., Kötz, H. *An Introduction to Comparative Law*. Oxford: Oxford University Press, 1998.