Evolving Europe: Voices of the Future

Loughborough, 8-9 July 2013

www.uaces.org

TACKLING THE SOCIAL EXCLUSION OF ROMA THROUGH LEGAL INCLUSION? TRENDS AND ISSUES ARISING FROM EUROPEAN COURTS AND MONITORING BODIES

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Abstract: In the last decade, a holistic approach addressing the social inclusion of Roma has started to enter the European policy agenda. In particular, through the adoption of a EU Framework for National Roma Integration Strategies up to 2020, European Member States have been called to commit themselves in the socio-economic inclusion of Roma by means of active policies. At the legal level instead, the socio-economic inclusion has not been comprehensively tackled yet. Nonetheless, case law and legal opinion ensuing from European Courts and monitoring bodies are increasingly considering cases of Roma rights violations as "systemic patterns" of their exclusion. This paper critically considers the topic of social inclusion of Roma in Europe both at political and legal levels. The discussion specifically focuses on the possible pathways of social inclusion of Roma arising from European jurisprudence and legal opinion. The analysis shows that social exclusion derives and – at the same time – underlies legal exclusion. Thus, the cross-examination of these two parallel trends may shed some light on the processes of mutual influence characterizing the social-legal ex/in-clusion of Roma in Europe. In conclusion, opportunities of Romani empowerment ensuing from the joint consideration of these two trends are critically discussed.

DRAFT VERSION

The topic of social exclusion of Roma is often interpreted by the public debate as a problem of immigration, of public order, of linguistic minority and/or of race/ethnicity.[1] In the realm of "common sense" each of these aspects may hold a grain of truth. As we move to the realm of scientific debate, one quickly realizes that scholars are unable to provide adequate answers to this issue because the "bridges" between *Romani studies* and general culture are still missing.[2] 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. [3]

This paper argues that the overall social exclusion of Roma in Europe derives and – at the same time – underlies their legal exclusion. In other words, legal exclusion of Roma in Europe cannot be considered only as a by-product of social exclusion, rather the representation of Roma in the legal definitions and legal texts performs[4] (in the sense of forms *a priori*) and perpetuates the social exclusion of this social group in turn. The first section of this paper focuses on the current legal framework addressing the status and the rights of this social group and highlights the mutual relationship linking social and legal exclusion of Roma in Europe. The second section examines the role of "strategic litigations" in enhancing Roma rights in European judicial fora and monitoring bodies. The conception of "Romani cultural identity" as understood and developed in the case-law of European Court of Human Rights (ECtHR) is analyzed by section three. Whereas section four examines the growing recognition of Roma rights within European judicial fora and international monitoring bodies. The final section is devoted to a critical reflection on the opportunity to advance the social inclusion of Roma in Europe through a complementary legal inclusion.

1. EUROPEAN LEGAL FRAMEWORKS AND ROMA RIGHTS

The protection and the promotion of Roma rights in Europe articulates on three geo-legal spheres:[5] a) the European Union (EU) as the most inner level, (b) the Council of Europe (CoE) at the intermediate level, and (c) the Organization for Security and Cooperation in Europe (OSCE) as the most external one.

These geo-legal dimensions have produced – especially in the realm of the rights of minorities – an increasing osmotic process between international law and domestic

[1] 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 Giuffré Editore, 2010).
[2] A. Simoni, *Stato Di Diritto E Identità Rom* (Torino: L'Harmattan Italia, 2005), 9.
[3] "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.
[4] See the performative theory of Austin in J.L. Austin, *Philosophical Papers* (London Oxford University Press, 1970).
5 R. Toniatti, "Los Derechos Del Pluralismo Cultural En La Nueva Europa," Revista Vasca de Administración Pública 58, no. 2 (2000). "Supranational Law, International Law and soft law correspond to every of these geo-legal sphere. Each one characterized by the formation of an "European Constitutional Law". Ibid., 23.

constitutional laws mutually reinforcing the guarantees belonging to each single dimension.[6]

(a) The EU is the smallest organization (in terms of number of Member States) dealing with the respect of human and minority rights in Europe. Originally created and organized as a tool for economic integration, it has increasingly become concerned firstly in individual human rights and secondly on 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[7] than on the one of the promotion of minority rights.[8] 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 relations in the enlargement policies towards the Eastern part.[9] 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[10] of 1985, the *Groener* case[11] of 1989 and the *Bickel/Franz* case[12] 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.[13]

(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 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,[14] the ECtHR has increasingly played a

[6] The combined effect of the increasing 'internationalization' of minorities' standards and the parallel conditionality of these standards vis-à-vis domestic norms has produced the so-called "internationalization of constitutional law". F. Palermo, "Internazionalizzazione Del Diritto Costituzionale E Costituzionalizzazione Del Diritto Internazionale Delle Differenze," *European Diversity and Autonomy Papers*, no. 2 (2009).

[7] 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).

[8] 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).

[9] 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.

[10] *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.

[11] *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.

[12] *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.

[13] 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 OSCE in the legal field of minority rights, since so far, it has not adopted specific legislation on this field. K. Shoraka, *Human Rights and Minority Rights in the European Union* (Abingdon: Routledge, 2010), 84-89.

[14] The only provision mentioning minorities in enshrined in Art.14 of ECHR which prohibits discrimination on the ground of association, *inter alia,* with a national minority.

vital role in promoting respect for minority rights, by extensively interpreting the provisions of its institutive treaty.[15]

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.[16] 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).[17] 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 and intolerance by working closely with the civil society.[18] 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.[19] 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.[20]

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[15] 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).

[16] 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.

[17] 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 .

[18] 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 Nº 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

[19] 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/

[20] 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 Nº 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

(c) 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.[21] 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, at the same time, assists States through recommendations and guidelines.[22]

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.[23] Despite these positive legal improvements, its system of protection still presents some serious gaps, characterized by a Westphalian conception which still roots – on 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 sets of guarantees deriving from these legal regimes because of their peculiar non-territorial feature.

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 cultural identity, and consequently Roma rights, are not adequately defined and satisfactorily addressed by current legal categories. Thus, their factual situation cannot be comprehensively improved at social level.

Accordingly, the resulting "legal limbo" where the Roma minority falls (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 those Member States were 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 legal status and rights of Roma.

2. STRATEGIC LITIGATIONS AS A MEANS TO FOSTER THE RECOGNITION OF ROMANI CULTURAL IDENTITY AND ROMA RIGHTS

The last two decades, however, have witnessed a remarkable legal advancement at the European level both in the recognition of Romani cultural identity and in the consideration of Roma rights. Such an advancement has occurred by means of "strategic litigation", a judicial tool borrowed from the U.S. constitutional experience and increasingly applied to Roma cases. Indeed, the widespread situation of segregation of Roma in Europe has often been compared to that of Black Americans of the 50s-60s. To the same token, litigation

[21] J. Wright, "The Osce and the Protection of Minority Rights," *Human Rights Quarterly* 18, no. 1 (1996).
[22] 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).
[23] M. Nowak, *Introduction to the Human Rights Regime* (Leiden Martinus Nijhoff Publishers, 2003).

has started to be used as a tool to focus public attention on social and legal realms where legislators have been unable or unwilling to effectively intervene.[24]

"Strategic litigations" precisely aim at "pushing" judges to challenge existing legislation, in particular in those cases where international treaties and domestic constitutions are *de facto* ineffective to produce the "social justice" they were intended to bring. At the same time, the use of "strategic litigations" may also "push" judges to adopt new legislation especially in those fields where domestic legislators have been silent or incapable of implementing legal commitments ensuing from international or European legislation.

At the practical level, one the most far-reaching examples of the use of "strategic litigations" in the U.S. experience is the case of *Brown v. Board of Education*, decided in 1954.[25] In that case, the U.S. Supreme Court decided that local laws establishing segregated schools for Black American pupils were unconstitutional since they totally breached constitutional equality provisions. Similarly, in 2007, in *D.H. and Others vs. Czech Republic*[26] the ECtHR decided that segregation of Romani pupils in Czech Schools constituted a systemic pattern of discrimination towards them (in breach, *inter alia,* of Art.14 of the ECHR), in that racial affiliation shown to be the key element to exclude this social group from accessing regular schools.

According to Goldston, three strategies have been effective in the use of this judicial tool: positive obligations, burdens of proof and rebuttable presumptions.[27] At the same time, two major changes in European legislation have also contributed to the successful use of the "strategic litigation" tool: 1) the adoption of the Racial Equality Directive 2000/43/EC by the European Council of Ministers in 2000 prohibiting discrimination in a wide range of socio-economic sectors including employment and education; 2) the adoption of Protocol No.12 to the European Convention creating a "free-standing" right to non discrimination analogous to the right enshrined at Art. 26 of the International Covenant on Civil and Political Rights.[28]

These legal developments have not only allowed to strengthen the legal foundations of "strategic litigations" at the ECtHR level: they have also propelled an "osmotic force" in bringing "strategic litigations" before other international monitoring bodies (in particular before the Committee monitoring the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) and the European Committee on Social and Economic rights (ECSR)).

[24] On the use of strategic litigation 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).
[25] 347 U.S. 483 (1954).
[26] D.H. and Others v. Czech Republic, Application No. 57325/00, Chamber Decision of 7 February 2006, Grand Chamber decision of 13 November 2007.
[27] 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: Giuffré Editore, 2011).
[28] Goldston, "The Struggle for Roma Rights: Arguments That Have Worked ": 310.

3. JUDICIAL RECOGNITION OF ROMANI CULTURAL IDENTITY

"Strategic litigations" as a tool to enhance both the recognition of Roma rights and of Romani cultural identity have started to be used particularly in the last fifteen years. In the absence of a specific treaty provision dealing with minority rights within the ECHR, the recognition of Romani cultural identity in the jurisprudence of the ECtHR developed through a "jurisprudential legal revolution" which is still in progress. Traditionally, the ECtHR's approach towards minority rights (and towards any other form of recognition of social difference) was in fact characterized by a "minimum interventionism".

In its early jurisprudence, the Court 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.[29] 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 individuals belonged. Soon after, the ECtHR started to progressively develop a doctrine 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.[30]

While an increasing consideration of minority cultural identity started to emerge in the jurisprudence of the ECtHR,[31] it did not *per se* pave the way for the parallel recognition of Romani cultural identity as well. The early jurisprudence of the ECtHR on Roma cases mostly concentrated on patterns of gross human rights violations perpetrated by police officers, whereby States failed to investigate or to promptly provide remedy against victims.[32] Later on, the Court of Strasbourg began to consider also cases of discriminatory attacks against Roma mostly in the spheres of education and housing.[33] It is precisely in this second set of cases that the Court began to openly deal with Romani cultural identity.

[29] Sandland, "Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of the Human Rights ": 480.

[30] Y. Donders, *Towards a Right to Cultural Identity?* (Antwerpen/Oxford/New York: Intersentia 2002), 292.

[31] 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 9th 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 10th 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 2nd 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 13th 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).

[32] Specifically 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. The trigger case in this realm was *Assenov 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.

[33] Specifically 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).

The ECtHR firstly "discovered" Romani cultural identity especially in three cases: *Buckley v. UK,*[34] *Chapman v. UK,*[35] and *Connors v. UK*.[36] The cases alleged a breach of the right to respect for private and family life, as enshrined at Art. 8 of the ECHR. In its decisions, the Court progressively interpreted the right to respect for private and family life as giving rise to a "positive obligation to facilitate the Gypsy way of life"[37] thus fully considering Romani cultural identity.

It is interesting to note, however, that the "discovery" of Romani cultural identity by the Court of Strasbourg firstly hinged on a very stereotyped conception of Roma. Such a (mis)conception, perceived Roma as homogeneously belonging to the same ethnic group,[38] whose cultural identity was indissolubly associated with the elements of "nomadism", "travelling life" and "caravan home". In this early Court's conception, "the Romani social group" was mostly represented through the features of "vulnerability" and "social exclusion" which made it in "seek of exemption".[39] Such a perspective, extremely biased by "paternalistic" assumptions, generally disregarded the aspect of autonomy in the representation of this social group.[40]

As the number of Roma cases presented before the ECtHR increased, the Court's perspective towards this social group progressively departed from this early conception. Even though the overall approach of the Court towards Roma has remained quite "paternalistic",[41] some mild attempts of evolution in the general judicial attitude towards Roma have started to take place. In *D.H. and Others v. Czeck Republic*, the dissenting opinion of Judge Jungwiert warned the Court on the dangerous use of "abstract words" when approaching Romani cultural identity. While the use of words such as "emancipation", "autonomy", "integration" and "inclusion" may potentially open to a more "matured" and respectful perspective towards this social group, it may as well potentially mask reality with abstract terms deprived of any effective functional value.[42]

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[34] *Buckley v. the United Kingdom,* Application No. 20348/92, European Court of Human Rights, decision of 25th September 1996, Reports of Judgements and Decisions 1996-IV, no.16.

[35] *Chapman v. the United Kingdom,* Application No. 27238/95, European Court of Human Rights, decision of 18th January 2001. See again chapter 5 for further analysis on this case.

[36] *Connors v. United Kingdom* Application No. 66746/01 European Court of Human Rights decision of 27th May 2004.

[37] 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).

[38] Without minimally consider the "rich diversity" existing under the "umbrella" definition "Roma".

[39] On the definition of Romani cultural identity in ECtHR's early jurisprudence see the critical analysis of D. Farget, "Defining Roma Identity in the European Court of Human Rights " *International Journal on Minority and Group Rights* 19, no. 3 (2012).

[40] See, *inter alia, Chapman* whereby the Court held: ..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 (paragraph 96).

[41] See, *inter alia,* Judge Borrego Borrego's dissenting opinion § 13 "The Grand Chamber begins by calling into question the capacity of Roma parents to perform their parental duty. The judgment states: "The Court is not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent (at paragraph 203)".

[42] Dissenting Opinion of Judge Jungwiert § 5. *D.H. and Others* (2007) In warning the Court on the potentially dangerous usage of abstract terms Judge Jungwiert refered to the study J.P. Liégeois, *Roma in Europe* (Strasbourg: The Council of Europe, 2008).

In *Muñoz Díaz v Spain,* [43] while emphasizing once again the elements of "vulnerability" and "social exclusion" characterizing its initial jurisprudence on Roma,[44] the ECtHR did not justify the decision of protecting/promoting the rights of the applicant as belonging to a group "seeking exemption from rules applying to everyone else".[45] Quite the opposite, the Court took the view that "the fact of belonging to a minority does not create an exemption from complying with marriage laws [rather] it may have an effect on the manner in which those laws are applied".[46] Against this new and more "emancipated" perception of Romani cultural identity, in the final decision of *Muñoz,* the Court recognized her marriage contracted under Romani traditional rites, has having the same legal effects of other civil marriages contracted in Spain at that time[47] (1971).

In *Aksu v. Turkey*[48] the issue of the "stereotyped" image of Romani cultural identity has been once again fully brought in question. Mr. Aksu, the applicant, complained about the discriminatory representation of Romani cultural identity in remarks and expressions used in three government funded publications (a book about Roma and two dictionaries).[49] However, in its decision on the merits, the Court considered the case unfounded from a procedural standpoint since Turkish authorities took all necessary steps to comply with their obligations. [50] Even if 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", [51] on a substantial standpoint, the Court remained a step behind in the process of "dismantling" stereotyped images of Roma. Indeed, the ECtHR only encouraged the Turkish Government to pursue efforts to combat negative stereotyping against Roma.

Surely the Court could have brought a more substantial contribution in the process of "emancipation" of the representation of Romani cultural identity in the public sphere.[52] Nonetheless, it should not be forgotten that the process of recognition of Romani cultural identity is still under development and that it has already brought some significant achievements. First and foremost, the Strasbourg Court has cut the "invisibility curtain" which for a long time has let Roma in a state of socio-legal "separation" and "(un)equality" *vis-à-vis* mainstream societies. This "curtain" has been progressively cut as to involved not only gross human rights violations (as in the first cases presented before the ECtHR) but also "softer" violations such as hate speech. In other words, in a timeframe of less than twenty years, thanks to the use of "strategic litigations" brought before the ECtHR we

[43] *Muñoz Díaz v Spain (2009)* Application No. 49151/07, European Court of Human Rights decision of 8th December 2009.
[44] Indeed, the reference to Chapman is evident, Ibid., § 60.
[45] § 86.
[46] *Muñoz Díaz v Spain (2009)*, § 60.
[47] During the franquist regime (1971).
[48] *Aksu v. Turkey*, Application nos. 4149/04 and 41029/04 European Court of Human Rights decision of 15th 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.
[49] 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.
[50] § 85.
[51] § 75.
[52] This is also the view of the Dissenting opinion of Judge Gyulumyan attached to *Aksu* (2012).

have moved from a socio-legal era when gross human rights violations against Roma were not considered to be justiciable at all, to a socio-legal era when *only* gross human rights violations (namely the right to life and the prohibition of torture) were considered to be admissible before the Court, to a present era when also "softer" human rights violations (such as hate speech), are considered to be admissible i.e. justiciable. Moreover, the judicial recognition of "Roma rights" and to a certain extent of Romani legal identity, has propelled from the ECtHR to other judicial courts at European and at domestic levels,[53] as well to other European and international monitoring bodies.

4. PROMOTING THE RECOGNITION OF ROMA RIGHTS IN COURTS AND MONITORING BODIES

In parallel with the increasing recognition of Romani cultural identity within the ECtHR's judicial forum, a growing recognition of Roma rights has started to take place. Despite of the recognition of the unalienable right to life and of the protection from inhuman or degrading treatment, the jurisprudence of the ECtHR has also concentrated on a set of cases dealing with discriminatory attacks towards Roma especially in the socio-economic sphere. Additionally, other monitoring bodies, namely the Committee monitoring the implementation of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Committee monitoring the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the European Committee of Social Rights Committee (ECSR), have progressively been involved in cases of human and minority rights breaches where the ethnic belonging to a Romani community was underlying a discriminatory attack.

In the realm of education, the ECtHR considered the practice of putting Romani children in special classes or in special schools as amounting to racial segregation, given that a breach of the non-discrimination principle can occur even in cases where law is not openly discriminatory but its application amounts to a disadvantage for a particular social group.[54] Especially in the case of Romani pupils, the ECtHR considered the access to right to education as "a primordial right"[55] which has to be ensured through "a reasonable relationship of proportionality" even in cases when Romani pupils were put in separate classes to better address their learning difficulties in the lack of a sufficient proficiency in the language of instruction. [56]

In the healthcare sphere, a series of cases was brought before international monitoring bodies and European courts in relation to a quite widespread practice of sterilization of Romani women mostly occurring Central-Eastern Europe without informed consent.[57] The

[53] Although the ECJ has not been directly sued yet on Romani issues, in 2010 EU Justice Commissioner Reding warned France that it would have faced an infringement procedure if it failed to implement directive 2004/38/EC. As for the effect of ECtHR's decisions on domestic Courts see, inter alia, 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).

[54] *D.H. and Others (2007)* §184.

[55] *Sampanis v. Greece*, Application No. 32526/05, European Court of Human Rights, decision of 5 September 2008 § 72.

[56] *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 §180.

[57] See A.S. v. Hungary (2004) CEDAW/C/36/D/4/2004. *V.C. v. Slovakia*, Application No. 18968/07, European Court of Human Rights, decision of 8 November 2011. *N.B. v. Slovakia*, Application No. 29518/10, European Court of Human Rights, decision of 12th June 2012. *I.G. and Others v. Slovakia*, Application No. 15966/04, European Court of Human Rights, decision of 13th November 2012.

ECtHR in particular, found that such a practice was a by-product of a widespread negative attitude towards Roma and that it indirectly aimed at limiting the proportion of population living on social benefits.[58] Thus, in its jurisprudence, the Court recalled that is a duty of the State to ensure a positive measures to secure reproductive healthcare rights particularly with regard to vulnerable communities such as Roma.[59]

In the realm of housing, it is worth recalling the number of cases brought before the ECtHR, which besides promoting the process of recognition of Romani cultural identity, also contributed to recognize that law produces different effects according to the different identity of the individuals subject to it.[60] To the same token, also the ECSR stated that the access to the right to adequate housing should be understood in terms of States' positive obligation and that the access to it determines – in turn – the access to several important rights and related services.[61]

5. MOVING FROM A *DE JURE* TO A *DE FACTO* INCLUSION OF ROMA IN EUROPE: CRITICAL REMARKS

Especially in the last decade, Roma have reached an institutional recognition without precedent in the European panorama. Among the most significant advancements occurred at the political level, the EU Framework for National Roma Integration Strategies up to 2020, deserves a special mention. The Framework entails in fact a holistic approach which tackles the social exclusion of Roma in the European Union by requiring Member States to actively engage in the promotion of policies of inclusion in the areas of education, employment, healthcare and housing.

At the legal level, the use of "strategic litigations" before European judicial fora and international monitoring bodies has developed an increasing legal consideration on Romani cultural identity and Roma rights. Such a consideration has allowed a certain degree of "emancipation" of Roma on the legal sphere by making both Romani individuals and Romani communities "visible" and *de jure* "fully entitled" to human and minority rights. Yet, both the representation of Romani cultural identity and the recognition of Roma rights that have so far been developed, at the European legal level, are overall unable to comprehensively tackle the needs of this social group.

[58] *V.C. v. Slovakia*, Application No. 18968/07, European Court of Human Rights, decision of 8 November 2011. § 146.
[59] Ibid.
[60] See to this regard, Sandland, "Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of the Human Rights ".
[61] See *International Federation of Human Rights (FIDH)* v. Belgium, Complaint No. 62/2010, Decision on the Merits 21st March 2012. See also some other relevant cases brought before the ECSR Committee to this regard: ERRC v. Bulgaria, Complaint No. 48/2008, decision on the Merits 18th February 2009; ERRC v. Greece, Complaint No. 15/2003, decision on the Merits 8th December 2004; ERRC v. Bulgaria, Complaint No. 31/2005, decision on the Merits 18th October 2006; ERRC v. Italy, Complaint No. 27/2004, decision on the Merits 7th December 2005; ERRC v. France, Complaint No. 51/2008, Decision on the Merits 19th October 2009; ERRC v. Portugal, Complaint No. 61/2010, Decision on the Merits 30th June 2011, In this case the Committee found in fact only violation of Arts. 16, 30 and 31.1; COHRE v. Italy, Complaint No. 58/2009, Decision on the Merits 25th 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); 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. European Roma and Travellers Forum v. France, Complaint No. 64/2011, Decision on the Merits 24th 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.

As seen at section three, the representation of Romani cultural identity in the legal sphere is still permeated by the prejudices that have historically characterized the existence of Roma in Europe, at the social level. As Farget clarifies, in Courts' decisions, judges not only draw inspiration from applicants and States' complaints when representing Romani cultural identity but – at the same time – they become "agents" in reproducing (mis)representations of Roma.[62] In the lack of a comprehensive legal framework tackling the legal status of Roma as a non-territorial minority and Roma rights, judges are even "freer" in playing this role i.e. in reproducing an image of Romani identity and Romani needs that is more dependent on a social (and personal) (mis)conception than on a legal one. Accordingly, the dimensions of social and legal exclusion of Roma in Europe are strictly connected and mutually interdependent.

To the same token, when reflecting upon the opportunities of inclusion of this social group in Europe not only from a *de jure* but also from a *de facto* level the dimensions of social inclusion and legal inclusion of Roma in Europe cannot been considered separately. Indeed, the current paths of economic and social inclusion of Roma in Europe currently developing at political and legal levels, risk of becoming null and void if they will keep running on two parallel tracks which do not foresee any possibility of intersection in a common legal framework.

On the one hand, in the lack of any binding/justiciable mechanism, the overall implementation of the EU Framework for National Roma Strategies, risk of becoming totally nullified by the domestic austerity measures adopted in times of financial crisis. On the other hand, the judicial decision aimed at promoting Roma rights and Romani cultural identity risk of becoming totally unapplied in the lack of a comprehensive legal framework addressing the specificities of Romani cultural identity and Roma rights.[63] Indeed, as long as legal gaps and pitfalls characterizing the current legal framework of minority rights in Europe will not been solved in a comprehensive legal framework addressing both the non-territorial identity and the rights of Roma in Europe, the dimensions of political and legal dimensions of ex/in-clusion of Roma will produce a short circuit which will defeat the institutional recognition of Roma in Europe so far achieved.

[62] Ibid.: 305.
[63] 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).

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