ECMI

HANDBOOK

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FOR
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Compilation of Lectures:

Ensuring Equality and Preventing Discrimination on Ethnic Grounds

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The European Centre for Minority Issues (ECMI) is a non-partisan institution founded in 1996 by the Governments of the Kingdom of Denmark, the Federal Republic of Germany, and the German State of Schleswig-Holstein. ECMI was established in Flensburg, at the heart of the Danish-German border region, in order to draw from the encouraging example of peaceful coexistence between minorities and majorities achieved here. ECMI's aim is to promote interdisciplinary research on issues related to minorities and majorities in a European perspective and to contribute to the improvement of interethnic relations in those parts of Western and Eastern Europe where ethnopolitical tension and conflict prevail.

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Introduction

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This handbook is a product of the project carried out in 2014-2017 by the European Centre for Minority Issues (ECMI) in Belarus, Moldova, and Ukraine. The project, officially named the ECMI Eastern Partnership Programme (EPP) and funded by the Ministry of Foreign Affairs of Denmark, envisaged the launch and development of a dialogue between governmental officials in charge of ethnic politics and human rights, representatives of civil society organizations, and academic experts within, as well as between, each of the three countries. The project does not relate to the Eastern Partnership, which is an institution initiated by the European Union (EU), but is implemented within the same Eastern Partnership geographic area – hence its name. The primary reasons for having chosen these countries were, first, the fact that all three are of particular importance for the development of Europe (since they constitute a borderland of the EU), and second, that they have a number of common features related to the ethnic composition of their populations, their linguistic background, and existing internal policies addressing ethnic diversity.

The project had two main thematic frameworks, namely, the participation of minorities in public life and human equality on ethnic grounds. These topics were chosen because they are cornerstones for the development of ethnic policies and ethnic relations in any country. The inclusion of people of different ethnic origins, as well as different cultural and linguistic backgrounds into the political, economic, social, and cultural spheres is crucial for any society that aims to survive and develop as a whole, rather than as a mechanical sum of isolated "communities" that are hostile to each other or to the state. The theme of equality is of the utmost importance because the most complex and significant disputes and conflicts arise around situations and relationships that people assess as unfair – fairness being most often described in terms of equality or equal rights. Decisions made by the state and society within these two major frameworks define whether the established social order will be regarded by a given country's residents – both the majority and minorities – as fair, and therefore legitimate. All political and organizational decisions related to the use of languages, education, public support to ethnicity-based cultural associations, and the protection and development of ethnic cultures are ultimately related to the broader issues of participation and equality.

The seminars were the most important part of the project, bringing together a diverse collection of public officials, civil society representatives, and researchers to address the aforementioned main themes. Each event combined lectures by guest experts with general discussions on accumulated practical experience, achievements in analytical work, future initiatives, and prospects for future work. The participants discussed the possibility of using a variety of mechanisms to ensure participation of national minorities in public life, the protection of equal rights, as well as the practices being used in the three countries and their positive and negative outcomes.

The lectures were presented by European and Canadian experts in the field of minority protection and non-discrimination. The topics they discussed were very effective in jumpstarting

productive discussions at the seminars. The ECMI has decided that the publication and wider distribution of the lectures would be interesting and useful for a broad audience: both those who are professionally engaged as well as those who are simply interested in the issues of public administration, human rights, and ethnic relations. The selected lectures are grouped into two volumes. The first is devoted to the issues of minority inclusion in society and minorities' communication with public authorities. It is composed of lectures that allow for discussion and deliberation on a wide range of problems associated with the active participation of minorities in public life. The second, which this publication summarizes, covers the issues of equality and non-discrimination on ethnic grounds. It includes lectures that cover main components and subtopics of this broad and complicated sphere that is undoubtedly of enormous theoretical and practical importance for any country and the international community in general.

While planning the EPP seminars, the project's management team decided that describing ethnic diversity and equality promotion would allow for the representation of those social relations where various approaches and interpretations of the terminology and definitions are in competition.

International instruments set general outlines and principles, but nonetheless do not provide any detailed definitions nor practical instructions. Those that have been developed are often contradictory and easily criticised. Accordingly, it is impossible to define anything within the sphere of ensuring equality and anti-discrimination as the 'correct' solution or practice.

Bearing this in mind, the EPP team initially did not consider it acceptable nor prudent to impose any concepts, ideas, or formulas imported from Western Europe or Northern America to the EPP countries. The EPP project instead suggested an open discussion on how the approaches that are being developed internationally can be considered and applied in Belarus, Moldova, and Ukraine. Consequently, the main aim of the lectures and the given compendium is primarily to show the limitations and the possibilities of using key definitions of equality, as well as approaches to the practical implementation of these definitions.

One should start with the understanding that there is no universal consensus on what equality is, including in law. Usually the term formal, informative, or real equality is used, but still needs further elaboration. First, equality is a normative request enshrined in ideology or legislation; second, equality is factually bound or observed by terminology as equal or identical treatment. Generally, real or informative equality means providing people with an equal level of freedom and dignity, which can ultimately lead to unequal treatment. Herewith, informative equality can be understood differently – as equality of the initial conditions, equality of opportunity, or equality of social results.

The key to understanding these issues of equality as well as ensuring equality itself is the term "discrimination". Generally, international instruments, national legislation, and case law decisions of international bodies and national courts define discrimination as abusive treatment that places people in unequal conditions by virtue of their characteristics. One should differentiate between so called "direct" and "indirect" discrimination. The former can be defined as the unequal treatment of people due to characteristics by which they differ from others, whereas the latter occurs via universal treatment that categorically places certain people in a disadvantaged position. At the same time, not all specific provisions made to people in differing positions should be considered discrimination. Discrimination can only be considered as emphasizing distinctions or, conversely, ignoring differences between people in an arbitrary and

unreasonable manner. In legal practice, this means that either the act has no legitimate aim or the means used to achieve its goal are unjust.

Discrimination is not necessarily caused by xenophobia, intolerance, or the desire to cause harm to different peoples or a specific category of people. Discriminatory behaviour can be caused by indifference, an aspiration to follow generally accepted patterns of behaviour, the desire to meet the needs of others (for example, customers), as well as one's own understanding of how people's lives should be organized or who should systemically benefit. This being said, manifestations of xenophobia, especially in acute forms such as hate crimes and hostile language, can constitute a particular discrimination issue that is independent of discrimination. Such actions do not always directly lead to discrimination in the sense that they infringe on rights in a systemic manner, but counteracting them nonetheless requires special tools.

International human rights treaties, European Union law, and the laws of many countries prohibit discrimination on various grounds, including on the grounds of race, colour, and ethnicity. Discrimination on ethnic or similar grounds is not considered legally different from discrimination on other grounds and is addressed with the help of those legal mechanisms.

The concept of discrimination reflects only one of the components of equality and only one of the possible approaches to understanding the problem of inequality. Debates, disputes, and conflicts about inequality thus often concern such areas of life and relationships where it is difficult or impractical to use the term “discrimination”. Usually this occurs when it is difficult to establish whether groups or peoples are in a comparable position to one another and what the criteria for justified or unfair treatment are. Such difficulties arise most often in the sphere of cultural policy or language usage.

Minority protection, in addition to combating discrimination, is another theoretical framework within which issues of equality can be raised and resolved. It is important not to confuse minority protection with non-discrimination, and, in particular, not to follow the widespread misconception that anti-discrimination practices only serve to protect minorities – on the contrary, they are universal. The protection of minorities simply offers a slightly different perspective and includes additional approaches and aspects. The protection of minorities includes three main components and implies: (1) ensuring equal rights for those who do not belong to the largest “nation”, (2) creating opportunities for preserving and expressing group features, and (3) creating conditions for their participation in public life and protecting their interests.

Formal equality, including equal treatment, does not ensure equal social opportunities for people of different origins and, more broadly, does not solve the problem of their social adaptation and integration to society. For various reasons, some or all of the groups may be excluded entirely from politics, public life, prestigious or profitable spheres of employment, the education system, or their access to health care housing, etc. may be limited. Ignoring such phenomena leads to destructive consequences for the whole society. The marginalization of an ethnic group cannot simply be overcome only by prohibiting discrimination and persecuting those who are guilty and responsible for it. To preserve the unity of society and avoid splits or conflicts, it becomes necessary to change the whole system of existing relations, thereby creating conditions for the greater social mobility of disadvantaged groups and reducing inequality.

To denote and define policies of this kind, a different terminology is used globally, presenting

terms such as “special measures” and “positive measures”. The main objective of "positive measures" is to encourage more active entry and access of socially vulnerable or marginalized groups to the labour market and educational services and to eliminate all formal and informal social barriers to their full inclusion within society. The approach that dominates international organizations, European Union bodies, and national court decisions is that "positive measures" must be justified, have clearly articulated narrow goals, and be proportionate and temporary in nature, e.g. should be terminated upon the achievement of the desired result (equalizing the indicators of the past "weak" and "strong" groups)

A different approach is required when addressing the needs of ethnic or national minorities, where special conditions are needed to preserve their distinctive features and represent their interests. Such groups may differ in the features of resettlement, language proficiency, social composition, and due to these characteristics, it may be more difficult for members of the group to comply with the legislation requirements or the authorities’ policies than for the majority. Accordingly, they are particularly sensitive to have their special situation or special needs ignored. At the same time however, the development of education for minorities, the use of minority languages in the public sphere, or the creation of special mechanisms for representation in parliament and executive bodies have also created certain advantages for people of different ethnicities. Unlike positive measures, special treatment of minorities cannot be temporary, as it is assumed that minorities retain their characteristics and special needs for as long as they want. The creation of benefits for ethnic minorities is not seen as discrimination, as the majority and minorities are not in comparable positions regarding the protection of special characteristics and the ease of expression of their particular needs.

Consequently, the topic of equality includes different components, each of which represents a complex problem area. This volume contains texts that address the most important, complex, and meaningful of these components: general principles that allow the combination of the protection of diversity with equality, international legal means of protection against discrimination, national means of combating discrimination, the role of national legislation in protecting minorities, positive measures and the scope of their application, means of countering the “language of hatred” and “hate crimes”, and the practice of ensuring and protecting equality in certain areas of public life or in relation to individual groups.

An introductory chapter by the Latvian Member of Parliament and member of PACE Parliamentary Assembly **Boriss Cilevičs**, titled “Contemporary nation state and cultural diversity: concepts and legal framework of the Council of Europe”, presents an overview and analysis of the modern normative approaches used by the Council of Europe (as well as by other European institutions) for conceptualising diversity and equality on ethnic and cultural grounds.

Aleksejs Dimitrovs, a legal advisor to the Green/EFA Group in the European Parliament, Brussels, in his text “The use of anti-discrimination law and general human rights law for the protection of minorities: practical limits and opportunities”, presents an overview of existing international and European legislation, as well as anti-discrimination legislation that protects national minorities’ rights, and analyses their implementation in the spheres of employment, name usage, media, and other areas.

Fernand de Varennes, Dean of the Faculty of Law at the Université de Moncton in Canada and one of the world’s leading experts on language rights, in his article “International law and

implementing the language rights of minorities", provides an overview of international legal approaches and mechanisms pertinent to linguistic equality and to the protection of linguistic minorities.

Marina Andeva, Assistant Professor at the University American College Skopje (Macedonia), in her text "The role of minority-related legislation in the protection and promotion of equality on ethnic grounds", analyses conceptual foundations and ways of implementing national legislation on minority protection in the region of Central and Southeastern Europe.

Balász Vizi, Associate Professor at the Department of International Law and European Studies of the National University of Public Service (Budapest, Hungary), in his article "Positive action, the prohibition of discrimination, and minority rights from a European perspective", presents a critical overview of "positive action" in general and specifically with regard to ethnicity, as well as its implementation for protecting national minorities.

Alexander Vekhovsky, Director of the SOVA Center for Information and Analysis, in his article "Countering aggressive manifestations of xenophobia in Europe: a legal framework", focuses on the principles applied in criminal and administrative legislation of OSCE member states, which aim to prevent hate crimes and hate speech.

Petar Teofilović, a professor of law at the Novi Sad School for Legal and Business Studies, UNION University of Belgrade (Serbia), and the first Provincial Ombudsman of the Autonomous Province of Vojvodina, in his text "Elements of parliamentary Ombudsman's independence," analyses the meaning of an ombudsman's independence from government and presents the main elements thereof.

Eugenia Relaño Pastor, a legal adviser to the Spanish Ombudsman, in her text "Roma integration policies in Spain", examines the legal and political mechanisms intended to protect the Roma population, counter discrimination, and ensure equal rights for the Roma.

The Contemporary Nation-State and Cultural Diversity: The Concepts and Legal Framework of the Council of Europe[1]

Boriss Cilevičs

1 Introduction

While discussing the relationship of a democratic state to cultural diversity[2], contemporary academic and political discussions constantly make reference to certain international (or European) standards. Modern society is characterized by globalization, increasing population mobility, the intensity of different migration types, the growing number of mixed marriages, as well as the efforts to preserve, develop, and - in some cases - facilitate a revival or even reconstruction of ethnic, national, linguistic, and religious minorities' culture.[3] All these factors determine the prime importance of the modern state with regard to increasing cultural diversity. Strategies of accommodating cultural differences have become a key policy issue for the modern nation-state.

A huge number of academic studies, practical projects, and targeted programs are devoted to this issue. However, is it possible in today's world to claim the existence of certain international standards in this field, along with universal and/or regional ones? Are there any generally accepted "rules of the game" for states that claim to be democracies? It is hardly possible to give a definite answer to these questions. Certain aspects of the diversity policies are clearly sufficient and duly governed by political agreements or even by binding instruments of international law. In other areas however, decisions remain the prerogative of nation-states, which act without restraint in determining their own policies. The principles of democracy and human rights are acknowledged as the absolute and undisputed benchmark. However, the interpretation and application of these principles vary significantly in specific situations related to cultural diversity.

In this article, the author summarizes the practical experience he gained during more than a

[1] This article has been published in Russian in the following conference book: Malakhov, V.S., Tishkov, V.A. and Yakovleva, A.F, eds., 2011. *Gosudarstvo, migratsiya i kulturnyi pluralizm v sovremennom mire,* Moscow: IKAR, 146-172.

[2] It should be noted that in this context, the term *culture* is used as an umbrella term to include racial, ethnic, linguistic, religious, and other dimensions. Thus, according to the modern European approach, diversity is conceptualized through culture and cultural diversity is understood as the widest possible range of ethnic, linguistic, religious, and other differences.

[3] As is well known, there is no universally accepted legal definition of "minority". However, the notion of minority is widely used in the description and analysis of cultural diversity, and specifically in legally binding documents. In this context, the term "minority" is empirically understood as a group which is numerically smaller than the rest of the state's (or region's) population, and different from the majority in certain cultural characteristics (language, religion, traditions, etc.).

decade of work in the Parliamentary Assembly of the Council of Europe, in the national parliament of Latvia, as well as in various civil society organisations.

2 Actors

The primary actors in determining cultural diversity standards are the nation-states, i.e. all internationally recognized states, which are the subjects of international law.[4] Despite an obvious erosion of the Westphalian system, the norms of international law in principle remain the product of a consensus of the nation-states. The state assumes any obligation voluntarily by ratifying particular treaties. There are some exceptions from this general rule: one of these being, for example, the concept of humanitarian intervention (although the final word of adopting international standards might belong to a sovereign state, in this case, a few or even one single state might make decisions that infringe upon the jurisdiction of one or multiple other states), or a very limited sphere of supranational jurisdiction. However, it is generally the sovereign states themselves who have the final word in acknowledging certain norms and practices as international standards.

However, inter-governmental organisations also have certain opportunities to exercise influence. The process of development and harmonization of standards does not take place in a vacuum, so to speak, as contemporary and specific political environments crucially influence said process. In addition to general humanitarian considerations, the decision-making of nation-states is affected by political and economic conditions, as well as security factors. Moreover, the policy of the state is not a certain constant and varies depending on what political forces have power. Often, a new government might not be willing to fulfil previous commitments. However, in this situation, international organisations have every reason (and in some cases, also the effective methods) to intervene. Finally, when it comes to human rights, the principle of sovereignty and non-interference in internal affairs is no longer absolute.[5] Thus, international organisations are able to exercise sufficiently effective leverage over the positions of nation-states, especially with regard to the development of international standards (specific types of leverage will be discussed later in this text).

An important role is also played by non-governmental organisations and civil society. While using effective lobbying mechanisms and civil campaigns, the “third sector” has managed to achieve, for example, the abolition of the death penalty in Europe, along with the establishment of the International Criminal Court. Another recent example is the change in the international community's attitude towards the difficulties faced by Roma in Europe, which is even more relevant to the subject at hand. Due to the efforts of NGOs over the past 15 years, many relevant programs and projects have appeared, a huge amount of money has been allocated to resolve the “Roma problem,” and – most importantly – the attitudes of the European states towards this issue have significantly changed. Beyond any doubt, we can talk about the emergence of a new unwritten standard of attitudes towards the Roma problems.

[4] The notion of “nation-state” is neither used in the legal context nor, strictly speaking, is it applicable as a legal term. At the same time, historians and social and political scientists actively use the term in order to underline the certain specificity of nation-state in contrast to a “non-nation” one. This distinction has no legal meaning.

[5] More precisely, this exception applies only to the *ius cogens* norms. These are the norms of international law that are recognized as imperative by the international community and do not require ratification by the states (for example, prohibition of genocide).

Finally, international corporations should be mentioned as well. As a rule, they are not particularly well suited to managing diversity. However, in certain cases their impact could be very significant. For example, it could have immediate relevance in situations linked to the status and rights of indigenous peoples living in resource-rich territories.

3 Approaches and Methods

The concept of standards is not strictly defined. Thus, it is used in practice in a wide range of contexts that go far beyond the normative dimension. It is hardly possible to formulate standards of diversity policies in academic discourse. Indeed, academic freedom results in the broadest variety of hypotheses, theoretical constructions, and conclusions. Restrictions are most minimal; though openly racist ideas (such as Holocaust denial) are obviously unacceptable. One can easily find an appropriate theory[6] or "scientific justification" for nearly any policy with respect to diversity. Different political regimes use this practice while seeking to prove a high level of democracy in their countries. This is particularly evident in various interpretations of the concept of integration, which is widely discussed and debated today.

An appeal to certain "universally recognized values" and "international standards" is a routine rhetorical tool of political discourse. A combination of the declared humanistic goals with attitudes, predetermined by the need to justify "real politics" based on interests rather than on values, often results in radically opposite assessments of the same situation by different actors who use the almost identical rhetoric of "universal values'. For example, U.S. official political discourse that addresses the integration of the Russian minority in the Baltic States views it as a model of democracy and successful integration, while Russian discourse usually claims that their treatment greatly violates human rights and even points out a revival of fascist mind-sets.

The broad scope of concepts and tools used to describe cultural diversity further complicates the specification of standards. Different tools are used to describe, analyse, and plan diversity policies. These can be legal concepts of human rights (the rights of national minorities as their integral part[7], and/or the concept of equality and non-discrimination), conflict resolution theory (conflict prevention and management using the methods of group psychology),[8] and political theories of democracy in diverse societies.[9] Among other things, successful diversity management also has a pronounced economic dimension, as (non-)consideration of diversity affects the economic efficiency of the state. This approach to diversity management has been used in several studies, in particular those focused on the language policies.[10]

[6] For instance, a broad variety of nationalism theories is shown by V. Malakhov in his monograph: Malakhov, V., 2005. *Natsionalizm kak politicheskaya ideologiya*. Moscow: Universitet.
[7] Framework Convention for the Protection of National Minorities, Art.1: "The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation."
[8] For instance, repeatedly re-printed classical work: Horowitz, D. L. *Ethnic Groups in Conflict*.
[9] Among numerous studies in this area the most notable one is: Lijphart, A. *Democracy in Plural Societies*; one should also notice "ethnic democracy" theory proposed by Sammy Smooha.
[10] In particular, François Grin's 1999 and 2007 publications develop this approach.

4 Political declarations and recommendations

Numerous declarations, political statements, and recommendations and guidelines of various international organisations that do not enjoy the status of legally binding documents are usually based on the unconditional value of cultural diversity. Unlike the adherents of "romantic nationalism", strategically minded politicians acknowledge that a culturally homogeneous society in modern Europe is nothing more than a myth. The possibility of "a state without minorities" is a dangerous illusion. Even if one tries to achieve ethnic or linguistic homogeneity through secession, new minorities appear in these new entities – for example, while the secession of Kosovo has to some extent settled the problem of the Albanian minority in Serbia (although there are still Albanian minorities in the Preševo valley and other regions), it has created another problem by turning the Serbians themselves living in Kosovo into a minority as well. Moreover, the problems of integrating other minorities (Roma or Ashkalia) has not been resolved, but rather aggravated.

The modern European Union stands quite opposite to the ideal of cultural homogeneity, i.e. "a state without minorities." On the contrary, the EU can be considered as a kind of quasi-"state without majority". The EU can, in fact, be called a union of minorities, because no ethnic or linguistic group constitutes a majority within its borders.

However, outside of political rhetoric, these specifics are currently embodied only in the declared equality of all the official languages of the EU Member States. These are rather expensive policies that fail to ensure the actual equality of languages in practice (Phillopson, 2003). Moreover, they increase the inequality between those languages that (due to historical circumstances) have received official status in a certain EU Member State and those languages that do not have this status (either as a minority language or – according to the EU terminology – as regional or *lesser used languages*). The paradox of this situation is especially obvious if the prevalence of some official EU languages and minority languages is compared. For example, the Maltese language, spoken by approximately 350,000, formally enjoys equal status with English or French, while Catalan or Russian, the mother tongues for several million EU citizens, have no official status.

In the course of the historical evolution of declared basic values, the first and most important value – stability – was supplemented by democracy. Today we can conclude that in recent years, cultural diversity has become another of these basic values.

A distinctive emerging form and assertion of standards that determine attitudes towards cultural diversity is so-called "political correctness". Considering the traditionally ambiguous and somewhat ironic attitude towards this phenomenon in the majority of post-Soviet states, one should recognize that a consistently implemented strategy of political correctness proves to be a very effective educational project that promotes adequate changes in the perception of cultural diversity by certain groups of the society.

Council of Europe documents of different statuses and levels constantly address the thesis of valuing cultural diversity. However, the formulations are usually rather general, which in many cases allows for different interpretations (for example, while developing and implementing immigrant integration or language policies).

The most significant example of effective development, interpretation, and promotion of diversity standards within the Council of Europe is the European Commission against Racism and

Intolerance [ECRI].[12] The ECRI mandate includes regular monitoring of legislation, policies, and practices of the Council of Europe Member States with respect to combating racism, racial discrimination, xenophobia, anti-Semitism, and intolerance. In addition to the publication of regular reports on the situation in specific countries, the ECRI also prepares general recommendations for key strategies to combat racism, particularly for the specialized state institutions in charge of such a task, for the use of statistical and sociological data, racism in sports, etc. Recently, the ECRI has also started to adopt statements in response to various emergencies such as openly discriminatory government activities or racist incidents.

Unlike a number of other expert committees in the Council of Europe structure, which are also in charge of regular monitoring within their competence, the ECRI's activities are not based on any of the Council of Europe conventions - the ECRI is not a treaty body that monitors the implementation of a specific international treaty. Thus, the ECRI makes its assessments, conclusions, and purely political declarations on the basis of a wide range of international instruments created by the Council of Europe and the UN, as well as the OSCE. However, the ECRI recommendations are always very specific. Thus, the ECRI is one of the most visible and effective mechanisms for the transposition of declarative policy standards into specific assessments and recommendations related to practical situations.

5 Legally Binding Instruments

A large portion of literature is devoted to the analysis of legally binding international treaties in this field. Thus, this article contains only a brief and non-exhaustive survey of the relevant instruments.

As a rule, international instruments formulate negative (i.e. prohibitions), rather than prescriptive, norms for states. Furthermore, the rights guaranteed to individuals by these documents usually refer to negative rather than positive rights. Another important characteristic of these documents is the official non-recognition of group rights. However, this is typical of modern international law in general, as only states and individuals are recognized as subjects of the law.[13] Therefore, legal texts refer to the rights of persons belonging to minorities, but not to certain collective rights of minorities. One can distinguish three major areas directly related to diversity policies:

5.1 Equality and non-discrimination

The specificity of the modern system of human rights protection, based on the adoption of the Universal Declaration of Human Rights in 1948 [UDHR], is precisely linked with the universality of human rights, which forms a cornerstone of this system. All previous human rights systems

[12] More information about the ECRI and its activities is available at: http://www.coe.int/t/dghl/monitoring/ecri/default_en.asp.

[13] The only exception is the concept of indigenous peoples' rights, based on the idea of collective rights to land and natural resources, as in the 2007 UN Declaration on the Rights of Indigenous Peoples 2007, and ILO Conventions No. 107 (1957) and 169 (1989). One should note that the corresponding term in the Russian language refers to the term *indigenous people* not only (and not as much) to describe people with a tribal way of life, as understood by the aforementioned conventions, but to designate the "primordial" character of the inhabitants of a certain territory (in contrast to "recent migrants"). Russian legislation on indigenous small numbered peoples of the North generally applies this term correctly. However, the public discourse is often linked with demands of collective rights based on an erroneous understanding of this concept.

were selective: for example, they ensured different rights for men and women or imposed restrictions in the domain of political rights on the basis of property status. It is therefore not surprising that the prohibition of discrimination (general or on various specific grounds) is included in several fundamental UN conventions.

The main document in this field is the International Convention on the Elimination of All Forms of Racial Discrimination 1965 [ICERD]. It is significant that the ICERD broadly interprets the concept of racial discrimination. It is addressed as:

> […] any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. (Art. 1)

Thus, one can conclude that the concept of "racial discrimination" is interpreted as discrimination based on any cultural difference.

Paradoxically, the most detailed tools and procedures in this field in Europe have been adopted within the framework of the European Union, not the Council of Europe. The EU Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin OJ L 180 [Racial Equality Directive] was the result of the long evolution of the concept of "European" equality. It was significantly influenced by the ideology that emerged in the United States within the course of desegregating. For several decades, EU norms prescribed equality only on the ground of gender (between men and women) and only in one segment (employment). The adoption of the Racial Equality Directive marked a radical extension of the scope of the concept of equality. To a quite limited degree, the Directive allows for an "affirmative action" strategy, typical of the American approach. Simultaneously, it introduces the key concept of indirect discrimination and also establishes the fundamental procedural principle of the reversal of burden of proof. This means that a person who is subjected to discrimination is not obliged to prove this fact. On the contrary, a suspected perpetrator is required to prove the validity of treating that person differently.

The main document of the Council of Europe is the European Convention on Human Rights 1950 [ECHR]. Art. 14 of ECHR provides for the prohibition of discrimination. However, this provision does not prohibit discrimination in general, but only covers the realization of the rights envisaged in other articles of the Convention. Thus, this article can apply only in conjunction with another substantive article of the Convention.

The adoption of Protocol No. 12 to the ECHR in November 2000 was a significant step forward. It contains the general prohibition of discrimination in any decision or action by public authorities. Unfortunately, up until the end of February in 2017, only 20 Member States of the Council of Europe have ratified this Protocol (18 more have signed it, but not yet ratified). A number of countries with well-developed domestic legislation in this field are among those Member States that neither ratified nor even signed the Protocol. This list includes the United Kingdom, the recognized leader in this domain. Ratification of the Protocol does not impose any new obligations on these states. However, it is obvious that governments do not want to empower the European Court of Human Rights to examine individual complaints about violations of the principle of equality. However, even before Protocol No. 12 entered into force, the European Court had adopted several crucial decisions on the interpretation of the right to protection against discrimination.

5.2 Minority rights

While developing a universal system of human rights protection within the UN after the Second World War, no special conventions on the rights of minorities were adopted, although this idea had been intensively discussed. The decisive factor was that the idea of minority protection was heavily discredited by Hitler, who used "the treaties on minorities", concluded upon under the auspices of the League of Nations, as a pretext for justifying his aggression against Czechoslovakia (allegedly for the protection of the Sudeten Germans). After the end of the war, Art. 27 of ICCPR had remained the only universal norm in this topic area for a long time.[15]

During the collapse of the socialist system, minority rights once again became the focus of the international community's attention. Ethnic conflicts that erupted in various parts of the former Yugoslavia, the Soviet Union, and also (although at a lower intensity) in some other European states, became the continent's main threat to peace and stability. It is therefore natural that the fundamental principles of minority rights were proclaimed not by an organisation dealing with human rights (i.e. by the Council of Europe), but by the CSCE (soon renamed to the OSCE – Organization for Security and Cooperation in Europe) in its Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE 1990 [Copenhagen Document].

The Copenhagen Document (like the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992 adopted soon thereafter[16]) was not a legally binding convention, but a political declaration. However, its main principles were soon transformed into the legal norms of the Framework Convention for the Protection of National Minorities 1995 [FCNM] within the framework of the Council of Europe. It is believed that the FCNM was the first legally binding document of its kind to address the issues of minority protection. However, a few weeks before the FCNM, a similar Commonwealth of Independent States' [CIS] convention had been adopted - Convention Guaranteeing the Rights of Persons Belonging to National Minorities 1994. Unfortunately, despite containing several important provisions, this document had little practical effect.

The FCNM is "a document of principles". It does not regulate the rights of minorities in detail. At the same time, it leaves the states the right to define specific forms and methods of implementation of its general rules. These specific decisions are subject to monitoring by a special expert body (Advisory Committee), which reviews periodic state reports on the implementation of the Convention, as well as "shadow" reports provided by non-governmental organisations and information obtained from other sources.

The fundamental weakness of the FCNM mechanism is its inability to examine individual complaints. There is a serious contradiction: on the one hand, the rights of minorities enshrined in the FCNM are proclaimed as an integral part of the universal human rights. On the other hand, in case of a specific violation, an international court cannot directly protect these rights. A solution is partly found in the Convention's reference to domestic judicial systems, as courts of general jurisdiction can directly apply the norms of international conventions. Moreover, the Constitutional Courts can, in many cases, revoke domestic legal norms if they contradict the

[15] "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 practice their own religion, or to use their own language." (ICCPR, Article 27)
[16] It was adopted by General Assembly resolution 47/135 of 18 December 1992.

state's international obligations.[17]

Nevertheless, the creation of a judicial (or at least a quasi-judicial) mechanism for handling individual complaints of violations of minority rights remained on the agenda, in particular, of the Parliamentary Assembly of the Council of Europe [PACE]. Thus, in 1993 the Parliamentary Assembly proposed the adoption of a special additional protocol on cultural rights to the European Convention on Human Rights (Council of Europe, 1993), which would empower the European Court of Human Rights to process applications pertinent to violations of minority rights. The Committee of Ministers rejected this recommendation, but the issue is still regularly raised in the PACE.

Despite the sceptical predictions of many experts, the FCNM has been ratified by an absolute majority of the Council of Europe Member States (39 out of 47). Four countries signed but did not ratify it[18], while another four did not even sign the document.[19]

5.3 Protection of cultural identity

There are a number of documents in this field that formally enjoy the status of conventions, adopted under the auspices of UNESCO. However, it is difficult to speak about their legally binding status, as the mechanisms for the implementation of these documents are by no means judicial. As a rule, these are various international and domestic programs and projects aimed at preserving cultural heritage. The same principles apply to the EU activities aimed at preserving and developing cultural diversity in Europe.

Within the Council of Europe framework, the main document in this field is the European Charter for Regional or Minority Languages 1992 [ECRML]. The specificity of this document (as is the case with similar UNESCO instruments) is that it is languages – and not individuals – that are the objects of protection. Thus, the Charter establishes a sort of quasi-legal personality of languages. Indeed, one can nominally speak about this legal personality, which predetermines the dual character of the Charter: on the one hand, it is usually included in the list of human rights conventions of the Council of Europe, and on the other hand, it fundamentally differs from other similar conventions.

As in the case of the FCNM, the special Expert Committee reviews the periodic state reports and evaluates the implementation of the Charter's provisions. However, unlike the FCNM, the Charter is composed on the basis of the *menu principle*: every one of its sections offers a list of commitments, and the state chooses a certain number of them when ratifying the Charter. Currently, 25 Member States of the Council of Europe have ratified the Charter and eight more have signed it but have yet to ratify it.

6 Judicial Precedents: Judgments of the European Court of Human Rights

The European Court of Human Rights' case law is particularly important for the interpretation of

[17] It depends on the legal system of a specific state and on the powers of the Constitutional Court how international obligations are transposed in domestic legislation.
[18] Belgium, Greece, Iceland and Luxembourg.
[19] Andorra, France, Monaco and Turkey.

standards because states are obliged to unconditionally comply with them. To execute the judgment, in addition to paying compensation to the victims of violations, the state must adopt so-called general measures that would prevent similar violations in the future. To achieve this end, it is often necessary to amend legislation or review administrative practices.

Although the ECHR does not contain norms directly defining the rights linked with diversity policies, the interpretation of other articles of the Convention is in some cases important for the protection of these rights. In recent years, a number of detailed studies on this issue have been published.[20] Here the most illustrative decisions will be briefly mentioned.

With regard to protection from discrimination, the case *D.H. v. the Czech Republic* (2007) should be specifically mentioned. In its judgment, the Court recognized that the reversal of the burden of proof is binding for the Council of Europe member states: it is the state that must prove that the decision (in this particular case, to systematically transfer Roma children to special schools for mentally challenged children) is not discriminatory.[21]

Certain aspects of diversity policies are relevant when a number of substantive provisions of the Convention apply. Acknowledgment of society's cultural diversity by the state is directly related to the fundamental right to freedom of association. On the basis of certain political considerations, states often do not recognize the existence of certain minorities on their territory and hence refuse to register their organisations. Denial is often justified by considerations of national security – if such a minority does not exist from the legal point of view, the state can insist that such a group's existence is therefore an illegal or even unconstitutional act. The European Court of Human Rights has repeatedly qualified these actions as a violation of the Convention, particularly in a number of cases against Greece.[22] In similar judgments against Bulgaria[23] and Turkey,[24] the Court also stressed the right of minorities to participate in political life, in addition to freedom of association. At the same time, the Court also determined the limits of this right in the case *Gorzelik v. Poland* (2004),when the decision not to register the association of the Silesian minority as a political party was found to be valid by the Court.[25]

In a number of individual applications to the European Court of Human Rights, spelling of personal names in accordance with the traditions of the original language was considered an integral part of the right to private and family life. As a rule, in these cases the Court did not find any violations in the actions of the authorities, particularly when the names and surnames were transformed (and distorted) in accordance with the rules of the official language of the new independent state, which once had been part of the Soviet Union.[26]

[20] See: Moucheboeuf (2006), Gilbert (2002), and Medda-Windischer (2004/05).
[21] It should be noted that the allegations of discrimination must still be justified *prima facie*, i.e. there should be sufficient provisional grounds for pursuing charges.
[22] *For example, in Sidiropoulos and others v. Greece*, 10.07.1998, Application No. 26695/95, *Tourkiki Enosi Xanthis and Others v. Greece,* 27.03.2008, Application No. 26698/05, *Emin and Others v. Greece,* 27.03.2008, Application No. 34144/05, and *Bekir-Ousta and Others v. Greece,* 1.10.2007, Application No. 35151/05.
[23] *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, 2.10.2001, Application No 29221/95 ; 29225/95.
[24] *The Socialist Party and others v. Turkey*, 25.05.1998, Application No. 21237/93.
[25] In Poland, the political parties of national and ethnic minorities are exempted from a 5 percent threshold at the parliamentary elections. This right was used by ethnic German party; the claimants failed to substantiate the differences between the Silesian identity and the identity of the Polish Germans.
[26] For instance, applications *Šiškina and Šiškins v. Latvia.* 9/04/2002. Application No. 59727/00, *Mentzen/Mencena v. Latvia*, 7.12.2004. Application No. 71074/01 and Kuhareca *v. Latvia*, 7.12.2004. Application No. 71557/01, and also applications of ethnic Poles from Lithuania (who insisted on the use of letter 'w' in their personal names, while

Attempts to invoke freedom of expression to protect the right to radio/TV broadcasting in minority languages were more successful.[27] In fact, the Court recognized that freedom of speech refers not only to the content of the disseminated ideas and information, but also to the form of their dissemination, including language. Thus, the right of a minority to freely disseminate and receive information and ideas in its own language is protected by the Convention. In many respects, this practice of the Court helped to abolish discriminatory language restrictions on private radio stations and TV channels in Latvia (Constitutional Court of the Republic of Latvia's Case No. 2003-02-0106).

With regard to the use of languages in education, the famous "*Belgian linguistic case*" (1968) should be mentioned.[28] The Court decided that the state is not obliged to provide education in minority languages within the public education system. However, this judgment dates back to 1968, when many modern approaches, concepts, and documents simply did not exist. At the same time, in *Cyprus v. Turkey* (2001), the Court found that the absence of Greek secondary schools in the northern part of Cyprus violated Art. 2 of Protocol No. 1 (the right to education).

Finally, another important decision concerned the requirement of proficiency in the state language for citizens running for parliamentary (or local) elections. In *Podkolzina v. Latvia* (2002), the Court found that rechecks of the proficiency level in the state language violate the right to elect and be elected. As a result, language requirements for candidates nominated to participate in the elections were abolished from the Latvian legislation.

Thus, through its judgments the European Court of Human Rights has determined a number of important standards pertinent to non-discrimination and minority rights. At the same time, these decisions address only certain specific aspects of diversity policies and do not establish a complete regulatory system.

7 Translation of standards from international to domestic level

The system of international standards for diversity policies exists mainly at the level of rhetoric and political declarations. Only some of its elements are determined by legally binding norms and accompanied by, to varying extent, rigid mechanisms for monitoring, evaluation and sanctions for violation. Assessment of effectiveness of these mechanisms is a topic for another study.

However, the practical implementation of the standards and their translation to the national level is usually determined by other mechanisms. Within the EU, this implementation is achieved either through directly applicable norms (regulations) and norms which require transposition, i.e. corresponding changes in the domestic legislation (directives). However, the use of these mechanisms in the field of diversity policies is very limited due to the aforementioned scarcity of the EU standards regarding to cultural diversity.

A more common translation mechanism is political conditionality. The most comprehensive

Lithuanian alphabet lacks it) were declared to be inadmissible. Claim *Bulgakov v. Ukraine*. 11.09.2007. Application No. 59894/00 was declared admissible, but in this case the Court did not find violations.

[27] For instance, in *Radio ABC v. Austria.* 20.10.1997. Application No. 19736/92, *Autronic AG v. Switzerland*. 22.05.1990. Application No. 12726/87, etc.

[28] The Case "*relating to certain aspects of the laws on the use of languages in education in Belgium*". 23.07.1968. Applications Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64.

example of its application is the enlargement process of the Council of Europe (and later, the European Union). Membership in the Council of Europe is conditioned by compliance with certain standards in the fields of democracy, rule of law and human rights. To join the organisation, a candidate state must demonstrate compliance with these standards. When an official statement expressing the will of the state to join the Council of Europe has been received, the situation is assessed and conditions for accession are formulated. As a rule, at this stage the state commits itself to adopting certain specific measures to meet the criteria. With formal acceptance to the Council of Europe, a list of the candidate's obligations is compiled, often with specific deadlines for their accomplishment. In addition to the specialized expert bodies, the PACE Monitoring Committee also controls the implementation of these obligations.

Some of these standards are fairly formal (for example, ratification of certain international conventions) or easily formalized, while other require substantial data collection and analysis.

An important feature of the political conditionality approach is a fairly rapid evolution of standards. For example, after the FCNM was opened for signature, its ratification has now become a prerequisite for joining the Council of Europe for all new candidate countries. However, the states that became Council of Europe members before the adoption of the convention are not obliged to ratify it, as no mechanisms exist which could force them to do so. The situation in the EU is even more evident: while all EU Member States admitted in 2004 and 2007 have ratified the FCNM, some “old” Member States explicitly reject the basic principles of this convention (for example, France and Greece[29]). Thus, political conditionality inevitably generates a certain ambiguity of standards. Can democratic traditions become sufficient “compensation” for the lack of formal commitments pertinent to diversity policies? A universal and exhaustive answer to this question is hardly possible.

An obvious weakness of political conditionality is the political – not legal – nature of monitoring the commitments' implementation. For example, the PACE Monitoring Committee often decides on its assessment of a certain legislative norm or practice (including their compliance with the principles of human rights) by voting through its members, i.e. politicians who are members of national parliaments. This mechanism significantly differs from the decision made by the competent court (even if its judges also use the voting mechanism) or by a specialized expert committee.

It is characteristic that the interpretation of the content of obligations is far from unambiguous and generally accepted. An interesting example is the case of the Copenhagen criteria, which constitute the conditions for the admission of new members to the EU. The European Council approved them in Copenhagen in 1993 and amended them in Madrid in 1995. The first criterion is a political one, which *inter alia* includes “respect for and protection of minorities.”

How does the EU interpret this criterion and assess whether a candidate state complies with it? The EU did not and does not have its own legal framework on the protection of minorities. Neither does it have the relevant institutions capable of performing a qualified examination and

[29] Despite the fact that Greece signed (but has not ratified) the Framework Convention, its political elites do not recognize the existence of minorities in the country. The only exception is “the Muslim minority of the Western Thrace”, whose acknowledgement was conditioned by the 1923 Lausanne Peace Treaty. In general, the position of Greece is the most vivid illustration of the fact that diversity policies are inconsistent in some European countries. For more details see *inter alia*: PACE, 2010.

assessment of the situation in this field in the candidate countries.[30]Therefore, in practice, the assessment of the candidate's compliance with this criterion often turns into a purely political discussion, in which the governments of the candidate countries play a decisive role. Parliaments (and, consequently, the opposition) participate in the negotiations rather symbolically while institutional participation of civil society is not foreseen.

In practice, the European Commission largely relies not on the results of political negotiations, but on the expert assessments and conclusions of other international institutions, primarily the OSCE High Commissioner on National Minorities and, to a lesser degree, the Council of Europe.

In practice, “pre-accession” political conditionality has indeed led to a number of significant improvements in diversity policies in almost all candidate countries. However, sustainability of these improvements remains questionable. For example, after accession to the EU, Estonia and Latvia have demonstrated decreasing interest in implementing the recommendations of international organisations, and the liberalization of diversity policies that started in the early 2000s has been replaced by the opposite trend, as was predicted by numerous experts (Poleshchuk & Tsilevich, 2004).

Finally, one should emphasize that the mechanism of political conditionality applies not only to the states with candidate status for membership in the Council of Europe or the European Union. Thus, the EU consistently includes in its trade and cooperation agreements with third party countries provisions on sanctions applicable if one of the parties violates human rights or democratic principles (conditionality clauses). Formally, these norms are symmetric, i.e. they equally apply to both contracting parties. However, in practice, they allow the EU to use economic leverage as an incentive to demand that its partners (primarily “the third world countries”) comply with certain democratic principles.

In addition to political conditionality, there are a number of other opportunities for leverage at the disposal of the international community. However, truly “hard” coercive measures (economic sanctions, or even military or humanitarian intervention) apply only in the most extreme cases, and should this happen, it is hardly possible to speak about a translation of standards.

8 Diversity policy at the national level

The perception of cultural diversity at the national level usually combines contradictory trends. Diversity is perceived as a problem, a resource, and an advantage. Different groups of society have significantly different perceptions of it. The dominant trend directly depends on both the declared values and practical goals of a specific political regime.

8.1 Symbolic and practical level

It is important to underline that issues pertinent to diversity policies are emerging on both a practical and a symbolic level. Effective diversity management implies finding practical solutions at both levels, as they both are important. For example, a typical symbolic problem is the use of

[30] With regard to the collection and analysis of information, the situation has significantly changed since the creation of the European Union Agency for Fundamental Rights (FRA). However, the FRA mandate does not envisage comprehensive monitoring, and the right to make decisions on compliance or non-compliance with certain standards remains the responsibility of the EU political bodies.

minority languages in place names or public signs. In one case, the use of toponyms in the Hungarian language in southern Slovakia was the main point of conflict conflict in the country in the mid-1990s. The practical importance of this issue is usually insignificant. The absence of the street nameplates in their language is usually not a problem that affects the daily life of residents belonging to a linguistic minority, even if they do not speak the official language and even if the official and minority languages use different alphabets. Bilingual signs rather symbolize the minority's claims to being the master (or at least the "co-owner") of the state, which is why they are regarded such hostility by the nationalist-minded segments of the linguistic majority.

One of the most typical practical issues is the use of languages in the health-care system. Regardless of whether this matter is regulated, physicians are bound by not only legal, but also professional and ethical norms of another kind – the Hippocratic oath. The *bona fide* performance of their professional duties implies that a physician must do everything possible to understand the patient, irrespective of the language of communication prescribed by the language laws. However, most issues related to cultural diversity have both a symbolic and a practical component.

8.2 Strategies of diversity policy and international standards

Modern unitary states use different strategies pertinent to cultural diversity (federal states usually face more complicated situations). These strategies can be divided into three categories: conservative, liberal, and multicultural strategies.

Conservative strategies are aimed at the homogenization of society: weakening and suppressing cultural diversity both in the public and private spheres. The extreme version of this strategy is expressed by the infamous slogan "one country, one people, one language." Conservative strategies were widespread in Europe in the 19th and 20th centuries.

The liberal strategy implies so-called "cultural neutrality". Indeed, it is impossible to implement the naive concept of liberal political philosophy within a completely "culturally neutral" nature of a democratic state.[31] A specific language (or languages) must be used in law making, the military, and legal proceedings. This alone inevitably destroys a hypothetical "cultural neutrality." Modern liberal strategy implies cultural uniformity in the public sphere, but does not prevent diversity in the private domain. This strategy may even include support of cultural diversity within the general framework of supporting civil society. For example, associations of national minorities can receive grants for their cultural projects on equal footing with other non-governmental organisations. Regardless of its "neutrality" and pronouncedly equal treatment, liberal strategy still puts persons belonging to a minority in an obviously unequal position, and therefore may result in indirect discrimination.

The third strategy is multiculturalism, which is less common in Europe. In its essence, multiculturalism implies the recognition and support of cultural diversity in both private and public spheres. Multiculturalism is the "invention" of the immigration states, Canada being an example of the most consistent application of this concept.

Today, none of the European countries implements any of these models in their "pure" forms.

[31] Will Kymlicka offers an in-depth analysis of the liberal approach to cultural diversity. See, for instance: Kymlicka, 1995 and 2001.

A number of European states (for example, France, Greece, and Turkey) are inclined towards a conservative strategy. Some elements of multiculturalism can be found, in particular, in the United Kingdom, where a municipality can distribute information about social services and benefits in dozens of languages. However, it is the liberal strategy that forms the basis of the contemporary diversity policies in the majority of European states, which seek to find optimal balance between national unity and cultural diversity.

Within this (rather conditional) classification, one can conclude that modern international standards restrict conservative strategies, in some cases impose liberal strategies, and encourage elements of multiculturalism (although in rhetorical terms rather than legal norms).

9 Contemporary interpretations of international standards of diversity policy

As was already noted, the nature of the standards in the field of diversity is negative rather than prescriptive. In other words, these standards impose certain restrictions on the nation-states with regard to their freedom to determine their policies.

The most universal restrictions are related to the principles of non-discrimination and equality. Being mandatory for the modern states, they have sufficiently developed mechanisms of control and sanctions (including judicial ones). Restrictions determined by minority rights are much more selective and rely on much less-developed implementation mechanisms. In turn, the principles of preserving cultural diversity and the right to identity (to the extent that they are not reflected in the documents on the prohibition of discrimination and the rights of minorities) have almost no legal enforcement mechanisms. Their implementation remains a matter of political conjuncture and the goodwill of the nation-states.

9.1 Interpretation of the non-discrimination principle

The key question of the interpretation of the non-discrimination principle is whether equal treatment *per se* guarantees equality? It is not always possible to give a positive answer to this question. The modern understanding of equality goes beyond the limits of formally equal treatment. Indeed, absolute equality is an ideal concept; it is impossible to achieve it in practice simply because all people have different characteristics, both primary (those constant and independent from the individual's free choice such as race, skin colour, age, mother tongue, sex – with certain reservations) and secondary ones (those determined in principle by the individual's free choice of political view, religious belief, social belonging, etc.).

For example, the existence of only one official language creates formally equal conditions for all. At the same time, this situation automatically puts people for whom this language is not native in an unequal condition, particularly in the judicial system where the principle of competition applies. Many official holidays in the secular European states are linked with a certain religious tradition (for example, Christmas or Easter). According to their status, these are public and not religious holidays. Nevertheless, they are perceived differently by individuals belonging to the Christian (even if they are not practicing Christians), Muslim, or Jewish religious traditions. The situation is even more difficult when different Christian denominations celebrate their major holidays on different days. This issue applies, for example, to the Orthodox minorities

in most EU countries. Thus, these formally neutral and equal-for-all conditions do not always guarantee the real equality of people belonging to different cultural groups. In some cases, this can lead to a so-called indirect discrimination, which is prohibited *inter alia* by the aforementioned EU Race Equality Directive.

Does it mean, for example, that the existence of only one official language in a certain state is discriminatory? Certainly not, as not every difference is discriminatory — only unjustified different treatment is discriminatory. The principle of equality does not exist in a vacuum, since in practice it must be balanced with the other legitimate interests of society. Attempts to ensure absolute equality can lead to the totally opposite result. Let's take a hypothetical situation: a certain state guarantees the use of any language of an individual's choice in civil proceedings and in administrative practice. This would most probably entail inadequate resource costs and the judicial and administrative systems would become very inefficient. As a result, the whole society would suffer, including those minorities whose interests were formally taken into account by the implementation of such measures. Each specific situation of an alleged discrimination should be considered separately, and all specific factors should be taken into account. In these proceedings, courts apply the principle of proportionality, verifying the validity of differences (or formally equal treatment) by the legitimate interests of society.

An increasingly applicable modern concept of full and effective equality implies that sometimes it is necessary to use a different attitude with respect to individuals in substantially different situations in order to ensure genuine equality, while a formally equal attitude may appear discriminatory. This principle was recognized *inter alia* by the European Court of Human Rights in *Thlimmenos v. Greece* (2000). The use of minority rights instruments becomes necessary in these situations. The concept of minority rights has historically emerged and developed as a separate domain, independent of “general” human rights. It is now becoming a fundamental part of the equality and non-discrimination paradigm.

9.2 Interpretation of minority rights

Public discourse still frequently perceives the rights of minorities as some kind of “additional” rights on top of “general” human rights. However, the modern interpretation considers minority rights an important part of the equality and non-discrimination principle.

The main principles of the modern system of minority rights protection can be formulated as follows:

- The rights of minorities are an integral part of fundamental human rights. Consequently, they are universal and this fact constitutes a fundamental difference between the modern system of minority protection and the selective system of the League of Nations, which ensured only the rights of certain specific minorities in certain territories. The rights of minorities cannot be interpreted as certain privileges that some groups could be provided (or not provided) by the state at its discretion.
- The concept of minority rights complements the fundamental principle of equality and non-discrimination: it is to be employed when a different attitude is required in order to ensure full and effective equality.
- International treaties (in particular, the FCNM) offer only basic principles for the protection of minorities. They can be uniquely implemented in different countries depending on their specific situations. The compliance of these specific decisions with the letter and spirit of these treaties is determined through monitoring procedures. These decisions should be

continuously improved through an on-going, inclusive dialogue between all parties concerned.

- Minority rights are individual rights. However, in a number of cases they can only be realized jointly with other individuals belonging to this group. The rights of minorities are not collective (group) rights; contemporary international law does not recognize the legal personality of groups.
- The principle of effective participation is central to the fair implementation of treaties on minority protection. The numerous conditions included in the norms of international treaties should be interpreted in the context of the principle of effective participation and not used as a pretext to deny the rights of minorities stipulated in the treaties.
- States have a certain freedom of choice to decide which groups should be recognized as national minorities on their territory. However, these decisions cannot be arbitrary. They should be made on the basis of a dialogue between all parties concerned and should by no means lead to discrimination of any individual or group.

10 Conclusion

This review and analysis of various forms of international standards in the field of cultural diversity shows that nation-states exercise very wide freedom in determining their policies. At the same time, fairly strong and effective instruments and mechanisms apply in a number of specific areas. This allows for the restriction of practices of nation-states that contradict certain basic principles. These mechanisms have a number of limitations of a primarily territorial nature. The most rapidly developing standards of diversity policies are those linked with the implementation of the principle of equality and non-discrimination. At the same time, the development of standards in the field of minority rights has been restrained, since ethnic conflicts are no longer seen as a main threat to peace and stability in Europe.

Further development and enhancement of standards and mechanisms of their implementation is vital to finding adequate answers to the challenges connected to the intensive growth of cultural diversity in modern Europe and in other regions of the world.

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The Use of Anti-Discrimination Law and General Human Rights Law for the Protection of Minorities: Practical Limits and Opportunities

Aleksejs Dimitrovs[1]

1 Minority Rights And Non-Discrimination In International And European Law

The concept of minority rights is well established in international and European law. Article 27 of the 2018-913 stipulates that in those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in a community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. Although the wording of this provision is quite general and there is no similar provision in the European Convention on Human Rights 1950 [ECHR], two international treaties of the Council of Europe – the European Charter for Regional and Minority Languages 1992 [Charter] (Dunbar, 2008) and the Framework Convention for the Protection of National Minorities 1995 [Framework Convention] (Eide, 2008) – represent a well elaborated concept for the protection of minority rights in Europe. It should be mentioned that the Framework Convention has a larger number of state parties than the Charter –Moldova, for example, has not ratified the Charter.

In the meantime, minority rights are an inherent part of the general system of human rights protection. Article 27 of the ICCPR is part of a general human rights agreement. Article 1 of the Framework Convention stipulates that the protection of national minorities and of their rights and freedoms forms an integral part of the international protection of human rights; the Preamble to the Charter mentions that the right to use a regional or minority language in private and public life is an inalienable right conforming to the principles embodied in the United Nations ICCPR as well as the spirit of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms. This means that the rights and interests of persons belonging to minorities can sometimes be effectively protected not by recourse to minority rights as such, but by referring to human rights law in general and non-discrimination in particular.

Provisions directly prohibiting racial, ethnic, linguistic, and religious discrimination are contained, *inter alia*, in Articles 2 and 7 of the Universal Declaration of Human Rights 1948, Articles 2(1) and 26 of the ICPPR, and Article 2(2) of the International Covenant on Economic, Social and Cultural Rights 1966 [ICESCR]. At the regional level, Article 14 of the ECHR, along with Article E of the Revised European Social Charter 1996 ETS 163, provide for the prohibition

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of discrimination. Although the scope of Article 14 of the ECHR is somewhat limited, since it can only be used in conjunction with other Convention rights, this will be remedied as more and more of the Council of Europe's states ratify Protocol No.12, which contains a self-standing right to equal-treatment (Wintermute, 2004). For the time being however, Moldova has yet to ratify the Protocol.

The European Union (EU) also has the competence to legislate in order to combat discrimination based on, *inter alia*, racial or ethnic origin, and religion or belief in accordance with Article 19 of the Treaty on the Functioning of the European Union 2007 [TFEU]. On the basis of this Article, two equality directives have been adopted: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin OJ L 180 and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L 303.

How does the concept of minority rights correlate with non-discrimination? It does not constitute an exception, but rather complements general human rights, including non-discrimination, in order to better explain how to frame minority-related policies avoid discrimination to achieve full and effective equality. Still, it does not exclude maintaining or adopting specific positive measures (sometimes called affirmative action) to prevent or compensate for disadvantages linked to racial or ethnic origin, religion or belief, and language.

However, the general principle of non-discrimination is aimed at combatting not only direct discrimination, but also indirect discrimination. Proportionality and indirect discrimination are both equally fundamental in the context of the culture of justification, profoundly entrenched in the law at all levels. Consequently, Article 26 of the ICCPR prohibits both direct and indirect discrimination. This latter notion in particular is related to a rule or measure that may be neutral on its face, lacking any intent to discriminate, but that nevertheless results in discrimination because of its exclusive or disproportionate adverse effect(s) on a certain category of persons, as indicated by the UN Human Rights Committee in *Derksen v. the Netherlands* (2004). Similarly, the International Convention on the Elimination of All Forms of Racial Discrimination 1965 [ICERD] equally requires taking the actual effects of regulation into account. In other words, the relevant provisions of international law expressly extend beyond what is explicitly discriminatory to encompass measures that are not discriminatory at face value, but discriminatory in fact and effect. This is demonstrated by the approach of the UN Committee on the Elimination of Racial Discrimination in *L. R. et al. v. Slovakia* (2005).

The Council of Europe's instruments are very similar in tone, emphasising the particular importance of indirect discrimination. The European Court of Human Rights considers that where a general policy or measure has a disproportionately prejudicial effect on a particular group, the fact that said policy or measure is not specifically aimed or directed at that group does not exclude that this may be regarded as discriminatory notwithstanding, such is as seen in the case *Thlimmenos v. Greece* (2000). A difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group, as the Court noted in *D.H. and Others v. the Czech Republic* (2007). The European Committee of Social Rights, while interpreting Article E of the Revised Social Charter, went even further by ruling in *Association Internationale Autisme-Europe (AIAE) v. France* (2003) that such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to

all.

In addition, the EU, with all its Member States, is fully grounded in the justification paradigm. For example, Article 2(2)(b) of Council Directive 2000/43/EC states:

> Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Member States cannot possibly hide behind the general requirements of legality and must give compelling reasons for the policies that are found to be indirectly discriminatory, since toleration of indirect discrimination is an exception from the general rule prohibiting this kind of treatment, which is to be implemented very strictly.

Of course, both instruments on minority rights and on general protection of human rights are legally binding and should be implemented properly at the national level. However, there is no mechanism of examination of individual complaints under the Framework Convention and the Charter, whereas many provisions of those instruments could be interpreted and implemented in different ways, giving state parties a wide margin of discretion. Bearing this in mind, in practice it is useful to reinforce references to minority rights instruments by making reference to general human rights instruments, in particular, as regarding the prohibition of discrimination.

2 Physical Violence, Incitement to Violence or Hatred

When dealing with actual physical violence based on ethnic or racial origin, religion or belief, and language, Article 6(2) of the Framework Convention stipulates the 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. In parallel, the right to life is protected by Article 6 of the ICCPR and Article 2 of the ECHR; torture and cruel, inhuman, or degrading treatment are prohibited by Article 7 of the ICCPR, Article 3 of the ECHR, as well as by the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 and the Council of Europe's European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987.

Even if the case is foremost analysed from the point of view of general human rights norms, a potential discriminatory motivation should be taken into account by the authorities. As recognised by the European Court of Human Rights in *Nachova and Others v. Bulgaria* (2005), the authorities' duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Article 2 of the ECHR. It may also be seen as implicit in their responsibilities under Article 14 of the ECHR when taken in conjunction with Article 2 to secure the enjoyment of the right to life without discrimination.

With regard to the incitement to violence or hatred, there is no specific guarantee against it in general human rights instruments, apart from the prohibition of discrimination. Still, in some instruments, the relevant provisions are well elaborated, such as in Article 4 of the ICERD; the failure to implement such obligations may result in violation of individual rights, as highlighted by the UN Committee on the Elimination of Racial Discrimination in *The Jewish Community of*

Oslo et al. v. Norway (2005). In the EU's legal system, the incitement to violence or hatred is also prohibited by Council Framework Decision 2008/913/JHA of 28 November 2008 OJ L 328 on combating certain forms and expressions of racism and xenophobia by means of criminal law. In most cases that deal with the incitement to violence or hatred, the argument of the freedom of expression is at stake. Still, as the European Commission of Human Rights put it in *Glimmerveen and Hagenbeek v. the Netherlands* (1979), the freedom of expression does not protect the spreading of ideas that are racially discriminatory.

3 Identity and Names

Article 3(1) of the Framework Convention stipulates that every person belonging to a national minority shall have the right to freely choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights connected to that choice. Furthermore, Article 11(1) mentions that the Parties undertake to recognise that every person belonging to a national minority has the right to use his or her surname (patronym) and first names in the minority language and the right to official recognition of them, according to the modalities provided for within their legal system; this right is also recognised by Article 10(5) of the Charter.

Identity and names might be treated as a part of the right to respect for private and family life, as protected by Article 17 of the ICCPR and Article 8 of the ECHR. Indeed, the European Court of Human Rights was prepared to look into the issue of minority names through the prism of privacy. Nevertheless, it recognised a wide margin of appreciation in the authorities' approach towards recording minority names in the official language, such as in *Kuhareca alias Kuharec v. Latvia* (2004) and *Bulgakov v. Ukraine* (2012). Some national courts construct this margin of appreciation at national level quite strictly, for example, by arguing that the name and family name of an individual must be written in a passport in the official language, otherwise the constitutional status of the official language would be denied (as the Lithuanian Constitutional Court put it in case No.14/98 21-10-1999 ruling).

Still, the UN Human Rights Committee in some cases identified violations of the right to privacy in cases relating to minority names. For example, in *Raihman v. Latvia* (2010) it stated that, while the question of legislative policy, and the modalities to protect and promote official languages is best left to the appreciation of state parties, the forceful addition of a declinable ending to a surname – which has been used in its original form for decades, and which modifies its phonic pronunciation – is an intrusive measure that is not proportionate to the aim of protecting the official language. In its own evaluation of *Bulgakov v. Ukraine* (2007), the Committee added that the State party went beyond transcribing the name and patronymic of the author and actually changed them on the basis of the rules contained in a Ukrainian grammar book. It therefore considered that the unilateral modification of the name and patronymic on official documents was not reasonable.

4 Employment, Goods and Services

There is no provision protecting the right of access to goods and services in general human rights law, and the rights related to employment are protected by the right to work and just and

favourable conditions of work in Articles 6 and 7 of the ICESCR, as well as Articles 1 and 2 of the Revised European Social Charter. Therefore, the prohibition of discrimination is of utmost importance. In particular, the EU Council Directive 2000/43/EC, which implements the principle of equal treatment between persons irrespective of racial or ethnic origin, pays particular attention to discrimination in relation to conditions for access to employment, to self-employment as well as to occupation, employment and working conditions, and access to and supply of goods and services which are available to the public. Once again, it should be mentioned that the prohibition covers not only direct, but also indirect discrimination, as well as harassment and an instruction to discriminate. Taking this into account, apparently neutral provisions, criteria, or practices might be also verified from the point of view of non-discrimination, such as official language proficiency requirements in employment (Kochenov et al., 2013).

5 Freedom of Thought and Religion, Freedom of Expression, Freedom of Assembly and Association

Article 7 of the Framework Convention stipulates that the state parties shall ensure respect for the right of every person belonging to a national minority to freedom of peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience, and religion; Article 8 envisages the person's right to manifest his or her religion or belief and to establish religious institutions, organisations, and associations. Of course, the same rights are also protected by Articles 19, 21, and 22 of the ICCPR and Articles 9, 10, and 11 of the ECHR.

In some situations, the mere idea of the existence of a certain minority and association on that ground, as well as the spreading of ideas concerning relations between the state and minorities might lead to interference with the aforementioned rights. However, as the European Court of Human Rights put it in *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* (2001), demanding territorial changes in speeches and demonstrations does not automatically amount to a threat to a country's territorial integrity and national security; the essence of democracy is its capacity to resolve problems through open debate. Sweeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities and however illegitimate the demands make may be – do a disservice to democracy and often even endanger it. In a democratic society based on the rule of law, political ideas which challenge the existing order and whose realisation is advocated by peaceful means must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means.

The aspect of non-discrimination is also relevant in this context. For example, as the UN Human Rights Committee noted in *Waldman v. Canada* (1999), the ICCPR does not oblige States parties to fund schools that are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria.

6 Media

Article 9 of the Framework Convention and Article 11 of the Charter protect the right to create and have access to media in the minority language. Human rights related to media are also covered by the freedom of expression in Article 19 of the ICCPR and Article 10 of the ECHR. They are similarly protected in the context of private media, also the right to property, as enshrined in Article 1 of Protocol No.1 to the ECHR.

In many countries, the authorities try to restrict the language of broadcasting by introducing language quotas. Whereas it might be relevant to discuss those cases by referring to the concept of indirect discrimination, the courts might be also prepared to tackle the issue of the freedom of expression. For example, the Latvian Constitutional Court found in case No. 2003-02-0106 that the language quota for private broadcasters has neither furthered more extensive use of the official language nor advanced the process of minority integration. Therefore, it concluded that there was no pressing social need to introduce the quota.

7 Communication with Authorities in Minority Languages

Article 10(2) and 10(3) of the Framework Convention, as well as Articles 9 and 10 of the Charter, regulate different aspects of communication with authorities in minority languages. There is no general human right to communicate with authorities in the language of one's choice, as indicated by the European Commission of Human Rights in *Inhabitants of Leeuw St Pierre v. Belgium*. Nevertheless, the right to be informed in an understandable language in the context of criminal proceedings is recognised by Article 14 of the ICCPR and Articles 5 and 6 of the ECHR. In certain situations, lack of the possibility to use one's language or to be informed in understandable language, including in civil or administrative proceedings, might result in a violation of the right to a fair trial.

The aspect of non-discrimination is also important here – the choice of language by the authorities or a refusal to communicate in a certain language cannot be arbitrary. The UN Human Rights Committee indicated in *Diergaardt et al. v Namibia* (2000) that the authors had shown that the State party had instructed civil servants not to reply to the authors' written or oral communications with the authorities in the Afrikaans language, even when they were perfectly capable of doing so, therefore the authors were victims of the violation of the prohibition of discrimination.

8 The Use of Languages in Public Information

Article 11(2) of the Framework Convention envisages that that every person belonging to a national minority has the right to display in his or her minority language signs, inscriptions, and other information of a private nature visible to the public. Since the freedom of expression covers all kinds of communication, Article 19 of the ICCPR and Article 10 of the ECHR also protect this right. If the sign or the inscription is a part of a private property, the right to property as enshrined in Article 1 of Protocol No.1 to the ECHR is also relevant.

The UN Human Rights Committee dealt with such use of languages in *Ballantyne, Davidson,*

McIntyre v. Canada (1993). It came to the conclusion that it is not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English. This protection may be achieved in other ways that do not preclude the freedom of expression, in a language of their choice, of those engaged in such fields as trade. For example, the law could have required that advertising be in both French and English. A State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice.

9 Education

Articles 13 and 14 of the Framework Convention and Article 8 of the Charter cover the issue of access to education and education in minority languages. Although the right to education is also recognised by Article 13 of the ICESCR and Article 2 of Protocol No.1 to the ECHR, the linguistic aspect of the right to education is not as such protected by those provisions, as the European Court of Human Rights noted in their *Case "relating to certain aspects of the laws on the use of languages in education in Belgium".* Nevertheless, the Court was prepared to find a violation of the right to education in a situation where primary schooling in a certain language was ensured, whereas continuation at the secondary-school level was not, such as in *Cyprus v. Turkey* (2001).

The prohibition of discrimination should be taken into account regarding both accessing existing institutions of education and defining the modalities of such institutions. In *D.H. and Others v. the Czech Republic* (2007), the European Court of Human Rights decided that the routine placement of Roma children in schools for children with mental disabilities was discriminatory. On the other hand, the Latvian Constitutional Court in case No. 2004-18-0106 looked into the issue of state-funded school with instruction in minority languages and was ready to admit that persons belonging to minorities are in a different situation in comparison with persons belonging to majority; therefore the principle of non-discrimination might require a differential treatment in terms of language. In case No. 2005-02-0106, the same court found that the provision of subsidies to private schools with only instruction in the official language violates the principle of non-discrimination, as all private schools should be treated in the same manner.

10 Remedies

A wide variety of different remedies are available in cases of incompliance of domestic laws and practices with international law. If the laws are not compliant, the legislators might be lobbied to change them; a constitutional court might be addressed in order to declare incompliance. If the text of a norm is not problematic as such, change of the administrative practice of implementation might be promoted by addressing the executive or by recourse to the judicial system. Ombudspersons and other administrative bodies might be helpful in changing the practices.

At the international level, the European Court of Human Rights deals with examining individual applications about violations of the ECHR. The UN Human Rights Committee is entitled to examine individual communications concerning violations of the ICCPR, also from Belarus. The Committee also examines state reports on the implementation of the Covenant, where civil

society might also provide useful additional information in the form of shadow reports.

The UN Committee on the Elimination of Racial Discrimination examines state reports in a similar manner. It is also entitled to deal with individual communications from the states that have made a declaration under Article 14 of the ICERD, such as Ukraine and Moldova.

The Advisory Committee of the Framework Convention for the Protection of National Minorities and the Committee of Experts of the European Charter for Regional or Minority Languages do not examine individual complaints. Nevertheless, those committees might be addressed by civil society in order to better inform them on the implementation of the mentioned agreements by state parties.

The OSCE High Commissioner on National Minorities does not monitor the implementation of any specific international agreement. Nevertheless, if violations of human rights have the potential to lead to a conflict, the High Commissioner is entitled to intervene with recommendations.

Finally, the EU does not have any formal mandate to follow the developments concerning human rights in general and minority rights in particular. That being said however, as Article 2 of the Treaty on European Union explicitly mentions that respect for human rights, including the rights of persons belonging to minorities, is part of the EU's values, the union of the conceptions of rights might be addressed in the framework of its relations with the Eastern Partnership.

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International Law and Protecting and Implementing the Language Rights of Minorities

Fernand de Varennes

If you talk to a man in a language he understands that goes to his head, if you talk to him in his own language that goes to his heart.

– Nelson Mandela (1918–2013)

1 Introduction

In all societies committed to human rights, how to respond to linguistic diversity, respect the human rights of linguistic minorities and ensure their integration in national society are important matters of law and policy. Views differ as to what is most appropriate, and obviously depend on each country's unique circumstances. Nevertheless, it is possible to extract from the hundreds of concrete state practices from around the world certain trends which have had positive results and are in harmony with the international human rights law which emerged after the end of World War II.

This article is mainly intended as a tool for those who are first involved with and responsible for these responses: the policy-makers, i.e. local, regional and national authorities who have international legal obligations vis-à-vis minorities or their languages, while also serving as a reference point for advocates.

It is not suggested that each practice identified here is ideally suited for all states and all situations. That is neither feasible nor desirable. What it seeks to provide is a framework on how to respond to linguistic diversity in different contexts in a way which favours the inclusion of minorities in full respect of their human rights, based on the experience of successful state policies.

2 The Linguistic Rights of Minorities

Since linguistic rights are human rights,[1] the standards that can be invoked and the exact content of these rights are to be found in international and regional political and legal human rights documents.[2] A comprehensive but practical view of what constitutes a linguistic right

[1] This article is restricted to recommendations on the linguistic rights of minorities. Most of the rights and freedoms relating to language, such as freedom of expression, are actually available to 'any person', and are thus not limited to minorities. Since linguistic rights are individual human rights, most of these rights are also available to majorities, to indigenous peoples, to stateless persons, non-citizens, deaf and unsighted individuals, migrants and refugees.

[2] In addition to international law and its legally binding treaties, there are political and moral commitments which states approve formally in the form of declarations in international bodies such as the United Nations, UNESCO, the Council of Europe, the African Union and the Organization of American States. While declarations such as the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, and the UN Declaration on the Rights of Indigenous Peoples are not legally-binding treaties, they may have significant impact in

leads to a better understanding as to how many human rights impact directly—and in some cases even tremendously—on language.

Although there is no generally accepted categorization of linguistic rights in international law, these can be divided in three broad categories (which can be described under the principles of linguistic liberty, fundamental fairness, and proportionality) within the applicable rights standards:

1. Linguistic liberty: the private use of minority languages.
2. Fundamental fairness: minority languages and criminal law.
3. Proportionality: the use of minority languages by authorities.

2.1 Linguistic liberty: the private use of minority languages

2.1.1 General description

All private use of a language is protected by freedom of expression. It is therefore one of the most powerful linguistic rights available to individuals, and indirectly minority communities, on their use of any language in a private context. But it is far from being the only relevant human rights provision, depending of course on the type of restriction or interference by state authorities:

- freedom of religion (in religious activities, the use of liturgical languages is arguably also protected by freedom of religion);
- Article 27 of the International Covenant on Civil and Political Rights (ICCPR) (for minorities);
- freedom of association;
- the right to private life;
- the prohibition of discrimination on the ground of language (but potentially also on national origin, ethnicity, race or religion).

From a practical point of view, there is no obstacle to the simultaneous involvement of a combination of these freedoms and rights: in other words, it is quite possible that a specific language issue could involve at the same time not only freedom of expression, but also Article 27 of the ICCPR (if involving a minority) and the prohibition of discrimination, among a few others.

Authorities must therefore be aware that regardless of the status of a particular language, or whether they are dealing with a person who belongs to a minority, or is an indigenous person or a non-citizen, any intrusion in the language preferences of an individual in the private sphere is, generally speaking, more than likely contrary to a significant number of human rights standards—and probably ought to be avoided if a state wishes to avoid acting in breach of its international legal obligations.

These linguistic rights are in a sense the easiest to understand and implement by policy-makers, since they require that authorities not interfere with the linguistic preferences and practices in the home and community. In other words, by staying away and not ‘interfering’ in private

two ways: first, because they signal a consensus among states as to the type of conduct they should respect in terms of the linguistic and other rights of minorities and indigenous peoples; secondly, because documents such as these may actually be signalling the future direction that states may be willing to consider in terms of the use of minority (and other) languages.

activities—and the language(s) used in these—a government would be complying fully with the linguistic dimension of freedom of expression, freedom of religion, etc.

Most governments in the world already tend not to get involved in relation to the language individuals use at home, or with other members of their community, or in their mosque, church, synagogue, or temple, or at the office of a private company. Indeed, it can be said that this is increasingly the case in most parts of the world. States that may have previously had laws banning the use of certain languages even in private contexts (Turkey in relation to Kurdish; Basque, Catalan and other national minority languages of Spain during General Franco's regime; French-only legislation in Québec, Canada for commercial signage) have largely abandoned such measures.

There are unavoidably situations where state authorities may have a legitimate interest in requiring that private parties use an official language in some situations where there is a significant public interest: warning signs about a potential danger, health advisories or information on consumer products, or signs visible to the general public may all give rise to situations where the use of an official language may legitimately be required from private parties. These are where there may be uncertainty on how these legitimate interests may interact with the principle of linguistic liberty. The main areas of concern—and the practical measures that can be taken in each to better implement the applicable linguistic rights—in this category for both authorities and individuals alike—are:

- language in private: commercial, cultural, family and religious activities;
- the linguistic form of a person's name;
- private media and communication;
- language in community: use of language between members of a linguistic minority.

2.1.2 Language in private: commercial, cultural, family and religious activities

All individuals, including members of a minority, have the right to use their language of choice in private activities where they express themselves through language. This can include a large variety of different areas such as:

- private signs or writing visible to the public or used inside a private building such as a religious or cultural centre, shop, etc.;
- the language used by members of a family at home;
- language used by members of a minority in religious, political or social events;
- language used in a commercial or associative setting.

This is an 'area of concern' more because it is illustrative of a general good practice in most countries: state authorities usually do not interfere in the private language usage of minorities in private commercial situations, private events involving culture, religion or other social activities, or even in a familial context. Put simply, banning a minority language in any of these cases could be a serious violation of freedom of expression and Article 27 of the ICCPR, and may be in some cases discriminatory or violate freedom of association.

The main challenge in these areas include, on the one hand, how to understand and deal with permissible restrictions on the private linguistic preferences of individuals under a number of limited grounds in international law, usually when it is necessary and proportionate for reasons of public health, morality or public order, or protection of the fundamental rights and freedoms

of others. This would not be a likely occurrence.

On the other hand, without being a restriction on linguistic liberty, it is possible for authorities to require that an official language also be used in conjunction with the language preferred by an individual in private matters, though the additional use of an official language may not exclude or impose an unreasonable burden on a minority's language of choice. This is a more likely scenario because it has been fairly widely recognized that protecting an official language or promoting its use in certain areas by private parties in a state are legitimate interests (*Ballantyne, Davidson and McIntyre v. Canada*, 1993).

The 'best practice' in all these cases of private use of a minority language is not to restrict the linguistic choice of those involved, nor impose any requirement to use the official language. This is the approach generally adopted in most African, Asian, American and European states, including Mexico, the Maldives and South Africa, to name but a few.

A 'good practice' could still respect the liberty of private parties to use a minority language, but in addition impose, where there is a legitimate state interest, the additional requirement of also using to an appropriate degree the official language. One positive measure in this sense where states have a legitimate interest is the case of public displays of a commercial nature. Following the conclusion of the United Nations Human Rights Committee that freedom of expression includes linguistic expression (*Ballantyne, Davidson and McIntyre v. Canada*, 1993), the Government of Québec eventually adopted measures requiring that publicly visible commercial signs, advertising and posters must be in the official language, but a minority (or any other language) is always allowed if the official language is markedly predominant. There is no such language requirement in cases of private cultural, religious, social or political signs.

A 'bad practice', in breach of international human rights, would be either to ban the private use of a minority language outright, or impose the additional use of the official language in addition to the use of a minority language where there is no legitimate state interest. One extreme example of the latter would be demanding that parents speak with their own child at home in the official language and in their own language, or as in the case of the good practice in Québec that the requirement to use the official language would be extended to religious or cultural signs.

From a policy point of view, the best approach in practical terms for authorities to adopt in order to comply with the linguistic rights in private activities is one of general laissez faire. In the few areas of concern where it is legitimate to impose the use of the official language in addition to a minority language, this must not amount to an unreasonable burden on the private party, individual, organization or business. Any unreasonable linguistic requirement could be considered discriminatory in human rights law.

2.1.3 The linguistic form of a person's name

A large number of the world's countries can be said to have adopted a very practical and effective approach to the issue of the linguistic form of the names of minorities, as they do not interfere with the private use of a person's name,[3] or the language used for such name. The issues of state recognition and use of an individual's name, and of the official transliteration of a person's name written from one script to another, are distinct matters dealt with later in this

[3] Name is used here as a generic term to include forenames (or first names) and surnames (last or family names).

guide.

A more complex matter occurs if authorities were to somehow prevent the use of a person's name in private situations because it is in a minority language. This would likely be a grave concern in terms of freedom of expression, the right to privacy or private life, perhaps the right to a name, Article 27 of the ICCPR, and might in some situations be contrary to the prohibition of discrimination.

An individual's name is a fundamental aspect of one's identity, and by and large states address this in an inclusive way: very few if any currently prohibit or prevent either the private use of names which are not in the official language or prohibit names of individuals in a specific minority language.

More problematic has been situations where state legislation indirectly impacts on an individual's name in private activities. International jurisprudence seems to suggest that the linguistic form of a person's name is protected if state legislation or practices result in concrete obstacles in using one's own name in private matters (*Raihman v. Latvia,* 2010). On a number of occasions, the UN Committee on the Elimination of Racial Discrimination (CERD) has also linked any state interference in the language of a person's name as potentially constituting racial discrimination (CERD 2001, para. 18, CERD 2010, para. 12).

As in the case of the private use of a minority language generally, a 'best practice' in relation to the private use of a person's name in a minority language is to not interfere in any way, by legislation or otherwise, with this linguistic choice. This approach is in place in almost every country of the world: governments have no laws which would interfere directly or otherwise with the private use of the names of individuals in minority languages.

A small number of states require that all citizens have their names registered in the official language, though not preventing directly any private use in its original linguistic form. Such a requirement runs the risk of being contrary to international law if it prevents, obstructs or seriously inconveniences a person attempting to use his or her name in a minority language in private life. Practical measures to avoid such a risk would be for any legislation requiring the registration of a person's name in its official language form strictly limit this to internal use by state authorities. The legislation would have to clearly state that there is no obligation on minorities to use the official language version of a person's name in private activities (such as banking, commercial transactions, private transportation, usage between members of a minority, etc.).

2.1.4 Private media and communication

The use of minority languages in private media is covered by the usual 'private-oriented' human rights: freedom of expression, the prohibition of discrimination (if it applies to only certain non-official languages), and Article 27 of the ICCPR. Simply put, banning a private media outlet from publishing or broadcasting in a minority (or any other language) could be deemed generally to be a violation of freedom of expression; this would easily be seen as a breach also of Article 27 in relation to a minority language since it would prevent members of a linguistic minority from using their language with other members of their group, and would most likely be deemed discriminatory since such measures in the past have tended to target specific minority languages. Most states today generally comply with these linguistic rights.

The main remaining area of concern today usually involves government policies which indirectly impact on minority private media. This can take various forms: allocation of broadcasting or rebroadcasting licences, frequency allocation, treatment of incorporation requests or registration of minority language media, or even difficulties for minority language publishers in obtaining paper for their publications. It is now extremely rare to have an outright ban on private media using a minority or non-official language (UN Human Rights Committee, 1993).[4]

There is however no right for private media in a minority language to be awarded automatically, for example, a radio or television frequency or licence simply because they use a minority language. Nevertheless, authorities must keep in mind two important considerations: first, the prohibition of discrimination requires that minority media not be disadvantaged in an unreasonable way in the granting of frequencies or broadcasting licences; secondly, the need to ensure a plurality of views, to reflect the diversity of society and to reach the intended publics all suggest that private media in minority languages should actually be favourably considered by authorities. In other words, '[t]he State should support broadcasting in minority languages. This may be achieved through, inter alia, provision of access to broadcasting, subsidies and capacity building for minority language broadcasting' (OSCE High Commissioner on National Minorities, 2003). While in the past there may have been technological restrictions which limited the number of available frequencies in electronic media, this is increasingly no longer the case with new media and digital technology.

In practical terms, private media in minority languages provide one proven pathway to favour the inclusion and effective participation of linguistic minorities in public affairs. They are in effect additional tools which public authorities can use to communicate, inform and involve minorities more directly in their own language. Policy-makers can thus protect plurality, diversity, quality and access for linguistic minorities through legislation and regulatory mechanisms.

Positive measures are widespread throughout the world with the common practice of not having in place any obstacles to the free use of minority languages in private media. Some states, in addition to not having any obstacles to the use of minority languages in private media, include funding to favour their presence, such as that provided by the *Comisión Nacional para el Desarrollo de los Pueblos Indígenas* in Mexico, which permitted broadcasting in some 30 indigenous languages by 20 community radio stations. Kosovo also established a Minority Media Fund to provide assistance to electronic and printed minority language media. Canadian legislation indicates that the broadcasting system should 'reflect the linguistic duality and multicultural of Canadian society, and the special place of Aboriginal peoples'. This has in practice led to support to licencing and frequency allocations to a large number of community minority and indigenous language radio stations, and some available funding to support their operations. In Spain, authorities in Catalonia provide funding and tax concessions to strengthen the presence of the Catalan language in private publishing, radio and television.

2.1.5 Language in community: use of language between members of a linguistic minority

There are some situations where persons who belong to a linguistic minority are prevented ('denied') from using their language with other members of their group which goes beyond

[4] '7. The Committee expresses its concern over the inadequate protection of the rights of ethnic, religious and linguistic minorities in the Dominican Republic. In this regard, the Committee notes that the prohibition of broadcasting in a language other than Spanish is not in conformity with article 19 [freedom of expression] of the Covenant.'

simple cases of freedom of expression because of its collective dimension, while freedom of expression might often be invoked in such cases (ICCPR 1966, Art. 27).[5] For example, members of a linguistic minority cannot be prevented physically from speaking their own language among themselves (*Lovelace v. Canada*, 1977). Public authorities cannot forbid the establishment or operation of private schools that teach a minority language or use a minority language as a medium of instruction. This has been recognized in treaties even before the creation of the United Nations (see for example Permanent Court of International Justice 1935, p. 17). There is widespread recognition of this right in legal and political documents, despite some differences in the way it is formulated.

Many governments around the world have practices which can be said to be in line with this linguistic right since generally there are no barriers that would prevent members of a linguistic minority from using their own language amongst themselves. In a number of cases, states have favourable measures in place to provide support to strengthen or promote the use of a minority language in community with other members of their group. In relation to its Swedish-speaking and Saami minorities, Finland for example has mainstreamed support for their activities as part of government programming. They have their own associations/institutions and are funded within the framework of the overall cultural funding system.

Some areas of concern occur where private parties prohibit the use of minority languages on their premises, or linguistic minorities are prevented from opening or operating their own private schools where a minority language is a medium of instruction. Another issue of some contention is whether this linguistic right imposes positive obligations towards the survival of a minority language or funding for the activities of linguistic minorities.

Policy-makers must be keep in mind that they have under Article 27 the obligation to ensure minorities are not prevented from using their own language among themselves: a particular challenge occurs when private employers ban their own employees from using a minority language either between themselves or with clients speaking their language. This does not involve situations where business or safety concerns mandate the use of one language. While this is not a result of a prohibition by authorities, Article 27 may still give rise to an obligation that such conduct not be allowed, and might also be discriminatory. A practical measure to avoid this potential human rights breach is to adopt legislation and implementation measures to prohibit such conduct, and provide remedies against private parties who do not comply.

There are also particular matters arising out of private education and minority languages which still remain to be clarified from a human rights perspective. For policy-makers and rights-holders, it is for example important to keep in mind the distinction between private minority schools and public schools which use a minority language as a language of instruction. In the case of the latter, different linguistic rights consideration would enter into play, and are considered separately.

One matter of debate is whether there is an obligation to support, fund or recognize private minority schools and the education they provide. The prevailing consensus would seem to indicate that while currently human rights do not require the funding of private minority schools

[5] 'In those States in which […] linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group […] to use their own language.' Article 30 of the Convention on the Rights of the Child is similarly worded, though including indigenous children.

unless there is a situation which might be discriminatory,[6] authorities must not prevent the establishment of such schools. Authorities would also have the obligation to recognize the qualifications obtained in such schools, subject to general national educational standards. Students in such schools should always have the opportunity to acquire fluency in the official language.

2.2 Fundamental fairness: minority languages and criminal law

2.2.1 General description

Because of the significance of language in ensuring the fairness of a criminal trial and the integrity of legal process, international law and domestic legislation in most countries recognize that an accused has certain linguistic rights as minimum guarantees for a fair hearing.[7] It has even been adopted in a European Union directive that confirms this linguistic right as a fundamental right with the EU which must be harmonized in the legislation of member states (Directive 2010/64/EU). An accused is entitled to the free assistance of an interpreter if he or she cannot understand or speak the language used in court, though it would be sufficient to provide this in a language understood by the accused, not necessarily in a minority language. It also appears clear that to have a fair trial, the interpretation provided must be 'adequate'. The interpretation has to be practical and effective (*Kamasinski v. Austria*, 1989). This also includes translation of certain court documents (ICCPR Art. 41(3)(f)). The official language to be used by authorities in court is not affected by this linguistic right. The interpretation and translation to be provided do not need to be in the accused's own language, only a language s/he understands. In cases where an individual only understands a minority language, or where judicial authorities find it 'convenient' to communicate with the accused in this language, the minority language will be used.

Authorities are usually aware that there cannot be a fair trial if an accused doesn't understand what is being said. While this linguistic right is one of the most widely recognized human rights in international law, there are at times difficulties in implementation, as opposed to rejection of the right itself: the translation may not always be available when required; the quality of the interpretation may not be adequate; documents essential to enable suspects to exercise their right of defence are not always provided within reasonable time or without charge; or even at times an accused is considered sufficiently fluent in the language of court proceedings so as not to require interpretation, when this is actually not the case.

As with any other situation of difficulties in implementation, policy-makers should have in place mechanisms to identify and correct cases of non-compliance. This is dealt with later in this article, but in a general sense it can be said to require clear guidelines and enforcement measures to better assure the application of this basic right.

Some countries such as Japan have opted for a practice which can be particularly sensitive to linguistic minorities. When a defendant or witness does not speak Japanese, the criminal court is required to hire an interpreter proficient in his or her language, and not simply any language understood.

[6] This can occur if state authorities unreasonably only provide financial support to some private minority schools. Waldman v. Canada (1999).
[7] See 'Language Rights in the Minimum Guarantees of Fair Criminal Trial' in Namakula (2014).

2.3 Proportionality: the use of minority languages by authorities

2.3.1 General description

Linguistic rights imposing a positive obligation on state authorities to use a minority language is the most complex, contentious and consequential category for both policy-makers and rights-holders. On the one hand, there are legitimate concerns and limitations of practicality and expenditures for authorities, as well as queries as to the status of official or minority languages in such situations; on the other hand, it can be extremely important in terms of access and inclusion for linguistic minorities. In some contexts, the denial of linguistic rights can result in widespread exclusion and marginalization.

Recent regional and international human rights decisions suggest that a state language preference—even if it relates to a country's only official language—which can constitute discrimination if it is unreasonable or unjustified (J.G.A. Diergaardt et al. v. Namibia 2000, Kevin Gumne and others v. République du Cameroun, 2009). Additionally, public education not provided in a child's language could be a breach of the right to education if students are imposed an unrealistic burden through the language choice of authorities (*Cyprus v. Turkey,* 2001), or excluded from the opportunity of learning the national language (Catan and others v. Moldova and Russia 2012). The implications—although still far from universally accepted—are that the prohibition of discrimination on the ground of language can lead to situations where state authorities have an obligation to communicate with members of the public in a non-official language, often a minority language, where this is reasonable and justified, and that in relation to the right to education there can be situations of a 'denial of the substance of the right' if the language used as medium of instruction is not a child's mother tongue.

Whereas for linguistic rights in private activities the defining principle would be a laissez-faire approach, the case of the use of minority languages by state authorities would seem to call for a proportional approach, based on what is reasonable or justified after consideration of all the relevant circumstances in order to comply with the prohibition of discrimination. This is essentially also the principle enshrined in treaties and documents dealing specifically with the human rights of minorities, such as the Council of Europe Framework Convention for the Protection of National Minorities (1998). This tends to take the shape of a provision indicating, among others, an obligation for state authorities to use a minority language where the numbers, demand and geographic concentration of its speakers make it a reasonable or justified use of a minority language.[8]

Many states have in practice accepted and applied a proportional approach in the use of minority languages as an effective and appropriate approach to their own linguistic diversity. Belgium, Bolivia, Canada, India, Italy, Switzerland and many others have more than one official language to take into consideration to put this into effect legally and to recognize it politically. While not necessarily attributing official language status, many if not most governments in the world require in some areas an 'appropriate' use of minority languages.

Beyond the legal principle itself, there is a fairly widespread understanding that a proportionate

[8] Other documents containing the same general approach, though with some variations, include the European Charter for Regional or Minority Languages, the Oslo Recommendations regarding the Linguistic Rights of National Minorities, the UN Declaration on the Right of Indigenous Peoples, and the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

response is highly desirable for a number of very practical reasons:

- For linguistic minorities to participate effectively in decision-making processes, information must be made available in appropriate languages (Global Transparency Initiative 2009, p. 1).
- Access to public services, particularly in areas such as health and social services, is most effective when offered in a minority's language, particularly for indigenous or traditional minorities.
- Education in a minority's own language results generally in better student retention and academic results, including in learning the official language particularly for vulnerable segments of society such as indigenous peoples and women (Benson 2005).
- Economic and employment opportunities increase significantly for minorities when their language is used proportionally by authorities.
- Studies and practices in many countries demonstrate that an appropriate and proportionate use of minority languages can increase inclusion, communication and trust between members of minorities and authorities.

A proportional approach to the use of minority languages to reflect the reality of a state's linguistic diversity—in a reasonable, realistic and inclusive way so as to respect the prohibition of discrimination—is a highly complex process. Countries with more long-standing traditions consistent with this principle include India and Switzerland, while other more recent practices are Belgium and Ethiopia.

It is not simply a matter of authorities using a minority language once a minority has reached a numerical or percentage threshold, since every country and situation is unique. Factors that may be considered in determining the appropriate scale of use of a minority language by public authorities, or what is a sufficient number or is justified in a particular case, will depend on the circumstances. Prominent among these would be the number of speakers of a minority language, the level of demand for the use of a minority language, the territorial concentration of the minority, a state's available resources in light of any additional costs in training or materials, the type of service being requested in the minority language and the relative ease or level of difficulty in responding to the demand. A useful reference point as to how to identify what is an appropriate proportional approach in different areas can be extrapolated from the European Charter for Regional or Minority Languages, which attempts to identify the obligations to use minority languages in different situations—though this is of course designed for European contexts.

In addition to practical concerns of feasibility, there may also be in some countries fears that using a minority language may constitute a threat to the unity of the state or be detrimental to a minority's integration into the wider society. Evidence tends to show however that it is the failure to find the appropriate degree of use of a minority language which can lead to increased exclusion, mistrust, and weak participation in public life—and even to violent ethnic conflict as history has shown from the not so distant past in places such as Macedonia, Myanmar, Sri Lanka and Sudan.

The main areas of concern as to a proportionate use of minority languages by authorities are:

- administrative, health and public services in general;
- public education;
- public media;

- identity and participation.

2.3.2 Administrative, health and public services in general

Speakers of a minority language who are sufficiently numerous and concentrated at the national, regional or local levels should be entitled to receive from authorities an appropriate degree of administrative and public services in their language. This is based partly on the need for effective, meaningful access to such services, and avoidance of unreasonable or arbitrary disadvantage because of linguistic barriers or preferences. In addition, this can also contribute to the integration of linguistic minorities through better communication, as well as related employment and other opportunities related to the use of their language by authorities.

It is not possible to give a specific number or percentage when persons belonging to a minority can be said to have the right to use their language with public authorities, since every situation is unique. Factors that may be considered in determining the appropriate scale of use of a minority language by public authorities, or as to what is a sufficient number or is justified in a particular case, will depend on the circumstances involved. Prominent among these would be the number of speakers of a minority language, the level of demand for the use of a minority language, the territorial concentration of the minority, a state's available resources, and the type of service being requested in the minority language and the relative ease or level of difficulty in responding to the demand. There may also be other relevant considerations.

Despite the lack of a fixed percentage or number of speakers needed to be entitled to the use of a minority language by public authorities, there are concrete examples of state practices which are useful to illustrate when this might occur. In Finland, members of the Swedish minority are entitled to have their language used by public authorities in a municipality designated bilingual where they constitute at least eight per cent of the population, or number at least 3,000 persons. The indigenous Sami language is also official in municipalities where at least 7 per cent of the population speaks Sami. In the United States, hospitals, nursing homes, managed care organizations, state Medicaid agencies, home health agencies, health service providers, and social service organizations which receive federal funding must use a minority language, translation or interpretation under non-discrimination legislation (Title VI of the Civil Rights Act of 1964) and must ensure access for linguistic minorities 'where it is reasonable', based on four criteria: the number or proportion of the linguistic minority individuals, the frequency of contact with the service, the nature and importance of the service, and the resources available. In India, the principle of proportionality is largely practised in administrative and other public services where, in addition to Hindi and English at the national level, some thirty languages are used officially by state and territorial authorities is the various. There are in addition a number of regional minority languages designated by the President of India which must be used by authorities in certain parts of the country, and guidelines on the use of minority languages in districts and municipalities where they constitute a certain population (at least 60 per cent for official language status; 15 per cent for important documentation in minority language).

2.3.3 Public education

Numerous studies around the world (see generally UNESCO, 2008), , Thailand (Kosonen and Person, 2013), Vietnam (UNICEF and Vietnamese Ministry, 2012), Latin America (for indigenous peoples) (Lopez, 2009, p. 36), and Canada (Churchill, 2005, p. 13) reach broadly

similar results on the effects of education in a minority's mother tongue: children stay in school longer, increasing their overall chances of obtaining on average better grades in school, and a higher degree of fluency in both the official language and their own language.[9] Put differently, minority students only taught in the official language will on average repeat grades more often, drop out of school more frequently, have worse results, end up later in life with the lowest paying jobs and highest unemployment rates, and learn the official language less well than students who were taught in their own language. If persons belonging to linguistic minorities have a responsibility to integrate into the wider society through the acquisition of knowledge of the official language, then this can be best achieved through effectively teaching them in their own language. A World Bank survey confirms the generally better outcomes from education in one's language, even in the acquisition of fluency in the official language (Dutcher, 1997). As outlined in UNESCO's Jomtien Declaration in the provision dealing with access and equity, educational disparities for linguistic minorities must be removed so that they do not suffer discrimination in access to learning opportunities (World Declaration on Education for All, 1990).

The main challenge for public authorities is how to determine the appropriate degree of use of a minority language in education. While each country, minority and situation are unique, there are specific guidelines beyond those already mentioned in this article that can be useful from non-legal documents, such as The Hague Recommendations Regarding the Education Rights of National Minorities (1996).

2.3.4 Public media

Public media should reflect cultural and linguistic diversity in a non-discriminatory way. By receiving and imparting information in a minority language which minorities can fully understand and communicate in, public authorities are contributing to their more equal and effective participation in public, economic, social, and cultural life. The presence of minority languages in public media also contributes to greater integration and social cohesion, since authorities are able to inform and engage minorities directly in their own language—thus reflecting an inclusive policy towards them. Other human rights standards acknowledge that states have an obligation to 'encourage the mass media to disseminate information and material' in accordance with the UN Convention on the Rights of the Child's educational goals, including the development of respect for the child's own language (1989, Art. 17(a)).

The application of the principle of proportionality in public media implies the use of minority languages to the degree that it is justified and reasonable in light of the number of speakers of a particular language, the demand, the available resources and areas of involvement of authorities, etc. This involves all types of public media, whether public authorities are involved in public radio or television broadcasting, printed, electronic and new media. In some cases, special consideration must be given to a minority language's position. In broadcasting for example, it may initially be necessary to develop an adequate terminology and therefore to allocate additional funds for this purpose.

The nature and potential impact of this media also brings about distinct obligations to promote

[9] For example, in one 2013 ranking of France's high schools ('*lycées*'), the top educational facility for the whole country was the Lycée Diwan teaching in the minority Breton language rather than the country's only official language. This school's also had a higher average fluency in the French language than mainstream students, even though most of their instruction was in Breton.

tolerance, respect for diversity, and social cohesion. Minority interests and concerns should not be relegated exclusively to minority programming or media, but also mainstreamed into broadcasts in the official language. Persons belonging to linguistic minorities should also be consulted and participate in the development of minority language public media so that their interests and concerns can be better reflected.

2.3.5 Identity and participation

For many, language is a central marker of identity both for individuals and the political community represented by the state. Policy-makers must keep in mind that while the choice of an official language (or languages) is a matter which falls within a state's prerogative, and it is legitimate to promote and protect it as a component of national identity, this must be done in conformity with international legal obligations, including respect for linguistic rights. While integration, including the sharing of an official language, is a legitimate aim for social cohesion, it must be understood as one which respectfully accommodates diversity while promoting a shared sense of belonging in society. Some countries such as Bolivia have chosen to move away from a single national identity, asserting instead a 'plurinational' identity, including the indigenous languages as official languages. Similarly, Switzerland's identity is not based on a single culture or language, but on a confederation representing the country's four main languages.

The use of a minority language and social cohesion—the former as a response to an individual's identity and the latter to the state's choice of an official language since in many countries promoting an official language is seen as important in achieving cohesive societies—are not mutually exclusive. In most countries in the world, linguistic minorities are often bilingual, even multilingual. Still, the effective participation of linguistic minorities may at times be problematic because of language barriers. Where linguistic minorities, particularly those who are also indigenous, have an insufficient command of the official language, and their linguistic rights are not implemented, they run the risk of not being able to effectively participate in cultural, social, economic or public life.

There are therefore two main areas of closely connected concern: where minorities do not have the opportunity to acquire fluency in a state's official language(s), and where state authorities do not use a minority language in a proportionate way. Both can combine and result in the exclusion or marginalization of minorities in society, and have quite the opposite effect on their integration in society. Good policies for integration and inclusion of linguistic minorities thus involves recognizing and balancing these multiple linguistic identities within society. Where the language of a minority is used in relations with administrative authorities, it often becomes a significant factor in increasing a minority's participation in public life and provides for more effective means of communication on issues affecting minorities. However, if a country adopts a new official language, minorities can find themselves severely excluded from participation in public life and even educational opportunities if no linguistic rights are in place and they have not had opportunities to learn the official language.

To encourage the effective participation of linguistic minorities in public life, examples abound of the usefulness of using minority languages in electoral advertisements, electoral public service television and radio programmes, and in electoral material where these minorities are concentrated.

Finally, evidence shows the beneficial effects of the use of minority languages by authorities in areas such as health care, education and even employment rates—all leading factors in the effective participation of minorities in the social and economic fabric of society.

3 Linguistic Rights and the Challenges of Implementation

It is one thing to recognize the existence of linguistic rights, but quite another to put these into practice. The recognition of what are these rights in concrete terms in the various areas of concern highlighted in this article is nevertheless an important first step, since authorities cannot effectively implement linguistic rights if they themselves do not know or understand what these rights entail.

In a general sense, countries which have successfully implemented linguistic rights are those which have clarity in legislation, have ensured linguistic liberty in the private sphere for linguistic minorities, have adopted a proportional or sliding-scale approach to the use of these languages by authorities, have in place the necessary structures and institutions to ensure authorities carry out their duties, and finally have effective remedies if they do not.

The most effective approaches would appear to be those where the executive, the legislative and the judicial arms of states have evolved implementation institutions and mechanisms involving all three branches of the state. This would appear desirable so that the linguistic rights of minorities, including where a minority language such as Maori in New Zealand has an official status, are not merely or mainly symbolic or aspirational.

Perhaps the main area of concern in terms of implementation of minority languages involves the use of minority languages by state authorities, including in the field of public education, where the principle of proportionality would apply. This is a very practical issue, since it requires concrete measures involving personnel, structures and expenditures, meaning steps must be taken to comply with the linguistic obligations of the machinery of the state and government. In other words, where there is an obligation on authorities to use a minority language, practice in many states throughout the world show this should ideally require the implementation of a series of steps involving all branches of the state: legal, judicial, administrative and political.

On the legal level, the use of a minority language by authorities should be elaborated upon through legislation, regulations and directives or guidelines. The judiciary should also have a significant role: linguistic rights need to be justiciable, so that persons who belong to minorities can seek clarifications from the courts on the meaning and scope of application of these legislative measures, particularly in terms on the use of minority languages in administration (communications and services to the public) and education. Beyond clarifications, individuals should be entitled to seek the enforcement of their linguistic rights directly in a court of law where there is a failure to implement these obligations. Some countries even go so far as to provide funding to allow individuals to go to court in case of failure of authorities to use a minority language as prescribed.[10]

On the administrative level, a number of institutions which are part of the executive branch must

[10] This is for example the case of the *Language Rights Support Program* which has for the period of 2012-2017 $7.5 million for financial support to groups and individuals seeking legal remedies regarding constitutional official language rights. Information available at: http://www.padl-lrsp.uottawa.ca/index.php?lang=en.

be involved so that the human resources, financial, public service and legal parts of the machinery can be set in motion to guide, co-ordinate and oversee the implementation of the use of minority languages in the government and its administration. And finally, on the political level, the use of more than one language in any country involves a number of key players who must not only formulate policies responsive to the needs of a country's population in matters of minority language use, but also provide conduits for consultation, communication, and responses involving parliament, parliamentary committees, the government and other more political entities.

Though different countries using more than one language (and thus at least one minority language) will have different structures in place with some unique aspects, it is striking that in practice states that effectively use more than one language in their administration clearly have in place structures and mechanisms involving all three branches of the state:

1. There is always some kind of political mechanisms in place, both for overseeing politically the direction and policy of language use by authorities (with parliamentary committees for example) and for providing for resolution of language disputes by an institution answerable to parliament, such as in the case (usually) of a commissioner or ombudsman.
2. The constitutional, legislative and regulatory framework for the use of more than one language is usually well detailed, and individuals or groups can seek to enforce most provisions on the use of these languages by authorities in court.
3. At the administration level, there is a lead department and minister within government to coordinate the effective implementation of the use of languages by authorities. This can take the form of direct and close involvement of the department responsible for budgetary and financial matters, human resources and civil service hiring, training, and allocation.

The above general description on how to effectively implement linguistic rights can be found, with some variations, in the practice of countries such as Canada, Ethiopia, Finland and India.

A final common element often found is the presence of mechanisms in all three branches of the state—legal, political and administrative—to oversee, and if necessary enforce compliance by, authorities. For example, 'good practice' in terms of the effective implementation of the use of French in Canada, which is a minority language with official status, involves the interaction of all three components of the state, including putting into place systems to address cases where authorities fail to use this minority language as they are legally or constitutionally mandated. From a legal point of view, individuals and other affected parties can normally raise the issue of the violation of their linguistic rights by seeking a court order, damages or other appropriate remedy. Politically, this corrective role is attributed to the Commissioner of Official Languages answerable to the Parliament, although there are also other parliamentary committees which may also become involved. In the administrative and governmental part of the state apparatus, the departments of Canadian Heritage and the Treasury Board may, as part of their supervisory functions with the administration, order civil servants and managers to comply with policies or face disciplinary and other steps for failure to observe their linguistic functions.

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The role of minority-related legislation in the protection and promotion of equality on ethnic grounds

Marina Andeva

1 Introduction

Numerous European countries have special constitutional norms, constitutional agreements, special laws and individual legislative provisions directly related to the populace's ethnic heterogeneity or, in other words, to ethnic groups and/or minorities. In some cases, domestic minority policies are directly based on bi- and multilateral international instruments, such as treaties and declarations. The terminology, scope of application and rationales of these pieces of legislation vary. The given text seeks to provide an overview of the existing national models and approaches with a focus on their potential contribution to equality on ethnic grounds. In most cases, equality provisions appear to be merely replicas of the general constitutional provisions on equality of citizens and human beings before the law. They also symbolically underline the equal value of minorities vis-à-vis the majority as constituent parts of the given society. More specific provisions concern special guarantees for the maintenance of minority-related cultural and educational institutions including, for example, official multilingualism and special representation rights.

2 Overview of the Development of Minority-Related Legal Instruments

The protection of the rights of minorities and the importance of international human rights law have not been universally accepted. The League of Nations introduced the first modern international 'experiment' in regards to the minority issue, which "constitute[d] an unsurpassed high point in a centuries old tradition" (Robinson, 1971, p. 62). Pentassuglia's (2009) structure of the international instruments protecting minority rights as a sequence of movements (trends) explains in detail the different steps and periods in the development of the international instruments for minority rights protection and promotion.

According to Penstassuglia (2009), *the first movement* features minority instruments without an established international framework of human rights with the post-World War I League of Nations system. With the disintegration of the three multinational empires (Austria-Hungary, Prussia and the Ottoman Empire), a redrawing of the boundaries was caused and with that the birth of newly emerged or enlarged states. The League of Nations was a system that consisted of special treaty and declaration based obligations, created to accommodate nationals who belonged to racial, religious or linguistic minorities existing in these newly born states. Thornberry (1991) describes the League's minority regime as "the most extensive developed by the international community" (p. 40). Minority issues left for states to deal with were popularly

known as 'minorities' treaties' and 'declarations'[1] and some special measures were also taken to address individual cases.[2] Nevertheless, these treaties did not constitute any 'fresh departure' in respect of minority protection (Robinson, 1943) as the guaranteed rights were limited. The League system protected only certain minority groups in selected states in Eastern and Central Europe (Austria, Hungary, Bulgaria, Turkey, Poland, Greece, Czechoslovakia, Romania and Yugoslavia). Later, other states (Albania, Lithuania, Latvia, Estonia and Iraq) joined the system by making declarations. After 20 years of 'experiment', minority regimes operating under the League system gradually collapsed (with the outbreak of World War II); minority treaties and regimes were considered non-operative due to desuetude or by operation of the *clausula rebus sic stantibus*.

A second movement in the development of minority-related legislation is characterized by international human rights as a substitute for minority rights. The post-World War II period established a human rights framework, caught between universalistic ideals and the need to focus on group issues. The human rights approach was intended to remove 'ethnic particularism' from the code of rights available to everyone (Pentassuglia, 2009). When the UN spoke out for an individualistic approach for human rights and fundamental freedoms for all, states showed determination to learn from the terrible collective experience of the Holocaust by adopting the Genocide Convention in 1948. The universal human rights that were affirmed in the United Nations Charter, and confirmed in the Universal Declaration of Human Rights, as well as main regional instruments in Europe and the Americas, were observed as instrumental. Since the very beginning, on the UN agenda, the minority issue has been present, argued and very well documented; despite the fact that neither the UN Charter nor the Universal Declaration of Human Rights contains provisions on minority groups, both of them do refer to the principle of non-discrimination. The UN Sub-Commission[3] did include 'protection of minorities' alongside 'prevention of discrimination' in its title. Furthermore, a thorough study (to be produced by the commission) of the problems of minority groups was referred to the Economic and Social Council [ECOSOC] by General Assembly Resolution 217 A (III), which was passed together with the resolution containing the Universal Declaration. Subsequent activities were seen as fundamental for the drafting of the Article 27 of the International Covenant on Civil and Political Rights [ICCPR] in 1966. A minority rights provision finally made it into the most classic general human rights treaty ever adopted, recognizing the right of persons belonging to 'ethnic, religious or linguistic minorities' to enjoy their own culture, to profess and practice their own religion, or to use their own language. When the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities was adopted in 1992, a significant advancement was made (with the end of the Cold War and as a result of the new minority related disputes that emerged in Central and Eastern Europe), further expanding the scope of the UN protection of minority rights. The UN standards were then reinforced by many instruments at the European level, including the 1995 Council of Europe's Framework

[1] Of these, the Polish Treaty, 1919 (between Poland and Principle Powers and its Allies) became a standard formula for subsequent treaties, such as the Treaties of Saint-Germain-en-Laye, 1919, Neuilly-sur-Seine, 1919, Trianon, 1921 and Lausanne, 1920. Amongst these declarations are the Declaration by Albania, 2 October 1921, the Declaration by Estonia, 17 September 1923, the Declaration by Finland, 27 June 1921, the Declaration by Latvia, 7 July 1923 and the Declaration by Lithuania, 12 May 1922.

[2] Such as the Jewish minorities in Greece, Poland, Romania, Lithuania, the Vlachs of Pindus in Greece, the Ruthenians in the Carpathian Mountains, the non-Greek monastic communities of Mount Athos in Greece, the Moslem minorities in Albania, Greece and the Kingdom of the Serbs, Croats and Slovenians, the Szecklers and Saxons in Transylvania, the non-Moslems in Iraq, and the Kurds' linguistic rights in Iraq. See more in Robinson (1943).

[3] The sub-commission was established in 1946 as a subsidiary body to the Commission on Human Rights.

Convention for the Protection of National Minorities [FCNM].

The third movement is defined as minority related standard-setting, a way of integrating minority provisions into the international framework of human rights beyond cases of gross abuse (Pentassuglia, 2009). The developments seen in the past decades have gone hand-in-hand with a sort of resistance from the international community sectors to either robust minority rights regimes or the very notion of minority rights. The minority rights instruments adopted since the late 1980s do not make provisions for a juridical body to monitor provisions' implementation. Efforts to include minority rights in jurisprudential discussions and analysis on specialized instruments have been unsuccessful, especially in Europe. There has been a unwillingness of states to uphold standards that meet the core of minority demands and consequently provide advanced forms of protection under positive international law. Standards are rather focused on indigenous communities, and the minority provisions that are established take a strictly individualistic approach, with lack of direct entitlements to territorial or non-territorial autonomy or solid language and educational rights. However, an opportunity has been provided for re-considering the minority question (a long-standing issue) and the impacts of the security mandates after the collapse of the Soviet Union and Yugoslavia, as well as during ethnic conflicts in other parts of the world.

The fourth movement is characterized by a rapidly expanded body of international minority jurisprudence, particularly under general human rights treaties, and its direct or indirect relation to developing case law at the domestic level. The basic structural design of the third movement remains, whereas the fourth movement seeks for jurisprudential assessments to address minority claims within the human rights canon. The framing of discussions regarding minority group rights continues, as the interest in the subject has been renewed. The international jurisprudence on minority issues shows, in different ways, within different settings, signs of unprecedented transformation; from the UN Human Rights Committee to the European Court of Human Rights, from the European Court of Justice to the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights, from the Committee on the Elimination of Racial Discrimination to the African Commission on Human and People's Rights, from international criminal tribunals to *ad hoc* bodies.

Minority issues, over the years, have come under intense study. A platform for discussion has been provided; researchers, civil society workers and academia show high interest, having discussions, writing on and analysing on multiculturalism and multinationalism as significant subject matter to be brought to attention. Moreover, political debates have raised issues on cultural identity, democratic participation and social cohesion. There is a strong demand by experts, leading groups and non-governmental organizations (NGOs) for re-considering the minority question within the wider international human rights canon. It seems that the language of minority standards still needs to be explained. A distinctive form of judicial discourse is fast emerging that appears to be contributing to a relatively more solid 'legalization' of minority issues, regardless of the treaty or regime in question.

3 Mechanisms and Approaches for the Protection and Promotion of Equality on Ethnic Grounds

The relationship between the individual member of a certain ethnic group, the collective and the

state is often explored only in part. One could argue that minority rights cannot be human rights except to the extent that they are a specialized regime for persons belonging to minority groups. If there were truly a minority rights regime, then those rights would not be, by definition, human rights: human rights attach to individuals, whereas minority rights ought to attach to the minority *qua* minority group (See Freeman, 1995 and Donnelly, 1992). In Article 27 of ICCPR, the protection is given to persons belonging to minority groups, thus emphasizing the individual rights of minority members, not a group right of the minority group. Some rights that this article protects are also guaranteed to all individuals (not necessarily members of a minority group), for instance freedom of religion, freedom of expression, the right to education and the right to freedom of association. Some scholars see minority rights as shorthand for human rights that are of particular relevance to persons belonging to minority groups who wish to preserve their own identity (Packer, 1996). The most complex issue is how the individual, the minority group and the state interact and how the rights of the individual as a member of one minority group and the minority group as whole are protected and promoted by the state (Geoff, 2005).

There are basically two perspectives when it comes to individual vs. group rights discourse. In the group (collective) rights discourse, the state has duties both towards the minority group and the individual. Persons belonging to the minority group have a relationship with the state and with the minority group. The minority group can make the demands of an individual for the cause of preserving the minority identity. Under international instruments, the state owes duties to persons belonging to minority groups as individuals within the jurisdiction of the state and as members of the minority, in addition to having obligations to the minority group. Considering this individualistic approach, only the individual persons belonging to a minority group have rights. And since belonging to a minority group is a matter of individual choice (right to freedom of association),[4] whenever there is a conflict of interest between the minority group and the individual, the state should prefer the individual over the minority. However, this position is not necessarily that simple in practice; the protection of the group (through Article 27) can only ever be derivative of a benefit to persons belonging to the minority group. The state, in this sense, has a dual role: 1) regulating the relationship between the individual persons belonging to the minority group and the group; and 2) guaranteeing rights to the individual members of the group and to the group itself. The minimum of the latter case is to have a right to recognition and a right to no arbitrary removal of pre-existing rights. Finding the right balance in regulating the relationship is the most difficult task. We will see here in this text how special minority rights frameworks and solutions for their protection developed in practice, which moves towards assuring equality of rights and opportunities for minorities.

Minority rights have their hierarchical order which begins with the principles of non-discrimination and of equal rights. Climbing up on the scale we find special rights (which may or may not be accompanied by affirmative action).[5] On the top we encounter collective rights which reach a certain level of self-determination up to the right of autonomy as the maximum legal status a minority may achieve within a state (Brunner and Küpper, 2002).

[4] Self-identification is an essential aspect of being a member of a minority. Persons belonging to minority groups also have the right to leave the group without fearing that the state will continue to label them as members thereof. Membership of a designated minority or indigenous community may be determined by three approaches: 1) reliance on objective or factual criteria; 2) self-identification; and 3) acceptance by other group members. See Hadden (2005).
[5] These special rights, which take into account the differences of the minority members, can be granted as individual or collective rights.

3.1 Non-discrimination, Equality and Diversity

> The foundations of inequality lie less in property than in human diversity, or in the human tendency to differentiate themselves from some while associating with others to form groups.
>
> (Kukathas, 2003, p. 214)

Kukathas suggests that we should "abandon equality as an aim because the suppression of diversity brings with it problems of its own, and, in the end, does not bring about equality but simply creates different inequalities" (Kukathas, 1997). In contrast, others defend the principles of equality, which include principles of satisfaction of basic needs, equal respect, economic equality, political equality, and sexual, racial, ethnic, and religious equality. Basic equality is the cornerstone of all egalitarian thinking: the idea that at some very basic level all human beings have equal worth and importance, and are therefore equally worthy of concern and respect (Baker *et al.* 2004).

The state should treat all of its citizens with equal respect and consideration. For national minorities, the conception of equality concerns equal access to one's societal culture. Without any special guaranteed rights, the societal cultures of national minorities are vulnerable to economic and political decisions by the majority. A national minority, as much as the majority society, has a right to preserve the societal culture that it never relinquished and that is essential for its attainment of the good life. Kymlicka coined the terminology of 'group-differentiated rights' as special rights which aim at equalizing minorities' opportunities to integrate into the mainstream society without discrimination or prejudice. Ethnic groups wanting to become an integral part of the majority society, while retaining a measure of their traditional cultures, seek rights that would enable them to exercise their cultural practices and beliefs. As Kymlicka notes, these rights, rather than having a *Balkanizing effect*, promote the social integration of ethnic groups by equalizing their capacity to function effectively within the institutions of the majority society (Kymlicka 1995, p. 150).

When one country comes into contact with other culture(s), it has to welcome the culture(s) as equal; however, scholars think that the culture(s) coming into the country cannot claim equality (Taylor *et al.*, 1994). Living together with another culture gives a well-grounded opinion about that culture, as it takes some time to understand and respect another culture. Nevertheless, it is hardly possible that in all cases different cultures will see each other as equal (and they do not have to). Equality is not a necessary condition when considering citizens' rights, as there can be 'tolerance', which treats people equal but does not see all as equal. Sometimes we know that it is relevant in a given context to treat people equally, but we find it difficult to decide if two individuals are equal in relation to it. When applying the principle of equality in a multicultural society, equal treatment is likely to involve different or differential treatment, raising the question as to how we can ensure that the latter does not amount to discrimination or privilege, and there is no easy answer (Parakh, 2000).

3.2 Theoretical State Models

Palermo and Woelk (2011) extensively explain and discuss at least four fundamental ideological (abstract) models that determine the overall attitude towards arrangements of differences within a state: 1) nationalistic repressive model; 2) 'agnostic' liberal model; 3) 'promotional' model; and

4) multinational model. Clearly legislative and administrative practice and case law show how the reality and the historical experience tend to combine elements of different models, due to different circumstances and different parameters of the adopted decisions.

In the first, *nationalistic repressive model*, the state emphasizes the repressive ideology of national identity and unity in the population's homogeneity, exalting exclusivity and superiority. The differences in the society are considered from the perspective of their repression and their annihilation. An example could be the case of the German speaking minority in the Province of Bolzano in Italy where in 1939 German speaking citizens were offered a 'choice', to stay in their own land and give up their language and culture by Italianization of their names, or to obtain the German *Reich* citizenship and abandon their homes (Brunner and Küpper, 2002).

The second, *liberal model* is characterized by exclusive attention to individual rights and a consequent indifference to the collective demands of diversity. In these systems there is no denial of individual fundamental rights and the liberal designs are based on the general recognition of the principle of equality in the formal sense (non-discrimination) of all citizens; however, the instruments designed to guarantee equality in a substantive way are disregarded. An example of such model in practice can be seen in the case of United States' approach which is based on the following characteristics: a) all citizens are included in the concept of 'nation'; b) new nations cannot be created within the American nation; and c) there is the right to liberally maintain the characteristics of one own identity. Another example is the case of France, where citizenship has always been seen as the only key factor in France: the citizens have all rights, non-citizens have none.[6]

The *'promotional' model* is characterized by the presence of a dominant national group (the majority) alongside with one or more minority groups. The recognition, protection and promotion of minorities are essential for the constitutional order and constitute part of its core values. Thus, while the classical liberal model guarantees the right to be equal, promotion recognizes the right to be different. Italy is an example of this 'promotional model', where exclusively linguistic criteria are a distinctive feature when defining who are minorities in the country. The promotional instrument for their protection is extremely differentiated, since the protection of the various linguistic minorities through the entire territory is quite different. To understand the recognition and protection of minorities one must first keep in mind the fundamental distinction between linguistic minorities and other minorities. Article 6 of the Italian Constitution does not specify whether the protection should be implemented through a minority law (applied for all minority groups) or through different measures for each of the minorities to be protected. This an interesting gradation of the level of protection emerges in this case. There are: 1) *extra-protected minorities*—the most protected minority groups in the special autonomous regions in the Alpine and north-Adriatic area (Trentino-South Tyrol, Friuli Venezia Giulia, Val d'Aosta) which are diverse in the intensity and modality of protection; 2) *minorities eventually protected*—those listed in the law of 1999, whose different level of protection depends on whether the various instruments provided by law are activated or not; 3) *non-recognized (and unprotected) minorities,* or groups which, while in possession of the subjective requirement for the request for recognition as a distinct group, do not fulfil the objective requirement of recognition and, therefore, are legally irrelevant to the differential treatment (Sinti and Roma people, but the same goes for immigrant minorities).

[6] Until recently, France has an open policy for the acquisition of citizenship by foreigners.

The entire constitutional order in the case of a *multinational model* is designed to complement and reflect the diversity of institutional constituent groups in the organizational structure of the state, either through the appearance of the territorial division of power, or through specific rules concerning the form of government. Legally there are no majorities and minorities: each national community is a constitutive element of the state. Examples of this model can be seen in Switzerland, Belgium, Bosnia and Herzegovina, Canada and perhaps the European Union. Certainly, there are differences, and this model can be divided into two sub-models: 1) multinational equal; and 2) multinational proportional. In the first case, in the state representative organs there are equal number of representatives of all constitutive ethnic/linguistic group (in Bosnia and Herzegovina, for example). In the second case, in the state organs the number of representatives of the ethnic groups are in proportion with their demographic representation of the members of those groups in the total population of the country (in the case of Canada as well as in the case of Republic of Macedonia after 2001). In the designation of ethnic, linguistic or religious minorities, the territorial principle often applies. This can lead to a change in the territory's identity as a result of the social and demographic developments.

3.3 Special Measures, Instruments and Rights

3.3.1 Bilateral and international agreements

The standards set up by international organizations, such as the UN, OSCE and Council of Europe, essentially serve as a basis for the drafting of provisions concerning minorities in bilateral agreements. The most often quoted documents are: the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992, the relevant OSCE documents in general, the Concluding Document of the Copenhagen Meeting of the Conference on the Human Dimension 1990 in particular, Article 27 of the ICCPR, and Recommendation No. 1201 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights of the Parliamentary Assembly of the Council of Europe. In some of the more recent agreements reference is also made to the Council of Europe Framework Convention for the Protection of National Minorities.

Bilateral agreements as legal instruments for minority rights protection have limits. One of the limits, inherent in their structure, is that certain minorities may benefit more than other groups from their provisions, because state parties are usually interested in protecting certain kin-groups and not others. Even if this attitude may not be unexpected or unreasonable, considering that the purpose of these agreements is to alleviate tensions among kin-and home-states, there is a risk that the situation of minority groups without kin-state, such as Roma/Gypsies, Gagauz, Tatar or Vlachs, are being ignored if too much emphasis is placed on the kin-state as the guarantor of minority rights. Minorities with a kin-state have the possibility of constantly improving their conditions through kin-state support, but, from a human rights perspective, minority groups without a kin-state and other groups in similar positions often need more protection than kin-groups. A number of countries in South-eastern Europe and especially in the western Balkans started negotiations on bilateral agreements on mutual minorities. Like most of the bilateral agreements concluded in the field of minorities, the only beneficiaries are the members belonging to one of the mutual minorities (Lantschner, 2004). Members of other minority groups are therefore excluded from the scope of the application of the agreements. Compared to more general regional or international instruments, bilateral agreements have the advantage of having the possibility for the states to adapt the general instruments to the needs

of their minorities.

3.3.2 Affirmative action

As stated before, the 'promotional' model as a constitutional design for minority rights' protection is characterized by the recognition of diversity as a primary feature. The right to be different is firmly recognized. The legal system under this model acknowledges, in favour of minority groups, a series of special rights in order to ensure their effective enjoyment of the same rights as the majority of the population. It is a combination of special rights granted for the collective exercise of minority groups' rights and rights of self-government, which in some parts of the territory can also be similar to those characteristic to the multinational systems/designs. Minorities are recognized within the state; thus a form of state protection of minorities is secured. This can be seen as a first technique for minorities' promotion. Another important way of promoting minorities recognized in one nation state is the enforceability of rights in certain territorial areas, linked with 'numeric' criteria. Here it is not a question of territorial autonomy, with the prior identification of areas that are granted self-government so that minorities can manage their own competences that most concern them, but of forms of cultural autonomy. The 'numeric' criteria are seen in the case of Republic of Macedonia with the Ohrid Framework Agreement of 2001. In this case the threshold is 20 per cent, both at the national and the municipal level for transformation of the municipalities into bilingual areas; a law on territorial reorganization involved the fusion of few municipalities to facilitate the frequent cases where the threshold was exceeded at the municipal level. On this delicate issue there was a referendum in 2004 to prevent the entry into force of the law, but it failed because of lack of a quorum. With the new legal provisions, many municipalities (including the city of Skopje) have become officially bilingual, and the state as a whole has assumed the character of a bi-national state (as required by the Albanian minority) rather than 'just' promotional (as strenuously sought by the Macedonian majority).

Another arrangement for the promotion of minorities is seen through the recognition of the right to effective participation of the minority group in the political life of the state. Apart from the rules on political representation and on representation in advisory bodies, this refers in particular to the presence of organs and processes of reconciliation between the minority and institutions. In Slovenia, the constitution (Article 64) established: the right of the Italian and Hungarian communities to form partnerships for the maintenance of their national identity and for information and publishing, the right to self-government bodies; and the duty of the state is to decentralize the powers of interest to minorities and to finance their activities.

Faced with the risk of assimilation by the majority or permanent exclusion, minorities need special and stronger rights than those guaranteed to all in general. There are—and here lies the difference with respect to the prohibition of discrimination—few rules valid only for a specific group in order to ensure full enjoyment of rights by otherwise structurally discriminated groups. These 'special' rights (i.e. not general, but in reference only to certain types of entities) are, on the one hand, access rights, on equal terms with certain services (education in the mother tongue, the right to use their own language in the administration, etc.), and on the other hand, 'reserved' 'preferential' rights, needed to overcome obstacles in society (e.g. gender quotas in electoral lists). In this second case, when the recognition of special rights for the minority is an acknowledgment of more rights than those held by the citizens of the majority population, it is called 'affirmative action'. It is evident that the balance between the principle of equal rights and special protection is never static, but is constantly changing (Palermo and Woelk, 2011). The

parameter for the realization of this balance is, like the case for fundamental rights, the principle of proportionality, i.e. the maintenance of a balanced relationship between the objective pursued and the means to achieve it, measured in terms of adequacy, need and effectiveness. The remedial measures of historical injustices and discrimination that are justified, therefore, tend to follow the end of a conflict as a means to improve the position of the minority. However, once a situation is reached in which there are no more dangers for the proper survival of the minority, the same measures may not be proportionate because they restrict the fundamental rights of others. Affirmative action is understood as comprise; positive steps to insure genuinely equal protection. The degree to which people in general are in favour of affirmative action depends in large measure on how that policy is described (Cohen and Sterba, 2003). It implies a variety of strategies designed to enhance employment, educational, or business opportunities for groups, such as racial or ethnic minorities and women. However, the manner in which these efforts are implemented, the types of action they require, and the broader implications they carry for society may vary from one specific programme to another. Affirmative action, regardless of its specific form, is primarily a policy intended to promote the redistribution of opportunity (Kellough, 2006). Some people benefit directly, while others may not be as well off as they would have otherwise been. Many arguments are offered on each side in the affirmative action debate. The struggle over affirmative action is a political contest consistent with Harold D. Lasswell's (1936) classic definition of politics as 'who gets what, when, and how'.

The 'specialty' of these rights, with respect to the formally equal treatment for all, potentially exposes the risk of creating further conflict. Therefore, in order to be legally eligible, the affirmative action must be particularly justified and pass the test of reasonableness. In practice forms of affirmative action beyond the legal and institutional sphere can frequently be found, for example in the distribution of public funds, or minorities' commitment in public schools to teach tolerance and acceptance of others. This is due to a further element of distinction between the simple non-discrimination and special rights: while the former generally does not involve costs, the latter, requiring active intervention by the authorities, of course, also has an economic impact, which is often very considerable (the cost difference between a monolingual and a bilingual or multilingual administration).

3.3.3 Equal access to political participation

A combination of special rights and special electoral systems which allow for equitable minority political representation is often used to ensure political participation to minority groups. Territorial autonomy, veto powers, guaranteed representation in central institutions, land claims, and language rights are all special measures and rights that can help rectify existing disadvantages for some minority groups by alleviating the vulnerability of minority cultures to majority decisions. These are external protections that can guarantee for members of minority groups to have same opportunity to live and work in their own culture as members of the group. However, there are also limits to these practices. Special representation is necessary only for those groups who face serious risks of underrepresentation and repression; obviously, the dominant groups are already represented (Young, 1997).

For members of minority groups, the guarantee of the right to representation and political participation has significance that goes far beyond the simple desire to influence the outcome of a decision process that is the sum of individual wills, and that leads to a result acceptable to the majority of citizens.

In order to promote effective participation, specific governmental arrangements are often needed and necessary and when those arrangements are established with corresponding institutions and authorities ensuring the effectiveness, the human rights of all those affected should be respected. Different types of models for minorities' representation are seen through the implementation of power-sharing mechanisms.

3.3.4 Power-sharing arrangements

It was noted earlier that the *multinational model* is designed to complement and reflect the diversity of institutional constituent groups in a state. Whereas differentiation is the exception (the institutionalization of the groups), in the multinational model it is a rule. Each group is essential for the existence of the legal order; without one group the order would not exist, at least not in this form. The governance structure of these systems is based on the necessary division and sharing of power between the groups.

Achieving peaceful minority–majority relations can be done if minorities feel that the state in which they reside is also 'their' state—that it 'belongs to them'—and will be prepared to integrate themselves fully into that state and its structures. This, in turn, will contribute to stability and peaceful minority–majority relations; effective participation is another *conditio sine qua non* (Hofmann, 2008). Each group within the state is essentially important for the existence of such peaceful relations and the governance structure is based on the necessary division and sharing of power between the groups; a model known as 'power-sharing' (Weller and Wolff 2005; McEvoy and O'Leary, 2013). Two different forms of power-sharing are distinguished: consociationalism (consociational democracy) (Lijphart, 1977) and 'integrative' power-sharing (Horowitz, 1985). The first power-sharing form can be partially or totally based on the territorial principle (segmental autonomy in the cultural sector), can include a grand coalition government (between parties from different segments of society), proportionality (in the voting system and in public sector employment), and a minority veto. Horowitz's power-sharing argues that in order to safeguard minority interests, the system should make the votes of minority members count; they should not have just representation, but rather actual influence (this could be achieved through three practices: federalism, vote pooling and a presidential system).

In a power-sharing arrangement another important aspect is the functionality of the system, i.e. is it equivalent or proportional (Palermo and Woelk, 2011); the former treats equally all constitutive groups within the composition of the state organs and the decision-making process and the latter is based on minority representation following their numeric consistency. The debate on power-sharing—the various institutional forms it may take and its general suitability for the settlement of ethnic conflicts—has proceeded for many years. The consociational theory has become one of the most influential; it appears in a vast and broadly applied literature.

3.4 Measures and instruments in specific areas

Diversity treatment is reflected in the existence of different characteristics of minority rights arrangements adopted by different countries. Above we have discussed the general theoretical models. However, the particularities of the arrangements and measures to be adopted in specific cases depend significantly on the area which needs to be regulated and is in close relation to minorities rights of becoming equal or almost equal with the majority population.

The area of *cultural preservation and respect of minorities' culture* is the most pronounced one.

Countries acknowledge and protect cultural diversity through constitutional provisions in which they provide persons belonging to national minorities or ethnic groups with the right to develop their own culture, together with other members of the minority or ethnic group.[7] There are also different mechanisms used for financing cultural development and activities of persons belonging to national minorities. In Slovenia, Hungarian minorities, in order to meet their needs in the field of culture, can be financed by the state budget within the framework of the funds for the Italian and Hungarian national minorities (under the Exercising of the Public Interest in Culture Act, Art. 31). In the Italian region Friuli Venezia Giulia, funds from the state budget for the cultural activities of the Slovenian minority are determined on a yearly basis. In Serbia, for example, national councils of national minorities are formed as cultural autonomy bodies with the primary role of representing minorities in respect of the official use of language, education, public information in the language of the minority, culture, and participation in decision-making, including making decisions related to these fields, as well as in establishing institutions in these fields. In Slovenia the main institutions involved in minority cultural matters are the Councils of the Self-governing Ethnic Communities guaranteed by the Law on Self-governing Ethnic Communities (Arts 4 and 9). In Hungary, similar to Serbia, national and local self-governments of minorities may establish cultural institutions and coordinate their activities (Art. 36 of the Act LXXVII of 1993 on the rights of national and ethnic minorities). Bilateral agreements between countries, as well as the ratification of the European Charter for Regional or Minority Languages, contribute to the overall protection of minorities' culture in individual states.

The *right to use minority languages* is often stipulated by constitutional legislation and is implemented in different ways through various national, federal or regional laws. The scope of application varies in terms of the territorial and/or threshold approach, as well as the various arrangements in terms of the use of minority languages in communicating with different public authorities and institutions; another question is what linguistic rights are guaranteed by the states. There are cases where the territorial application of linguistic rights is predominant. In Slovenia the Italian and Hungarian minority languages can be used only in the so-called 'ethnically mixed territories', defined by the Slovenian law, which is strictly linked with the proportion of Italian and Hungarian speaking population in the specific state territory. Similar provisions can be found in other countries, such as in Italy. The population threshold is often used for the identification of municipalities in which persons belonging to national minorities can use their mother tongue in relation to public authorities, among others. In Romania and Slovakia, the rules regarding the use of minority languages apply in municipalities in which a minority represents at least 20 per cent of the population. In Macedonia, the threshold of above 20 per cent is considered to be a criterion for establishing the minority language as second state official language. In Serbia, if the number of persons belonging to national minorities reaches 15 per cent of the total population in the city/municipality, the assembly has to harmonize its statute with statutory provisions and introduce the language and script of the minority into official use. There are also systems in which there are neither territorial delimitation nor population thresholds. The case of Hungary is an example where all officially recognized national and ethnic minorities have the right to establish local, regional and national self-governments which have the right to make decisions in the fields of minority education and language use in relation to public authorities as well as minority media and culture. Most linguistic measures are very much related to the use of interpreters in public institutions when the public servants do not speak the specific minority language. However, there are also cases where there is a

[7] See for example the Slovak Constitution (Art. 34(1)) or the Austrian Federal Constitutional Act (Art. 8(2)).

proportional quota system which allows for public institutions to have employees speaking the minority language. This is the case, for example, in the Italian province of South Tyrol where the aim is to create and maintain ethno-linguistic pluralism inside the administration (Lantschner and Pogeschi, 2008). The same applies also in the case of the Republic of Macedonia, where the proportional system is guaranteed by the 2001 Ohrid Framework Agreement.

In reference to *minorities' political participation*, various models and approaches are seen in practice. This is also linked to which model of power-sharing is adopted or which power-sharing arrangements are preferred in specific country for specific context. There are different ways in which political participation can be ensured. One option is to provide for representation in elected bodies at national, regional and/or local levels. Another possibility is the establishment of consultation mechanisms and a third one is to provide for cultural or territorial autonomy. In reference to minorities' participation and representation in elected bodies, of great importance is their numerical consistency in the country. Countries where there is a small percentage of the population belonging to national minorities lack special rights or mechanisms to facilitate or ensure for minorities' representation. This is the case for example for Slovakia and Austria. In Hungary, it is constitutionally guaranteed for all minorities to be represented, and such representation is subject to further definition by separate law (Art. 68(3) of the Hungarian Constitution). In Romania, the representation of one organization per national minority (the one which has obtained the largest amount of valid votes among the organizations of the same minority) is guaranteed in the parliament (Art. 62(2) of the Romanian Constitution) as long as their share of the votes in the elections is at least 10 per cent of the average number of validly cast votes in the entire country necessary for the election of a deputy. In Italy, in the Friuli Venezia Giulia region, the Slovenian minority party could be represented in the regional assembly under certain conditions (coalition with another party and receiving at least one per cent of votes region wide).

Minorities' representation almost always reflects the numerical strength of the linguistic group. This is the case, for example, in the South Tyrol province in Italy for representation in the Provincial Assembly. Guaranteed representation is present in different countries in different forms, and mostly for larger minority groups. In Slovenia, the Hungarian and Italian ethnic groups have guaranteed representation in the National Assembly and right of double voting (one vote they cast for the election of representatives equally to all other Slovene citizens, and one for the election of the representative of their community). In Croatia there are also reserved seats in legislative and other bodies of the government and local self-government units and the number depends on the minorities' numerical consistency.[8] In Serbia, minorities' representation is ensured with special advisory bodies to the government (Council for National Minorities) in which members are representatives of national councils of national minorities in the country. At local level, there are Councils for Interethnic Relations. In the Republic of Macedonia there are several arrangements ensuring minorities' representation which are also crucial for the rights of minorities to be part of the decision-making processes in the country. These arrangements emerged from the Macedonian power-sharing mechanisms and are the following: 1) Badinter double-majority voting; 2) equitable representation; 3) proportional electoral model; and 4) special representation bodies at the state and local level (Committee for Interethnic Relations

[8] The minorities specified in the law are entitled to vote for eight members of parliament (MPs) in their special electoral districts, designated either for a specific minority, or for a group of minorities (three places are reserved for the Serbian minority, one each for the Hungarian and Italian minorities, and three more to other minorities united into the groups for this purpose).

and Commissions for Inter-Community Relations). Parliamentary adoption of laws relating directly to minorities must follow the Badinter principle, requiring a majority vote of deputies representing ethnic minorities. The aim of this principle is to protect ethnic minorities in parliamentary decision-making, meaning that laws with a significant impact on ethnic minority communities may not be adopted by a simple majority, but require a 'double' majority, including a majority among political representatives of the community. The principle of equitable representation is determined by the constitution, placing it as one of the fundamental values of the state's constitutional order.[9] Minorities' participation in the decision-making process is guaranteed as well through specific parliamentary bodies. With the 1991 Constitution, a Council for Inter-ethnic Relations as part of the parliament was introduced. With the amendments brought by the OFA, a Committee for Inter-ethnic Relations was established composed of 19 members: seven Macedonians, seven Albanians, and one each from the communities of Turks, Vlach, Roma, Serbs and Boshniaks, elected by the parliament. At the local level, one particular instrument allows for greater minority participation. With the 2002 Law on Local Self-Government, the formation of commissions is foreseen in those municipalities where at least 20 per cent of the total population, determined at the last census, are members of an ethnic community. Commissions review issues referring to the relations between local communities, providing opinions and proposing resolution of problems that may arise between these communities.

Minorities can be included in the election and decision-making process through their ethnic parties, but they can be also included into mainstream parties (non-ethnically defined parties), which can be somewhat favourable to minorities in dominant-power systems, since such parties can dominate the competition and their leadership has all the power to decide whether or not to include members of the ethnic community in adequate numbers on its electoral lists. This is proven to be the case in Macedonia specifically for smaller minority groups. Minority representation is highly dependent on the electoral system employed. Particularly relevant are also the ethnic structure of electoral districts, electoral rules and the intensity of electoral competition. The political participation of smaller-in-size communities in the parliament is practically always guaranteed through pre-elections coalitions, since they often face the inability to command a majority of support and as a result they are always forced to exercise executive power by entering in different forms of coalition. This is why it is important for a smaller minority group to always have additional mechanisms and instruments with which it can be included in the overall decision-making process, especially in what concerns their rights and interests (such as the cases of special bodies and commission and double voting mechanisms).

4 Concluding Remarks

The outline of the existing national models and approaches in this text are depicted firstly by providing an overview introductory presentation of the minority-related legal instruments and their development at the international level. These are crucial in order to understand the progress of these instruments and to link their influence on particular country-specific approaches in regards to minority protection and promotion. Generally, all countries have made efforts to harmonize their national legal systems with international norms ensuring minorities' protection. The text went further in giving an overview of different special measures, instruments

[9] Added with Amendment VI as an addition to line 2 of constitutional Article 8.

and rights which are directed to ensuing equality for ethnic and cultural groups and further explored some examples and cases of specific measures in different areas which are of minorities' concern: cultural preservation and respect of minorities' culture, right to use minority languages and minorities' political participation.

There is a symbolic significance in the recognition of the importance of minorities as a fundamental aspect of international law. The controversial application of special measures for minority members highlights the importance of the distinction between equality in law and equality in fact. Equality in law prevents discrimination of any kind, whereas equality in fact may involve a necessity of introducing and implementing different treatment by different arrangements and measures in order to obtain results which aim at establishing a certain equilibrium in a multinational and multicultural society. We have seen in this text a few examples as well as existing solutions in concrete countries as cases. Minority-related legislation and instruments are crucial to ensure equality in fact after an equality in law is already firmly established in the countries' legal and political system.

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Positive Action, the Prohibition of Discrimination, and Minority Rights from a European Perspective

Balázs Vizi

1 Introduction: The Principle of Equality and "Positive Action"

In the field of human rights protection, the prohibition of discrimination and the principle of equality are key concepts. In a very simplified approach, there are two major models of equality (see, among others: McCrudden, 2005): while formal equality is based on the idea of treating individuals in the very same way, irrespective of their circumstances, substantive equality takes into consideration the specific context and circumstances of people. A "formal" approach takes a neutral position and focuses on procedural or "individual justice". In this context, equality is the final goal to counterbalance individual injustices. Individuals who are in a comparable situation but are treated differently suffer discrimination that shall be eliminated in order to guarantee full equality under the law. Classic anti-discrimination legislation addresses such situations and targets specific situations in which an individual faces discrimination based on her/his personal characteristics (age, ethnic identity, race, sexual orientation, disability, etc.). In this way, legal measures are designed to eliminate direct discrimination – for example, exclusion from certain positions on ethnic bases, discriminative employment strategies (favouring men over women or younger candidates over elder candidates, etc.).

Another approach is based on the idea of effective or substantive equality, focusing on "group justice", i.e. group characteristics that lead to discriminative situations that can be overcome through targeted measures and actions that will lead to a material equality. In this aspect, the idea of formal equality has specific weaknesses: to establish discrimination, it needs a comparison with a comparator that overlooks the inherent collective dimensions of inequality (like group membership, societal context, etc.). Substantive equality does not require a comparator, it focuses on the situation of the group and on the outcome of their situation. Still, many see a risk in applying the requirements of effective or substantive equality, arguing that it may maintain divisions and reintroduce inequality. To answer these concerns, the concept of discrimination encompasses both direct and indirect discrimination, as well as the strategy of positive action – usually seen as a temporary measure – to fight collective discrimination. In fact, substantive equality might require formally unequal treatment. This is often called the 'paradox of equality' (Fredman, 2005).

In general terms, positive action comprises all sorts of measures aimed to help specific groups of society, minorities, or socially disfavoured groups to overcome decades of past societal discrimination. The idea behind this is to provide substantive equality of opportunities for both groups and individuals (Strauss, 1998). The adoption of these measures has always been controversial because by setting up a system that benefits specific groups of society regarding access to public services, employment, education, training or promotion, the outcome of a

positive action measure is that an individual belonging to the traditionally privileged group is "penalized" by losing his chance to, for example, enter a job or obtain a promotion. Opponents to these positive measures argue that the individual who must lose her/his chance of entrance to a particular job or to university is penalized unfairly because she/he bears the burden of redressing grievances made by the whole society.

Another problematic element is that the basis for listing the groups whose societal injury is thought to be so serious as to entitle them to preferential treatment is done at the expense of individuals belonging to other groups. Moreover, the ranking of groups entitled to preferential treatment must be submitted to permanent political and/or judicial scrutiny and updated. Therefore, as these affirmative action policies began to have the desired effect, the categories of people classified as disadvantaged group would change. Furthermore, problems arise in connection with the idea of preference itself. In this sense, it has been argued that positive action programmes may only reinforce common stereotypes holding that certain groups are unable to achieve success based solely upon their individual capacities. Critics also argue that the use of special measures targeting disadvantaged groups maintains social divisions between different societal groups and may lead to deeper cleavages along ethnic, racial, or social lines. Positive action is also criticised as a form of unhealthy "social engineering", an artificial policy tool utilised by governments in order to change society (Abram, 1986).

It is true that positive action involves a preferential or at least a differential treatment of a particular group of the society. However, the expected outcome of such policy measures is reaching a more substantial social equality. As De Vos (2007) puts it, positive action can be defined as "a process to introduce a dynamic, result oriented approach that internalizes group dimensions into an equally static and individual formal equality model".

Based on McCrudden's (1986) classification, different categories of positive action can be identified by increases in intensity:

1) *Eradicating prohibited discrimination*. Consciously examining, identifying, and eradicating any discriminatory or distorting policies and practices. The aim of these measures is to stop existing discrimination and prevent any further instances of it. Such procedures and actions may help to eradicate direct or even indirect discrimination, but they may not be effective in addressing more complex situations of institutional or structural discrimination.

2) *Purposefully inclusive policies*. This category involves superficially neutral target policies that seek to increase the proportion of members of the underrepresented group by using criteria that do not overtly discriminate, e.g. focusing on a geographical area or on the unemployed.

3) *Outreach programs*. The third category of actions uses group affiliation and seeks to accelerate the inclusion of the underrepresented groups, either through targeted support (e.g. training, education, advertising, etc.) or through targeted sensitisation. The potential strength of outreach programs is that they help compensate for the disadvantages suffered by members of vulnerable or disadvantaged groups. Even if such programs may be useful for encouraging participation by disadvantaged groups, they cannot guarantee definite results.

4) *Preferences*. Such preferences are superficially biased diversity policies that seek to increase the proportion of members of underrepresented groups through soft targets. Offering preferential treatment to members of vulnerable, disadvantaged groups – usually in the field of education and employment – involves preferential measures (often quotas) in recruitment,

promotion or selection. Aside from reserving posts or positions by applying special quotas for women, disabled people or members of a minority group, alternative personal characteristics – such as ethnic background, disability, gender, etc. – may link someone to a disadvantaged group. This can be a factor that is taken into account in recruitment or promotion decisions.

5) *Redefining merit*. This fifth category refers to attempts to 'redefine merit', i.e. to examine and redefine the criteria that institutions, employers use for filling a post, or schools use for selecting students. This is particularly relevant in public life – the assumption being that having a certain proportion of senior figures in government and in elected bodies from disadvantaged groups may improve decision-making. Many European states have introduced such measures by reserving parliamentary seats and senior public offices for members of minorities or by requiring political parties to select a specific number of women among their candidates.

2 Target Groups and Justification of Preferential Treatment

In theoretical terms, the main question is formulated around the limits and legitimacy of differential treatment. The measures addressing historical or structural disadvantages of particular groups do not necessarily imply preferential treatment, but certainly differential treatment. There are two challenges in this aspect: one is to identify the target groups and the other is to identify the limits of differential treatment. The outer limit of legitimate differential treatment and positive action is undoubtedly the prohibition of discrimination (Bossuyt, 2003). Identifying target groups is often made on the basis of a "suspect" class, like race, ethnicity or gender. It should be emphasised that specific groups targeted by positive actions are in a vulnerable or socially disadvantaged situation. The only legitimate aim of any affirmative or positive action is to help the achievement of substantive equality for such groups in certain fields.

Positive actions are acceptable insofar as they serve to achieve substantive equality, and the measures are expected to be proportionate to this aim. Proportionality can be examined by analysing the effects of the adopted preferential measures. In this context, symmetrical and asymmetrical approaches can be distinguished: in the first case, a particular characteristic may imply differential treatment and this would automatically require scrutiny regarding the proportionality of such measures. The asymmetrical approach always focuses on the situation of the disadvantaged group and would consider whether the differentiated measures disadvantage an already disadvantaged group or a privileged group. In the first case, a heightened scrutiny should be applied for justifying the measures; while in the latter case there would not be an automatic need for it.

Taking a closer look at the proportionality requirement, positive action measures – as explained above – cover a broad set of measures and many are not controversial. The stronger measures however – e.g. the use of specific quotas – more likely require an asymmetrical approach in examining their proportionality.

In an overview of the the practices of international human rights bodies, Henrard found that while UN treaty bodies are usually open to positive action and substantive equality, other supervisory bodies, namely the US Supreme Court, the European Court of Justice, and the European Court of Human Rights, adopted a more critical approach towards positive action (Henrard, 2011).

3 Minority Rights and the Prohibition of Discrimination: Theoretical Issues

Against this background, the situation of national or ethnic minorities seems to be particular: minority identity indeed may be endangered by the majority society, however positive actions and preferential treatment for minorities cannot always be expected to serve as temporary measures. As discussed below, minorities may need preferential or differential treatment in order to maintain and preserve their identity. In this aspect, substantive equality for minorities can only be achieved if states uphold their obligations to help them and to recognise their linguistic, ethnic, or national characteristics in the public sphere, in education, etc. Nevertheless, political philosophers have been divided in considering whether such (by their nature "permanent") special measures and rights that recognise the group character of minorities are acceptable and applicable without violating the principle of equality.

From a liberal viewpoint based on the principle of equal individual rights, the clauses of non-discrimination are, on the one hand, sufficient for maintaining a just political community despite differences in language or ethnicity. On the other hand, among the equal individual rights that are attributed universally is the guarantee that no discrimination will be made against members of the political community on the basis of belonging to different ethnic, religious, or linguistic groups. In this sense, the goals of "equality", together with the idea of non-discrimination, form the foundational principle of an effective system that protects minority rights (see Brems, 2001).

The proponents of this argument, based on the non-discrimination model (Walzer, 1980; Glazer, 1995), say that states are requested to have an attitude of "benign neglect" towards the ethnic, religious, and linguistic identity of their citizens, and in the public realm states shall be fully neutral to particularistic differences as ethnicity or language. In purporting that formal equality is the key issue, it is argued that if the law protects all persons from all forms of discrimination, there is no need to provide 'extra' rights and instruments for minorities, because it violates the same principle of (formal) equality and non-discrimination. Accordingly, the individual person is seen as being independent from the community and is free to determine his/her own personal preferences in regard to belonging to one community or another. Better said, an individual is free to determine his/her identity.

Without debating the fundamental importance of the equality principle in literature (and the liberal theory of rights), communitarians like Michael Sandel, Michael Walzer, or Charles Taylor levied a major criticism against liberal theories. They criticised liberals for the idea of a disembodied, deontological self. Parts of the peoples' identity are determined by belonging to a community, usually the one in which the person was born into. In order to accommodate both individual and communitarian perspectives within the framework of the liberal rights tradition, Kymlicka (1995 and 2001) made an attempt to find a theoretical justification for minority rights.

As Kymlicka (1995) postulated, individual freedom is in fact dependent on the presence of a "societal culture" providing a meaningful "context of choice". In other words, access to one's language and culture is essential to effective enjoyment of freedom. Based on Dworkin's argumentation of the essential need to protect the survival of culture, he continues that, "[c]ultures are valuable, not in and of themselves, but because it is only through having access to a societal culture that people have access to range of meaningful options" (p. 83). Moreover, Kymlicka continues that, "[t]his argument about the connection between individual choice and culture provides the first step towards a distinctively liberal defence of certain group-

differentiated rights" (1995, p.83-84). Thus, in guaranteeing free access to individual human rights and fundamental freedoms, it is also necessary to take the societal culture of the individual into account.

This theoretical approach can be linked to the right to identity as international legal instruments recognise it (Thornberry, 1991), from which most other specific minority rights can be derived. From a broader perspective, protection from genocide, apartheid, and from discrimination based on ethnic or national origin – which are also cornerstones of the present system for protecting human rights internationally – all reflect the acceptance of the right to existence (Thornberry, 1991), which is intrinsically connected to the right to identity (see e.g. Art. 27 of International Covenant on Civil and Political Rights 1996 [ICCPR]). But whereas every person's right to his/her own identity is acknowledged under international law, the effective protection of this right poses a set of questions concerning the group-characteristics of national or ethnic minorities. The main question in this regard is therefore to define to what extent specific state actions are necessary and legitimate for protecting and promoting minority identity.

4 International Norms on Non-Discrimination and Minorities

As explained above, the prohibition of discrimination is a deeply embedded norm in international law on human rights[1], and it is also widely acknowledged as a pre-requisite for the protection of minorities.[2] The very basis of the legal status of a minority is the principle of non-discrimination.

As Henrard (2000) stated in her extensive work on a 'full-fledged' system of minority protection, such a system:

> […] [c]onsists of a conglomerate of rules and mechanisms enabling an effective integration of the relevant population groups, while allowing them to retain their separate characteristics. Such a system is based on two pillars or basic principles, namely the prohibition of discrimination on the one hand and measures designed to protect and promote the separate identity of the minority groups on the other. (Henrard, 2000, p. 8).

Equality, in this sense, requires abstention from and prevention of discrimination. In fact, equality in dignity requires respect for the self-identification of the individual within her/his group, and hence a right for the community to preserve its identity (Thornberry, 1991).

In a European context, the European Convention on Human Rights 1950 [ECHR] offers a broad approach to the prohibition of discrimination. Art. 14 states that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, *association with a national minority* [emphasis added], property, birth or other status.

The emphasised is particularly relevant, although the relevance of this article for minority issues

[1] See among others Art. 2 UDHR; Art. 14 ECHR; Art. 26 ICCPR; Art. 2 para. 2. ICESCR.
[2] All relevant legal and political documents reaffirm the principle of non-discrimination in relation to minorities see, e.g. UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992 Art. 2(1); FCNM Art. 6(2); CoE Language Charter Art. 7(2); CSCE Copenhagen Document Art. 32; CSCE Helsinki Document "The Challenges of Change", Part VI. Human Dimension, Art. 30-35.

in the practice of the European Court for Human Rights is relatively low.[3] Within the OSCE framework regarding the protection of minorities, the same principle was formulated as that the participating states

> […] [a]ffirm that the ethnic, cultural, linguistic and religious identity of national minorities will be protected and that persons belonging to national minorities have the right freely to express, preserve and develop that identity without any discrimination and in full equality before the law. (CSCE, 1990, para. 10)

The OSCE High Commissioner on National Minorities stated that:

> […] [n]on-discrimination and effective equality are not only foundational and cross-cutting principles; they are prerequisites for the effective contribution of all to the common good. The prohibition of discrimination entails equality before the law and equal protection under the law, and that obstacles to effective equality are removed. (OSCE HCNM, 2012, para. 3)

A similar approach is taken in Art. 4(1) of the Framework Convention for the Protection of National Minorities 1995 [FCNM] , which states that, "[t]he Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited". Such an approach is also reinforced under Art. 6(2) of the FCNM, which requires "[…] [t]he Parties [...] 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." Both the formula adopted within the OSCE and the wording used in the FCNM are slightly different from the relevant article of the ECHR: these provisions formulate an 'active' approach to the non-discrimination principle in regard to minorities, which implies that people belonging to minorities should enjoy and be able to develop their identity freely.

Within the UN itself this important distinction has also been made between the anti-discrimination approach and minority rights. The UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities (1947) gave a useful indication of their stance on the matter by explaining the themes of its mandate (Section V):

1. Prevention of discrimination is the prevention of any action that denies individuals or groups of people the equality of treatment that they may desire.
2. Protection of minorities is the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics that they possess and that distinguish them from the majority of the population (…) [if] a minority wishes for assimilation and is instead excluded, the question is one of discrimination.

So, the prohibition of discrimination is the indispensable basis for 'real' minority protection policy or legislation, but in itself is not a sufficient instrument. Hence, whereas the prevention of discrimination generally demands equality, including special temporary measures (designed to remove not only legal but also social and/or economic obstacles to the enjoyment of rights and freedoms) the core of the "protection of minorities" lies in special and essentially permanent measures intended to safeguard the identity of certain groups (Pentassuglia, 2002). If the principle of non-discrimination is converted from its negative aspect (no negative

[3] Relevant cases include the "Belgian Linguistic" Case *Case relating to certain aspects of the laws on the use of languages in education in Belgium*, ECtHR judgement 23/07/1968; *Sidiropoulos and others* vs. *Greece* ECtHR judgement 11/07/1998; *Chapman* vs. *United Kingdom* ECtHR judgement 18/01/2001.

consequences) to a positive formula, it says that minority members must not have fewer, but the same rights (and duties) as any other citizen. Thus, the principles of non-discrimination and equal rights are closely linked and, as the OSCE High Commissioner stated in the Ljubljana Guidelines, "Ensur[e] effective equality in law and in fact also impl[y] a positive obligation to adopt targeted policies and, where necessary, special measures" (2012, p. 10). In a similar way Art. 4(2) of the FCNM formulated:

> The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.

The Explanatory Report attached to the FCNM makes clear that any positive action made to enhance equality between different persons and groups is acceptable only in proportion to the discrimination suffered (paras. 38-40).

5 Special Rights and Positive Action

Non-discrimination and equal rights – even in a minority-centred approach – do not normally suffice to enable the minority to maintain a distinct collective identity. In everyday life, the special features of their identity are – by the very fact of being different – threatened numerically, socially, economically, and culturally by the surrounding majority. The majority identity – or, as one could put it, the majority culture – exercises a certain assimilative pressure that becomes stronger the more a minority is integrated into the overall society, the more dispersed its members are, and the more they are exposed to the majority culture and assimilate to it. Maintaining a distinct minority identity thus entails a 'fight' against the pressure of the majority culture. Special rights serve to equip the minority with the necessary means of defence. Thus, special rights go further than mere equal rights (even in their minority-centred approach): they give the minority and/or its members rights different from those of the majority that are specifically addressed to the minority's needs.

These special rights are designed to account for the minority's cultural differences. In fact, specific minority rights, as they are embedded in international documents, usually cover three main areas that are particularly relevant for the preservation of minority culture and identity: a) linguistic rights, which may comprise a wide set of private and public relations as well as areas where the use of minority languages is acknowledged; b) specific rights related to education in minority languages; and c) that specific group of rights that can be delimited as covering the right of minorities to effectively participate in political, economic and social life. These special rights can be interpreted as the "translation" of human rights into minority situation. To give an example, the fact that people belonging to minorities may use their language in communication with public authorities or may receive education in their minority language does not entail any restriction on the right to use of the dominant majority language in public life or in education of persons belonging to the majority. While there is a need for special measures to guarantee minority language rights, it still passes the non-discrimination test, since special minority rights shall not in any way limit the right of persons belonging to the majority. In this sense, when states recognise special minority rights or take special measures to provide protection for the survival of minority identities, they do not necessarily employ positive policy actions.

6 Positive action and international minority rights protection instruments

As demonstrated above, international documents on minority rights explicitly recognise the need for and the legitimacy of special measures for minorities, obviously within the limits of the principle of non-discrimination. Like the above quoted Art. 4 of the FCNM, the OSCE Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE 1990 [Copenhagen Document] and the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992 [Declaration on Minority Rights] similarly recognise that special measures for minorities do not violate *per se* the prohibition of discrimination. As the UN Declaration on Minority Rights stated in Art. 8. para. 3: "Measures taken by States to ensure the effective enjoyment of the rights set forth in the present Declaration shall not prima facie be considered contrary to the principle of equality…" The FCNM Explanatory Report (1995, para 39.) also underlines that "such measures need to be 'adequate', that is in conformity with the proportionality principle, in order to avoid violation of the rights of others as well as discrimination against others."

Nevertheless, as Henrard (2011) argues:

> […] in terms of the criteria for discrimination: the aim of substantive equality for persons belonging to minorities in relation to their right to identity is clearly considered to be a legitimate aim. Still this does not grant a carte blanche, more particularly it would not absolve from respecting the proportionality principle. (p. 400)

Indeed, the particular characteristics of minority rights as a set of special rights aimed at maintaining, protecting, and promoting existing differences of minorities required special measures from the states. In this sense, the essence of minority rights is questionable if such special measures aimed at differential treatment – in order to maintain minority identity – would be strictly and automatically scrutinised under a symmetrical approach to positive action. In this aspect, minorities and minority rights require a special kind of policy action: those that are not temporary measures and do not violate the principle of equal treatment. Though rights do not inevitably require positive actions, there may be situations where positive actions targeting members of a minority are needed in order to help them achieve substantive equality. This is particularly the case when members of a minority community suffer multiple forms of discriminatory behaviour (e.g. women) or when a minority group is also socially and economically marginalized. This particular distinction, however, is often ignored and any special treatment aimed at protecting minority rights is seen as a positive policy action, which therefore falls under the prism of anti-discrimination measures.

7 The FCNM and Positive Action

The FCNM has, since its adoption, remained the most comprehensive Council of Europe instrument on minority rights. The FCNM states under Art. 1. that minority protection and rights form "an integral part of the international protection of human rights", which consequently means that minority rights are considered to be integrated with basic conceptions of human rights (Thornberry and Estébanez, 2002). Following this perspective, the FCNM Art. 4(1) guarantees equality and non-discrimination for members of minorities. Nevertheless, the prohibition of discrimination goes beyond Art. 14 of the ECHR prohibiting discrimination based on belonging

to a national minority not only in regard to the rights covered by the FCNM, but in all matters that may affect "equality before the law and equal protection of the law". As it was seen above, Art. 4(2) requires special measures in order to to realise these goals, and the measures envisaged in the FCNM are not specifically limited in time or scope similar to the general anti-discrimination provisions within international law (cf. Art. 1.4 and 2.2 of ICERD).

However the Explanatory Report underlines the need to respect the proportionality principle, and it seems to be a reasonable argument that measures for differential treatment "should be maintained as long as the groups concerned wish" (McKean, 1983). In this regard, the FCNM Advisory Committee [FCNM AC] stressed the importance of involving minorities in decision-making: special measures for minorities "must be developed and implemented in close consultation with those affected and due account must be taken of the specific conditions of the persons concerned in their design." (FCNM AC, 2016, para. 65.) In addition, it underlined the importance that states need to design and implement their special equality promotion policies based:

> […] on comprehensive data related to the situation and access to rights of persons belonging to national minorities, also taking into account the various manifestations of multiple discrimination that may be experienced, including those arising from factors that are unrelated to the national minority background such as age, gender, sexual orientation and lifestyle markers. (*Ibid*., para. 66.)

This being said, it also encouraged states to employ "a broad scope of application" with respect to the rights contained in the FCNM and to adopt special measures in different policy fields according to the needs of a minority (see e.g. FCNM AC, 2003, paras. 36-38). In this way, it can be concluded that in regard to minority rights the limits of positive actions are connected to their real effects and the Advisory Committee is dedicated to applying an asymmetrical approach in evaluating proportionality of positive actions.

8 The European Court of Human Rights and Positive Action Towards Minorities

The practice of the European Court of Human Rights [ECtHR] also confirms that special measures targeting minorities do not automatically require a heightened scrutiny – even if in other cases and situations preferential treatment based on ethnicity does.

In the *Belgian Linguistic Case* (*Case relating to certain aspects of the laws on the use of languages in education in Belgium*, 1968), the ECtHR already apparently acknowledged that when a policy of differential treatment is aimed at correcting factual inequalities, there would be no need for a proportionality requirement. Even if the Court in this case did not use the "correcting factual inequalities" formula, it stated that: "[…] the competent national authorities are frequently confronted with situations and problems, which, on account of differences inherent therein, call for different legal solutions, moreover, certain legal inequalities tend only to correct factual inequalities" (para. 10).
This argument may lead to the conclusion that formal inequalities that correct factual inequalities do not necessarily violate Art. 14 of ECHR, the principle of non-discrimination. In another, more recent decision, in its judgement on the *Sejdić and Finci* v. *Bosnia and Herzegovina* (2009) case, the Grand Chamber stated that "Article 14 does not prohibit Contracting Parties from

treating groups differently in order to correct 'factual inequalities' between them" (para. 44). The ECtHR jurisprudence may confirm that the Court adopted an asymmetrical approach to the prohibition of discrimination when the special measures in question target minority rights (Henrard, 2011).

The ECtHR made an even more significant statement in this regard in its judgement in *Chapman* v. *UK* (2001), when it acknowledged that states have positive obligations to respect minority identity. In this case, the ECtHR examined the potential violation of Art. 8 of ECHR (right to respect for private and family life), and concluded that this also covers the respect for a special way of life that is inherent to minority identity. It also requested that state authorities help uphold this. Even if the judgement is rather vague on what kind of special measures would be accepted in this context, it may be seen as a recognition of the legitimacy of special measures for minorities.

In another important case, *Thlimmenos* v. *Greece* (2000), the applicant (a Greek national) was refused an appointment as a chartered accountant on the basis of a previous criminal conviction which comprised of disobeying an order to wear a military uniform, due to his religious beliefs as a Jehovah's Witness. The Court determined that the facts of the case fell under Article 9, and unanimously found a violation of Article 14 in conjunction with Article 9. The Court declared that the state had, without objective and reasonable justification, failed to treat persons equally whose situations varied greatly. This means that states may violate the prohibition of discrimination when they fail to treat people fairly due to their unique situations.

These two judgements (*Chapman* v. *UK* and *Thlimmenos* v. *Greece*) may be interpreted as a turning point in ECtHR's approach to minorities: the Court acknowledged that there are special state duties for the protection and promotion of special minority rights. It has also, at the same time, apparently shown openness to adopt the asymmetrical approach to the prohibition of discrimination. This line of reasoning was followed in *Muñoz Díaz* v. *Spain* (2009) as well, when the Court linked state duties to adopt differential measures to special needs arising from the separate identity of a minority (in this case, the Roma). Moreover, it seems to be an acceptable conclusion that the Court in this decision acknowledged that duties to treat minorities differently does not imply a higher scrutiny of discrimination – even if the grounds of differentiation are sensitive (ethnic, national identity, or religion).

9 The Principle of Non-Discrimination and Positive Action for Minorities under the Acquis

The European Union has developed as a unique, supranational organisation in those policy areas where the founding treaties established EU competencies, and the Union has much broader regulative power than any international organisation. However it cannot be perceived as an entity with full sovereignty. The division between member state competences and those specifically assigned to the EU is debated on some matters, but it is clear that the protection of minorities is regarded as falling under the exclusive competence of the Member States. It is also important to bear in mind that the legal order of the European Union has developed as a tool for deepening economic integration among Member States, and until recently human rights issues have been interpreted by EU institutions within this context. Whenever minority protection issues, generally in the context of the respect for non-discrimination, emerged in relation to the

application of EU law, the European Court of Justice [ECJ] followed this approach. The ECJ usually applied strict scrutiny of presumably discriminatory measures and – in its case law pertaining to minorities – gave priority to safeguarding the fundamental market freedoms over any form of positive discrimination.

To give an example, when a domestic measure aimed at protecting minority rights was found as discriminatory on the basis of nationality, the European Court of Justice did not consider the original goal of that measure and applied a symmetrical and strict scrutinising approach. In the *Bickel/Franz* (1998) case, the ECJ upheld the rights of Mr. Bickel and Mr. Franz of Austrian and German nationality, respectively, who were prosecuted in the province of Bozen/Bolzano (Italy). They decided to have the criminal proceedings conducted in the German language on the same basis as the members of the German-speaking minority living in the region of Trentino-Alto Adige. The Court applied Art. 6 of the Treaty on the European Union [TEU], in combination with the freedom of movement and residence of EU citizens, and argued that the Italian government cannot deny their right to equal treatment under domestic legislation on the basis that the relevant domestic provisions were purposely designed to protect the ethnic minority residing in the province. Though the ECJ stated in its decision that "the protection of such a minority may constitute a legitimate aim" for Member States, the Court upheld its rigorous position on safeguarding the principle of non-discrimination based on nationality and giving absolute priority to fundamental market freedoms over minority rights protection measures. Indeed, according to this logic, states are expected to extend the reach of minority language rights to nationals of other Member States. This approach presents its own sensitive issues that have both financial and political costs. It might also not give protection to minorities anymore, e.g. when it affects minority quotas in local public administration (Toggenburg, 2008). Moreover, based on the ruling of the ECJ in the *Bickel/Franz* (1998) case, Pentassuglia (2001) argued that this restrained approach is minimizing minority rights considerations on the basis of general community interests.

In another important case, the ECJ needed to balance the principle of free movement of EU citizen workers with a Member State's official language policy. In the *Groener* (1980) case the ECJ had to decide whether the requirement for all teachers to have some knowledge of Irish, the first national language, was compatible with the free labour market principles. Although the Court found that in this specific case the language requirement was legitimate, it examined whether the particular level of knowledge of Irish that was requested was reasonable in these circumstances (Shuibhne, 2002). Since Irish is a *de facto* minority language in Ireland, national measures to promote and protect it can be seen as a kind of minority protection measures as well. Acknowledging this perspective, the Court mostly focused on the exercise of national competences and less so on the minority protection aspect. Indeed, the ECJ stressed that language policy is primarily a question of the national competence of Member States, so it did not evaluate whether the promotion of the minority language was legitimate or not. The Court examined only the proportionality of the measure in its effects on fundamental market freedoms. However, even if Irish is the weaker language in Ireland, it is nonetheless the first official language of the state. In this aspect, its constitutional legal status is much stronger than most minority languages in EU member states. So the Court may not necessarily apply the same approach to other cases regarding minority language use.

It may be concluded that:

> fundamental market freedoms carry in any event a greater weight and the ECJ was not willing to adopt a lower level of scrutiny pertaining to the prohibition of

> discrimination on the basis of nationality when this differentiation is caused by a national minority protection measure (Henrard, 2011, pp. 410-411).

Nevertheless, in the past years human rights principles have gained more importance within the EU. The Treaty of Amsterdam 1997 – following the consistent approach developed by ECJ over the years – recognized human rights among the founding principles of the Union and it also extended the basis of prohibited discrimination beyond the formal market freedoms. It is particularly important that Art. 13 TEC (today Art. 19 TFEU), which was introduced by the Amsterdam Treaty, established specific competence for the EU to take action against discrimination. According to the wording of Art. 19 (1):

> [w]ithout prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Surprisingly, the TFEU anti-discrimination provision, unlike the ECHR Art. 14, does not mention discrimination based on association with a national minority.[4]

The adoption of the European Union Charter of Fundamental Rights in 2000 marked another milestone in developing a stronger human rights dimension in EU law. The European Commission indeed later decided to screen its legislative proposals for compatibility with the Charter (Commission, 2005). By the entering into force of the Lisbon Treaty, the Charter of Fundamental Rights gained a stronger legal status by obtaining a binding legal force on an equal level to the treaties. The Charter of Fundamental Rights sets an even more inclusive approach to the prohibition of discrimination when it states, under Art. 21, that:

> Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, *membership of a national minority* [emphasis added], property, birth, disability, age or sexual orientation shall be prohibited.

The listed grounds under Art. 21 are broader than those set out in Article 19 TFEU, as introduced by the Treaty of Amsterdam. However, as the drafters of the Charter explained:

> [t]here is no contradiction or incompatibility between paragraph 1 [of Article 21] and Article 19 of the Treaty on the Functioning of the European Union which has a different scope and purpose: Article 19 confers power on the Union to adopt legislative acts, including harmonisation of the Member States' laws and regulations, to combat certain forms of discrimination, listed exhaustively in that Article. Such legislation may cover action of Member State authorities (as well as relations between private individuals) in any area within the limits of the Union's powers. In contrast, the provision in Article 21(1) does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas. Instead, it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law. Paragraph 1 therefore does not alter the

[4] It should be noted that Art. 19 TFEU, despite the specific attention paid by the European Parliament to the situation of languages in the EU, does not include “language” among the grounds on which discrimination is prohibited.

> extent of powers granted under Article 19 nor the interpretation given to that Article. (Explanations relating to the Charter of Fundamental Rights, 2007, Title III).

Nonetheless, in 2000, Art. 13 TEC (Art. 19 TFEU) provided a legal basis for the Council to adopt two important anti-discrimination directives. The Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin OJ L 180 [Racial Equality Directive] covers a broad range of areas where Member States are required to fight against discrimination. Parallel to the Racial Equality Directive, in relation to Art. 13 TEC (Art. 19 TFEU) Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L 303 established a general framework for equal treatment in employment and occupation.[5] The Racial Equality Directive sets out a binding framework for the prohibition of racial discrimination, as it prohibits direct and indirect discrimination and also racial "harassment".[6] The Racial Equality Directive applies to "all persons", including nationals of third countries, and it applies both to natural and legal persons (Art. 3.) and declares – by referring to UN treaties, the UDHR, and the ECHR – that "[t]he right to equality before the law and protection against discrimination for all persons constitutes a universal right" (Preamble, para. 3).

Moreover, it outlaws discrimination in the areas of employment, social protection, social advantages, education, and access to the supply of goods and services. Persons who believe they are victims of discrimination are granted access to administrative or judicial procedures to defend their rights, empowering the victims to seek additional support from external organisations in the proceedings (Art. 7). The Racial Equality Directive shifts the burden of proof to the respondents if the defendant can provide evidence that sets the presumption that there has been discrimination (Art. 8). It foresees mechanisms to sanction those who discriminate. Finally, the Racial Equality requires Member States to designate a body for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin (see Toggenburg, 2003). The Racial Equality in principle acknowledges also the legitimacy of positive action, as it states under Art. 5 "[w]ith a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin." The fact that this provision recognizes positive action "with a view to ensuring full equality in practice" indicates the final goal of positive action, but does not render it obligatory. Moreover, since it stresses that the principle of equal treatment "shall not prevent" positive action measures, it indicates that such measures are considered to be strictly optional. It seems clear that this provision only tolerates state practices for introducing positive action measures within the limits of "ensuring full equality in practice". Regarding the situation of minorities however, the Racial Equality Directive does not offer a clear step forward towards legal recognition of their protection under EU law. It does not contain a provision on the reasonable accommodation of the particular needs of the members of minorities or ethnic groups. Thus, it leaves open the question whether a failure to provide reasonable accommodation should be considered a manifestation of prohibited discrimination under this provision.

Even if the legal recognition for positive action aimed at protecting minority identity or promoting

[5] However, this Directive only refers to discrimination on the grounds of religion or belief, disability, age and sexual orientation without mentioning discrimination based on racial or ethnic origin.
[6] According to Art. 2(3) of the Directive, harassment will be deemed to be discrimination "when an unwanted conduct related to racial or ethnic origin takes place with purpose of or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment".

minority rights is still missing from EU law, it should be acknowledged that the Lisbon Treaty (Treaty on the European Union) has brought about progress in the general acknowledgement of the idea of minority protection. Under Art. 2 TEU, listing the fundamental values of the Union, the treaty mentions for the first time in EU primary law the protection of the rights of "persons belonging to minorities". In addition, over the years, the term "minorities" appears more prominently in EU policy documents – primarily within enlargement policies. The situation of Roma especially gained more attention not only in the activities of the EU Agency for Fundamental Rights, but also in Commission programs. Nevertheless, it has not established any specific competence for the EU in regard to the protection of minority rights. In this context, it is interesting to see that even the EU Framework for National Roma Integration Strategies adopted by the Commission in 2011 ignores specific minority rights issues in its four key areas: education, employment, healthcare, and housing. Its main focus is on providing equal opportunities for Roma in these fields.[7] The European Commission has regularly been reluctant to acknowledge any competence for legal actions in this field and as a recent judgement showed, it failed even to consider specific initiatives in this regard (see, for example, *Minority SafePack v. Commission*, 2017).

10 Conclusions

It is not surprising that positive action measures are evaluated in very different ways within the context of different international instruments. While the FCNM offers a flexible and supportive approach towards positive action, the ECtHR applies a comprehensive scrutiny on its effects on equality. Over the years the ECtHR jurisprudence moved towards an asymmetrical approach and is now more open to acknowledging the idea of substantive equality. Both substantive equality and the acceptance of group dimensions are essential for minority rights protection, which is confirmed by the interpretation of the equality principle under the ECHR.

Against this background, under EU law the primacy of formal equality vis-á-vis the recognition of special minority rights and positive action measures supporting it has not changed over the years. Within the EU, as a special organisation with predominantly economic competences, minority rights issues are still examined under a strict symmetrical approach to equality and the respect for market freedoms prevails. It is still to be seen how the more robust recognition of human rights within EU law and the growing political interest in minorities will transform this limited approach and contribute to the emergence of minority rights perspective in EU law.

[7] See also at http://ec.europa.eu/justice/discrimination/roma/eu-framework/index_en.htm

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Countering Aggressive Manifestations of Xenophobia in Europe: A Legal Framework

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1 Introduction

The SOVA Center for Information and Analysis – an organisation led by the author – specializes in the field of study concerned with manifestations of ethnic and religious xenophobia (in other words, aggressive intolerance or manifestations of racism) and measures to counter them. This work has led us to focus not only on the specific practices but also on the main legal concepts used in resolving these encounters. Such concepts are thematically broader than racial, ethnic, or religious intolerance and should not only be addressed within the context of Russian legislation, as they are formed with significant influence from international law and the legislation of other countries. These considerations have led to this type of research, which resulted in the book Criminal Law of the OSCE Countries on Hate Crime, Incitement to Hatred and Hate Speech, the main findings of which will be presented in this article.

2 Why It Is Important to Speak About Criminal Law in This Context?

Various actions linked with intolerance – be it violence, public statements, discrimination in civil relations, etc. – are in complex mutual relationships, which are heavily dependent on the specific circumstances of time and place. Thus, it is difficult to address what the exact cause and consequences of these actions are, or what might be more dangerous or less so. Generally, discrimination is the most common problem for individuals who face it in their relations with the state, their employer, or other organizations. However, many people have a particularly strong emotional backlash against manifestations of intolerance that target the groups they associate themselves with (or that others associate them with). In the post-Soviet space, these manifestations are usually referred to as xenophobia.[1] We must understand that this xenophobia, along with discrimination, incitement of hatred, hate crimes, as well as extreme phenomena like ethnic cleansing and genocide cannot always be arranged in an unambiguous chain of cause-and-effect relationships. Discrimination, for example – or at least the indirect kind – can be caused not just by outright intolerance, but also by pragmatic considerations (for instance, if we speak about employment). Similarly, the incitement of hatred is not always directly linked with cases of hate violence – we often see that the active promotion of violence does not lead to violence, but that the latter sometimes erupts without systematic incitement.

[1] In respect to groups, defined through the concepts of “race,” “nation,” “ethnicity,” “country of origin,” etc., this xenophobia is referred to as racism. However, the word “racism” is used in other contexts, which are different at various times in different societies and even in different groups.

It is not so easy to say which of all these phenomena are worse from the point of view of the victim of discriminatory treatment. Some consider violence as more dangerous or intolerable, some consider derogatory statements to be the most grave, and some claim serious difficulties in finding a job is the worst effect, etc. However, while attempting to create a common approach for promoting societal peace, the legislature is forced to develop a hierarchy of threats and damages, the more serious of which would fall within the scope of criminal law and be subject to prosecution. In the OSCE Member States for example, violent crimes against persons are considered to be more serious and criminal than certain inflammatory public statements or discriminatory actions (if criminalized at all). This, of course, goes without saying.

The norms of criminal law are certainly not applicable to all manifestations of intolerance. Firstly, this is a simple statement of fact: none of the countries criminalize all forms of discrimination (which might, in one way or another, be linked with intolerance) as well as all kinds of intolerant statements (in the broadest sense of this word - including works of art in different genres, gestures, symbolic actions, etc.). Secondly, tolerance and intolerance are very dynamic concepts that are applicable to various relationships, so that even the most radical supporters of criminalizing ethically disapproved behaviour might not call for the criminalization of all forms of intolerance.

This means that not only the range of legal and social measures against intolerance, but also – with regard to the domain of criminal law –particular norms of defining what is criminal in the context of this topic must be examined. The author's book addresses the three main types of criminal norms: those related to hate crimes, incitement of hatred and similar statements, and organizational activities, the intention of which are to commit these crimes. At the same time, it should not be forgotten that criminal prosecution is not mandatory and is certainly not the only form of a state's reaction to these actions. For instance, non-serious violent crimes may not call for criminal prosecution. This applies even more to xenophobic and other unacceptable public statements, the reaction to which should not be (and *de facto* is not) criminal prosecution, but rather a variety of less intrusive remedial actions. This being said, this essay nonetheless concerns itself with reviewing instruments of criminal law. The reasons for this are because:

1) they are the most powerful tools for addressing issues of discriminatory and xenophobic actions;
2) they are excessive used;
3) criminal cases historically attract public attention;
4) they provide grounds for maintaining other strategies for countering discrimination or xenophobia.

3 Hate Crimes

Hate crimes are not defined in international law. At the same time, "hate crime" itself is a relatively modern legal concept, and it is thus imperative to define it. The formulation used by the OSCE - "Hate crimes are criminal acts committed with a biased motive" – has been largely consented to (OSCE, 2009*)*. This means that for a hate crime to be classified as such, the following two conditions should be met. First, the act must be criminal, regardless of motive or aim according to the domestic legislation of a country.

Second, there must be a motive of prejudice against a particular social category of people, and not against the victim personally. This means that a crime is a hate crime not because of the

characteristics of the offender or the victim, but specifically because of the motive, which is understood as a combination of the personal motivations and goals of the perpetrator. The motive of the crime may be single or plural, primary, or secondary. However, do all of these options constitute hate crime? This question is not so much addressed by law and is instead mostly settled by judicial practice. Motive is not necessarily characterized by hatred (although in most cases it is) but, more importantly, through selectivity with respect to the victim – in other words, discriminatory attitude. This attitude is usually referred to as "prejudice." Determining the criteria for what constitutes a discriminatory attitude is closely linked with which categories of persons are considered in legislation – the type of prejudice being interrelated within the ambit of the threatened group. Laws on hate crimes are fundamentally non-discriminatory (i.e. they do not specifically protect black individuals, Catholics, etc.), but they contain a list (most often – a closed list) of prejudice types, which might not protect all types of minorities[2]. Accordingly, the characteristics included in the list, based on the laws that determine the presence of hate motive, are often called "protected characteristics". The "hate motive" permits the invoking of responsibility for the attacks against persons who cannot be attributed to the respective characteristic, as in this case the key role belongs not to an objective "identity" of the victim, but to the offender's considerations on the matter. In this case, the latter could, by association, attack the spouse of a person belonging to minority or a minority rights defender. Hate crimes are extreme manifestations of discrimination that excessively traumatize their victims as well as the self-awareness of the groups, which are subsequently more likely to be subjected to such attacks. It should also be considered that hate crimes are correlated with more large-scale social conflicts and political instability.

Laws against hate crimes are not a universal phenomenon. Other than in cases of murder, they are almost absent in, for example, Germany, the Netherlands, and Estonia, and totally absent in the eleven OSCE countries, predominantly among EU members, but also in Montenegro and Turkey. In the Netherlands, there is an instruction for prosecutors rather than a law. It suggests imposing half to twice as high a penalty, but this measure is unlikely to be sufficient. Leastwise, the Council Framework Decision 2008/913/JHA of 28 November 2008 OJ L 328 on combating certain forms and expressions of racism and xenophobia by means of criminal law

National legislations on hate crimes differ in several parameters. For example, some jurisdictions contain special articles of the Criminal Code, but in most cases the motive of hatred is either a general or an aggravating circumstance for all crimes, or a private aggravating circumstance according to the specific articles of the Criminal Code. These approaches can also be combined. In some countries, attention is given to the offender's emotional motive, while in others – due to the fact that he chose a victim on grounds of belonging to a group. It should be acknowledged that all of these approaches have their pros and cons.

The most important differences in domestic legislation between OSCE countries relate to "protected characteristics". Almost all countries include at least the concept of race and/or colour, nationality, ethnicity and/or country of origin, and attitude towards religion. Some[3] are rather common in state legislation concerning this topic-area. The political and/or ideological views of the victim or their membership in political and other organizations, for example, are mentioned in the legislation of ten countries including Belarus, Belgium, Romania, Russia, and

[2] The term "minority" is used here and everywhere not in an arithmetic sense, but as a threatened or discriminated, current or historical, state of the group.
[3] This does not include the United States, as the legislation there differs from one state to another, and all the variants can be found in at least some states.

Spain. Mention of different characteristics related to class division, income level, etc. can be found in nine different countries's legislation, including Moldova and Romania, but among them only Belgium is an "old democracy". Mentions of the sexual orientation of the victim (in various formulations) appear in the legislation of 16 countries, of which only Albania and Canada are not EU member states. Sex or gender as "protected characteristics" can be found in legislation of the at least 11 OSCE members (ten of which can be found in the previous list). Even fewer countries (ten EU Member States and Albania) consider the victim's health condition.

There are also less common indicators, for example the motive of religious fanaticism, matrimonial status, age, education, and other victim characteristics. They are usually imported from anti-discrimination laws in those countries where the provisions on hate crimes are included in the system of anti-discrimination norms.

The 14 OSCE countries have published lists of "protected characteristics" for lawmakers to consider, though all varieties of "hate motives" cannot be predicted. However, an open list actually violates the legal certainty principle, which is bad in and of itself. The wording of open lists can vary and entails different consequences. Sweden, for example, uses the phrase "other similar ground", while Malta refers to "xenophobia"; this prompts one to select prejudices similar to those listed. Norway uses the format "any other circumstances relating to groups in need of special protection", which sounds reasonable enough, but such clear wording remains nonetheless ambiguous, since the non-discriminatory approach to the formulation of the law suggests that it is the characteristics (which a group may or may not possess) that are protected, and not the groups in a collective term. Other countries (for example Belarus and Russia) simply refer to certain undefined "social groups" or (as in the case of Hungary and the Czech Republic) simply to "other groups of people", which makes actions that could be called "criminal" indefinitely broad and abstract.

4 Laws on Groups

Since late 1970, a number of countries introduced a new type of state body into their legal systems: independent institutions, the main task of which is the protection of human rights through the control of the legality and even legitimacy of other state bodies (mainly executive bodies and public services). Due to their features, competences and mode of work, they do not fall within any of the three classic branches of state power, but rather make a separate one, the 'fourth branch', the main function of which is to control the work of other bodies. The most prominent and widely spread among them is the institution of the ombudsman, although some countries have established similar independent institutions (sometimes under the same name) for the protection of certain rights or groups of citizens with somewhat different authorities than those of ombudsman institutions.

The functions, authority, procedures of the ombudsman, as well as the nature of the legal acts produced, differ from those of other state agencies. It is an independent institution established by the parliament at the level for which it is founded. Its major functions are to control the work of the administration and public services, and to protect human rights from maladministration by preventing or at least decreasing violations committed by the executive. The ombudsman is elected by the parliament, and is responsible to the parliament for the work of the institution. The parliament may also remove the ombudsperson from office if legal requirements have been

met. The same applies to the ombudsperson's deputies, if there are any provided for by the law. Still, an ombudsman is not a parliament's working body, but an independent institution in respect of all aspects of its work, including hiring and dismissing employees and proposing its budget to the parliament.

An ombudsman acts upon complaints from parties who believe that their guaranteed human rights have been violated by the administration and public services; in most countries an ombudsman may also start proceedings ex officio. After investigating a case, an ombudsman may conclude that no violation of human rights has occurred, or find that there was a violation. In the latter case, the ombudsman shall address the administrative body that committed the violation with recommendations or proposals on what it should do to remedy the violation, and/or how to avoid similar violations in the future. Recommendations, conclusions and proposals of ombudsmen are not legally binding. Their authority rests primarily on the strength of the legal arguments that an ombudsman invokes in the findings on human rights violations, and on the credibility of the institution which can be built up and constantly maintained only through an independent and impartial fulfilment of its tasks. The goal of such recommendations is not only to prevent violations of human rights by the administration, but also to improve the legality, quality and transparency of its work, i.e. to aid it in meeting the requirements of 'good administration' meant to be a service to citizens instead of a mere ruler over them. Therefore, although such recommendations are not binding, administrative bodies are expected to follow ombudsman's well founded recommendations unless they are able to submit relevant legal counter-arguments. If recommendations have not been complied with by the involved administrative body, the ombudsman shall notify the government and/or parliament on such avoidance, and require that they take appropriate legal measures against that administrative body. In cases of repeated incompliance by the administrative body, the ombudsman may also inform the public through the media about those cases and about bodies that continually refuse to follow the institution's recommendations. In many countries the ombudsman is authorized to initiate proceedings for the removal from office of heads of administrative bodies that continue to violate human rights. The ombudsperson may also initiate relevant legal proceedings against functionaries and employees who violated human rights by committing a crime, misdemeanour, or similar punishable offences. In many countries the ombudsman may also start proceedings before the constitutional court or the highest regular courts.

The ombudsman is authorized to submit proposals to the parliament regarding amendments to existing legal acts or enactment of new legal acts on issues within the institution's competences. Once a year the institution submits regular reports to the parliament, and it may submit extraordinary reports on the results of its investigations about certain issues, particularly in cases of serious or massive violations of human rights by the administration. Regular reports contain the ombudsman's findings on the state of human rights in general, on violations of those rights by the administration, on compliance (or non-compliance) of administrative bodies with its recommendations, and on other activities and findings of the institution on issues within its competences. Given that the main purpose of such reports is to inform the representative body about the cases of maladministration resulting in violations of guaranteed human rights and on the measures that should be taken to prevent such violations, the general rule is that the parliament takes notice on those findings and debates upon them, but there is no vote 'for' or 'against' such reports. Basically, the debate should result in conclusions on measures directed towards the improvement of the work of the executive.

One of the main tasks of the ombudsman is the protection of human rights, which includes

ethnic minority rights as well. In order to raise the protection of these rights to an even higher level, some countries have established a general ombudsman office where one deputy deals specifically with minority rights, who normally leads and coordinates a unit within the institution that is specialized for minority issues (e.g. the Provincial Ombudsman of Vojvodina, state ombudsman offices in Serbia and Greece, etc.). Some others have established a special ombudsman for the protection of rights of ethnic minorities (Hungary, Finland). The aim, procedures and authority of such specialized offices are the same as those mentioned above, but focused on the protection and advancement of ethnic minority rights and improvement of the work and conduct of the administration in the area of ethnic minority rights. In addition, such units and offices frequently operate pro-actively by organizing activities aimed at educating both the citizens and employees in the administration about the guaranteed ethnic minority rights and legal means for their protection, by organizing conferences, roundtables and debates on issues related to ethnic minority rights, and conducting activities aimed at the promotion of minority rights. In doing so, they cooperate with other ombudsman institutions in the country (if there are any) and abroad or with other organizations that deal with minority rights (also domestic and internationally). An advantage of ombudsman institutions in this area is that one of their main functions is the protection of human/minority rights, whereas executive bodies that deal with these issues always take into consideration the 'public interest' as they understand it (which may result in findings of no violation not because there was none, but because they deem that some 'higher interests' justifies such restrictions or violations).

Ombudsman institutions in Serbia exist on all three levels: state, provincial and local. Those on the local level are not mandatory according to the law, so the assemblies of each local unit decide whether they shall establish a local ombudsman or not. The first ombudsman institution was established in 2003 in the Autonomous Province of Vojvodina, and the state ombudsman was founded in 2007 under the title of the Protector of Citizens. In both institutions one of the deputies is elected for the protection of ethnic minorities' rights. The Provincial Ombudsman, who covers the territory of the Autonomous Province inhabited by the ethnically-mixed population, was particularly busy in dealing with issues in this area. Since the beginning, its activities were often directed to minority rights, and its annual reports on the state of minority rights combined with recommendations for the improvement of the work of the executive in this area have been a valuable source of information both for other institutions and for the public.

Nonetheless, the successful work and adequate fulfilment of the controlling and protective functions of these independent institutions crucially depend on the respect for the rule of law. Unfortunately, besides lip service, such a context is still very far from reality in Serbia. In practice, neglect of these institutions' recommendations or even obstructions of their work were not rare, particularly at the beginning of their work. Over time many executive agencies have comprehended that a new controlling institution had been introduced into the legal system and have increasingly started cooperating with it in investigations or in carrying out recommendations, but previous attitudes are still not rare exceptions—supervisory bodies are often seen by the administration as adversaries rather than partners. In addition, so far there has not been any genuine political will to support this institution. The supervisory function of relevant assemblies over the executive remains underdeveloped; the ombudsman's findings and recommendations intended to improve the performance of the administration and the state of human rights are simply not taken seriously. Parliamentary debates on annual reports are usually just a formality and, with rare exceptions among representatives, often focused on all kinds of attacks on the incumbent ombudsman and/or the institution (including even brutal

defamatory and denigrating ones), rather than on attempts to find constructive ways to deal with problems detected and reported by the institution. More than once explicit legal requirements regarding conditions that candidates have to meet in order to be elected have been violated (e.g. prohibition for a candidate to be a member of a political party; prohibition for retired people to be candidates). At the local level, regulations adopted by local assemblies often make the institution subordinate to and dependent on the local executive rather than a controlling mechanism over its work.

Besides a general ombudsman or an ombudsman for (ethnic) minority rights, some countries have established institutions for the equal treatment (i.e. against discrimination) of citizens, such as: the Ombudsman against Ethnic Discrimination (Sweden), the Commission for Protection Against Discrimination (Bulgaria, Macedonia), the Equality and Human Rights Commission (Great Britain), the Equal Treatment Commission (Netherlands), the Gender Equality and Anti-Discrimination Ombud (Norway), the Ombud for Equal Treatment (Austria), Board for Equal Treatment (Denmark), the Federal Commission against Racism (Switzerland), the Federal Anti-Discrimination Commission (Germany), and the Commissioner for the Protection of Equality (Serbia), etc. These bodies deal with cases of institutional or individual discrimination, which is frequently manifested as discrimination on ethnic grounds. They are set up either as specialized administrative bodies or separate independent institutions. Most of them have authority similar to those of ombudsman institutions, but some have additional ones (e.g. representing victims of discrimination before the court, making legally binding decisions in concrete cases).

In Serbia, this institution is the Commissioner for the Protection of Equality, which was established by the state Act Against Discrimination of 2009. The Commissioner is elected by the state assembly. Its main duty is to monitor the observance of this Act, i.e. to act upon complaints in cases where discrimination had allegedly occurred on either grounds prescribed by the Act (including ethnic belonging), regardless of whether the perpetrator is an individual, legal person, or public agency. The Commissioner may not start proceedings upon its own initiative. In addition to having similar authority to that of an ombudsman, with the consent of the aggrieved party, the Commissioner (unlike ombudsman) may also press charges against perpetrator of discriminatory acts and represent the victim before the court.

5 Incitement of Hatred: An International Legal Framework

All the countries of geographical Europe and beyond have legislation in place against the incitement of hatred. Among OSCE countries, these laws are missing only in the United States and the Holy See, and thus these two countries will be left aside in this discussion. Laws on the incitement of hatred historically inherited the laws on blasphemy, treason, etc. However, in the post-war period, after the world had experienced the might of propaganda that enticed racial and similar hatred, the laws limiting freedom of expression were mainly focused on the elimination of the incitement of hatred, or at least its extreme forms. Awareness of this task led to fairly clear – by the standards of international law – rules set in a number of conventions and covenants, the standards of which make up the fundamental basis of national legislation against incitement of hatred (for the countries that have ratified these norms).

It is important to bear in mind that the core concept in this case is not hate speech, but incitement of hatred, and specifically – public incitement. This terminology is based on that used in

international law and expresses the way the state and most analysts understand the primary hazard – not as a manifestation of intolerance or propaganda, but as statements in the broadest sense of the word that induce listeners to dangerous actions or create danger in such actions. The most detailed "thematic" provisions can be found in the already mentioned Art. 4 of the ICERD, which states:

> […] shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.

The restrictions on freedom of expression are clearly understood in International Covenant on Civil and Political Rights 1996 [ICCPR] as well. According to its Art. 19 p. 3, cl. B, the right to freedom of expression "[…] may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary […] for the protection of national security or of public order, or of public health or morals".

Moreover, as Art. 20, p. 2 suggests, "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

We see that international human rights law contains fairly general provisions in terms of this legislation, which leaves considerable room for variation. "Incitement of hatred" is the key concept, which goes back to the UN covenants and conventions. There are numerous explanations as to what is meant by "incitement" (from direct appeal to public justification of certain actions, but perhaps also including indirect statements that do not include any appeal). Special attention should be paid to the already mentioned phrase from Art. 20 of the ICCPR, which uses the notion of "incitement". Of course, in the terms used by the Criminal Code, "incitement" is always understood as incitement of a specific person to a specific crime, and Art. 20 does not define it in this way. Presumably, it concerns not fully addressed or even indirect public speeches, which are focused not only on expression of some personal thoughts or emotions (in this case, xenophobic) but on incitement of the audience to something.

The problem is that the cited norms do not provide clarity as to what the audience is exactly inciting, what is meant by "hatred". The same Art. 20 (and it is not alone) mentions inciting violence and discrimination, but does not limit itself to this. For instance, Art. 20 also mentions "hostility". It seems that the concept of "enmity" is neither clearer, nor more comprehensible, than that of "hate."

Meanwhile, states have bound themselves to criminalize "incitement of hatred" and generally do commit to this sentiment. But how exactly? One can narrow down the number of legal provisions considered as those that precisely address inciting actions and the statements that produce negative feelings. The statements from the second group can indeed also lead to aggressive, hostile actions, but they do not call for them directly. I believe that this separation is important, since we can never accurately predict the consequences of our words. Even a completely neutral-toned statement, which does not contain provocative intentions, may (under certain circumstances) trigger violence. Conversely, the most urgent calls to violence may also be in vain. Therefore it would be useful to distinguish between the legal provisions that speak of direct incitement and those that speak about the actions that are potentially dangerous, regardless of the speaker's motives. Sometimes this division takes place and sometimes it does

not.

Specifically, we assume that the actual negative attitude or opinion towards people on any grounds is not a crime, but only certain actions, including those verbal. It is important not to reveal the speaker's attitude (although it is, of course, important for understanding the situation), but to estimate precisely the social aggravation of their statement

I want to mention that all OSCE countries have criminalized statements that do not directly call for a direct and aggressive action, but nonetheless pose a potential danger. Calls to violence are criminalized in 25 OSCE countries, although in some countries, including Ukraine, not explicitly but through referencing violence as an aggravating circumstance in the general article on inciting hatred. Calls for discrimination are penalized in 19 countries, which are mostly the EU member states, but also ex-Yugoslav countries and Moldova.

The language used in the articles of the Codes concerning the limits of freedom of expression is extremely diverse. However, it seems that the different terms "incitement of hatred," "humiliation," "threat," and even the "humiliation of national honour" (as used in Ukraine), firstly, can be divided into those that are more or less "hard" (i.e. establishing more or less widely understood limitations), and secondly those where the law enforcement is only partly dependent on differences in legislative language.

How can one understand, in general terms, what is criminal in this sphere and what is not? At the European level, it is not possible. At the domestic level, it can also be problematic, as the wording of the Criminal Codes' articles of this kind can never be exhaustive and exclude doubts and differences in interpretations. Within the EU, an attempt to unify this type of legislation was made in 2008. The aforementioned Council Framework Decision 2008/913/JHA was adopted, but only a small portion of the EU member states has followed the EU Council's recommendations.

6 The Rabat Plan of Action: On Framework and Criteria of Criminality

For numerous reasons, domestic legislation cannot be made the common denominator in the foreseeable future. Also, in the foreseeable future, the laws of many countries will maintain rather broad interpretations, causing confusion among citizens. However, these problems can, to considerable degree, be resolved not in legislative terms but through the interpretation of laws by a professional community of lawyers. The most natural form of this interpretation at the domestic level are precedent-setting decisions of higher courts and the interpretations of supreme courts in terms of law enforcement. However, there is also the international community of legal experts, whose comments on international law influence, albeit indirectly, both law making and domestic comments.

Between 2011-2012, the United Nations attempted to systematize rules relating to hate speech and incitement to hatred and to at least issue some recommendations. To this end, a series of global expert seminars were held, which resulted in the Rabat Action Plan, agreed upon in autumn of 2012 (UN Human Rights Council, 2013a). The Rabat Action Plan provides the following essential recommendations for lawmakers:

- There should be legislation prohibiting incitement of hatred, since it is directly stipulated by

international law;

- The wording of this legislation should not deviate from the language of international law, including Article 20 of the ICCPR. This means, in particular, that states should not change the "hard" terms like "hatred" to softer synonyms;
- Restrictions on freedom of expression should not be excessive so as not to upset the balance established, in particular, by Articles 19 and 20 of the ICCPR. They are a "must" in a democratic society and should respond to any real social need;
- These restrictions must be clearly stated in law, but not too broadly and vaguely;
- Penalties and restrictions must be proportionate, so that the damage from the restrictions to freedom of expression would not exceed the damage from the statement;
- Laws on blasphemy and criticism of religion are unacceptable, even beyond their usually discriminatory nature, "religious freedom, consecrated by international standards, does not include the freedom to have a religion free from criticism and ridicule";
- There should be a clear distinction between statements that entail criminal liability, those that do not (but may be subject to administrative restrictions or civil action), and those that, while not restricted by law, may be a matter of concern in terms of tolerance and respect for human rights.

The Rabat Action Plan also highlights the numerous problems of enforcement. The decisions are often fixed not in legal acts, but in the official comments. The investigation and the court are invited to assess six key factors:

- The context of the statements, both local in space and time, and wider afield (in the sense of the historical experiences and precedents of the country, etc.);
- The status of the subject of hate speech: it is clear that the effect of the statement strongly depends on the social status of the speaker;
- The intent of the crime: international law addresses incitement to hatred, and not just the distribution of some texts;
- The actual content of statements, including not only its literal content but also the style, etc.;
- Extent of the speech: this primarily concerns the reach of public statements not only in quantity, but also in quality of the intended and actual audience, whose perception of the statements is critical for its evaluation;
- The likelihood of criminal liability: of course, the statement is criminal irrespective of whether the effects materialized from it (for example, bashing and calls to violence), but one should take into account the probability of more serious consequences than the actual hatred incited.

Finally, the Rabat Plan of Action pays great attention to the fact that sanctions – not even criminal, but civil or administrative ones – are the last resort of countering the spread of intolerance, the first being the systematic prevention on the part of state bodies and the citizens themselves and their associations. In this sense, the document summarizes the dominant position of experts and government officials of most countries (UN Human Rights Council, 2013b).

7 Publicity

One should specifically focus on one of the "Rabat criteria" for analysing the extent of a statement's criminality, namely on the problematic "degree of publicity." With the emergence of

the Internet, legislators started facing a new challenge: the number of the public statements that could potentially be considered illegal grew massively and even more. This has set up serious problems for lawmakers, which have not yet been resolved in a satisfactory manner. The problem of jurisdiction is the simplest of them. Indeed, the Internet is global, but the law can only be enforced locally. A more or less common understanding has emerged that the state is responsible for protecting its citizens, including from that which is written on the Internet by citizens of another state. However, this second state could consider the very same statement as not criminal, therefore making it impossible to bring the author to justice. This conflict of laws is not a new one.

The most difficult problem is the state's inability to prevent the distribution of certain content that is spread by an active and small group of people. For example, any formal procedures for deleting a page (or video, or something else) from the Internet or blocking access to it usually takes months, days, or hours in the case of maximum and exceptional mobilization. However, it takes just minutes to upload a new copy of the same material onto the Internet. When books previously were banned, the process of their printing took longer than investigation activities and court proceedings and there was therefore practical sense to the ban. Nowadays however, the effort-effect ratio of these law enforcement actions has drastically changed.

In any case, before material is deleted, the question of its illegality should be decided. If we are speaking about incitement of hatred, the decision is made through criminal procedure,[5] and in this case, as the "Rabat criteria" provide the degree of the statement's publicity should be assessed, as laws on incitement of hatred generally require publicity as a mandatory characteristic (though the laws of Armenia, Cyprus, and Slovakia are exceptions). Domestic legislation bypasses the fundamental question of how to measure publicity. Comments significantly differ, as does law enforcement. Where in Western Europe people are almost always charged with a criminal offence for statements which have a wide audience of thousands of people, countries in the Commonwealth of Independent States [CIS] still use the Soviet approach, which sees a public statement as addressing "an indefinite range of people," regardless of its size.

It is important to understand that the criterion of publicity is not binary by nature – publicity has many manifestations and, so-to-speak, levels. Under otherwise equal conditions, the wider the target audience for public provocations, the more dangerous it is – a fact that should be reflected in the punishment if any is available, since the perceived public danger could be too small for criminal prosecution. A quantitative parameter does not require further comment, but it should be mentioned that a qualitative one is of equal importance as it is simply useless to call for a pogrom before one audience, while being enough to hint before another. In the end, it depends on people's averseness to violence that will trigger violence against someone else. Publicity can be understood not as a personal statement, but is it essential to assessing an act's threat level? For example, one can send an inflammatory email to several thousands of people from home, or one could also present the same biases in the bar to an indefinite but also very narrow circle of companions seated nearby. However, it is not obvious which of these two public appeals is more dangerous. Sadly, legislations insufficiently take this into account. Unfortunately, the ECRI General Policy Recommendation No.7: National legislation to combat

[5] In Russia, Kazakhstan, and some other Central Asian countries, a simplified mechanism for prohibiting materials was developed but an analysis of this strange mechanism does not fall within the scope of this review. One can only say that it proved to be very inefficient and produced numerous abuses.

racism and racial discrimination, which is in general very helpful, is in this case very controversial:

> Member States should ensure that it should not be too difficult to meet the condition of being committed in "public". Thus, for instance, this condition should be met in cases of words pronounced during meetings of neo-Nazi organisations or words exchanged in a discussion forum on the Internet. (ECRI, 2003, p. 19)

Indeed, any publication in the Internet, if it is not password-protected or restricted by any other means (for example, a post in a social network which can be seen only by friends), can potentially be addressed to all people in the world who are technically able to see it. However, in practice, very few or no people may read this publication, because the Internet is full of very rarely visited pages and social network accounts. Moreover, few people have a real chance to get acquainted with the statement within the context of the "discussion" that it belongs to, i.e. the debate that emerges from the string of comments belonging to a specific blog or account post on a social network. One should read a thread from beginning to end, but most are less than keen to do this, instead preferring to just sporadically read individual comments. This being said, there have been cases where individuals have been criminally prosecuted for their comments, though they were seen only by a few members of the same dispute. Thus, a fair law enforcer needs to assess the real number of actual readers or users who had a significant probability of becoming acquainted with this statement (even those who occasionally read the blog). It is still often difficult for law enforcement bodies to not only accomplish this, but also simply recognize the existence of this issue.

Laws often equate traditional and Internet media in terms of the assessment of a statement's social risk (as advised by the ECRI). However, what does this achieve? There are blogs and websites that are much more popular than some newspapers, but it is also certain that many blogs and websites have an audience that is much smaller than that of a speech made in a local pub.

Adequate consideration of all these circumstances by law is hardly possible. However, it is possible in comments on law enforcement practice and later in law enforcement instructions.

8 Prejudices Types and Expression Methods

The variety of group types that are subjected to manifestations of hatred is no less than that of hate crimes (see above). There are conventional "protected characteristics," linked to race, ethnicity, or religion. Among the 55 examined countries, Andorra and Germany do not use the concept of "race" and in Malta there is no prosecution for inciting hatred in connection with religion. Sixteen countries, including Belarus and Ukraine, have only this minimal set of characteristics.

However, there are also other quite common "protected characteristics." In 11 countries, it is criminal to incite hatred against the rich or poor. These countries are very different politically, but it is only Belgium that is developed and prosperous in this list. Here the concept of "social hatred" is included, which can be found in the post-Soviet regions. Incitement of hatred towards the sick and disabled is prohibited in nine countries, and they all are EU member states. Sexual orientation can be increasingly found in domestic legislation on hate speech. Today this exists

in 21 domestic legislations, but there is no country further east than Estonia among them. Sex as a protected characteristic occurs less frequently, as legislation for this is provided in only 15 countries (12 EU Member States, Russia, Turkey, and Moldova). Criminalization of inciting of hatred on the grounds of beliefs, including those that are political, seems problematic as it threatens to unduly restrict the freedom of political debate. Nevertheless, it takes place in both old (The Netherlands) and young (Estonia or Moldova) democracies.

There are also rarer prejudices referred to in laws on the incitement of hatred. These include, for example, stem and class (in Kazakhstan), origin (understood very differently throughout various countries), region of residence or origin (in three countries, it is understood as a sub-ethnic characteristic, or even as a substitution for the ethnic one), age (included in four countries, including Luxembourg and Romania), and matrimonial status (covered in Luxembourg). There could be different reasons why these atypical norms appear. For example, they may be rooted in the specifics of local politics (such as the legacy of the civil war in Tajikistan), or could be formulated in anti-discrimination law, which is the framework for norms on incitement of hatred (this is most clearly be seen in the cases of Belgium and Luxembourg).

All these various options demonstrate that there is no “right” answer to the question of what “protected characteristics” should form a list used in the criminal law domain. In general, it could be said that the list always reflects (with some delay) the state of public debate in that country: for example, what topics seem to be the most relevant for incitement of hatred. It can be assumed that if prejudices, which are ignored or not even condemned by the society’s majority, are included in this list above, they are unlikely to be effective.

A number of countries, when considering hate crimes, try to find a solution by making the list of characteristics open. This is the case of the nine countries, from Germany to Russia (Germany being the only country in this list that is located in Western Europe). One can also notice differences in how the law sometimes regards a social group (for instance, ethnic) as an object of enmity, as well as occasionally the people who belong to it. I see this distinction as more important for the philosophy of law, but it is difficult to speak to how it might affect law enforcement.

In some countries, the law mentions specific methods of inciting of hatred – for example, an insult directed at certain symbols or even various forms of action such as the distribution of printed materials. However, this is of little use to law enforcement, since these references in no way mean that the usage of other methods and forms is not criminal. In many countries there are special laws that prohibit statements of a rigidly defined kind, for example, insults directed towards the Church or denial of known mass crimes. This category of prohibitive law should be reviewed separately.

9 Blasphemy

In addition to the usual criminalization of inciting hatred and expressing hostility against people on religious grounds, as well as the criminalization of hooliganism or other illegal intervention in religious activities, special religion-related limitations exist in approximately half of the OSCE member states. They are absent in 29 out of 57 legislations. These special laws always date back to older legislation or have been recently adopted in order to replace it, and can significantly vary in their content. Although they are often referred to as the laws on blasphemy,

blasphemy against God is criminal in only two countries: Finland and Greece. The term "defamation of religion" is often applied to special laws; resolutions that called for combating the "defamation of religion" were repeatedly adopted by the UN General Assembly at the behest of Muslim countries, as well as Russia and its allies. The term "special laws" can be understood very differently, and this diverse understanding can be found in various countries in various combinations. Interestingly, all these cases in the OSCE region are encountered in the so-called "old democracies" of Europe. We see statements (in the broadest sense of the word), which to one extent or another defame or mock doctrine foundations[6], religious organizations[7], certain significant religious practices[8], or sometimes even the clergy at the time of ministration[9]. The term "defamation of religion" without further specification can be found in the laws of Cyprus and Slovakia, and a rather vague concept of "blasphemous libel" remains in Canada and Ireland.

Sacraments are a specific subject of protection in this type of law. One does not speak of the general criminalization of acts of vandalism, but of the statements and other actions, which are judged not on their damage, but specifically on profanation and mockery of sacraments. These statements are criminalized in nine countries, from Spain to Finland. In some countries with a separate code for minor offences, as in Russia or Hungary, these actions are attributed to it.

There are specific norms on the "offence of religious feelings" that are in tandem with general norms on inciting hatred against people on religious grounds and the norms on "defamation of religion". They are present in the eight countries, including Russia, Ukraine, Switzerland, and Uzbekistan, and in the last case, the law equally protects "the feelings of citizens related to their religious or atheistic beliefs". In five further countries – from Poland to Spain – one can see norms that, in one way or another, link the norms on the "defamation of religion" and on the "offence of religious feelings."

10 Historical Revisionism

Within this context, "historical revisionism" is referred to as a denial, derogation, or glorification of certain universally recognized historical crimes. This concept is relatively recent, as it became a subject of criminalization in the 1990s. The issue of "Holocaust denial" became the initial momentum for its emergence, but contrary to popular belief, legislation used throughout the entire OSCE area is not specifically focused on this issue and covers a much wider scope. In one form or another, these laws can already be found in 24 countries.

The aforementioned Council Framework Decision 2008/913/JHA explicitly requires that EU member states bind themselves to criminal provisions that focus on "historical revisionism." It even determines what is supposed to be criminalized: public approval, denial or principal trivialization of the acts of genocide, crimes against humanity, and war crimes as defined by Articles 6-8 of the Rome Statute of the International Criminal Court 1998 or Article 6 of the Charter of the International Military Tribunal [Nuremberg Charter] 1945 if the statement calls for violence or hatred. At the same time, states are free to limit criminalization to only those

[6] For example, the articles of Christianity; this is the case in five countries, three of which are Scandinavian.
[7] Being the case in four countries, from Greece to Germany.
[8] Being the case in seven countries.
[9] Again, being the case in four countries.

historical crimes that have received judicial confirmation by certain international or national courts. The Framework Decision 2008/913/JHA has significantly affected the legislative process, but in eight EU member states these norms are still missing.

Laws that specifically refer to the Nuremberg trials can be found in countries with very diverse historical backgrounds - Austria, France, Belgium, Germany, and Russia[10] - and their formulations significantly vary. In post-communist countries, laws could address the crimes of the two totalitarian regimes, the Nazi and the Communist ones – this being the case in the Czech Republic, Hungary, Lithuania, Poland, and (since 2015) Ukraine. However, no small number of countries opted to limit themselves to those historical crimes that have particular historical importance to them, but chose to criminalize the denial, belittlement, or excuse of any similar crimes, some of which directly refer to the Rome Statute. These universalistic norms can be found in the Criminal Codes of 11 countries, from Armenia to Switzerland. In Croatia, the Criminal Code is complemented by a reservation inspired by EU recommendations: "if done in a way that can contributes to violence or hatred toward such group or members of such group". The same is found in Armenia, Bulgaria, and Malta, the Bulgarian Criminal Code being in relation to crimes against peace and humanity. Of course, "historical revisionism" could also be criminalized indirectly. The Netherlands considered the Supreme Court, which stipulates that such statements may be a means of incitement of hatred, as sufficient. In Portugal, the same idea is directly inscribed in the norm of the law.

11 Conflict Resolution and Anti-Discrimination Approaches

Summing up the review of domestic legislations, it is possible to make some preliminary observations that arise from their comparison of different characteristics. The laws analysed here were born amid concerns of public security or large-scale conflict prevention, but are increasingly conceptualized in terms of equality and countering discrimination. Of course, these differences in understanding are also reflected in subsequent legislative practices, especially if we are speaking about laws on inciting hatred and on the criminalization of participation in these discriminatory and xenophobic groups.

For example, there is a group of countries that, by criminalizing statements, take into account their possible effects embodied in the form of riots, etc., or make reservations concerning public security or the threat of the society's division. We see this in a number of countries that have recently experienced wars or violent conflicts: For example, some (but not all) countries of the former Yugoslavia, all Central Asian countries, Cyprus, Georgia, Moldova, and Turkey.

However, the laws of Albania and Germany are on par with this type of legislation, a fact that also applies to the laws of Canada, England, and Finland. This kind of legal language can be understood as an attempt to eliminate the criminalization of statements that could do not lead to socially dangerous consequences. This idea complies with one of the criteria of criminality defined by the Rabat Action Plan. However, we must understand that if this criterion becomes the key one, it in fact makes the speaker's responsibility conditional on circumstances beyond their control.

[10] Russian legislation has another quite unusual legally defined crime: "dissemination of false information about the activities of the Soviet Union during the Second World War, committed publicly."

Now we face a gradual shift from the concept of "security protection" towards the concept of "promotion of non-discrimination". The anti-discrimination approach is more or less consistently being implemented in 14 countries (Belgium, Bulgaria, Cyprus, Czech Republic, Estonia, France, Georgia, Greece, Liechtenstein, Lithuania, Luxembourg, Slovakia, Slovenia, and The Netherlands), all of which are the EU/EEA member states, except for Georgia, which strive to join the EU.

Welcoming this shift in general, the fact cannot be omitted that the restrictions made largely in order to protect sensitive minorities can sometimes be equally as rigid as the limitations introduced in the name of state or public security. The comments of Miklós Haraszti, the OSCE Representative on Freedom of the Media from 2004 to 2010, will be the only ones referred to here. In his notes, which carry the revealing title "Hate Speech and the Coming Death of the International Standard before It Was Born (Complaints of a Watchdog)", Haraszti (2012) writes that heightened attention to the cultural and political contexts increasingly blurs the very idea of a universal approach to freedom of expression, and that the idea that restrictions of this freedom should be exceptional is gradually losing force almost everywhere.

12 The Abuse Threat

On the other hand, undemocratic governments certainly constitute a greater threat to freedom of expression. I have been monitoring the implementation of legislation in Russia as long as it has been in existence and could show it in detail.[12] One cannot say that all cases of abuse are linked precisely with the intention of the authorities to exercise political repressions. Often it simply requires the work of law enforcement agencies for accounting purposes. The less clear the laws and official comments to them are (i.e. the less clear the threshold of criminality statements is), the greater the temptation for law enforcement agencies exists. An important role of law enforcement belongs to the usage of mythologized or common concepts about non-mainstream movements, primarily religious ones (in the Russian context, the examples of the Jehovah's Witnesses and the Muslim adherents to Said Nursi's teachings are well known).

We see that the Russian anti-extremism legislation, which is based on maximal extension and the blurring of the boundaries of the statements' criminality is, to varying degrees, copied by a number of the CIS countries. It is also unevenly used there for excessive restrictions on civil liberties. In particular, Belarus and Moldova copied these laws, but in terms of the scale of their application and abuse, Kazakhstan is closer to Russia.

13 Recommendations

This review suggests some possible recommendations. I will present them only briefly and begin with criminal law. An attempt to make bans broad enough in order to encompass all dangerous statements leads to the situation that, in the public perception, the law on inciting hatred acquires two dangerous traits:
1) They become less distinct, and their application is less consistent and understandable; in

[12] Russian practice of abuses distinctive by its scale and diversity can be found in annual reports prepared by the SOVA Center. They are all available at its website, access: http://www.sova-center.ru/misuse/publications/

countries without a strong tradition of proportional and responsible law enforcement, it is fraught with extensive misunderstanding dictated by either political or bureaucratic motives;
2) These laws substitute for moral norms and fully delegate the duty to monitor it to the law enforcement agencies. It is, in principle, harmful for society if one agrees with the fact that self-regulation should remain the main instrument.

Thus, I believe that the wording of criminal laws on inciting hatred should be narrowed to specific appeals for aggressive action. This will make these norms much more understandable to citizens, including potential offenders and the police, and in the future will allow for a greater degree of legislation harmonization, at least on a European scale. Most intolerant statements should be regulated not by criminal, but by civil law – citizens who are hurt by these statements may prove their point in a fair trial by not delegating this important task to the state. Moreover, the goals of these citizens and the state may be different.

Of course, it is true that civil procedural law in many countries does not provide, or may even restrict, such an opportunity. In the end, I think these problems can be solved and that all matters pertaining to such categories as humiliation and defamation will be moved into the scope of defamation cases, which is where such legal disputes rightly belong, in my view. The problem of limiting freedom of expression on the part of the state will be resolved, especially given that the consequences of losing a civil trial may be even more serious than a sentence for a minor offence. Let us recall that, in practice, hate speech is considered a minor offence in almost all countries. At the same time, this will resolve the issue of the "truth" of statements that comprise hate speech; fact-finding occurs more naturally in civil litigation than in the criminal process because the court is not bound by the presumption of innocence. This mechanism probably has its costs, but it also releases itself from the costs of broad criminalization.

There is a broad category of statements that are not directly aimed at the humiliation of another group or even incitement against it, but nonetheless result in varying degrees of discomforted feelings among many who associate themselves with this group. It is simply inevitable in this domain to speak of religious groups. One may urge not to disparage heretics, etc., but one cannot ban it, because this debate forms an integral part of freedom of religion. If we speak about national or ethnic groups, it is most likely about historical and political disputes related to the formation of identity. This is not necessarily linked with current or even recent political events, but is certainly related to them. Examples of this can be seen in debates on the conquest of Kazan or the ethnicization of the Battle of Kulikovo. We cannot exclude this debate and must accept the fact that they can hurt or even provoke the citizens. Although of course, people, out of goodwill, should strive to avoid making statements that could have such consequences.

In conclusion, I will very briefly address what should be done in addition to improving repressive methods, as they are still not the main ones. In this domain, I rely partly on the findings of the Rabat Action Plan. Firstly, and this is especially relevant to the countries with a long legacy of statist views (including all post-Soviet states), the behaviour of authorities and officials is very important. Thus, disciplinary measures and positive selection are necessary here. Demotion or dismissal of officials for their xenophobic statements or discriminatory actions, which are widely covered by the media, will produce a greater effect than a few processes against lurking racist agitators. Secondly, popular activities in the spirit of inter-religious or inter-ethnic dialogue are not as important if they are taking place at a high level. I believe these have little impact on the lower levels, but stress the differences that may not be worth emphasizing. Instead, ethnic, religious, and other diversity as a part of local initiatives has a positive effect. Thirdly, a

systematic anti-discrimination policy is needed. Although it will not immediately eliminate discrimination, it will immediately give the proper message to society and will gradually inculcate the rejection of discriminatory treatment as such. Fourthly, ethical standards are very important within the journalistic and other communities. However, professional standards are even more important for journalists: most of hate speech in the media results from a lack of professionalism. Fifthly, when confronted with manifestations of intolerance, both the authorities and citizens should (in the first place) think not about how to start a criminal or a civil case, but how to engage in direct or indirect public debate and how to create a proper counterbalance in the form of solidarity and the assertion of equality values. We cannot afford to be less inventive than the adherents of hatred.

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Elements of a Parliamentary Ombudsman's Independence

Petar Teofilović

1 Introduction

The relevant legal acts of almost all countries that established parliamentary ombudsman define the institution as *independent*.[1] Independence is essential for impartiality and the effective implementation of an ombudsman's main functions, which today generally consist of protecting human rights through the supervision of administrative work.[2] The independence of any institution is more than simply being resilient to outside influences that might directly affect its work as well as decisions made on other subjects; it incorporates many other elements relating to the structure and functioning of the institution. For the purposes of this paper, the term "independence" will be defined as a cluster of characteristics which protect the inner structure, work, and decision-making of the institution from restrictions, changes, orders, instructions, or any other attempts of external agents to manipulate its functioning.

Independence means that the status, functions, and work of an institution are outside the influence or control of other governmental bodies (particularly those whose work is supervised by the ombudsman), interest groups (political parties, business, religious, labour or other organizations, etc.), or individuals. Given that an ombudsman generally controls the work of administrative agencies and public services, their independence – particularly from the executive – is very important (Council of Europe, 2003).

Independence is a complex quality, the fulfilment of which may be influenced by numerous factors. All of them affect its state by either protecting it or by limiting it, and these factors should thus be taken into consideration when assessing the achieved level of independence. With regards to each of those elements, an institution may enjoy different levels of autonomy between the two extremes – "full independence" and "full dependence". In addition, the influence of particular elements may change for different reasons, so the achieved level of independence may vary over time. Their common feature is that they may be curbed in various ways, which aggravates the fulfilment of the institution's constitutional and social functions. Therefore, relevant legal acts normally contain provisions intended to secure the ombudsman's independence, or at least to limit the effects of factors that may restrict it.

The first chapter of this article deals with the position of the ombudsman within the system of

[1]The text relates mainly to ombudsmen elected by parliaments of particular territorial units. Besides parliamentary ombudsmen, there are kindred institutions with the same name whose heads are not elected by the parliament. They are either parts of the executive (as a unit within a particular ministry or in the government, or as a separate executive body), or founded by other organizations (professional, academic, etc.). The latter share some common features with parliamentary ombudsmen, but their heads are not elected by a parliament, so they are not analyzed in this text.

[2] The justification, content, and importance of an ombudsman's independence are essentially the same as those of any other independent institution (e.g. courts, budget auditors, etc.). The main difference between an ombudsman and most other institutions is that an ombudsman makes no legally binding decisions, but employs "soft law" – recommendations, opinions, suggestions – to bodies it controls and/or to those superior to the controlled ones, which is discussed in further details.

state bodies and the importance of this institution's independence and integrity. The main part of the text presents an overview of elements relevant for the independent work of the ombudsman, illustrated by examples of solutions in various countries. The final part of this study contains conclusive remarks on the topic and a summary.

2 The Meaning of the Ombudsman's Independence

The institution of ombudsman does not fall within the three classic branches of state powers (legislative, executive, and judiciary). For a long time, the main ombudsman's function consisted of controlling the execution of laws by the administration. As the awareness of the importance of human rights grew, the ombudsman was seen as the appropriate body to be entrusted with a task to protect human rights. Most ombudsmen founded since the late 1970s were charged with both these tasks (control over the administration with the aim to prevent human rights violations). Besides taking part in proceedings in cases of alleged human rights violations, an ombudsman also has a role in raising public awareness of these rights, educating and informing the public and state bodies on relevant issues concerning the topic, reporting findings of maladministration, recommending measures for the improvement of the work of administration in protection of human rights, etc.

An ombudsman is elected and removed from office by the relevant parliament[3] and is responsible for the work of the institution to the parliament that elected him/her (Kucsko-Stadlmayer, 2006, 2008). The ombudsman's annual and extraordinary reports, containing the assessment of the state of human rights and findings on maladministration of agencies under the institution's control, are submitted to the parliament. In many countries, the ombudsman may propose amendments to existing legal acts or the enactment of new ones that relate to areas within the competencies of the institution (Kucsko-Stadlmayer 2006).[4]

The work of administrative agencies and other public services is the main subject of parliamentary ombudsman's control. Given that illegal or otherwise irregular work of the administration almost always constitutes a violation of human rights, the primary goal of the ombudsman's activities in this area is to improve the functioning of the administration and to prevent it from committing human rights violations. The executive has no formal authority over the ombudsman and its work. However, in practice, the administration does curb the ombudsman's independence in various ways, requiring adequate counterbalance in relevant legal acts.

As a general rule, the ombudsman has no authority to review the decisions of the judiciary. Courts are also independent institutions and their rulings do not fall within the scope of

[3] The preliminary results of the University of Vienna's scientific project on the comparative characteristics of ombudsmen institutions include relevant information for 75 ombudsmen from 45 (mostly European) countries. The research shows that in 65 cases, the ombudsman is elected by the relevant parliament (of the state or certain territorial units), whereas only in 3 cases is the ombudsman nominated by the Government. Where the data for regional ombudsmen are omitted in Kucsko-Stadlmayer (2008), and only those relating to national ombudsmen are presented, according to which the ombudsman is elected exclusively by the relevant parliament in 89 percent of cases taken into consideration.

[4] According to the data for 59 European ombudsmen, 43 have the authority to directly propose to the parliament amendments to legal acts or the enactment of new ones in order to improve the legal regulation of issues pertaining to the ombudsman's area of expertise, while 4 others do that in practice, though such an authority is not explicitly mentioned in the relevant legal act. (Kucsko-Stadlmayer, 2008)

ombudsman's supervision. Still, ombudsmen may legitimately state their opinion on the administrative aspects of courts' work since they are not a judicial but an executive function.[5] In some states the ombudsman has somewhat wider authority in relation to the judiciary,[6] but those powers never extend to the possibility of annulling or amending judicial rulings and are rarely used in practice.

One of the main features of this institution is that the ombudsman uses "soft law" instead of authoritative powers in its work. Recommendations, opinions, conclusions, or proposals of the ombudsman are not legally binding and do not have to be enforced. The respect and impact of such recommendations is based on other grounds: strong legal arguments; the authority and integrity of the institution; guarantees of its independence and impartiality; the possibility of initiating various legal proceedings against public servants under the ombudsman's control and before the constitutional court; the possibility of publicly presenting cases of maladministration that cause human rights violations or of omissions to conform to ombudsman's recommendations; the power to propose the removal from office of public officials responsible for human rights violations; and the like. The integrity of the institution is built up through practice to the extent possible in its given context. It is based on its comprehensive insight into the work of a wide range of administrative agencies, on its knowledge of contemporary standards in the area of human rights, and on the strength of its arguments. The institution's authority also correlates with the public's perception of its independence and impartiality. The independence of the ombudsman is thus one of the foundations of its authority and a key factor for carrying out its social functions. The independence of human rights institutions, including the ombudsman, is deemed essential for its work and several international documents contain recommendations that stress its importance (Council of Europe, 1998).[7]

In conclusion: it is not sufficient to introduce the institution of ombudsman into the system by law but it is necessary to secure its independent work. This requires incorporation of various protective mechanisms into legal acts that regulate its organization and work, the occasional modification of some other legal acts, and the necessary adjustments of other state agencies to the role and functions of ombudsman as a new body.

3 Main Elements of the Ombudsman's Independence

The ombudsman's explicit determination as an independent institution is found in most legal acts that regulate its work. As stressed in the introductory section, the ombudsman's social functions may be carried out only if its independence is secured in practice. Independence does not mean unaccountability and arbitrariness, but autonomy in structure and in function of an

[5] For example, the length of judicial proceedings, delays in the enforcement of judicial decisions by the court's administration, or failures related to fair trial requirements protected by the constitution.
[6] E.g. the possibility to take certain measures in cases when the verdict is the result of a serious abuse of law by the judge, the possibility to use certain extraordinary legal remedies, or to challenge courts decisions before the highest court of the land.
[7] The United Nations documents noted in the Council of Europe 1998 publication the necessity for guarantees of independence and pluralism of institutions for the protection and improvement of human rights. At the regional level, see also Recommendation No. R (97) 14 of the Committee of Ministers to EU Member States on the establishment of independent national institutions for the promotion and protection of human rights (30 Sep. 1997), which recommends the establishment of independent national human rights institutions for the protection of human rights and improvement of democracy in member states, also in the above source.

institution in accordance with its authorities granted by the law. The aspects of the ombudsman's independence may primarily relate to its status, organization, or its functions. They are closely related and affect each other. The means of securing independence are usually explicitly stated in relevant legal acts, normally including procedures and measures in cases where the independence of the institution is jeopardized. Still, cases not foreseen by the law may occur in practice and significantly affect the work of the institution, requiring additional legal solutions.

Elements of the ombudsman's independence affect the proper and consistent positioning of this institution in a concrete legal system. The analysis that follows will cover the basic content of listed elements and an extended elaboration of the most important ones. These elements include:

1. The rank of a legal source that establishes and regulates the institution
2. The procedure for the election and dismissal of the ombudsman
3. The ombudsman's term – its length and expiry, re-election
4. The requirements for candidates for the position of ombudsman, and compatibility with other public functions or professions
5. The ombudsman's responsibility, and grounds for his/her dismissal
6. The ombudsman's immunity
7. The ombudsman's authorities
8. The relationships among different ombudsman institutions:
   - No hierarchy among institutions of different levels and authority to control its work vested only in the parliament that elected the ombudsman
   - Relationships between parliamentary and governmental ombudsmen, i.e. between general and specialized (thematic) ombudsmen
9. The ombudsman's salary - the way it is determined and the amount
10. The election and position of the ombudsman's deputies (if provided)
11. The institution's staff - independent formation and management
12. The equipping of the institution, work conditions, and its location
13. The institution's budget – its formation and use
14. The regulation of relevant proceedings before the parliament
15. The social context:
    - the achieved level of development of democratic institutions and coordination among them
    - adequate positioning of the ombudsman in the system of state bodies (primarily adjustments of relevant legal acts preceding the act on ombudsman)

3.1 The rank of a legal source establishing and regulating the institution

The ombudsman may be established by the constitution, a statute, or a by-law. Normally, the constitution contains only the fundamental principles about the status and character of the institution, whereas statutes or by-laws contain detailed regulations. The rank of a legal act that establishes this institution depends on the level of a territorial unit for which it is to be founded, on the normative powers such a territorial unit enjoys, on the authority desired for the institution, and the like. Establishment of the ombudsman by a constitution or a statute is characteristic for state or federal institutions, while by-laws are more frequently utilized for regional and local institutions.

In the ideal case, national ombudsmen are established by the constitution and the parliament

enacts a statute that regulates the institution in detail. In this case, the ombudsman is a constitutional institution from the start, which significantly contributes to its authority, importance, and relationships with other bodies, and consequently to its independence in general. The other option is that the ombudsman is established by a statute and later, at the time when the state constitution is amended or altered with a new one, the relevant provisions on the ombudsman are inserted into the constitutional text. In this case, the position of the ombudsman becomes stronger after it becomes a constitutional category, providing that it does not initially gain this status but does so at a later time.[8] Ombudsman is a constitutional category in approximately two-thirds of the 49 states taken for comparison (regardless of whether it was first established by a statute or not) (Kucsko-Stadlmayer, 2006).[9] In around a quarter of them (12 out of 49) it is established and regulated only by statute[10], and only in a few of the compared cases it is regulated by a bylaw (Kucsko-Stadlmayer 2006).[11]

The rank of the legal act that establishes this institution plays an important role in strengthening its independence. The constitution postulates the basis for the election and dismissal, status, and authority of the classic state organs such as legislative, executive, and judicial bodies, but also of those that appeared later (mainly independent institutions including ombudsmen). When the ombudsman is established by a statute, the fact that certain bodies established by a constitution are controlled by an institution founded by a legal act of lesser legal force may, in practice, produce confusion as to the scope and content of its authorities towards constitutional bodies within its control. However, if the ombudsman is founded by the constitution and the principles underlying its relationships with the executive are defined by the constitution, the relationship between the ombudsman and other bodies becomes more appropriately grounded.

3.2 The procedure for the election and dismissal of ombudsman

The procedure for electing the ombudsman is of high importance for the independence and impartiality of the institution. Major issues are: who proposes candidates for the ombudsman, i.e. who may initiate proceedings for their dismissal; who elects or dismisses them, and in what procedure; and what majority is required for the ombudsman's election and removal. Issues related to the requirements one must meet to be eligible for the position of ombudsman are tightly linked to these questions, and are discussed later in this text.

3.2.1 Eligibility to propose candidates

Solutions in respect to who can be and how one can propose the candidates for ombudsman differ, reflecting the characteristics of the particular political and legal system.[12] When

[8] That was the sequence of steps in the case of the Protector of Citizens (ombudsman) of Serbia: first the Act on the Protector of Citizens was adopted in 2005, and then the new Constitution of Serbia containing provisions on the Protector of Citizens was enacted in 2006.

[9] For instance Scandinavian countries, the majority of countries of former Yugoslavia, Russia, Spain, Portugal, Hungary, etc., in total 33 out of 49 national institutions. (Kucsko-Stadlmayer, 2006, 2008)

[10] For instance the Czech Republic, France, Ireland, United Kingdom, etc.

[11] Such is the case of the Provincial Ombudsman of Vojvodina: the institution was established by a decision enacted in 2002, which is a bylaw and the highest-ranking legal act that the Assembly of the Province of Vojvodina may enact autonomously. In 2009, it was finally included in the "provincial constitution" called the Statute of Vojvodina, an act that needs to be confirmed by the state parliament of Serbia to become valid.

[12] For instance, candidates for the position of ombudsman may be proposed by: the President of the Federation, the Federal Chamber of the Federal Assembly, representatives in the state Duma, and associations of representatives in the state Duma (Russian Federation); the parliamentary board for legal matters (Denmark); the President of the Parliament (Lithuania); the President of the Republic (Estonia); representatives and political parties in the parliament (Bulgaria); representatives in both chambers of the Parliament in a plenary session (Spain); 30 members of parliament, or the parliamentary board for matters related to administration (Vojvodina); half of the total members of

determining who will be vested with the authority to propose candidates (which is the initial phase in the process of electing an ombudsman) the intention is normally to secure that a candidate will be acceptable for as many relevant factors as possible. This may be crucial for successful election, since in most countries a qualified majority in the parliament is required for electing the ombudsman. Those who have no direct interest in influencing the work of the institution should make the proposal of candidates for ombudsman, since there is a lower risk that such proposals will be biased and it will thus be easier to elect the ombudsman. It also provides additional guarantees for the independence of the institution because the elected candidate will not be seen as someone who protects interests and political agendas of some political party or lobby group, but rather as someone who provides equal and objective treatment for all the interested subjects. In rare cases where two or more ombudsmen head the institution, the proposals of candidates are usually made in a way that secures adequate balance among different political actors.[13]

Although subjects who propose candidates for this office differ from one state to another, the main function of this institution – protection of human rights from violations by the administration – is generally taken into account when determining to whom to confer authority to propose candidates. Since the ombudsman supervises the work of the administration, the basic logic requires that the government, its ministries and other parts of the executive do not even propose candidates, and particularly are not the decisive or the only factor in the election process. If the candidacy for the ombudsman position would depend on those whose work the institution actually controls, the final proposals would compromise the institution's necessary impartially.

The same applies to agents eligible to initiate the dismissal proceedings of the ombudsman. Given that the proposal for dismissal may be motivated by the intention to remove an ombudsman who is not tolerant of maladministration, even though he acts according to the law and within his authorities, the right to propose the dismissal of the ombudsman may be even more important than the one to propose candidates. In brief, parts of the executive should not be authorized to propose the dismissal of ombudsman, since such proposals could be a mere retaliation against the ombudsman by those criticized for maladministration.

3.2.2 Majority required for the election and dismissal of the ombudsman

A certain qualified majority of parliamentary representatives is required for the election of the ombudsman in many countries. In some cases the census is met when the majority of the total number of representatives votes for the candidate[14], but frequently the census is even higher – usually 2/3 of the total number of deputies (Commissioner for Civil Rights Protection of Poland, 1998; Kucsko-Stadlmayer 2006).[15] The rationale for this solution is the intention to reduce the

the Board for constitutional matters (Serbia); joint proposal of the Vice President of the State council and presidents of the Supreme Court and the Appellate Court (Netherlands); in Austria, where three ombudsmen are elected on the state level, the three political parties with the largest number of representatives in the parliament propose one candidate each, etc.

[13] In the majority of cases one ombudsman heads the institutions. A distinction must be made between institutions that have more than one ombudsman and those that, besides an ombudsman, have one or more deputies. Deputy ombudsmen do not run the institution. They have less authority than the ombudsman and are subject to their instructions. Exceptions to this are, for instance, Belgium (two ombudsmen), Austria (three-member Ombudsman Board where each year another one among them takes over the presidency of the Board) or Moldova (three ombudsmen). See more in Kucsko-Stadlmayer, 2006, 2008.

[14] E.g. in Romania, Denmark, Serbia, Croatia, Macedonia, Sweden (Kucsko-Stadlmayer, 2006, 2008).

[15] A two-thirds majority is required for the election of ombudsmen in Slovenia, Malta, Hungary, Bosnia-Herzegovina, for the Provincial Ombudsman of Vojvodina (regional institution), etc. In Spain it is required that 3/5 of the total number of deputies in both houses of the Parliament vote for the same candidate; if voting for the proposed

possibility that one political party elects its own ombudsman. The higher the census, the more political parties will have to agree with the election of ombudsman. On the opposite side, if a simple majority (more than half of the deputies present at the session) is sufficient for the election, the votes of slightly more than ¼ of the total number of deputies will suffice to elect the ombudsman. The latter opens the possibility that a single political party elects the ombudsman, which could have a negative impact on the impartiality of the person elected.[16]

The same arguments apply to the issue of dismissing the ombudsman, which is perhaps even more sensitive. In all European countries the requirements in this respect are strict. In most of them, the majority needed for dismissal is the same as the one required for election, but in some the majority for the dismissal is even higher then the one for the election (Kucsko-Stadlmayer, 2006).[17] If a qualified majority is required for dismissal, the position of ombudsman is more stable, which is an important factor for strengthening the institution's independence. The lower the census for dismissal, the more vulnerable is the ombudsman's position; consequently, in the latter case the institution's independence is more susceptible to influences of a political, corporate, or other nature, since it is easier to replace one ombudsman with another even if they are performing well and within the law.

3.3 The ombudsman's term – length, expiry, re-election

In Europe, the ombudsman's term is only rarely linked to the beginning and ending of the mandates of representatives in the parliament.[18] Although in Sweden, from which the modern day institution of ombudsman originates, as well as in several other countries, the term of office for the ombudsman is four years (same as that of the Parliament), the dominant trend in European countries today is to have the ombudsman's term outlast the Parliament's (Kucsko-Stadlmayer, 2006).[19] This unequal term length is aimed at avoiding situations where after each parliamentary election, the parliament elects its "own" ombudsman – a person who would, for reasons such as political affiliation, prefer to avoid addressing improper work of the current administration.

The expiring of a term is a different case than dismissal. Expiration occurs when certain conditions are met, and it is safe to assume that prescribed circumstances have taken place. Reasons for dismissal are in most cases related to erroneous and/or illegal work of the incumbent, which also may cover cases where the institution was not performing independently for various reasons. The regular way of ending the term is when the time prescribed by law has

candidates was not successful new proposals are required, and in the latter case the census is somewhat lower: the majority in the Congress (lower house) remains 3/5 of the total number of deputies, but in the Senate (upper house) the consent of the absolute majority (50% + 1 vote) is sufficient to confirm the election – see: Art. 2, sections 4 and 5 of the Spanish 1981 Act on the Protector of Citizens. (Commissioner for Civil Rights Protection of Poland, 1998, Kucsko-Stadlmayer, 2006).

[16] For instance, the Serbian 2005 Act on the Protector of Citizens required this very threshold for the election of the ombudsman, which is lower than in any other European state. The threshold was finally increased by the 2006 constitution, which prescribes that the majority of the total number of deputies is needed to elect the ombudsman.

[17] E.g. in Finland, Norway, Poland, Iceland, Spain, and depending on the concrete reason for dismissal, in Moldova. Only in Armenia is the census prescribed for dismissal lower than that for the election of ombudsman. (Kucsko-Stadlmayer, 2006)

[18] Denmark and Norway.

[19] In about 80% of cases the ombudsman's term is longer than the representatives'. It usually lasts five (Serbia, Poland, Russian Federation, Albania, Slovakia, Spain, etc.) or six years (e.g. Netherlands, Austria, Hungary, Slovenia, the province of Vojvodina, Montenegro, etc.). In Estonia and Israel the term of the ombudsman is 7, whereas in Macedonia, Croatia and Luxembourg it lasts 8 years. In United Kingdom and in Lichtenstein the length of the term of Parliamentary Commissioner/ ombudsman is not limited, and it normally lasts until the bearer of this office is retired. The term of the ombudsman is never shorter than 4 years. (Kucsko-Stadlmayer, 2006)

expired, and is usually regulated in detail by the act on the ombudsman. Besides this, other reasons for the end of ombudsman's term include the fulfilment of conditions for retirement[20], loss of capability to perform official duties[21], the ombudsman's resignation[22], the ombudsman's death, permanent loss of working capacity, etc.

Another related issue is whether relevant legal acts prescribe the details of the procedure after the expiry of the ombudsman's term, i.e. of the (re)election of ombudsman. Those details include, for instance, whether the proceedings for the (re)election of the ombudsman must start before the end of the incumbent's term[23], how the proposals for the new ombudsman are submitted, whether there are solutions for cases where the term of ombudsman has expired and a new one was not elected,[24] etc. In principle, if relevant legal acts do not explicitly determine deadlines for starting and completing the procedure of (re)election, the body responsible for undertaking measures for this is the one that is responsible for the election, i.e. the Parliament. If no deadlines are prescribed, ad-hoc solutions (e.g. nomination of a deputy ombudsman to be the acting ombudsman until a new one is elected) may be abused to establish the state of affairs of an undetermined duration, which could last years.[25]

The related issue of re-election of the same person is solved differently in various countries. In some states this possibility is excluded, i.e. one person may be elected as ombudsman only once.[26] In almost half of European states, only one re-election (i.e. two mandates) is allowed[27], whereas in almost a third there are no limitations regarding the number of re-elections.[28] In some states, the term of the ombudsman is not limited in time, so the issue of re-election rarely

[20] For example, art.4 sec.2 of the Danish Ombudsman Act, No.473 (1996), art. 4. sec.1. para.2 of the Lithuanian Act on Seimas Ombudsman (1994), and art.9. sec.1 of the Decision on Provincial Ombudsman of Vojvodina (2002), etc.
[21] For example, art.2 of the French Act on Mediator (1973 and subsequent amendments).
[22] For example, art.19 sec.1 para.1 of the Croatian Act on Public Defender of Rights (1992), art.4 sec.1 of the Danish Act on Ombudsman No. 473 (1996), and art.9 sec.1 of the Decision on Provincial Ombudsman of Vojvodina (2002), etc.
[23] For instance, in Portugal the election of a new (or re-election of an old) ombudsman must be completed within the last 30 days of the incumbent's term; in Slovenia and Serbia the procedure for (re)election must be started at least six months prior to the expiration of the ombudsman's term; in Sweden the procedure starts and the election is to be completed during the last (fourth) year of ombudsman's term; in Hungary this procedure is to be completed within three months after the incumbent's term had expired (while he/she remains in office until the (re)election). In Vojvodina, the Decision on Provincial Ombudsman does not prescribe any deadline before the expiry of the ombudsman's term for starting the procedure of (re)election; so, it is possible that the election is late, that the proposal for the new one is, quite non-transparently, submitted the day before the session of the Assembly, that the proposal is added to the agenda at the very session, and that the whole procedure for election is completed in fifteen minutes.
[24] E.g. whether somebody needs to officially declare the expiration date of the incumbent's term, whether the term of the current ombudsman is prolonged until the election of a new one, or some other option takes place.
[25] While waiting for the election of a new one, such a provisional ombudsman is basically in a state of dependency on those who have some role in the election, and because he/she may be removed as easily as he/she was placed to that post even if a new one is not elected. Such a temporary state may be severely abused – for instance, to avoid the election in a legal and legitimate manner, since an interim ombudsman is running the institution without the regular procedure for the election. It may also facilitate the installation to this office, even for a longer period, of someone who otherwise would never be regularly elected, etc. Similar situations may degrade the independence of the institution to an empty proclamation. Challenges similar to this may also occur when the incumbent leaves the office for whatever prescribed reason before the expiry of the term for which he/she was elected.
[26] E.g. France, Andorra, Israel.
[27] E.g. the ombudsmen of Austria, Hungary, Ireland, the Russian Federation, Serbia and its province Vojvodina, etc. If not explicitly stated in the law, an issue may appear as to whether "one consecutive reelection", as prescribed in some cases (e.g. Vojvodina), means two terms in total, or the same person may be elected more than twice provided that, between the first two terms and the following one, they were not holding this office at least one term.

[28] E.g. Scandinavian countries (the incumbent Danish ombudsman was elected to this office six consecutive times), Baltic States, the Netherlands, Croatia, Ukraine, the EU, etc.

occurs.[29] An argument in favour of one or more re-elections is that it brings benefits from the previously accumulated experience of the incumbent. If the incumbent manages to demonstrate the authority of the institution during the first term, it will by all means positively contribute to its work in the ensuing terms. On the other hand, the possibility of re-election may be used as a means for political pressure on the incumbent (e.g. by linking the prospects for re-election to the way the ombudsman handles particular cases).

3.4 Requirements for the ombudsman, incompatibilities

A potential candidate for the position of the ombudsman has to meet certain conditions to be eligible for candidacy. Some conditions are positive requirements that the candidate must meet, while others relate to absence of features or circumstances that would make a candidate unsuitable for the post.

Among the positive ones, it is almost universally required that a candidate is a citizen of an existing state. Other frequently used conditions relate to personal and professional qualities required to perform this function. In approximately half of the European states, it is explicitly required that a candidate possess a university degree, usually from a law school;[30] a certain minimum length of previous work experience is also often stated, as well as experience in the field of human rights. Requiring a minimum age of candidates is also not an isolated case (Kucsko-Stadlmayer, 2006). In some countries, no special positive requirements are listed in the act that regulates this institution,[31] but even in those countries such conditions may arise from other legal acts (e.g. citizenship, fulfilment of the requirements that apply to the representatives of parliament[32], a health condition that does not hinder the person's capacity to perform a certain job, minimum age - a minor may not be a candidate for the ombudsman in any country, etc.). Frequently, some of the requirements relate to certain personal qualities of the candidate such as high moral standing, high esteem within society[33], etc., which is not the case with the majority of other public functions (Commissioner for Civil Rights Protection of Poland, 1998). Such requirements should not be surprising, since they establish at least some standards that may prevent the installation of a person of ill reputation to the post where they could harm others' human rights and the public's trust in the institution. The professional and moral esteem of the candidate in the public eye contribute to the independence of the institution's work and to the fulfilment of its tasks.

The second group of conditions usually relate to incompatibilities of the post of the ombudsman with other public offices, professional engagements, membership in certain organizations, and

[29] E.g. Lichtenstein, or the UK Parliamentary Commissioner. Tentatively, the issue of whether reelection is allowed could appear in these cases too, for instance if someone who was elected once and resigned is proposed for ombudsman again few years later.

[30] In some countries, any university degree is allowed - e.g. Belgium, Denmark, Norway, Finland, Hungary, Bulgaria, Croatia, Serbia, Montenegro, etc. In the province of Vojvodina, the candidate should in principle be a graduate lawyer, but a candidate who holds a university degree in some other field may also be proposed if they meet all the other requirements and have "considerable working experience in the field of human rights protection". Given that the basic requirement in respect to the length of previous working experience in the area of human rights is seven years, and that the proposal of a non-lawyer is an exception, it follows that non-lawyers must have at least seven years of experience in this field, although, as an exceptional scenario, that experience should be even longer. In Slovenia, there is no explicit requirement in this respect, and so far none of the three Slovenian ombudsmen were lawyers.

[31] E.g. the Netherlands, Spain, Lichtenstein, Ireland, etc.

[32] For example Austria's art.148, sec. 5 of the Austrian Constitution.

[33] E.g. "well established reputation for integrity and independence" (art.5, sec.2 of the Statute on Ombudsman of Portugal) "high prestige due to the individual's moral position and social sensitivity" (art. 2 of the Act on the Commissioner for Civil Rights Protection of Poland), etc.

administrative boards of private enterprises and/or organizations. The lists of incompatibilities sometimes contain no limitations and sometimes the ban applies only to specified additional activities that might affect the impartiality of ombudsman. Newer laws often explicitly prohibit that potential candidates are members of political parties.[34] The rationale for this ban is that their open political affiliation may affect the impartiality and independence of the institution in general, which would significantly reduce its authority and the citizens' confidence in it.[35] The negative conditions are primarily aimed at preventing certain private interests or inclinations of the ombudsman from influencing the work of the institution. They are usually enumerated in legal acts that regulate the institution, but may be prescribed in some other acts, too.[36]

3.5 The ombudsman's responsibility and grounds for his/her removal from office

The ombudsman is accountable for the work of the institution to the parliament that elected him.[37] Parliament is usually the only state organ authorized to dismiss the incumbent ombudsman in cases prescribed by law, although in some states removal from office is not possible under any circumstances (Austria) (Kucsko-Stadlmayer, 2006). Only in a few cases may the ombudsman be relieved from office by a decision of some other carefully selected state organ (Kucsko-Stadlmayer, 2006).[38] From the conceptual point of view, the authority to remove the ombudsman should be given only to a body that is not subject to the ombudsman's control or else the motivation for the dismissal could be the consequence of his/her findings against that body. Thus, such an authority should not be given to the government or to the executive in general. There is no European country where the government or some ministry may remove the ombudsman from office.

Typical grounds for the dismissal of ombudsman are, for instance, the subsequent fulfilment of circumstances listed as incompatible with the post,[39] sentencing the ombudsman for a crime (any crime, or one of those enumerated in the law), or loss of citizenship. Sometimes these reasons are less precise (e.g. negligence in performing duties, behaviour deemed improper for the head of this institution, etc.). In some countries, no concrete reasons for dismissal are prescribed, but it still may occur if the ombudsman loses the confidence of the parliament in a similar way as in cases of testing the parliament's confidence in the government.[40]

[34] An important exemption in this respect is Austria, where it is explicitly prescribed that each of three parliamentary parties with most representatives proposes one member of the three-member Ombudsman Board.
[35] In practice, this condition may be circumvented if the person elected for ombudsman is in fact a member of a political party, but after the election he/she formally resigns from said membership, or "freezes" his/her membership in the party during the term, or where it is prescribed that such membership formally terminates once he/she is elected to this post.
[36] In the case of the Provincial Ombudsman of Vojvodina, the obstacles for the election are rather strict and wide-ranging. They may not be a member of a political party, administrative or supervisory boards of enterprises, or labor unions, and if he/she has held any of the enumerated public offices on the provincial or local level, he/she is also disqualified. The last mentioned group of restrictions is aimed at reducing the probability that the ombudsman receives an application in a matter that they had dealt with earlier while holding another public office, since that would be seen as a departure from independent and impartial proceedings. While holding this post, the ombudsman may be engaged only in educational, scientific, and artistic activities, and is prohibited from performing any other professional activities.
[37] This is relevant in countries that, besides federal/national ombudsmen, also have state, regional, or local ombudsmen who are elected by parliaments of respective territorial units.
[38].E.g. by the highest court of the state (France, Estonia, Cyprus), or by the president of the state (Liechtenstein, some non-European states), which in principle reflects the status of this institution in the concrete legal system.
[39] E.g. joining a political party where party membership is prohibited for the ombudsman; taking another public office or starting professional activities that an ombudsman may not perform while in the office, etc.
[40] For example, art.3 of the Danish Act on Ombudsman, No.473 (1996).

The formulation of the grounds for dismissal may be of great importance for the independence of the institution. Namely, some grounds are objective and once their existence has been established, the issue of dismissal is just a procedural matter (e.g. loss of citizenship, starting activities incompatible with the post, membership in a political party). However, some grounds may be formulated in a way that depends on interpretation and may be abused, in which case they seriously attenuate the institution's independence.[41] To avoid arbitrary interpretation affected by daily politics or personal motives, reasons for dismissal should be formulated as clearly as possible without using vague, unclear, or broad terms such as "negligence in performing duties" and the like. Otherwise the dismissal could be used as a means of keeping the ombudsman under control or removing them if they are too critical of the work of the current administration.[42]

3.6 The ombudsman's immunity

The ombudsman often enjoys immunity, the scope of which varies from country to country. The immunity normally applies to criminal proceedings during the ombudsman's term, but in the majority of countries this immunity may be removed by decision of parliament (Kucsko-Stadlmayer, 2006).[43] In some cases immunity may not be removed if the removal is required because of the ombudsman's opinion or actions taken in the performance of their authorities.[44] Some parliaments may remove the ombudsman's immunity only if it is required for prosecuting them for a crime for which the prescribed punishment is above a certain limit,[45] while in some states criminal proceedings in such cases may be started without parliament's approval.[46] In many countries, it is explicitly prescribed that the ombudsman may not claim immunity if they are caught committing a crime.[47] In other countries, the immunity also applies to civil proceedings related to the performance of his duties[48], while in rare cases immunity applies only to civil proceedings.[49]

The function of immunity is to support the undisturbed work of the institution within its

[41] For instance, art.12 sec.3 of the Serbian Act on the Protector of Citizens states that the ombudsman may be removed "if he is sentenced for a crime that makes him inappropriate for the office". Such formulation leaves some space for arbitrary application of the law in respect of the "appropriateness" for the office, and is thus not as good as those which prescribe some measurable criterion such as the length of a punishment for crime. For comparison, art.10 sec.1 of the Decision on the Provincial Ombudsman of Vojvodina prescribes that ombudsman may be dismissed, among others, if he/she is "sentenced for a crime to prison", which is grounds that may not be construed differently. Art.19 sec.1 para.3 of the Croatian Act on People's Protector of Rights also contains a completely indeterminate reason: "The Public Defender of Rights may be dismissed before the termination of their term […] if the House of Representatives decides that they should be removed before the expiration of their term".

[42] For instance, art.10 sec.2 of the Serbian Act on the Protector of Citizens postulates that the "Protector of citizens and his deputy are prohibited from making statements of a political nature." Such a solution is quite controversial because it imposes a question as to whether the violation of the ban on "political statements" may be a justified basis for his/her dismissal. Such a reason is not listed as one of the grounds for the ombudsman's removal from office, and if deemed important it should be subsumed under some other prescribed grounds, e.g. "unprofessional and negligent performance of duties". On the other hand, given that no sanction, including dismissal, is explicitly prescribed in cases where the ombudsman makes political statements, such a provision is essentially only a declaratory one. The framers of this act and those who voted for it obviously do not know or do not comprehend that human rights make a universal system of values which limit state powers, which is a political issue *par excellence.* Thus, statements on the state of human rights and their violations inevitably have political content at least to some extent.

[43] E.g. in Bulgaria, Bosnia-Herzegovina, Slovenia, Poland, Czech Republic, Hungary, Serbia, etc. See more in Kucsko-Stadlmayer (2006)

[44] E.g. in Slovenia (art.20. sec.1 of the Act on Human Rights Ombudsman), Vojvodina (art.8 of the Decision on Provincial Ombudsman), etc.

[45] E.g. in Bosnia-Herzegovina.

[46] E.g. in France, Greece, Macedonia, etc.

[47] E.g. Bosnia-Herzegovina, Portugal, Poland, Russian Federation, etc.

[48] E.g. in Sweden, Portugal, Serbia, etc.

[49] E.g. in Israel.

competencies, and free public criticism of cases of maladministration without the threat that legal proceedings may be taken against ombudsman with the intent to obstruct or discredit their work, remove them from office, or retaliate against them because of assessments or actions taken within the scope of the institution's authorities. Although an adequately set immunity reinforces the ombudsman's independence, there are states where the ombudsman enjoys no immunity (Kucsko-Stadlmayer, 2006).[50]

3.7 The ombudsman's authorities

Ombudsmen have a wide range of investigative authorities. These usually include the authority to inspect the documents that are possessed by organs whose work is supervised by the ombudsman; to take statements from heads and employees, but often also from third parties as well, when necessary for conducting an investigation; to enter the premises of the agency against which the proceedings have been undertaken by ombudsman; to exercise unannounced supervisory visits to organs and public services under the institution's control (e.g. prisons, mental hospitals, institutions for care about children without parents, or about the elderly, etc.). In most cases, ombudsmen also have the authority to look into documents classified as secret, joined with the duty to preserve the secrecy of the data learned from such documents.

Ombudsmen do not have the authority to decide the subject matter of cases they investigate, nor to annul or alter decisions of agencies whose competence it is to deal with those cases. If the ombudsman finds that a violation of human rights had occurred as a consequence of maladministration, they will formulate recommendations, proposals, opinions, and similar non-binding conclusions, and will send them to the relevant bodies. In those recommendations, the ombudsman states what the maladministration consisted of in the concrete case, what violations of human rights he established, and recommends measures aimed to remove such violations. The ombudsman also has the authority – and the obligation – to submit annual and extraordinary reports to the parliament and may initiate or propose amendments to, or enactment of, legal acts that relate to the administration and human rights.

The independence of the institution in this respect means that other state organs, primarily those falling within the executive branch, may not issue any orders to the ombudsman to start or terminate proceedings, nor may they issue orders about the content of a final recommendation or opinion regarding findings on human rights violations, nor on the scope and content of reports to the parliament. In other words: undisturbed performance of the institution's authorities is paramount. If these authorities are restricted by law or obstructed in practice, the independence of the ombudsman is often only declaratory.

3.8 Relationship among the ombudsman institutions

3.8.1 No hierarchy among ombudsmen on different levels/only the parliament which elected the ombudsman has the authority to control its work

In countries where an ombudsman is established on different levels (national, regional, local), the main principle is that those on the lower level are not subordinate in any way to those on the higher level. For instance, the national ombudsmen may not impose to regional or local ones what cases they will handle and in what way, and there is no possibility to appeal the

[50] E.g. in Austria, Denmark, Finland, Netherlands, Slovakia, etc.

recommendation or opinion of a lower level ombudsman to the ombudsman on a higher level. In other words, a parliamentary ombudsman has no authority to control or direct the work of another. One reason for this is that each ombudsman is accountable only to the parliament that elected them but not to any other body, including ombudsmen of a higher level or the parliament of another territorial unit. Another strong reason is that an appeal against recommendations or opinions of an ombudsman would be inconsistent with the nature of those acts: they are not legally binding, and it would be absurd if a higher level ombudsman could annul or modify the recommendations or opinions formulated by a lower level ombudsman.

The independence of ombudsmen also incorporates independence from other, higher-level ombudsmen. It should prevent a higher-level ombudsman from imposing to another the obligation to proceed or refrain from acting in particular cases, from affecting the work of another institution, or from issuing binding interpretations for lower-level ombudsmen, etc. The differently levelled institutions require the establishment of relationships that are not based on hierarchy and subordination, but rather on coordination and cooperation.

3.8.2 Relationships between parliamentary and governmental ombudsmen, i.e. between general and specialized ombudsmen

The situation is different when it comes to the relationships between parliamentary ombudsmen and "governmental" ones. The latter are nominated and dismissed by the government and are not parliamentary ombudsmen. They are usually established either as a separate department within a ministry or the government, or as bodies authorized to supervise the respect and enforcement of laws in a particular area (e.g. discrimination, rights of children, gender equality, etc.). There are many various specialized/thematic ombudsmen in different countries, some of which enjoy a high degree of independence from the executive under relevant laws. Still, such "governmental" ombudsmen belong to the executive branch and thus the parliamentary ombudsmen in those countries normally have the power to control their work.[51] For this reason, the supervision of parliamentary ombudsmen over the governmental one does not constitute a violation of the independence principle.

3.9 The ombudsman's salary

The salary of the ombudsman may be used as means to indirectly influence their work and decisions. Therefore, the executive bodies that fall within the ombudsman's control (primarily the Ministry of Finances and similar agencies) should not have a decisive, but only a technical role in determining his salary. It is desirable to prescribe by law the criteria for determining the ombudsman's salary in order to prevent abuses of power through indirect economic pressures on the ombudsman (e.g. by changing the elements or reducing quotients for calculating the salary, by refusing additional payments such as daily allowances, travel costs, etc.).

The ombudsman's salary is often grounded on the principle that those who control other bodies should not have lower, particularly not significantly lower, salaries than those whose work they control. In order to prevent possible abuses and arbitrary interpretations on the concrete amount, a majority of European countries define the size of the ombudsman's salary in the act on the ombudsman or in some other related act. The ombudsman's salary is usually determined in the same way as salaries of other high-ranking officials. It is not stated as an absolute amount

[51] Such authority is sometimes explicitly prescribed and other times inferred from relevant provisions defining the authorities of the parliamentary ombudsman.

but is normally linked to the salary of the president or judge of the constitutional or supreme court of the state[52], or of the head of the highest auditing institution (all of which are also independent bodies)[53], or of the president or member of the parliament[54], ministers[55], or some other high-ranking official (Kucsko-Stadlmayer, 2006). In some countries, the amount is linked to the average salary multiplied by a certain quotient, so it amounts to several average salaries in the concrete country.[56]

In some countries, the ombudsman's salary is not defined by law but is determined by the parliament that elects him/her.[57] Finally, in some cases the salary is determined by some ministry (usually of finances),[58] the worst solution given that the ministry also falls within the ombudsman's control.

3.10 Election and position of the ombudsman's deputies

In most countries, a single person governs the ombudsman. Cases of "cooperative" institutions where two or more ombudsmen with equal authorities govern the institution are rare.[59] Finally, in a number of institutions the ombudsman has one or more deputies (the deputy system).

Approximately half the European national ombudsmen have deputies, while others do not have any. In most cases there is one[60] or two of them[61]. Only in a few cases does the ombudsman have more deputies.[62] Sometimes the law prescribes the minimum and maximum number of deputies without determining the concrete number, while the ombudsman proposes several deputies to the parliament within the prescribed limits.[63] Deputies usually observe certain areas of human rights or categories of individuals, similarly to specialized ombudsmen, and sometimes they head branch offices of the institution if there are any.[64] The deputies' competences are normally prescribed by the act regulating the institution, but sometimes the ombudsman assigns concrete area of work to deputies. In most cases, the ombudsman proposes deputies while the parliament elects them. The requirements that deputies must meet are in most cases less strict and the majority for their election is lower than for the ombudsman.

Deputies generally aid the ombudsman in their work, sometimes covering particular areas of human rights, heading the institution's branch offices, and the like. Still, too many deputies (depending on their assignments it could be four, five, or more deputies, numbers generally justified only in institutions which have branch offices headed by deputies) indicate an oversized apparatus where the main interest is to satisfy the cravings of political parties for having "their

[52] E.g in Serbia, Montenegro, Slovenia, Albania, etc.
[53] E.g in Belgium, Czech Republic.
[54] E.g in Austria, Slovakia, etc.
[55] E.g in Hungary, Poland, etc.
[56] E.g in Bulgaria, Estonia, etc.
[57] E.g in Denmark, Macedonia, the United Kingdom, etc.
[58] E.g in France and Greece.
[59] Instances of cooperative institutions are the ombudsmen of Sweden and Austria. In Sweden, four ombudsmen are elected, whereas in Austria, three of them make up the Ombudsman Board. In both institutions, as well as in others organized as cooperative ones, one of the elected ombudsmen is the head of the institution and has certain exclusive authorities (e.g. to employ associates and decide on issues related to their working status, to represent the institution, etc.).
[60] E.g. in Bulgaria, Czech Republic, Georgia, Hungary, the Netherlands, the United Kingdom, etc.
[61] E.g. Estonia, Poland, Spain, Portugal.
[62] E.g. three deputies – Croatia, Albania; four deputies – Romania, Serbia; five deputies – Greece, Province of Vojvodina; more than five – Macedonia.
[63] E.g. art.15 of the Slovenian Act on Human Rights Ombudsman prescribes that the ombudsman shall have at least two, but no more than four deputies.
[64] E.g. in Macedonia.

own" deputy. In such cases, the division of deputies among political parties is informal. The position of such "political parties' deputies" is basically dependant on the will of a particular political party rather then on the will of the majority in the parliament, and they will generally tend to be more biased in favour of certain political agendas than those who were proposed solely because of their professional and personal qualities. The main problem here is that such deputies are more concerned with particular interests than with the duties and tasks that the institution was created to fulfil, which may be disastrous for the independence of the institution.

In a "deputy system", the ombudsman is the head of the institution and deputies are subordinate to them. Deputies usually do not have all the authorities vested to the ombudsman.[65] Deputies' powers generally relate to carrying out proceedings, but normally do not include management over the institution, employment of associates and decisions about their status, decisions on the activities of the institution or other deputies, decisions on proceedings upon own initiative, decisions on the use of the budget of the institution, representation of the institution in public, and the like. Some of those authorities the ombudsman may confer to a deputy or to an associate within the institution.

From the point of view of institutional independence, relevant issues include how someone becomes a deputy (who makes proposals for deputies, whether they are elected by the parliament, etc.), what requirements a candidate for deputy must meet, what the relationship between the ombudsman and deputies is, and the legal mechanisms for establishing the deputy's responsibility. Usually it is the ombudsman who proposes candidates for deputies to the parliament. The same concerns that apply to proposals for ombudsman apply here – executive bodies controlled by ombudsman should not have a role in this process. The requirements for deputies are usually essentially the same as those for the election of ombudsman, although some may be less strict – e.g. the previous working experience required for deputies is usually shorter than for ombudsman, the parliamentary majority for election may be lower, etc. – but sometimes no requirements are explicitly prescribed.[66] Sometimes the law prescribes quotas for deputies belonging to certain social groups.[67] It is desirable to precisely define the relationship between the ombudsman and their deputies, as well as the duties and authorities of the latter. It makes it easier to establish if there was an abuse of authority by deputies, and aids in preventing the establishment of a parallel managing and decision-making structure within the institution. Finally, the ombudsman should have the authority to start disciplinary proceedings not only against employees but against deputies as well, at least in cases of severe violations of official duties. If the only means of the ombudsman against illegal, incompetent, or irresponsible work of a deputy is to propose said deputy's dismissal to the parliament and nothing else before such a radical measure, the prospects for the timely prevention of abuses are small.

[65] The dominant managing role of the ombudsman in the institutions with deputies is usually determined by the act that regulates this institution. For instance, the Decision on the Provincial Ombudsman explicitly enumerates the authorities of the ombudsman and three out of five of their deputies; the ombudsman also has an explicit obligation to perform the duties of their deputies in exceptional cases, whereas the deputies, besides enumerated duties and authorities, also perform any other duty upon the ombudsman's decision. Many authorities related to the organization and functioning of the institution, management, etc., which are enumerated in the Decision, are the exclusive authorities of the ombudsman, and others may excercise them only in the scope and duration that were transferred to them by the ombudsman themselves.

[66] E.g. in Slovenia

[67] For instance, the Decision on the Provincial Ombudsman of Vojvodina postulates that at least one deputy must belong to the less represented sex, and at least one of them must be a member of a national minority living in Vojvodina.

3.11 Institution's staff – independence in formation and management

The staff of the institution executes all the necessary tasks and duties. Independence is important in the selection of employees, meaning that no one may unilaterally instate employees or prevent someone from employment in the institution. Normally, the ombudsman has the exclusive authority to decide the number and profiles of employees, to assign them concrete tasks and duties, to decide on their advancement or termination of their employment, and on other issues related to their status in the institution. If some other outside agents decide these issues, they are in the position to effectively influence the institution's work and the carrying out of its functions.

Ambitions of the executive to influence the personal composition, and indirectly the performance of the institution, should not be underestimated.[68] They may lead to a situation where the executive can impose or prevent the employment of candidates in the institution. If the executive can affect the hiring and firing of members of the ombudsman's staff, it can render the independence of the ombudsman institution meaningless.

3.12 Equipping the institution and conditions of work

The issue of equipping the institution is also related to its independence. Namely, for the regular work of any institution, it is necessary to provide adequate offices for the employees, necessary technologies (computers, printers, telephones, furniture, etc.), and adequate conditions for the work with citizens, stationery, and the like. If the institution's budget does not include the means for acquiring the equipment it needs, but the purchase and distribution of equipment is administered by some executive agency, the ombudsman is not autonomous in deciding in these matters. Moreover, if the ombudsman has no representatives in such a body and no criteria for the distribution were set up, the outcome may easily be that the institution lacks the equipment it needs. Although this issue might seem marginal, proper equipping is clearly one of the prerequisites for the institution's normal functioning. This can be used as a way to put indirect pressure on the institution regarding its work and findings. The lack of necessary equipment or office space can even prevent the proper carrying out of routine tasks, preclude the employment of necessary staff, and jeopardize the independence and integrity of the ombudsman (via agencies that decide in these matters).

The location of the institution is not essential for its independence. Still, it is an important issue as to who decides on the location. If this is decided by bodies where the ombudsman has no representatives, particularly if those bodies include representatives of the executive, the ombudsman is clearly not autonomous in this respect. Decision on the location may also be abused to put pressure on institution, for instance through arbitrary relocation, which may seriously and for a long period hinder its normal functioning.[69] In many countries, ombudsmen have their own building and sufficient office space for their staff, but that is not the case everywhere. In some cases, the office space for the institution is rented, which increases the costs related to it.[70]

[68] Such was an attempt of the executive in Vojvodina in 2007/2008 to create a body made of the representatives of the ombudsman and of the executive that would decide on the employment of associates.
[69] This happened in 2006/2007 with the Provincial Ombudsman of Vojvodina.
[70] In most cases, the amount spent to pay the rent over several years could have been used for buying or building new premises for the institution. In addition to this, a negative impact that the increased costs of the institution create

It should be taken into account that the ombudsman should be as accessible to citizens as possible. If the ombudsman's premises are located in sites that are not easily accessible, or if strict security measures in the building create a semi-hostile environment, it may discourage the citizens from addressing the institution. This adversely affects the exercise of the institution's functions.

3.13 Budget of the institution

One of the key elements of the ombudsman's independence is the budget of the institution – its total amount for each year, and the amounts allotted to particular purposes.[71] In the majority of countries, it is explicitly prescribed that the ombudsman has its own budget, separate and independent from the parliament's and government's budget (Kucsko-Stadlmayer, 2006).[72] The budget and its use are generally approved by the parliament.

Independence of the ombudsman in this respect means that the institution is autonomous in proposing its budget, and in using the approved budgetary means. In most countries, it is explicitly prescribed that the ombudsman prepares the budget proposal, which is the most consistent solution from the point of its independence. In some countries the ombudsman submits the budget proposal directly to the parliament[73], although in some cases it is submitted to some other body.[74] In some states the proposal of the budget is the result of negotiations between the ombudsman and the ministry of finances, and a joint proposal is sent to the parliament.[75] The independence of the ombudsman in this respect is particularly respected in Macedonia, where it is prescribed that the parliament holds a separate session to discuss and decide upon the ombudsman's budget. In the Spanish province of Catalonia, a separate parliamentary board deals with issues related to the ombudsman and facilitates the communication between parliament and the ombudsman; it also prepares the proposal of the ombudsman's budget in cooperation with the ombudsman and sends it to the Catalan parliament.

Whether the ombudsman autonomously decides on the use of the approved budget or its use depends on prior consent of some other body (usually the ministry of finances) is also an issue of high importance for the independence of this institution. If the latter is the case, it means that some body other than the ombudsman may refuse to approve certain payments. Such

in public should not be ignored, particularly in times of crisis. Besides, renting the premises periodically requires decisions on new contracts, which may be abused in a similar way as that described.

[71] See the Recommendation of the Parliamentary Assembly of the Council of Europe 1615 (2003) 1, no. 7.vii.

[72] E.g. in Belgium, the Czech Republic, Estonia, Hungary, Ireland, the Russian Federation, Slovakia, etc.

[73] E.g. in Denmark, Slovenia, Ukraine, etc.

[74] E.g. the President of the state (Bosnia-Herzegovina), or to the Minister of finances (Austria and Latvia). The Decision on the Provincial Ombudsman of Vojvodina also prescribes that the ombudsman proposes the amount and structure of the institution's budget, but it is not consistently respected in practice. The proposal of the budget is formally submitted by the ombudsman to the provincial Secretariat for Finances, which conveys it with budget proposals for other provincial bodies and institutions to the Provincial Assembly. In practice, before sending the proposal to the Assembly the Secretariat determines whether, for what purposes, and how much the budget will be increased or reduced. The secretariat also intervenes in the proposal prepared by the ombudsman by decreasing certain segments, some of which are important for the functioning of the institution. Consultations between the ombudsman and the Secretariat for finances are not explicitly ordered by law, so the final proposal sometimes departs from the actual needs of the institution. Except in the first two years of the existence of the Provincial Ombudsman, the employment of new associates was severely obstructed at times when the need to fill the empty posts was pressing, by limiting the budgetary means for that purpose. In the period 2007-2009, the institution was completely denied means for employing new staff members. Thus in the early period of its work, the institution was constantly understaffed and in the six years after its establishment only slightly more than 50% of the prescribed posts were actually filled.

[75] E.g. in Slovenia.

restrictions may be within the authorities of the ministry of finances (e.g. where some payments were intended for purposes other than those approved for), but refusal to make certain payments may also be an instrument of obstruction and pressure, particularly if no adequate controlling mechanisms have been established. In such cases, the ombudsman's independence is merely a declaration.

3.14 Relevant proceedings before the parliament

In developed democratic systems, the ombudsman exercises an intense communication with the parliament, which is necessary to carry out the measures recommended by the ombudsman. The communication occurs for various reasons, initiated by the ombudsman's requests for an authentic interpretation of laws relevant for particular case, by the ombudsman's reports submitted to the parliament, proposals to the parliament regarding modifications of certain legal acts, etc. Cases where the ombudsman's request for authentic interpretation is rejected with an explanation that they are not authorized to ask for it, or where their amendments of certain legal acts are rejected with a similar response indicate not only the lack of understanding of the role of this institution, but also that other relevant legal acts may be contrary to the act on the ombudsman.

In this respect, it is probably most important to regulate the procedure related to their reports to the parliament. Namely, these reports are not suitable to be accepted or rejected in the parliament; the best part of their content is a report on the work of bodies that the ombudsman controls and on the state of human rights, while the account on the ombudsman's activities makes up only a part of them. Voting "for" or "against" the report in the parliament would impose additional questions: whether its rejection is the consequence of deficiencies in the institution's work or whether the assessments and criticisms in the report simply did not please some representatives? Does the rejection of the report by the parliament require the resignation of the ombudsman? Or is it grounds for initiating the procedure for the ombudsman's dismissal? What if the rejection of the ombudsman's report is not explicitly prescribed as a reason to start the removal procedure? Because the possibility of rejecting the ombudsman's report affects its content and, ultimately, the institution's independence, this would foster self-censorship. The effect of such voting may be that certain controversial issues are omitted from reports, or that assessments about the state of human rights or the legality of work of the administration are mitigated and adjusted to the attitudes of the majority in the parliament to avoid the possible negative consequences if the report is rejected. Thus the parliament should open a debate on the ombudsman's report and adopt certain conclusions about the findings and recommendations contained in it. It would be even more effective if the parliament would instruct the administration to analyse the report and take appropriate measures to carry out justified recommendations, or to present arguments for not following them. To make the communication between the ombudsman and the parliament useful, and to facilitate the institution's pursuance of its goals, it is necessary to clearly regulate all the procedures related to the ombudsman's initiatives, reports, and the like, either by the act on the ombudsman or by the house rules of the parliament. The role of this institution must be considered when setting those procedural rules, since regular parliamentary procedures are not adequate for at least some ombudsman motions.

3.15 The social context

In states where democratic institutions are underdeveloped and weak and the principle of rule

of law is just empty rhetoric, it is much more difficult to establish and develop the work of independent institutions (including the ombudsman) than in states with strong democratic traditions and institutions. In the former context, the executive often sees an independent controlling institution such as the ombudsman as an enemy that obstructs its powers and functioning or as an annoying body that imposes idealistic standards regarding respect of law and human rights. In reality, the ombudsman aids in the improvement of administration's performance as a service of citizens, raises the level of enjoyment of human rights, and consequently aids in reaching a higher level of satisfaction of citizens with the government. To secure the independence of this institution, necessary for carrying out its main functions, an adequate position of the ombudsman in the system of state organs is to be secured. That is achieved by legal norms that appropriately regulate its status and relationships with other entities in the concrete system. Loopholes and inconsistencies in relevant legal acts inevitably adversely affect the independence of the ombudsman, and indicate the lack of intention to improve the existing system in the direction of serving the citizens instead of ruling the citizens.

Cases of violations and obstructions of the ombudsman's independence mostly originate from the executive. It often invokes or tries to invoke bylaws enacted by the administration that apply to administrative agencies as applicable to the institution of the ombudsman with the intention of effectively disturbing and limiting its work. Even if there are justified reasons, the executive simply has no authority to regulate through bylaws the issues related to the status, organization, and work of the ombudsman. It may prepare drafts of legal acts that contain provisions relevant for ombudsman, but the parliament is the only body empowered to regulate those issues. Any action of the executive aimed at limiting the ombudsman's independence and integrity is therefore contrary to the law, and represents an illegal attempt to interfere with the work of an independent institution.

4 Conclusions

In most countries, the law explicitly defines the ombudsman as an independent institution. This independence is the foundation of the ombudsman's impartial and legal functioning. Consequently, it is necessary for carrying out the duties and authorities of this institution, and for fulfilling its social functions that normally include control over administrative agencies and the protection of human rights. As a complex characteristic the quality of which depends on multiple factors, the independence may be curbed or violated in various ways, so the regulations dealing with the ombudsman contain provisions aimed at securing its independent status and work. The most frequent and certainly most dangerous for the institution are the violations of its independence committed by executive bodies whose work is the main object of ombudsman's control.

In order to secure the ombudsman's independence, it is judicious to establish adequate mechanisms and measures for strengthening and protecting its various aspects by relevant laws, but that is not sufficient *per se*. The independence of the ombudsman is most frequently violated by actions contrary to law, either by violations of provisions that define the status and role of this institution in the particular state, or by actions that jeopardize or aggravate the institution's efficiency and normal work. Thus independence needs to be fostered in practice by respecting and consistently applying legal provisions that pertain to the status of the ombudsman and provide means for its protection from illegal influences, pressures, and obstructions.

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Roma Integration Policies in Spain

Eugenia Relaño Pastor

1 Introduction

In the last decade there have been an increasing number of political and academic debates on Roma in Europe. Spain has been praised for its exemplary treatment of its Roma population to the point where it has become a model for the European Commission and other European Union countries. As a matter of fact, in 2011 the European Commission adopted an EU Framework for National Roma Integration Strategies focusing on four key areas: education, employment, healthcare, and housing. These were very similar to the comprehensive 'Gitano plans' that were run for several years by some Autonomous Communities in Spain.

However, civil society stakeholders and academic researchers have pointed out the lack of monitoring and evaluation mechanisms in the aforementioned plans (Laparra *et al*., 2014). Despite recent studies having gathered empirical evidence of the policies' concrete effects and best practices for the inclusion of the Gitano minority in Spain, a real discussion between Romani studies researchers and policymakers has yet to be initiated (Piamontese, 2014).

The Spanish Roma population currently numbers approximately 725,000-750,000, per figures that have been used for by European institutions for Europe-wide Roma population estimations (Fundamental Rights Agency [FRA], 2015). Certain caution must nonetheless be observed with respect to these figures, as the real size of the population is not accurately known – there is no exact data available (Ministerio de Sanidad, Política Social e Igualdad, 2011). Since any public authority can certify the ethnic belonging of beneficiaries of Gitano/Roma-specific policies, the Gitano and pro-Gitano third sector organizations are made responsible for verifying "who is Gitano" (Magazzini and Piemontese, 2016, p. 235). The current size of the Romani population is always a controversial subject. Figures vary from a minimum of 453,000 to the calculations provided in the reports of the Applied Sociology and Social Studies Foundation[1], which quotes a total of 970,000 Roma in the 2009-2010 report (Laparra and García, 2011).

The number of Roma people in Spain has increased with the arrival of Roma from Romania and Bulgaria who, due to the lifting of the two countries' visa requirements in 2002, as well as their accession into the EU in 2007, frequently have settled in Spain as their country of destination. The number of Roma people of Romanian and Bulgarian nationalities who, as EU citizens, exercise their right to free circulation and residence in Spain is nonetheless difficult to quantify. This is due to the fact that they are also included in the large contingents of Romanian and Bulgarian citizens who temporarily or permanently residing in Spain. According to the Ministry of Health, Social Services and Equality however, Romanian and Bulgarian Roma citizens living in Spain could be between 50,000 (Ministerio de Sanidad, Servicios Sociales e Igualdad de España, 2012, p. 12) and 170,000 (López Catalán, 2012; Slávkova, 2010). One of the main challenges for Gitano NGOs and for state actors is the incorporation of the "new Roma" in the policy framework for "old Roma" (Gitanos). As Magazzini and Piemontese point out: "There seems to be a general consensus that the policies and programs developed for Spanish Gitanos

[1] Translated from: Fundación de Fomento de Estudios Sociales y Sociología Aplicada (FOESSA)

are not applicable to Roma migrants […] Roma immigrants are perceived to be 'at a previous stage' if compared to local Gitano communities" (Magazzini and Piemontese, 2016, p. 236).

The difference between "old" and "new" Roma minorities tends to create differentiation markers rather than foster empathy, and the Gitano organisations looked at the Roma newcomers as potential competitors. However, when the "Roma issue" became an opportunity for European project funding, the Spanish Gitanos were eager to adopt the terminology "Roma" in order to gain access to funds as new beneficiaries. In fact, progressive incorporation of Roma immigrants in the Spanish policies for Gitanos continues today. Indeed, the Catalonia Comprehensive Plan for Roma incorporated the "new" Roma in the policy framework for "old" Roma. The Plan asserts that Gitanos share common features with other Roma groups in Europe and therefore requires that the Spanish authorities pay special attention to "Roma population originating from other countries", to include them in the measures and actions aimed at Gitanos and, where circumstances allow it, to develop specific measures and actions aimed at promoting their social inclusion (Ministerio de Sanidad, Servicios Sociales e Igualdad de España, 2012a).

2 Twenty Years of Major Changes for the Roma in Spain

Starting with the 1978 Constitution, equal rights were granted to all citizens, opening a period of change for the entire country. This period of change included a democratic and highly decentralised state and the strengthening of structures for social welfare. Since 1985, a series of programmes aimed at the development of Roma have been implemented along with sectoral policies in health, education, housing, employment, social services, etc. The specific social policy, embodied by the Roma Development Programme 1989 in particular and in the plans of several autonomous regions, has been executed by a variety of actors, particularly local entities and non-profit organisations. Between the creation of the Roma Development Programme 1989 (*Programa de Desarrollo Gitano de 1989*) and the National Roma Integration Strategy in Spain 2012-2020 (*Estrategia Nacional para la Inclusión Social de la Población Gitana en España 2012-2020*), there have been more than twenty years of general and specific policies, implemented at various levels of government administration, that have transformed the situation for Roma in Spain.

Before evaluating the impact of the Roma development policies, one must take into consideration the major changes that the Romani population in Spain has undergone since the late 1980s, These changes provide the framework for the specific policies regarding Roma. The main changes have been demographic and socioeconomic.

Demographic change: Starting in the 1970s, Roma began a demographic transition with particular characteristics that had an outstanding impact on Roma: namely reducing infant mortality and increasing life expectancy. The resulting increase in quality of life and stressed importance of hygienic/nutritional conditions caused primarily an increase in the population, with very high birth rates in the 1960s and 1970s, and a later decline in the 1980s that continues to this day. The cause of this reduction was not due to an increase of average maternity age (characteristic of the Spanish population), but because a limited number of children were being born, as contraceptive methods and family planning become important to the majority of the Romani population. In the 1980s and 1990s, the population grew more numerous and younger than previous generations, and an increasing number began to settle in medium to large cities.

The reduction of family size also signalled a major change in the positioning of Romani women. Women did not have to dedicate so many years to maternity, and their health improved as result (Maya, Pernas Riaño, and Santiago, 2012).[2]

Socioeconomic change: The second biggest change is socioeconomic in nature, regarding the particular position and composition of Roma in regards to welfare and income. There are three processes that summarise the socioeconomic change: standardisation, stagnation, and heterogeneity. There have been incomplete and intense processes of administrative standardisation, the right and relocation to social housing, universal education of primary school children, access to the national health system, the possibility of receiving social allowances or benefits for unemployment, old age, illness or poverty. Standardisation has however not prevented Roma in Spain from being the "poorest of the poor", as exclusion still remains a palpable threat for a significant part of the population (Maya, Pernas Riaño, and Santiago 2012, 8). The 1990s brought more possibilities for promotion to many families. However, general data on poverty indicates a trend of stagnation (Laparra, 2007). In 2007, 77 percent of the Romani population was poor as compared to 17 percent in the general population. The Spanish Progress Report 2011, Decade of Roma Inclusion 2005-2015, states that:

> […] there is currently no data available that allows mid-term quantitative targets to be set in order to reduce the risk of poverty and social exclusion of the Roma. However, the National Strategy aims to incorporate indicators in its follow up with regard to relative poverty, material deprivation and intensity of household employment, in line with the European 2020 Strategy and the National Reform Programme. (Secretaria de Estado de Servicios Sociales e Igualdad, 2011, p. 2)

Regarding the heterogeneity of the Roma, data on employment, income, and education are very different throughout the different regions of Spain. Consequently, a map of the indicators for material wellbeing or educational promotion does not necessarily coincide with indicators that express social openness or integration. Whereas the employment, education, and income indicators in the Northeast are better, Roma also appear more closed within their own communities. Conversely, although unemployment rates and material deprivation in the South (Andalusia and Murcia) are higher, social openness seems to be well developed. Another source of diversity is gender and generation. The impacts of education, demographic changes, information technologies, and urban life have driven cultural changes among the younger Romani population, as well as women (Maya, Pernas Riaño, and Santiago, 2012, p. 8).

The general framework of the last 20 years has been the democratisation of the state, the strengthening of civil society, and a series of requests for participation from institutions that defend rights of Romani interests to others concerned with the equality of citizens. In spite of these advances, social rejection and discrimination, interethnic conflicts, and institutional segregation still persist in terms of unemployment, substandard housing, high rates of school failure and dropout, and a lower life expectancy compared to the rest of the population (Ministerio de Sanidad Servicios Sociales e Igualdad de España, 2012).

National surveys consistently demonstrate that Roma are the most rejected group in Spain, indeed more so than any other minority. Forty percent of the population would be disturbed if

[2] The average number of children per family is 3.18, as compared to 1.94 in the general Spanish population. Half of the population is under 25 years old, and 33 percent are under 16 years old. It is important to note that women outnumber men, demonstrating an improvement in female life expectancy and an approximation of general mortality patterns, See: Maya, Pernas Riaño, and Santiago (2012)

they had a Romani neighbour, and 25 percent would not allow their children to attend school with Romani children (Fundación Secretariado Gitano [FSG] 2012, p. 39). Moreover, there is an underlying layer of discrimination noticeable in the portrayal of Roma in the media, which contributes to the social prejudices against the Roma population (FSG, 2015b). Therefore, social rejection and discrimination against Roma remain, although their forms have changed. In 70 percent of the cases, Romani women experienced discrimination and the Internet appeared as a new space for discrimination and racism. The main areas of discrimination are social exchange in public, commercial or recreational spaces, political treatment, and access to employment or housing. Social conflict seems to have decreased today but in reality, it has only changed its face. It has become individual, fragmented. Finally, another disturbing phenomenon is the "institutional ghettos": the "Roma" neighbourhoods, the results of hasty re-housing plans; schools with a majority Romani population and the stigmatisation of the support Roma receive from the different administrations that could lead to controversial institutional dependency.

3 Main Public Policies: from Universal to Specific Policies

Data confirms that the cornerstone of progress in improving the living conditions of Spanish Roma has been the universal and inclusive character of the system of Spanish services and welfare, especially the universalization of the health system, public education, social housing, and other income and social policies (Secretaria de Estado de Servicios Sociales e Igualdad, 2011). There are special elements of the universal policies that have a particularly positive effect on Roma (and other groups): free books and scholarships to help Romani children attending school and a systematic monitoring of vaccination programmes (the healthcare programme 'Healthy Child).

The specific institutional support for the Roma at the state level has been given mainly by the administrative unit Roma Development Program (*Programa de Desarrollo Gitano*), launched in 1989, that is attached to the general Direction of Services to Family and Children, that in turn depends on the Ministry of Health, Social Services and Equality. The Spanish Parliament approved the first National Plan for Roma Development in 1985. Since then, the central Government passed a number of Action Plans and established consultative bodies for Gitano population, although regional governments have handled most of the policies. From the 90s onwards, various Autonomous Communities in Spain have been implementing comprehensive Roma Plans, assigning funds and anticipating many features of the European Strategy on Roma Inclusion. The great success of the 1989 Roma Development Programme was its existence: having a specific policy expresses a message of public support, puts Roma issues on the agenda, and strengthens the institutional presence of their organisations. However, the 1989 Roma Development Programme has limited financing and lacks a clear focus and strategy. (Maya, Pernas Riaño, and Santiago, 2012)

The National Roma Integration Strategy in Spain 2012-2020, which replaces the 1989 Roma Development Programme, was designed to be more participatory, with an important role played by the National Roma Council and its committees in different areas. However, its application was hindered by the same weaknesses: the lack of its own funding, decentralisation, and a lack of consensus between the autonomous regions who are responsible for implementing policies. The National Roma Integration Strategy lays the roadmap for public policies in the area of the social inclusion of Roma. In setting policies focused on the gradual elimination of poverty and

social exclusion among marginalised Roma communities (in particular in the areas of education, employment, health and housing), the strategy recognises the importance of developing local action plans that reflect the needs of individual communities. The priority areas of the Strategy are education, employment, health, and housing, which have quantitative objectives to be met by 2020. In 2012, this National Strategy coexisted with the Action Plan for the Development of the Roma Population 2010-2012 (Ministerio de Sanidad Servicios Sociales e Igualdad de España, 2012).

There have been some additional general programs that impacted Roma integration, such as:

1. The *National Reform Programme* (NRP), which proposes a series of measures in various areas that directly contribute to the social inclusion of disadvantaged Roma: education measures, employment measures, poverty reduction, and social inclusion measures (Secretaria de Estado de Servicios Sociales e Igualdad, p. 3).
2. The *2020 Strategic Framework for European Cooperation and Training*, which established four targets: make lifelong learning and mobility a reality; improve the quality and efficiency of education and training; promote equality, social cohesion and active citizenship; and strengthen creativity and innovation, including an entrepreneurial spirit at all education and training levels.
3. The *Spanish Employment Strategy 2012-2014*, which establishes targets coherent with the Europe 2020 Strategy and the commitments undertaken by Spain in its National Reform Programme.
4. *National Health Equality* Strategy, which focuses mainly on the promotion and development of inter-sector knowledge and tools to strive towards “Health and Equality in all policies”. It also offers a comprehensive support plan for infant and adolescent health, attempting to achieve equal development opportunities for all children, regardless of the status of their parents.
5. The *State Housing and Rehabilitation Plan 2009-2012*, which is still in force, includes in its main targets to “contribute, together with other administrations, to the eradication of sub-standard housing and slums”.
6. The *II Strategic Citizenship and Integration Plan 2011-2014,* which aims at integrating foreign nationals, including channels and measures of interest for Roma such as those concerning co-inhabitancy, equal treatment, non-discrimination and participation.
7. The *National Integral Strategy against Racism, Racial Discrimination and Xenophobia and Other Types of Intolerance*, approved in November 2011, which partially dedicates its analysis to a section on the racism suffered by the Roma.

4 Regional Plans

The administrative decentralization to the Autonomous Regions resulted in a variety of “Integration Strategies for Gitanos” applied in Spain. However, it is possible to distinguish some common elements, (Piemontese, 2014, p. 5) namely: (1) the formal recognition of the Gitanos as an integral part of regional societies and cultures; (2) the support to Roma-targeted initiatives; (3) the consideration of Gitano participation as a core element of the policies and programs to be developed; and a (4) comprehensive approach as the best response of public administrations to address Gitano exclusion. As Piemontese (2014) states:

> It is not surprising that Spain stood out as a remarkable and positive example when in 2011 the European Commission called upon all Member States to develop

> National Strategies for Roma Integration. According to a comparative study carried out by the European Roma Policy Coalition (2012) not only did the Spanish strategy incorporate the 10 Common Basic Principles on Roma Inclusion (Council of Europe 2011) in a satisfactory manner, but the exemplarity of the Spanish strategy appeared to be based upon evidence and 'lessons learnt' from previous experiences. (p. 5)

Six autonomous regions have approved specific plans for the integration of Roma:

1. **The Andalusia Comprehensive Plan forRoma** 1997-2000 (*Plan Integral para la Comunidad Gitana de Andalucía 1997-2000*) was the first plan developed and approved at the regional level. It shares the objectives of the 1989 Roma Development Plan.
2. In Catalonia, two plans were approved: **the Catalonia Comprehensive Plan for Roma 2002-2008** (*Plan Integral del Pueblo Gitano en Cataluña para el periodo 2002-2008*) and its added two versions in 2009-2013 and 2014-2016. The first plan identifies 11 priority areas: culture and identity, family, housing, education, employment, health, participation in social life, language, media, justice, and safety. The second plan widens the areas of action to also include social action and citizenship, women and gender politics, recreation, youth, participation, linguistic policy, rehabilitation of neighbourhoods and historic centres, and sustainability. The second plan was recognised as a good practice by the European Agency for Fundamental Rights before it was implemented, and it is the only plan that contained specific measures for immigrant Roma (FRA, 2009, p. 68).
3. In the Basque Country, two plans were also approved: **the Basque Plan for the Comprehensive Promotion and Social Participation of Roma 2004-2007** (*El Plan Vasco para la Promoción Integral y Participación Social del Pueblo Gitano del periodo 2004-2008*) and its 2008-2011 version. The second plan contains a specific section on the lessons learned from the experience of the first plan. This section includes a clearer definition of their activities, more participation of Romani organisations, methods and the adjustment of objectives, and actions to the period, resources, actual capacity of agents. It also assigns concrete specific responsibilities and guarantees specific budgets for the first year of the plan's implementation by government departments and public administrations. It is the only plan that includes preventive actions and interventions for Romani women who are victims of violence.
4. **The Extremadura Plan for the Promotion and Participation of Roma 2007-2012** (*Plan Extremeño para la Promoción y la Participación del Pueblo Gitano 2007-2012*) includes a series of specific objectives in the fields of education, housing, and employment.
5. **The Navarra Comprehensive Plan for the Care of Roma 2011-2014** (*Plan Integral de Atención a la Población Gitana de Navarra 2011-2014*) includes actions in the following areas: education, housing, employment, health, social services, youth and equality, associations, social image, and culture. Although it mentions the increase of the immigrant Roma population, it does not mention specific actions for this group.
6. **The Rioja Comprehensive Plan for Roma Population 2015-2018**.

As has been mentioned above, the Spanish administrative framework is characterised by the high level of decentralisation that has occurred in the last 30 years. Autonomous governments are well-equipped in key areas for social inclusion of the most disadvantaged groups, such as in education, healthcare, and social services. Local entities are also well-prepared in terms of citizens' safety, housing, social services management, and cultural activities, with some being

shared by all three administrative levels. It is therefore essential to have close cooperation between the different levels of administration in order to join efforts and resources for social intervention projects directed towards improving living conditions of the most disadvantaged Roma communities and promoting their social development[3]. Many regional governments have reported coordination mechanisms across different departments and areas. In many other regions there are also specific departments responsible for Roma policies that put dissemination and communication tools into place.

It is worthwhile to highlight initiatives carried out by several regions in different areas:

1. **Education:** Andalusia, Asturias, Castile and Leon, Catalonia, Galicia, La Rioja, Murcia, Melilla, and Basque Country have been implementing specific programs to prevent early school dropout.
2. **Housing**: Andalusia, Catalonia, and Madrid have included measures aimed at eradicating shantytowns via rehousing activities in their European Social and Integration Funds regional programmes.
3. **Employment**: most regions have prioritized investment in active inclusion and will implement measures aimed at promoting labour inclusion among vulnerable groups such as Roma.
4. **Health:** Andalusia, Aragon, Asturias, Cantabria, Extremadura, La Rioja, Madrid, Navarra, Basque Country, and Valencia have foreseen specific measures with the aim of improving the health of Roma. For example, Andalusia has implemented a specific *Health Programme for Roma Women* with successful results.

5 Education

One of the key areas in any strategy for the social inclusion of the Roma is education. In December 2011, the European Parliament supported the implementation of successful educational actions contained in the European INCLUD-ED project after intensive research and analysis of all educational systems in the European Union.[2] It examined which educational strategies help to overcome inequalities and promote social cohesion and which generate social exclusion, paying special attention to vulnerable or disadvantaged groups. In addition, the Ministry of Education, Culture and Sport also promotes the implementation of successful educational actions in schools with the aim of increasing the educational attainment of Roma students (MECD, 2011). According to Ministry figures (MECD, 2013), during the 2012-2013 school year, 64.4 percent of Roma men and women aged 16 to 24 did not successfully complete lower secondary education in Spain. Only 3.4 percent of Roma attained upper secondary education in the same period, and the early school dropout rate stood at 63.7 percent of young Roma aged 18 to 24 (MECD, 2013).

It cannot be denied that important advances have been made regarding the level of education among Roma over the past thirty years. Currently, 94 percent of Roma have been educated, although the serious problems of absenteeism, academic failure, and dropout still remain. The

[3] Some regions report having coordination mechanisms with local authorities in different formats also: consultation councils, *ad hoc* committees, etc. (e.g. Andalusia, Aragon, Castile-La Mancha, Catalonia, Extremadura, Galicia, La Rioja, Murcia). In some cases, this is linked to the financial support that some regions give to local authorities to assist them in the local implementation of Roma inclusion measures (e.g. Andalusia, Aragon, Asturias, Castile-La Mancha, Murcia).

[2] See more in Flecha (2015)

near-total education of Roma children in early childhood and primary education has taken place over the last two decades. Despite the progress achieved, Romani students experience excessive absenteeism and higher rates of academic failure in comparison to their generational peers. Access to secondary education is also lower than among the non-Roma population, aggravated by widespread dropout rates before reaching this stage of compulsory education. Secondary education seems to be the educational glass ceiling for Roma, as less than a quarter has completed secondary level studies (22.2 percent, according to the CIS). With regard to higher education, there are still few Roma who have earned college degrees. An estimated 200 Roma have university degrees. According to the CIS study, only 1.6 percent of Roma over the age of 20 continue their studies, and there is no data on this group that allows us to see what they are studying.

This situation also has a strong gender component. Among children who go on to secondary studies, 60.7 percent are males while 39.3 percent are female, indicating a high dropout rate among Romani girls in the transition from primary to secondary school. However, according to the reports issued by the FSG, Romani girls and youth who reach secondary studies finish it in a greater number than their male counterparts (FSG, 2015a).

The clear progress in access to education among Roma over the last thirty years should be noted. Despite this, most people interviewed and educational experts continue to have a "feeling" that there has been stagnation, if not a decline, in the education of Roma over the last few years (Maya, Pernas Riaño, and Santiago, 2012, p. 18). The access to the educational system among Roma in general has been delayed and the situation of exclusion and discrimination of Roma both had a crucial influence on the current levels of education. There are also other factors to consider that have influenced the level of education: the lack of specific training to serve Romani students in schools, the lack of references to Romani culture in textbooks, the neighbourhoods in which they live, the family´s income, and the parents' education.

6 Employment

In terms of employment and economic activity, the situation of Roma people in Spain is broadly characterised by a high activity rate, which contradicts the established stereotype about their lack of labour potential. "Roma people have always worked and have done so from a very young to a very old age, which remains unnoticed due to their relatively low contracted employment rate, this situation is often considerably under-represented." (FSG, 2012, p. 6).

In accordance with recent studies that have compared the Roma labour situation to that of the Spanish population as a whole, the most significant difference can be found in relation to salaried workers compared to the mostly self-employed Roma, as well as in the high proportion of persons working in a family, set against the relatively inexistent rate of this in the rest of the population. Furthermore, aspects such as unemployment and seasonal and part-time work affect Roma women more than non-Roma women and even Roma men (Maya, Pernas Riaño, and Santiago, 2012).

One of the major difficulties is the level of education, despite all of the efforts of the system and the Roma themselves: in 2005, seven out of ten Roma adults over the age of 15 were absolutely or functionally illiterate. The overall level of qualification remains low: the majority of the

population has a primary education, which leads to low-paid and less stable employment, which tend to be the first jobs destroyed by economic crises.[4]

Data confirms that the fundamental economic activity of the Romani population is still peddling**.** Peddling has been a positive element in improving the economic conditions of Roma between 1980 and 2000 (Rodríguez Cabrera, 2009). The 1985 peddling regulation regarding access to social security through cooperatives or freelance associations allowed for expansion and stability in this sector. Peddling has also served as a sector for the less educated population, for whom it is difficult to find employment in other fields.

The non-profit organisation *Fundación Secretariado Gitano* has been playing a key role in the social and labour integration of Roma people as an intermediate body between administration and Roma communities. Implementation through a non-governmental organisation as an intermediate body has proven to be crucial for the efficient and effective management of EU funding. The foundation helps with the operational and long-term partnerships established with private companies, the flexibility and adaptation of the programme to new social needs, and the implementation of social innovation projects. ACCEDER, for example, is one of the most referenced employment programmes in Europe: it runs in a network of centres distributed across the country, dedicated to serving Roma and non-Roma (more or less a third), which provides itineraries for employment based on guidance, training, and intermediation. These itineraries are based on labour market prospects and rely on efforts to raise awareness among employers, intermediation with companies including collaboration agreements, and social work that goes beyond guidance, as it involves combating prejudice and the substantial task of motivating Roma themselves. The results of this programme are known, as in this case data and evaluations exist: the programme served 35,000 people during its first period (until 2007), of which approximately one third found employment (FSG, 2015c).

In order to evaluate these and other programmes, it is necessary to take into account that the current policies do not directly generate employment for the Roma population. Most policies serve to bring the labour market closer to a population that has been far removed from it, mediating between agents and reducing prejudice and discrimination. Employment programmes are often a substitute for “natural” social networks that other citizens enjoy and are, in this aspect, essential to disadvantaged groups. The most important results have been produced by raising social awareness, changing the attitudes of many Romani families regarding employment (among young women, in particular) and in the diffusion of different experiences and innovative projects.

7 Health Policy

The universalization of health as a right of citizens via the implementation of the National Health System is a landmark that explains the health integration of the Roma and the significant improvement in their health (General Law on Health 14/1986). The principal source of information on differences in health is the survey performed in 2006 among Romani households, using the questionnaire of the National Health Surveys that provided, for the first time, a national, complete, and comparable panorama of the health status of Roma in Spain (Ministerio

[4] A third of Roma between 25 and 35 did not have any education. These figures improved in 2011: people without education had reduced eight points, to six out of ten without education among adults over the age of 15.

de Sanidad y Fundacion del Secretarido Gitano, 2005).

The most significant differences occur in perception of health: up to 35 years, this perception is similar to that of the general population, however the differences multiply after this age. Only 10 percent of Roma older than 55 state that they are in good or very good health, as compared to 38 percent in the general population and 32 percent in the poorest social group. Among Roma men, this figure is 33 percent, as compared to 52 percent of Spanish men in general. With regard to chronic illness, there is a higher percentage of diagnoses of asthma, ulcers, allergies, migraines and high cholesterol among Roma. There is a 17 percent prevalence rate of depression among Romani women, as compared to 7 percent overall (Maya, Pernas Riaño, and Santiago, 2012, p. 27).

The most important factors that explain these inequalities are linked to poverty and social inclusion: difficulties related to housing, education, employment, social image, discrimination and/or lack of access to social resources and goods. There are also factors related to culture, such as the Roman population's perception of disease and death, which can have a negative effect on preventive practices and behaviours, as well as following treatments. With regard to women, their position in the family, overload of work, and energy spent caring for others negatively affect their health. The third factor relates to the difficulties of the health system itself in adapting to social or cultural diversity, which is considered another element that adversely affects health equality.

Many positive actions have failed. However there have been three successful local plans: the 18,000 Plan in Vallecas (2000), the Project RIU in Valencia (2006) and the Navarra Comprehensive Plan for the Care of Roma 2011-2014. These plans have a "bottom-up" methodology: natural leaders from the neighbourhood are selected and trained to be healthcare agents, leading awareness raising and training activities in their environments. The local projects have offered some lessons: (1) the basic element for improving health is the rapprochement of the system to the people and their participation through health promotion. This entails empowering residents in vulnerable neighbourhoods to understand and use their own resources and those of the system; (2) projects must be grassroots, understand the territory, and provide information and training to local actors, individuals, and associations. This can be a fundamental element of cohesion and diffusion of good practices, as well as empowerment; (3) Health systems must learn to work in a across sectors**,** relying more on the abilities of users and building upon existing resources and assets, not just upon problems and risks.

8 Housing

According to the Action Plan for Roma Development 2010-2012 (Ministry of Health, Social Policy and Equality, 2011), problems in the field of housing are as follows: the persistence of slums and substandard housing, the concentration of the Romani population, and discrimination in access to rental housing. In addition, the Plan recognised the following exclusion factors in this area: insufficient resources for accessing housing, difficulty in financing real situations based on official requirements, the persistence of poor housing conditions, location in segregated and degraded urban areas without facilities and services, and social prejudice in the open housing market. The lack of access to adequate housing perpetuates the cycle of

exclusion, making it very difficult for families in this situation to gain employment access and achieve the same level of health and education as the general population. These processes of exclusion are more pronounced among immigrant Roma, who face an intersectional prejudice as both Roma and immigrants.

Housing is one of the fields with the most quantitative data, thanks to two studies performed by the FSG in 1991 and 2007 (FSG, 2007). This research indicates that over the last two decades the situation has improved significantly, with a reduction in the percentage of Roma living in precarious housing from 31 percent to 11.7 percent. This percentage includes people living in very deteriorated conditions (6.8 percent), shacks and caves (3.9 percent), prefabricated or transitional housing (0.5 percent), mobile homes or caravans (0.3 percent) and buildings that were not intended to serve as residences. In addition, 5 percent live in segregated environments. Comparing the results of both studies, we can see that the share of the Romani population living in slums has dropped from 10 percent in 1991 to 3.9 percent in 2007 (FSG, 2007).[5] Later on, the National Roma Integration Strategy in Spain 2012-2020 (Ministerio de Sanidad Servicios Sociales e Igualdad de España, 2012) narrowed down its objectives in the field of housing to eradicating slums and substandard housing, as well as improving the quality of housing for Roma. The positive aspect of this strategy is that it has set specific goals to be met by 2020.[6]

Many regional initiatives generally aim to improve the environment through the rehabilitation of deteriorated areas or to relocate the slum population or those living in substandard housing. Some examples are the Comprehensive Plan of the South Polygon in Seville (*Plan Integral del Polígono Sur en Sevilla)* and the Rental Housing Programme for Social Integration in Navarra (*Programa de Vivienda de Alquiler de Integración Social/VAIS*). VAIS is a good programme as it offers highly subsidized housing to families in situations of exclusion (many of them Roma). As a result, many families have access to any residential area that they desire, which has had an impact on accelerated residential integration.

Finally, a percentage of the Romani population can also access the housing market on their own, without financial support, but face the barrier of discrimination. The FSG reports detail cases in which people of Romani ethnicity were unable to rent apartments or were harassed by neighbours and authorities to not move to certain areas. Nonetheless, initiatives to combat this type of discrimination in Spain (despite the fact that the legal and institutional instruments are adequate) are practically non-existent. (Maya, Pernas Riaño, and Santiago, 2012)

9 Participation at Regional and Local Level

The EU Framework for National Roma Integration Strategies (NRIS) was adopted in 2011 and calls on Member States to draft their own NRIS. Continuous monitoring and evaluation of the

[5] While less than 1 percent of the majority population lives in housing lacking basic services (such as running water, pipes or electricity), this percentage rises to 8.5 percent for Spanish citizens of Romani ethnicity.

[6] Goals for 2020 include: reduce the percentage of Romani households living in slums from 3.9 percent to 0.5 percent; reduce the percentage of Romani households living in substandard housing from 7.8 percent to 3 percent; reduce the percentage of Romani households with lack of basic facilities from 8.5 percent to 2.1 percent; reduce the percentage of Romani households with humidity problems from 47.5 percent to 35 percent; reduce the percentage of Romani households with lack of urban facilities from 19.5 percent to 10 percent; reduce the percentage of Romani households with overcrowding problems from 29.4 percent to 20 percent. (Ministerio de Sanidad Servicios Sociales e Igualdad de España, 2012)

implementation of NRIS have demonstrated that, in many cases, the national strategies are lacking implementation at the local level. More and more EU institutions have expressed their opinion that NRIS should work at the local level. As a response, a guide was launched that provides practical information on how to achieve the respective national Roma integration targets at local levels by applying ESI Funds (EU Roma Network 2014).

Local institutions play a crucial role in the implementation of Roma integration and participation, as they are the ones dealing directly with Roma issues. An effective implementation of a national policy at the local level implies specific and concrete measures as well as the active participation of the local institutions and stakeholders. Dialogue with Roma civil society is a key aspect in that regard. The need for the better participation of Roma NGOs and Roma individuals was highlighted both in the Spanish NRIS and in its Operational Plan 2014-2016. Since 2012, progress has been made especially on supporting the involvement of Roma civil society in the policy cycle (planning, implementation and monitoring) at the national level. In addition, the Roma National Council (CEPG) receives active support from the Ministry of Health, Social Services and Equality. The main Roma civil society organisations are represented in this Council, allowing for very active participation in the policy cycle.

It is worth highlighting that strengthening the dialogue with regional and local authorities is very important to improving their dialogue mechanisms with Roma civil society. Several regions have specific dialogue mechanisms through which Roma civil society can become more involved in the planning, implementation, and monitoring of regional and local politics (e.g. Andalusia, Aragon, Asturias, Basque Country, Castile La Mancha, Castile and Leon, Catalonia, Extremadura, Galicia, Murcia, Melilla). Their collaboration in disseminating the objectives of the Strategy and Operational Plan has been key to raising awareness of its contents and activities among Roma population and other key stakeholders.

10 Discrimination

According to all opinion surveys, Roma are one of the least valued social groups. As the CIS (*Centro de Investigaciones Sociologicas*) barometer from November 2005 found, one in every four Spanish citizens would not want their children to share the classroom with Romani students and over 40 percent of Spanish citizens would feel very or somewhat disturbed if they had Romani neighbours (Centro de Investigaciones Sociologicas, 2005). The majority of Roma people live and interact on a daily basis with non-Roma people in the social arena, and this interaction is probably stronger than in any other European country. However, the *Fundación Secretariado Gitano* (FSG)'s Discrimination and the Romani Community (*Discriminación y Comunidad Gitana*) reports have collected numerous complaints of discrimination in the fields of employment, housing, health, healthcare services, goods and general services, justice, police, and the media (FSG, 2015).

Discriminatory attitudes towards Roma seem to still be alive in broad sectors of the population. In surveys performed by the FSG, 45.4 percent of people interviewed by the Roma Employment and Population Study (*Estudio Población Gitana y Empleo*) said they had felt discriminated against at some point in the employment process. This ratio implies that approximately 215,000 Roma have directly suffered from discrimination during the job search or in the workplace (FSG, 2011). In particular, the groups who feel the effects of discrimination are: young men in the

workplace or seeking work (60 percent); 19 percent of youth between ages 16 and 19, where they study or studied; unemployed Roma (83 percent); 63 percent of unskilled workers, where they work or while seeking work; and 78 percent of those who have sought work in the past four weeks, either during the job search or in their former occupation.

To date, there is no comprehensive or specific strategy for equality and non-discrimination for Roma communities. Although there is not an official statistical data on acts of racism or discrimination, nor the application of legal provisions in any areas to combat discrimination, the Council for the Promotion of Equal Treatment and Non-Discrimination of Persons for Racial or Ethnic Origin (*Consejo para la promoción de la igualdad de trato y no discriminación de las personas por el origen racial o étnico*) and the Network of Assistance to Victims of Discrimination are both very relevant to implementing the legislation concerning non-discrimination, anti-racism, and hate crimes in regards to the Roma population. On 15 March 2012, the Network of Assistance to Victims of Discrimination set up a coordinated service to assist discrimination victims, the Assistance Service for Victims or Racial or Ethnic Discrimination, which is coordinated by the FSG and run by seven social entities that specialise in combating racial and ethnic discrimination and are members of the Council committees (ACCEM, CEPAIM, Red Acoge, Movimiento contra la Intolerancia, MPDL, Spanish Red Cross and the FSG). This service provides specialist assistance at the state level to victims of discrimination.

11 Concluding Remarks

Roma have experienced major progress since the 1980s. The processes of change have lead to a “normalisation in poverty” for a large majority of the population, although there are Roma in sectors of the population that are more promoted and others. However, Roma have remained the poorest group. They remained the most rejected group in surveys on racism. They also suffer from the least advantageous situations in statistics on health, employment, and education.

The 2020 National Strategy has clear and relevant objectives. However, it is at risk of lacking a realistic analysis of the capacity for implementation. It is worth studying the possibility of decreasing the number of measures and to instead emphasise higher quality implementation. In order to do so, it is very important to rely on local “strategic partners” (local NGOs, experts, networks, etc.) who could teach about their own experiences and necessities.

Local interventions promoting the integration of Roma are to the benefit of all citizens and are therefore vital to breaking the inter-generational prevalence of poverty and exclusion among Roma and to unleashing the energies of Roma youth to generate new sources of growth. State, regional, and local actors should:

(1) Increase embeddedness of projects at the local level through close cooperation with local “strategic partners”. Projects implemented locally should rely on local resources (experience, networks, know-how, expertise, infrastructure, etc.) in planning, implementation, and evaluation.
(2) Strive for empowerment and capacity-building, rather than merely providing services.
(3) Bring more transparency to the decision-making processes and increase the accountability of the departments.

(4) Design strategies for dissemination and divulgation of the project among all potential beneficiaries and social agents.
(5) Foster communication with local agents and both public and private entities bilaterally. Consequently, human and financial resources should be provided as a result of a negotiation.

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