

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

# POLICY DEPARTMENT **C**

## CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Constitutional Affairs

Justice, Freedom and Security

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# TOWARDS A COMPREHENSIVE EU PROTECTION SYSTEM FOR MINORITIES

STUDY FOR THE LIBE COMMITTEE





**DIRECTORATE-GENERAL FOR INTERNAL POLICIES**  
**POLICY DEPARTMENT FOR CITIZENS' RIGHTS AND**  
**CONSTITUTIONAL AFFAIRS**

**CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS**

**TOWARDS A COMPREHENSIVE EU**  
**PROTECTION SYSTEM FOR MINORITIES**

**STUDY**

**Abstract**

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, examines the added value of developing a democratic rule of law and fundamental rights-based approach to the protection of minorities in the EU legal system, from an 'intersectional' viewpoint. It presents the state of play regarding the main challenges characterising the protection of ethnic, religious and linguistic minorities in a selection of 11 European countries, in light of existing international and regional legal standards. Minority protection has been an EU priority in enlargement processes as a conditional criterion for candidate countries to accede to the Union. Yet a similar scrutiny mechanism is lacking after accession. The study puts forward several policy options to address this gap. It suggests specific ways in which a Union Pact for democracy, the rule of law and fundamental rights, could help to ensure a comprehensive EU approach to minority protection.

## **ABOUT THE PUBLICATION**

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## LIST OF ABBREVIATIONS

|                        |   |
|------------------------|---|
| <b>ACFC</b>            | Advisory Committee on the Framework Convention for the Protection of National Minorities (CoE)  |
| <b>AFSJ</b>            | Area of freedom, security and justice   |
| <b>CAT</b>             | UN Convention against Torture   |
| <b>CAT Committee</b>   | Committee against Torture (UN)  |
| <b>CCPR</b>            | UN Human Rights Committee (Treaty body of the ICCPR, not to be confused with the <i>HRC, which stands for the UN Human Rights Council</i> ) |
| <b>CEDAW</b>           | UN Convention on the Elimination of All forms of Discrimination Against Women   |
| <b>CEDAW Committee</b> | Committee on the Elimination of All Forms of Discrimination Against Women (UN)  |
| <b>CERD</b>            | Committee on Elimination of Racial Discrimination (UN) (Treaty body of ICERD)   |
| <b>CESCR</b>           | UN Committee on Economic, Social and Cultural Rights (Treaty Body of the ICESCR)  |
| <b>CJEU</b>            | Court of Justice of the European Union  |
| <b>CoE</b>             | Council of Europe   |
| <b>CPT</b>             | European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (CoE)                               |
| <b>CRPD</b>            | UN Convention on the Rights of Persons with Disabilities  |
| <b>CRPD Committee</b>  | Committee on the Rights of Persons with Disabilities (UN)   |
| <b>CRC</b>             | UN Convention for the Rights of the Child   |
| <b>CRC Committee</b>   | Committee for the Rights of the Child (UN)  |
| <b>DG</b>              | Directorate-general   |
| <b>DG HOME</b>         | DG Migration and Home Affairs   |
| <b>DG JUST</b>         | DG Justice and Consumers  |
| <b>DRF</b>             | Democracy, the Rule of law and Fundamental rights (EU Pact)   |
| <b>EACEA</b>           | Education, Audiovisual and Culture Executive Agency (EU)  |
| <b>ECHR</b>            | European Convention on Human Rights (CoE)   |
| <b>ECOSOC</b>          | UN Economic and Social Council  |



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|                |  |
|----------------|--|
| <b>ECRI</b>    | European Commission Against Racism and Intolerance (CoE)                           |
| <b>ECRML</b>   | European Charter for Regional or Minority Languages (CoE)                          |
| <b>ECSR</b>    | European Committee of Social Rights (CoE)  |
| <b>ECtHR</b>   | European Court of Human Rights (CoE)   |
| <b>EESC</b>    | European Economic and Social Committee (EU)  |
| <b>EP</b>      | European Parliament  |
| <b>Equinet</b> | European Network of Equality Bodies  |
| <b>EU</b>      | European Union   |
| <b>FCNM</b>    | Framework Convention on the Protection of National Minorities (CoE)                |
| <b>FRA</b>     | Fundamental Rights Agency of the EU  |
| <b>FRCh</b>    | Charter of Fundamental Rights of the EU  |
| <b>HCNM</b>    | High Commissioner on National Minorities (OSCE)                                    |
| <b>HRC</b>     | UN Human Rights Council  |
| <b>ICCPR</b>   | International Covenant on Civil and Political Rights (UN)                          |
| <b>ICERD</b>   | International Convention on Elimination of All forms of Racial Discrimination (UN) |
| <b>ICESCR</b>  | International Covenant on Economic, Social and Cultural Rights (UN)                |
| <b>LIBE</b>    | EP Committee for Civil Liberties, Justice and Home Affairs                         |
| <b>MRG</b>     | Minority Rights Group International  |
| <b>ODHIR</b>   | Office for Democratic Institutions and Human Rights (OSCE)                         |
| <b>OHCHR</b>   | UN Office of the High Commissioner on Human Rights                                 |
| <b>OSCE</b>    | Organization for Security and Co-operation in Europe                               |
| <b>RESC</b>    | Revised European Social Charter  |
| <b>TANDIS</b>  | Tolerance and Non-Discrimination Information System (OSCE)                         |
| <b>TEU</b>     | Treaty on European Union   |
| <b>TFEU</b>    | Treaty on the Functioning of the European Union                                    |
| <b>UDHR</b>    | Universal Declaration of Human Rights  |
| <b>UN</b>      | United Nations   |
| <b>UNESCO</b>  | UN Educational, Scientific and Cultural Organisation                               |
| <b>UNHCR</b>   | UN High Commissioner for Refugees  |
| <b>UPR</b>     | UN Universal Periodic Review   |

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## EXECUTIVE SUMMARY

*<...> European countries – both individually and collectively – will have to step up and make their voices heard more forcefully on human rights issues within broader Europe, but also in the rest of the world. The only way that voice will have credibility and impact is if Europe brings its own human rights house in order and insists on better compliance with the standards <...>*

Nils Muižnieks,  
Commissioner for Human Rights, Council of Europe  
In the “Foreword” of the Annual activity report 2016

This study examines the opportunities and **added value of developing a democratic rule of law and fundamental rights-based approach to the protection of minorities in the EU legal system, from an ‘intersectional’ viewpoint.** It presents the state of play regarding the main challenges and gaps characterising the protection of ethnic,<sup>1</sup> religious and linguistic minorities in a selection of 11 European countries, in light of existing international and regional legal standards as well as monitoring actors and instruments. The countries covered are **Estonia, Finland, France, Greece, Hungary, Italy, Romania, Serbia, Slovakia, Spain and Sweden.**

The study shows that international and regional human rights bodies under the aegis of the **United Nations (UN), the Council of Europe (CoE) and the Organization for Security and Co-operation in Europe (OSCE)** play a key role in standard-setting for both non-discrimination and minority protection, along with monitoring the compliance and implementation by states’ parties. There are specific instruments (and actors) outlining minority rights, such as the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992, the CoE Framework Convention on the Protection of National Minorities and the European Charter for Regional or Minority Languages (section 1).

Whereas the non-discrimination principle is one of the key elements of international as well as European legal frameworks, there is wide discretion for EU Member States when actually defining ‘who minorities are’ for **setting standards** on what the state’s negative and positive obligations are towards them. A key challenge is gaps in implementation and follow-up of the findings and recommendations issued by these international and regional monitoring bodies in domestic arenas.<sup>2</sup> (See section 2 of the study.)

**Existing international and regional actors and instruments provide a wealth of information and data on EU Member State’s challenges in minorities’ protection** and the extent to which they may be structural, persistent and systemic in nature. That notwithstanding, they are not fully fit for EU purpose. Indeed, international and regional actors do not directly monitor the role of democratic rule of law and fundamental rights in light of the EU legal system’s specificities. At the heart of the autonomy of European law lie the following specificities: citizenship of the Union, the EU Charter of Fundamental Rights, EU secondary legislation on non-discrimination, the respect of cultural, religious and linguistic diversity or EU general principles of mutual trust and mutual recognition in European cooperation on criminal justice and asylum.

The study assesses the ‘entry points’ and current approaches in EU policy and law that cover directly and indirectly relevant areas of intervention in minorities’ protection (section 3). The **EU has its own legal and policy framework and a multiplicity of normative approaches of direct or indirect relevance to minority protection.** These are mainly

<sup>1</sup> In this study **ethnic grounds** are broadly understood as to cover national origin, race, skin colour, etc.

<sup>2</sup> European Commission Official Website, “Minorities”, see: [http://ec.europa.eu/justice/fundamental-rights/minorities/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/minorities/index_en.htm).

based on Article 2 of the Treaty on European Union (TEU) - the values of the EU and the EU Charter of Fundamental Rights, which explicitly mention national minorities. Secondary law in the EU more precisely specifies the non-discrimination approaches, through the Race Equality Directive<sup>3</sup> and the EU Citizen's Rights Directive<sup>4</sup>. Section 3 concludes that the EU has developed **a kind of minority protection 'regime' for Roma nationals** through its policy and legislative efforts. Nevertheless, minorities in terms of national origin, ethnicity, language or religion can experience very **different treatment** depending on the EU Member State in which they live or temporarily reside. The treatment of minorities and even the rights allocated to minorities often depend on a country's history, national and international political context, etc.

Moreover, existing EU minority protection **'soft law' or 'policy' tools**, such as the development of the EU Framework for National Roma Integration Strategies (NRIS), have played **a very limited role in better upholding and monitoring EU Member States' obligations** to comply with fundamental human rights standards on minority protection and addressing institutional manifestations of discrimination and racism. These non-legally binding forms of EU intervention have in turn led to some **civil society actors becoming centrally involved and increasingly dependent on EU funding available** for implementing the EU Framework for NRIS. The scope of this Framework, however, limits 'by design' public accountability venues and leads to 'self-restraint' with regard to the critical role that civil society plays in liberal democracies as 'watchdogs' of state compliance with minority protection standards and fundamental human rights (section 4).

Issues of **minority rights and the rule of law are intrinsically interlinked and mutually reinforcing each other**.<sup>5</sup> Whereas the present study focuses on minority rights, it is vital to recognise intersections with democratic rule of law principles. The discussion thus should be embedded into a broader debate about EU values and the political rationale of integration. State violations of minority rights, even if taken alone they could not prove a serious and persistent violation of EU values, can be an element in evidencing deconstruction of the rule of law and systemic, institutional violations of fundamental rights. And *vice versa*, if a breach of the rule of law is established, it is likely **to hit harder on minorities** – a fact that can be proven by way of a meticulous, contextual assessment, even in lack of well documented infringements of hard laws.

The study puts forward several policy options to address this gap and deal with possible instances of institutional, structural or systematic manifestations of discrimination, racism and xenophobia by state authorities and/or actors against minorities and disadvantaged groups in the EU. The European Parliament proposed in October 2016 to set up a new **EU mechanism on democracy, the rule of law and fundamental rights** (DRF mechanism), as part of an EU Pact aimed for the same purposes (hereafter - DRF Pact). The study suggests specific ways in which the Pact could apply to these domains and evaluates its potential added value and contribution in comparison with existing international and regional standards as well as current EU instruments and tools (see section 5).

A key piece of the EU DRF puzzle would be the **setting-up of an 'EU rule of law, democracy and fundamental rights commission'**. This DRF commission would be a body of scholars (independent from any European institution or EU agency) that would make context-specific/qualitative assessments and examine key thematic issues. Such issues should cover the compliance of all EU Member States and EU institutions with fundamental

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<sup>3</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

<sup>4</sup> Council Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68

<sup>5</sup> See for example the European Parliament, Resolution of 13 December 2016 on the situation of fundamental rights in the European Union in 2015 (2016/2009(INI)), P8\_TA-PROV(2016)0485, which discusses simultaneously the state of the rule of law (paras. 5-19) and the rights of minorities (paras. 96-104).

rights and minorities' protection in light of data available from the UN, CoE, OSCE and other EU-related actors and sources. It could also gather additional information on EU issue-specific questions and challenges.

The DRF commission should be entrusted with **the power to activate a 'shift in the burden of proof'** in the scrutiny procedure in cases where its assessments reveal indications of persistent and systemic breaches of Article 2 TEU values. It would have the power to ask relevant representatives of EU Member State governments to provide all relevant **evidence about their compliance with key findings and recommendations** emerging from the DRF commission's work. The EU DRF commission would also have the competence to determine the extent to which there are indications of persistent and systematic rule of law and human rights deficiencies in EU member states. The EU DRF Commission would then refer issues to the European Commission for initiating infringement proceedings and the Court of Justice of the EU (CJEU) for the urgent preliminary ruling procedure and the eventual **'freezing' of EU Member States' actions that may allegedly contravene Article 2 TEU.**

Furthermore, previous CEPS research on combatting anti-Gypsyism shows that the Commission's infringement procedures do not always ensure equality of treatment among Member States and a de-politicised monitoring system in respect of intersections between EU law and fundamental rights.<sup>6</sup> For example, the European Commission has started three infringement cases, against the Czech Republic, Hungary and Slovakia, on the segregation of Roma children in education, although no infringement proceedings have been launched against Italy on the longstanding issue of Roma segregation in housing.<sup>7</sup> Thus, **infringement proceedings do not capture Member State threats to the democratic rule of law and fundamental rights falling outside the scope of EU secondary legislation**, which are in turn covered by Article 7 TEU situations.<sup>8</sup> The proposed independent DRF Commission would fill this gap.

**The EU Charter of Fundamental Rights should be turned into a fully-fledged bill of rights for EU citizens and residents.** EU fundamental rights should protect citizens and residents even in domains where the EU has not yet exercised legal competence but which are of central relevance for the foundations of the EU legal edifice and its area of freedom, security and justice. This should go hand in hand with more consistent and evidence-based enforcement of current EU legal standards by the European Commission in cases where fundamental rights and intersecting issues such as minorities' protection are at stake. The study demonstrates that access to justice and independent monitoring of Member States' compliance with minority protection standards remains a recurrent challenge in the EU. **The EU should financially support and ensure the independence of national equality and human rights bodies and ombudspersons.** The EU DRF Pact could be utilised to strengthen the monitoring by national equality bodies and ombudspersons as regards 'follow-up' and enforcement of minority protection and non-discrimination standards.

**Promoting watchdog civil society functions**, such as strategic litigation and more regular civil society monitoring of the compliance of Member States and EU institutions with existing protection standards, **should be a central priority.** In this way, persons belonging to minorities and other legal persons (for example their institutions) who are directly and individually affected by an action/inaction could be enabled to bring actions before the CJEU. They could allege violations of the EU Charter either by the EU institutions or by a Member State, or both. **Civil society should also be granted legal standing on behalf of victims.**

<sup>6</sup> Carrera, S., I. Rostas and L. Vosyliūtė, "Combating Institutional Anti-Gypsyism: Responses and promising practices in the EU and selected Member State", CEPS Research Report No. 2017/08, May 2017.

<sup>7</sup> Open Society Foundations, *EC v Italy*, see: <https://www.opensocietyfoundations.org/litigation/ec-v-italy>.

<sup>8</sup> According to the European Commission "The scope of Article 7 is not confined to areas covered by Union law. This means that the Union could act not only in the event of a breach of common values in this limited field but also in the event of a breach in an area where the Member States act autonomously." European Commission (2003), Communication on Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 15 October 2003.

This should go along with permitting **collective complaints to be lodged before the CJEU on issues related to fundamental rights protection** and the establishment of a formal procedure for third-party interventions.

**The CJEU needs to become a fully-fledged fundamental rights court** if EU principles, such as those of the supremacy of Union law, mutual trust and mutual recognition, are to survive. It would be critical that the CJEU plays a more active and comprehensive role in ensuring states' compliance with EU-relevant international, regional and EU legal standards on minority protection and the EU Charter of Fundamental Rights.

The study concludes that the **EU should play a leading role in laying down the need for higher minority protection standards** than those currently provided by regional and international law. The EU should become a **'trendsetter' in democracy, the rule of law and fundamental rights globally**. This is particularly crucial in light of recent populist and extreme-right political developments in some European countries and across the Atlantic.

## INTRODUCTION

The period between 2015 and 2016 was marked in the history of European integration as a 'time of crisis'. The so-called 'European refugee crisis', the reintroduction of internal border checks within the Schengen area, and acts of political violence and terrorism in several EU Member States brought to the fore the adoption of policies and enactment of legislation with profound repercussions for the protection of minority groups and disadvantaged communities in the EU. History has also shown that it is often in 'times of crisis' that, in the name of the rights of 'majorities', minority protection becomes pressured and is put under strain by some political leaders.

The combined effects of such 'crises' have highlighted fundamental gaps and challenges in current approaches and tools aimed at protecting minorities in numerous areas of life in the EU. These challenges relate chiefly to important obstacles in the practical application of non-discrimination on grounds of nationality, ethnicity, race, religion or belief, as well as the lack of effective access to and upholding of 'group rights' – including regional and minority languages. The complex situation of Roma, Muslim and Jewish communities, along with that of minority-language speakers belonging to these and other communities, constitute a case in point calling for further exploration.

In the EU context, there is a lack of clarity as to whether and how minority protection standards are or could offer better safeguards to minorities – extending to national minorities as well as third-country nationals, asylum seekers and refugees – in comparison or in parallel with other existing international and regional minority protection instruments and monitoring actors. Article 2 of the Lisbon Treaty frames 'minority protection' as one of the fundamental values of the EU.<sup>9</sup> In addition, Articles 21 (on non-discrimination) and 22 (on cultural, religious and linguistic diversity) of the EU Charter of Fundamental Rights acquired legally binding form in the Lisbon Treaty.

Whereas Article 21 of the EU Charter of Fundamental Rights explicitly prohibits discrimination on the grounds of race, ethnic origin, religion or belief, language or membership of a national minority, there is not at present a comprehensive EU approach on how to address and cover current issues and challenges in 'minority protection policy'. This is particularly so in domains where the EU legal system presents its own specificities, such as citizenship of the Union and the rights and liberties enshrined in the EU Charter of Fundamental Rights, as well as general principles at the basis of the EU's area of freedom, security and justice (AFSJ), such as the principle of mutual recognition of judicial and administrative decisions in criminal justice and asylum policies.

Developments on the ground indicate how some policies and politics in several EU Member States increasingly and often artificially connect border controls, migration status, national origin, religion and terrorism or organised crime, and therefore generate profound risks to minority protections in the EU.<sup>10</sup> The Council of Europe (CoE) has recently underlined how the so-called 'European refugee crisis' has aggravated exclusion and xenophobia against Roma communities and other vulnerable minority groups, such as asylum seekers and refugees.<sup>11</sup> Several UN bodies have also expressed concerns about certain EU Member State

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<sup>9</sup> Article 2 of the Treaty of Lisbon (TEU) (emphasis added): "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."

<sup>10</sup> Carrera, S., D. Bigo and E. Guild, *Foreigners, Refugees or Minorities? Rethinking People in the Context of Border Controls and Visas*, Ashgate Publishing Limited, 2013.

<sup>11</sup> CoE, Congress of Local and Regional Authorities of the Council of Europe adopted a Resolution 403(2016) and Recommendation 388(2016) on "The Situation of Roma and Travellers in the Context of Rising Extremism, Xenophobia and the Refugee Crisis in Europe", 20 October, 2016.

governments openly using xenophobic and racist discourses and agendas,<sup>12</sup> and therefore engage in institutional manifestations of discrimination and racism against specific groups and individuals.

The EU's AFSJ represents one of the most symbolic achievements of the EU. The AFSJ is firmly anchored on the principle of mutual trust and mutual recognition, which run under the presumption that *after* accession all EU Member States comply with the values and legal principles of Article 2 of the Treaty on Europe Union (TEU), including not only democratic rule of law and fundamental rights, but also minority protection.

De Witte has rightly pointed out that “[f]or the European Union, concern for minorities is primarily an export product and not one for domestic consumption”.<sup>13</sup> Questions related to minority protection have taken on especial salience at the EU level as part of the enlargement rounds since 2004. The speech by Romano Prodi calling for the “Union of Minorities” at that time showed how much willingness and political momentum there was on minority rights issues.<sup>14</sup>

Genuine protection of minorities has constituted a pre-condition among the list of political criteria for accession in the context of EU enlargement with Central and Eastern European Countries as part of the so-called ‘Copenhagen criteria’.<sup>15</sup> A similar role and approach by the EU once countries become members of the EU is currently lacking, which has been referred to as the ‘Copenhagen dilemma’.<sup>16</sup> In addition, the European Commission officially has declared that it “has no general power as regards minorities”, despite being entrusted with the role of guardian of the EU Treaties and assessing this particular issue prior to accession.<sup>17</sup> The European Commission has explicitly said in the past that it has no competences on particular aspects of minority protection: “the recognition of the status of minorities; their self-determination and autonomy; the regime governing the use of regional or minority languages”.<sup>18</sup>

The assumption that EU Member States comply with minorities’ protection, democratic rule of law and with fundamental rights cannot, however, be taken for granted. Previous research has shown that EU citizenship and fundamental rights protection are particularly compromised during periods of ‘crisis’ or ‘emergencies’ to do with migration and asylum.<sup>19</sup>

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<sup>12</sup> UNHCR, OSCE ODHIR and CoE. Joint Statement “Hungary urged to refrain from policies and practices that promote intolerance and hatred”, 21 December 2015. (<http://www.unhcr.org/news/press/2015/12/5677cf666/hungary-urged-refrain-policies-practices-promote-intolerance-hatred.html>)

<sup>13</sup> De Witte, B., *Politics versus Law in the EU’s Approach to Ethnic Minorities*, EUI Working Papers, Robert Schuman Centre for Advanced Studies, Florence, EUI, 2000, p. 3.

<sup>14</sup> Prodi, R., President of the European Commission (1999 – 2004). Speech given at “A Union of minorities Seminar on Europe – Against anti-Semitism, For a Union of Diversity”, Brussels, 19 February 2004. ([http://europa.eu/rapid/press-release\\_SPEECH-04-85\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-04-85_en.htm))

<sup>15</sup> According to the Conclusions of the Copenhagen European Council “questions relating to national minorities can only be satisfactorily resolved in a democratic political framework based on the rule of law, with a functioning independent judiciary”, Conclusions of the Copenhagen European Council, Bulletin of the European Communities, 6-1993, para. 30.

<sup>16</sup> European Parliament (2012), Plenary debate on the political situation in Romania, statement by V. Reding, 12 September 2012. See also V. Reding, “The EU and the Rule of Law: What Next?”, speech delivered at CEPS, 4 September 2013.

<sup>17</sup> Official Website of the European Commission, DG Justice. ([http://ec.europa.eu/justice/fundamental-rights/minorities/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/minorities/index_en.htm))

<sup>18</sup> Official Website of the European Commission, DG Justice. ([http://ec.europa.eu/justice/fundamental-rights/minorities/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/minorities/index_en.htm))

<sup>19</sup> Guild, E., S. Carrera, L. Vosyliūtė, K. Groenendijk, E. Brouwer, D. Bigo, J. Jeandesboz and M. Martin-Mazé, “An Analysis of the Schengen Area in the Wake of Recent Developments”, Study for the Policy Department for Citizens’ Rights and Constitutional Affairs, European Parliament, 2016. ([http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571356/IPOL\\_STU\(2016\)571356\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571356/IPOL_STU(2016)571356_EN.pdf)).



There is a sound evidence from academia,<sup>20</sup> as well as from the international, regional and EU actors monitoring minority rights covered by this study, of discrimination in treatment among nationals within and among the EU Member States. Such differential treatment challenges the founding principle upon which citizenship of the Union has been anchored: non-discrimination on the basis of nationality.

'Protection gaps' are also apparent when looking at differential treatments among EU citizens on the basis of, for instance, their ethnicity, language and religion.<sup>21</sup> Just like *autochthonous* minority groups and EU citizens, third-country nationals and refugees are holders of fundamental human rights and once in the Union's territory should be offered a comparable level of protection from non-discrimination, hate crimes and hate speech on prohibited grounds of membership of a "national minority, nationality,<sup>22</sup> ethnicity, race or religion".<sup>23</sup> These are all areas where the EU has exercised legal competence and where room for manoeuvre in the Union's role could be further explored.

This context leaves us with an unresolved dilemma as to the exact ways in which minority protection challenges could be comprehensively addressed by the EU that would accomplish two goals: first, showing 'added value' and being compatible with the current division of competences between the EU and Member States; and second, preventing unnecessary duplication with other international and regional monitoring instruments and actors in venues such as the UN, the Organization for Security and Co-operation in Europe (OSCE) and the CoE.

A key European standard on minority protection has been said to be the Framework Convention for the Protection of National Minorities (FCNM), adopted by the Council of Europe in 1995, which entered into force in February 1998. While the Convention has been ratified by a total of 39 CoE states, not all EU Member States are party to it, which leads to an uneven geographical coverage of protection within the Union's AFSJ. For instance, France has not signed or ratified this instrument; countries like Belgium and Greece have signed it but with important derogations and exceptions when it comes to the definition of what is a 'national minority'. Despite these limitations regarding states' participation, the scholarly literature has rightly underlined its significant value as an important international standard-setting tool or even as an indirect source of general legal principles among CoE members and indirectly EU Member States.<sup>24</sup>

The EU has too often relied on standards and monitoring instruments delivered by the UN and the CoE when it comes to EU Member State compliance with democratic rule of law and the fundamental rights of minorities. The lack of a comprehensive EU policy approach to minorities' protection, however, may give rise to fundamental questions that, as stated above, are 'specific' to the EU legal and constitutional system laid down in the Treaties and developed in secondary legislation. They may also concern situations characteristic for

<sup>20</sup> Groenendijk, K., Reverse discrimination, family reunification and Union citizens of immigrant origin, in: E. Guild a.o. (eds), *The Reconceptualization of European Union Citizenship*, Leiden/Boston 2014 (Martinus Nijhoff) Immigration and Asylum Law and Policy in Europe Vol. 33, p. 169-188. Study for the Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, by Favilli, C. and N. Lazzarini "Discriminations emerging from petitions received", Brussels: European Union, 2017.

<sup>21</sup> Carrera, S., "The ECtHR's judgment in *Biao v Denmark*: Non-Discrimination among nationals and family reunification as converging European Standards", Judgement of 24 May 2016, Application No. 38590/10. *Maastricht Journal of European and Comparative Law*, 23(5), pp. 865-889.

<sup>22</sup> This is a new principle, that emerged in the EU legal framework. For more – see section 3.

<sup>23</sup> Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, 2008/913/JHA.

<sup>24</sup> De Witte, B., *Politics versus Law in the EU's Approach to Ethnic Minorities*, EUI Working Papers, Robert Schuman Centre for Advanced Studies, Florence, EUI, 2000, p. 3. D. Kochenov, *EU Minority Protection: A Modes Case for a Synergetic Approach*, Amsterdam Law Forum, Vol. (3) No. 2. 2011. (<http://amsterdamlawforum.org/article/viewFile/236/425>)

minority groups resulting directly from European cooperation, e.g. free movement by EU Roma citizen communities moving and/or residing in other EU Member States.<sup>25</sup>

Effectively safeguarding democracy, rule of law and fundamental rights represent the *sine qua non* for any comprehensive protection of minorities. The EU nonetheless lacks the legal and policy tools for promoting and monitoring/evaluating minority protection in both the Member States and EU institutional arena, namely a rule of law approach to minority protection addressing institutional manifestations of discrimination, racism and xenophobia.<sup>26</sup> In October 2016, the European Parliament (EP) initiated an important call for the European Commission to establish a new 'EU rule of law mechanism', as part of a wider EU Rule of Law, Democracy and Fundamental Rights Pact, which would aim at ensuring permanent monitoring and a comparable rule of law, democracy and fundamental standards across the EU.<sup>27</sup>

The EP resolution underlined that "there is no Union legal framework to guarantee their rights as a minority" and that "the establishment of an effective mechanism to monitor their rights in the Union is of utmost importance".<sup>28</sup> So far, the proposal has not been followed up by the European Commission, which has argued, despite evidence to the contrary, that such a mechanism would not have added value.<sup>29</sup>

The EP resolution explicitly mentions the centrality of the rule of law in relation to international and regional standards (para. H, emphasis added):

whereas respect for the rule of law within the Union is a **prerequisite for the protection of fundamental rights**, as well as for upholding all rights and obligations deriving from the **Treaties and from international law**, and is a **precondition for mutual recognition and trust** as well as a key factor for policy areas such as the internal market, growth and employment, **combatting discrimination, social inclusion**, police and justice cooperation, the Schengen area, and asylum and migration policies.<sup>30</sup>

This study explores the present international, regional and EU standards on minority protection and the main issues and challenges in their material and personal scope, as well as their implementation in a selection of 11 European countries. The examination covers the gaps and 'promising practices' in protection of minorities – including both nationals and non-nationals, especially in cases related to institutional manifestations of discrimination, racism and xenophobia against the Roma, Muslims and linguistic minority groups. The study explores venues and opportunities for 'more EU' in these domains beyond today's EU policy and legal approaches. It tests the launch of a rule of law approach to comprehensively address minority protection and secure the fulfilment of its commitments towards the fundamental rights and equality of treatment of minorities as laid down in Article 2 of the Treaty on European Union (TEU), Article 3.3 TEU and Article 10 of the Treaty on the Functioning of the European Union (TFEU).

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<sup>25</sup> As D. Kochenov argues "In the Union context it would be misleading to follow any of the accepted State-centred definitions of what a minority is strictly. Most importantly, the EU's approach should necessarily include the global groups which are either invisible or purposefully ignored in the minority rights discourse at the level of the Member States, i.e. those created by the Union itself. These include EU citizens residing outside of their Member State of nationality and third-country nationals who are long-term residents of the EU", pp. 40-41. In D. Kochenov (2011), *EU Minority Protection: A Modes Case for a Synergetic Approach*, Amsterdam Law Forum, Vol (3) No. 2, (<http://amsterdamlawforum.org/article/viewFile/236/425>)

<sup>26</sup> Ibid., p. 47.

<sup>27</sup> European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)).

<sup>28</sup> Ibid. para. T.

<sup>29</sup> Bárd, P., Carrera, S. 2017. "The Commission's Decision on 'Less EU' in Safeguarding the Rule of Law: A play in four acts. CEPS Policy Insights, No. 2017/08, March 2017.

<sup>30</sup> European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), para. H.

## Aim & Objectives

The study aims at gaining a better understanding of the current minority protection approaches in the EU's legal and policy frameworks and exploring new venues and options for future policy intervention in this domain. The specific objectives are the following:

- 1) **Map the main actors and monitoring instruments** that are tasked with ensuring compliance with these legal standards of minority protection **internationally and regionally – in particular the CoE, OSCE and the UN.**
- 2) Provide an overview of main **legal and non-legal standards of minority protection** envisaged in the EU in comparison with those of the CoE, OSCE and UN.
- 3) Analyse the **EU's entry points and approaches to minority protection** in the EU's legal and policy frameworks.
- 4) Assess **legal and practical gaps and promising practices** in a selection of 11 countries when it comes to minority rights protection.
- 5) Elaborate on the potential contribution of the broader **EU rule of law mechanism and other relevant EU instruments** for better ensuring minority protection.
- 6) Draw conclusions and provide **a set of policy recommendations** towards establishing a comprehensive, democratic rule of law with fundamental rights approach to minority rights protection.

## Scope

### Thematic – Material and personal scope

The study covers three different thematic areas of direct relevance to the state of minority protection in the EU: i) ethnic, ii) linguistic and iii) religious minorities. Particular focus has been placed on assessing legal issues/challenges and practical gaps in the EU's current minority rights standards in these three thematic areas.

While persons falling within each of these categories have often been analysed in a compartmentalised or group-specific fashion, this study aims at combining this thematic method with a cross-minority group approach. They all include vulnerable groups of individuals facing institutional manifestations of discrimination, xenophobia and injustice, particularly on issues related to anti-Gypsyism, Islamophobia and speakers of minority and regional languages.

- The most authoritative definition of the **anti-Gypsyism** phenomenon was suggested by the European Commission against Racism and Intolerance (ECRI) of the CoE in its General Policy Recommendation No. 13 on combating anti-Gypsyism and discrimination against Roma. **Anti-Gypsyism** was defined as “**a specific form of racism**, an ideology founded on racial superiority, a form of **dehumanization and institutional racism** nurtured by historical discrimination, which is expressed, among others, by violence, hate speech, exploitation, stigmatization and **the most blatant kind of discrimination**”.<sup>31</sup>

A recent study on Combatting Anti-Gypsyism highlights the role of the state, as “the concept indicates how **state institutions and actors** often play a direct or indirect role in co-producing and reproducing discrimination towards Roma and entrenching

<sup>31</sup> ECRI General Policy Recommendation No. 13, CRI(2011)37, ([http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation\\_N13/e-RPG%2013%20-%20A4.pdf](http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N13/e-RPG%2013%20-%20A4.pdf))

anti-Gypsy attitudes and stereotyping in the framing of laws and policies, as well as in their practical implementation and outputs."<sup>32</sup>

- The term of '**Islamophobia**' was first proposed by the Runnymede Trust and it was widely accepted, including by the predecessor of the Fundamental Rights Agency of the EU (FRA) – the European Monitoring Centre on Racism and Xenophobia.<sup>33</sup> ECRI, with its General Policy Recommendation No. 5 on Combating Intolerance and Discrimination of Muslims, already in 2000 touched upon the essence of Islamophobia. ECRI, in light of terrorist attacks, was "[s]trongly regretting that Islam is sometimes portrayed inaccurately on the basis of hostile stereotyping the effect of which is to make this religion seem a threat".<sup>34</sup>

Only in 2015 did ECRI include a definition in its recommendations on hate speech: "*Islamophobia* – shall mean prejudice against, hatred towards, or fear of the religion of Islam or Muslims."<sup>35</sup>

- Protection of linguistic minorities or **minority language speakers**, who are using a minority language as opposed to an official or majority language. The European Charter for Regional or Minority Languages (ECRML) defines and protects such languages. The qualification 'minority' in the ECRML refers to the language spoken by a numerical minority of the inhabitants of a state, where the majority speaks the official language.<sup>36</sup>

The study highlights that anti-Gypsyism, Islamophobia and discrimination of speakers of minority languages (as opposed to the minority language itself) essentially targets the EU legal system as defined in Article 2 TEU, as it poses challenges to fundamental rights, EU citizenship and freedom of movement for Roma EU nationals.

The study takes a broad personal scope for the proposed examination, in light of the inherent limitations to any normative and often simplistic distinction between 'old' and 'new' minorities (often meaning migrants and refugees), or rigid conceptualisations and demarcations between 'minority groups'. The study is nonetheless aware that nationality status is a relevant criterion in studying this field because minority rights – unlike universal human rights – are often recognised under the condition of holding the nationality of the state concerned. That notwithstanding, as this study shows, the EU's contribution to minority protection is one in which the protection of ethnic, linguistic and religious diversities is to be read from the perspective of the EU Charter of Fundamental Rights and secondary legislation laying down specific Union standards on non-discrimination and citizenship of the Union.

## Geographical scope

The study covers a selected sample of 11 European countries, which include Estonia, Finland, France, Greece, Hungary, Italy, Romania, Serbia, Slovakia, Spain and Sweden.

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<sup>32</sup> Carrera, S., I. Rostas and L. Vosyliute, "Combating Institutional Anti-Gypsyism Responses and Promising Practices in EU and Selected Member States", CEPS, 2017, (<https://www.ceps.eu/publications/combating-institutional-anti-gypsyism-responses-and-promising-practices-eu-and-selected>)

<sup>33</sup> Runnymede Trust, document 'Islamophobia: A Challenge For Us All', 1997. (<http://www.runnymedetrust.org/publications/17/74.html>)

<sup>34</sup> ECRI, General Policy Recommendation No. 5 on Combating Intolerance and Discrimination of Muslims, Adopted on 16 March 2000, CRI(2000)21, ([http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation\\_N5/Rec5%20en21.pdf](http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N5/Rec5%20en21.pdf)).

<sup>35</sup> ECRI General Policy Recommendation No. 15 On Combating Hate Speech Adopted on 8 December 2015, CRI(2016)15.

<sup>36</sup> Blair P., *The protection of regional or minority languages in Europe*, Fribourg: Ed. Univ. Fribourg 1994, p. 56.

This sample of countries for geographical coverage was proposed (and agreed with the European Parliament (Committee on Civil Liberties, Justice and Home Affairs (LIBE)/Policy Department for Citizens' Rights and Constitutional Affairs)) on the basis of the following set of criteria:

- coherent and wide geographical coverage of the main EU regions;
- different legal and constitutional traditions;
- relevance of the different types of minority protection-related issues around the main themes covered by the study; and
- potential for identifying challenges and promising practices.

### Limitations of promising practices

The authors have consistently chosen to refer to 'promising practices' instead of 'good practices' or 'best practices'. The institutional responses and examples of actions and programmes identified in the sample of 11 countries considered are **context-dependent and historically specific**.

The potential for 'transferability' of the national promising practices identified to other domestic arenas in the EU would need to be carefully examined in each national context. Online questionnaires for civil society and equality bodies produced some relevant answers, which helped to identify the examples discussed in subsection 4.2. The current research does not intend to undertake a full and in-depth examination of the actual 'effectiveness' and results of the envisaged promising practices.

The research takes into account mainly national responses to protect minority rights by governments, parliaments and other state institutions. Some selected practices by civil society have also been included, notably if there is a certain degree of institutional cooperation with local or national authorities. The assessment focuses on those promising practices that are of particular relevance in addressing institutional and systemic abuses of minority rights.

## Methods

In order to meet the research objectives, this study has adopted an interdisciplinary methodology. It has employed policy and legal analyses, combined with an online questionnaire and interactive discussion methods to engage legal practitioners and experts on the interim findings as well as the feasibility and added value of interim policy options or 'scenarios'.

The study is built upon the existing **state of the art** in this area of EU, regional and international legal standards, actors and mechanisms for non-discrimination and minority rights protection. It draws upon a wide range of legal sources, some of which are mapped and analysed in section 1. Section 3 assesses the EU's legal framework and current policy approaches in light of the EU Treaties, the EU Charter, related EU secondary legislation and other relevant policy instruments, alongside case law of the Court of Justice of the European Union (CJEU) and European Court of Human Rights (ECtHR). In addition, the research extracts insights from previous policy papers and studies, and takes due account of European Parliament resolutions and reports of relevance to the objectives of the study.

Three main data collection methods have been used in this study:

- **Desk research** covered the founding international conventions and regional instruments and EU Treaties, the EU Charter of Fundamental Rights, EU secondary legislation and related case law of the CJEU and ECtHR. The legal analysis has constituted a core element of the research. It has followed a classical, doctrinal legal approach, which amounts to interpreting the legal provisions, common standards and general principles as well as relevant jurisprudence.

- The **online questionnaires** involved i) a civil society questionnaire in cooperation with Minority Rights Group International (MRG), which gathered 75 responses in total from all 11 countries selected for this study; and ii) an equality bodies questionnaire disseminated in cooperation with Equinet (the European Network of Equality Bodies), which gathered 9 responses and covered 7 countries from the proposed sample. The partners – MRG and Equinet – contributed through a timely and swift dissemination of their respective questionnaires among the relevant respondents in the selected sample of EU Member States.
- **A focus group with legal practitioners from the selected Member States** took place on 17 July 2017 in Brussels. The group was asked to discuss and assess the feasibility and EU added value of a comprehensive minority protection system in the EU. The discussion was based on interim findings and proposed recommendations. This method secured additional qualitative data and built consensus on some of the preferred policy options.

## Approaches

Democratic rule of law and fundamental rights constitutes a prerequisite or starting point for effectively ensuring minority rights protection in the EU. Democracy, rule of law and fundamental rights are co-constitutive components in the EU legal and constitutional system envisaged in the Treaties. They cannot be read separately, but rather in a triangular relationship of close interrelations and articulations.

This triangulation takes specific shapes concerning nationals belonging to minority groups as well as 'new minorities' who are third-country nationals, such as refugees and migrants. Non-discrimination and equality of treatment (alongside equality before the law as a general principle of EU law) when enjoying fundamental rights, having access to justice and democratic representation/participation stands *at the centre* of that triangular relationship.<sup>37</sup>

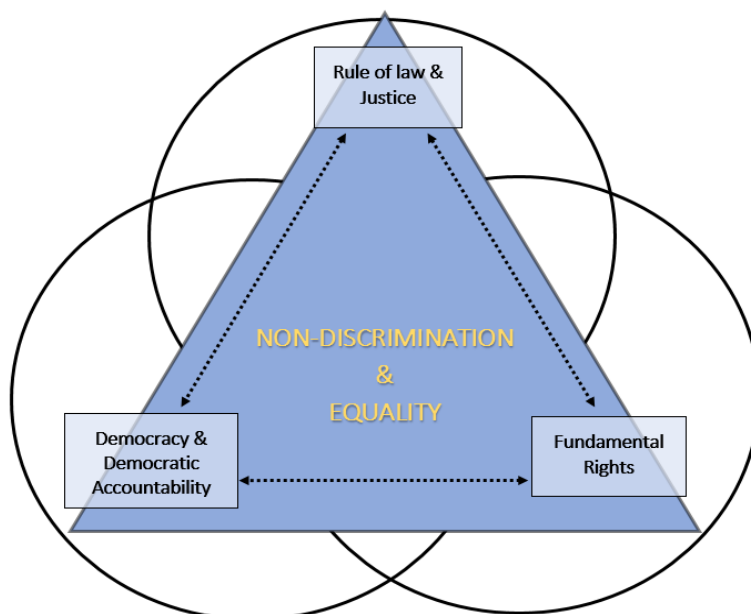
In the absence of democracy, an independent judiciary and fundamental rights, the protection of minorities finds no solid ground. Thus, the question is how the EU, addressing minority rights standards from a democratic rule of law with fundamental rights approach, could offer better protection across the EU while respecting the current division of competences between the EU and its Member States.

Actors and instruments monitoring minority rights and the rule of law at the international and regional levels may often give 'early warning' of structural deficits in the democratic rule of law and fundamental rights protection, and cases of constitutional and institutional capture. "Systematic" deficiencies in the democratic rule of law by a majoritarian government – which may qualify as a "clear risk of a serious breach" or a "serious and persistent breach by a Member State" under Article 7 TEU – have profound consequences for the population at large, and have particularly damaging repercussions for "minority groups".

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<sup>37</sup> Carrera, S., E. Guild and N. Hernanz, "The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism", Study for the Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, 2013.

**Figure 1. The triangular relationship between rule of law, democracy and fundamental rights**



**Source:** Authors' own elaboration, 2017.<sup>38</sup>

The European Commission has clarified that the concepts of 'risk' and 'breach' in the scope of Article 7 TEU values are "specific creatures of the Union legal system", and that "[a] variety of international instruments can offer guidance for interpreting the concept of 'serious and persistent' breach, which is taken over from public international law".<sup>39</sup> That risk must go beyond specific or individual situations, and concern a more *systematic* problem. There are, however, important nuances as to the way in which the Commission assesses the existence of a 'systematic' rule of law threat in EU Member States, which is political in nature.

The main official purpose of the EU Framework on the Rule of Law has been said to "address threats to the rule of law which are of a systemic nature". There is not a clear definition provided by this EU framework on the notion of 'systematic' in this context.<sup>40</sup> In the case *Ilias and Ahmed v Hungary*<sup>41</sup> (Application No. 47287/15) of 14 March 2017 the ECtHR reconfirmed that the presumption of mutual trust is *rebuttable*. The case law emerged in 2009 with the landmark case of an Afghani national, *M.S.S. v Belgium and Greece*

<sup>38</sup> Based on Carrera, S., E. Guild and N. Hernanz, "The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism", Study for the Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, 2013.

<sup>39</sup> European Commission (2003), Communication on Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 15 October 2003. According to this Report "Regarding the purpose of the breach, for instance, one might consider the social classes affected by the offending national measures. The analysis could be influenced by the fact that they are vulnerable, as in the case of national, ethnic or religious minorities or immigrants", p. 8 of the Communication.

<sup>40</sup> According to the Commission Communication (2014), A New EU Framework to Strengthen the Rule of Law, COM(2014) 158 final, 19.3.2014, the notion of "systemic deficiencies" in complying with fundamental rights when acting within the scope of EU law relates to for example, Joined Cases C-411/10 and 493/10, N.S., not yet published, paras 94 and 106; and Case C-4/11, *Germany v Kaveh Puid*, para. 36. With regard to the notion of "systemic" or "structural" in the context of the European Convention on Human Rights, see also the role of the European Court of Human Rights in identifying underlying systemic problems, as defined in the Resolution Res(2004)3 of the Committee of Ministers of 12 May 2004, on Judgments Revealing an Underlying Systemic Problem (<https://wcd.coe.int/ViewDoc.jsp?id=743257&Lang=fr>), p. 7.

<sup>41</sup> ECtHR, *Ilias and Ahmed v Hungary*, Application No. 47287/15.

(Application No. 30696/09).<sup>42</sup> In this case, the ECtHR rebutted that presumption of comparable reception conditions in Greece, which is the basis of the Common European Asylum System and thus subsequent asylum transfers to Greece.<sup>43</sup> Later the CJEU joined two cases before the Court (C-411/10 and C-493/10) for a preliminary ruling procedure. The Grand Chamber Judgement of the CJEU confirmed that the clause on responsible states in the Dublin Regulation should not be seen as "irrebutable".<sup>44</sup> Thus, the above-discussed case law confirms that national and EU authorities have the obligation to carry out an assessment on their motion with information about risks to the human rights of asylum seekers being transferred to 'safe countries'. That assessment must be based on reliable and objective sources, such as those provided by UN bodies.

This study applies that standard *by analogy* to other areas of EU law relying on mutual recognition and having direct or indirect repercussions for minorities' protection from the perspective of citizenship of the Union and non-discrimination. Similarly, in relation to the legal standard developed by the above-mentioned ECtHR case law, and as examined in section 2 of this study, the methods used by UN bodies monitoring human rights put especial emphasis on 'shifting the burden' of proof to the state authorities regarding minorities' protection. States have the obligation to actively find out and thoroughly investigate (based on information provided by international organisations and civil society actors) and provide effective remedies in the event that minority rights protection is challenged.

Minorities may be particularly affected by institutional and systematic deficiencies in the rule of law as they are often structurally excluded, misrepresented and/or lacking any representation in domestic arenas. Some are simply not part of the electorate (asylum seekers); others are, but are too small as a group and – in the eyes of the majority – insignificant to be meaningfully represented, while yet others belong to unpopular minorities and as a consequence fall victim to 'majoritarianism'.

Members of minority groups who have been excluded from "we, the people of Europe"<sup>45</sup> may be granted participation in democratic processes by courts and ombudspersons – entities that are anyway better equipped with tools of fundamental human rights protection than other branches of power. They can grant minorities 'non-discrimination' in effective access to rights, justice and democracy, the role of equality and human rights bodies. Civil society organisations, and notably minority-led grass-roots organisations, can articulate the issues and challenges on the ground.

Here it is important to stress *the dual nature of minority protection*:

- First, the *non-discrimination* approach suggests protection from discrimination despite differences on ethnic, religious or linguistic grounds (though some difference of treatment is allowed between nationals and non-nationals, but not among nationals). Non-discrimination is the first and traditional approach to minority protection in the EU legal system.
- Second, the *minority rights* approach tends towards the collective and suggests that a certain level and special degree of protection of the difference should be afforded to minority communities, such as the right to teach and use minority languages, to practise minority religions, to gather and participate in associations and/or political parties on the basis of nationality.

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<sup>42</sup> The first effort to rebut CEAS was *TI v UK* (Application No. 43844/98), 7 March 2000. Though back then in 2000 the ECtHR found the case inadmissible, without going into merits.

<sup>43</sup> ECtHR, *M.S.S. v Belgium and Greece*, Application no. 30696/09.

<sup>44</sup> CJEU, Judgement of the Court (Grand Chamber) of 21 December 2011. *N.S. (C-411/10) v Secretary of State for the Home Department and M.E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*.

<sup>45</sup> Balibar, E., *We, The People of Europe: Reflections on Transnational Citizenship*, Princeton, 2004.



The current study takes into consideration the notion of 'intersectional discrimination' and employs it as an approach in our analysis (see Figure 2 below). The question of '*intersectional discrimination*' has been addressed by previous studies covering gender discrimination and EU gender equality and non-discrimination law. Using the conceptual framework previously developed by Crenshaw in 1989, who argued that the focus on single grounds in discrimination law rendered invisible those who were at the intersection of two or more grounds,<sup>46</sup> Fredman<sup>47</sup> has provided an excellent analysis of how this concept is best suited to disrupt the established group demarcations used in antidiscrimination law, and challenge the widely-held construction of gender discrimination claims as experiencing disadvantage *only* in relation to gender.

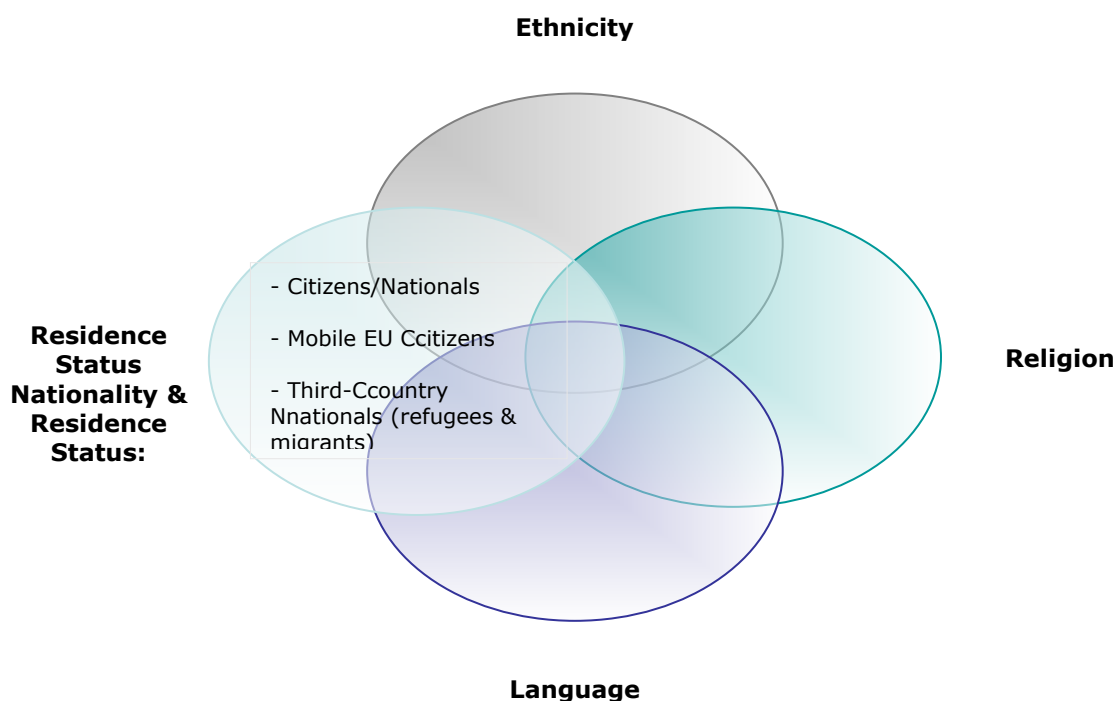
While acknowledging the specificities inherent to each theme and group covered in the wider area of 'minority protection', this study takes a multi-themed and multi-personal perspective under the notion of 'intersectional discrimination' in an attempt not only to capture synergetic or cross-group manifestations of structural discrimination against minorities, but also to capture cases where special public policy measures covering group or theme-specific protection may indirectly lead to discrimination for other vulnerable minorities. The focus is on how 'intersectionality' may develop and manifest itself because of cases of institutional discrimination affecting the relationship between the individual, minority communities and the state, and because of structural and systematic threats to the democratic rule of law and fundamental rights.

For practical reasons, the research has been organised around the ethnic, linguistic and religious minorities (for example, see Thematic Annexes 1-3), although it is important to grasp their inherently interrelated nature, as grounds could differ for the same person. As footnoted earlier, 'ethnic' origin in this study entails a broader category, covering grounds of national origin, race and skin colour.

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<sup>46</sup> Crenshaw, K., Demarginalising the intersection of race and sex, University of Chicago Legal Forum, p. 139. Crenshaw argued that "the reliance by discrimination law on a single ground analysis rendered invisible those who were at the intersection of two grounds", 1989.

<sup>47</sup> Fredman S. Intersectional Discrimination in EU gender equality and non-discrimination law, European Network of Legal Experts in Gender Equality and Non-Discrimination, European Commission, DG Justice and Consumers, Brussels, May 2016. According to Fredman "However, the role of 'grounds' in discrimination law has frequently functioned to obscure these relationships. In order to establish that discrimination is on the ground of sex, for example, it might seem that only the gender of a person should be taken into account, rather than her other identities and the ways in which these identities influence her relationships, page 36. The result has been, as Crenshaw highlighted, that the stylised claimant in a gender discrimination claim is constructed as experiencing disadvantage only in relation to her gender. This assumes that all her other characteristics are on the privileged side of the relationship. In other words, she is assumed to be a white, able-bodied, heterosexual woman, of the dominant religion or belief (which could include secularism) etc. This means that those who are the most disadvantaged are ignored", p. 34.

**Figure 2. Intersectionality of minority protection grounds covered in the study**

**Source:** Authors, 2017.

For example, a Syrian living in Europe could be discriminated against on the basis of his/her origins of nationality (Syrian), race, ethnicity or cultural origins (Arab), language (Arabic-language speaker) or religion (Muslim). In addition to this, just to convey the complexities, the current study takes into account the residence status in three quite broad categories of persons, which can and often do become grounds for discrimination: i) citizens/nationals (born or naturalised nationals); ii) mobile EU citizens residing in another EU country; and iii) third-country nationals (refugees or migrants). The study briefly acknowledges the specific situation and challenges of stateless persons and 'indigenous people' in this context.

Thus, it encompasses multi-theme and multi-group approaches, in terms of the material and personal scope. That notwithstanding, it is equally central to consider cases where different minority protection grounds may overlap, or where special policies aimed at addressing specific minority protection rights may actually have negative, harmful or even indirectly discriminatory consequences for other vulnerable or disadvantaged categories of minorities. There may be cases where there is 'intersectionality' of discrimination grounds, so that for instance policies on linguistic minorities could be misinterpreted and used to further undermine the fundamental human rights and extend the structural exclusion of specific ethnic minorities. For example, Romani children in the Baltic States are often placed in Russian-linguistic minority schools, which further undercuts their inclusion in society.

## Research questions and Objectives

This study examines the central question: **What is the state of play in minority protection in selected European countries, and what would be the added value and possibilities of having 'more EU' in ensuring a more comprehensive approach for**

**minority protection, which takes the democratic rule of law and fundamental rights and intersectional discrimination as points of departure?** Table 1 outlines more specifically the research questions and objectives and where/how they are addressed in this study.

**Table 1. How are the objectives addressed in the study?**

| Section    | Specific Objective   | Research Questions  |
|------------|--|---|
| Section 1. | <b>Mapping the main actors and monitoring instruments</b>  | Who are the main regional and international actors with competence in safeguarding and monitoring state compliance with minorities' rights? What are their main methods and instruments for monitoring and addressing complaints? What are their overlaps and potential synergies?  |
| Section 2. | <b>Main legal and non-legal standards of minority protection</b>   | What are the international, regional and EU standards for minority protection in three areas: ethnic, linguistic and religious minorities? Is there a 'European standard of protection'? Are migrant and refugee communities covered by it? If so, under what conditions?   |
| Section 3. | <b>The EU's entry points and policy/legal approaches to minority protection</b>  | Is there an EU approach to minority rights? What are the entry points and existing normative approaches to minority rights in EU law and policy? Does the EU have the legal competence to regulate in this domain? What potential is contained in citizenship of the Union, free movement, cultural and linguistic diversities, and the principles of mutual recognition and mutual trust? How could the EU show value in addressing 'intersectionality' and the rule of law in minorities' protection?     |
| Section 4. | <b>Legal and practical challenges, gaps, and promising practices in a selection of 11 countries</b>                          | How are selected countries complying with their legal obligations to protect minority rights? What are the legal and practical challenges arising at the national level when implementing the EU's approach to minorities? To what extent do existing monitoring mechanisms reach their aims to safeguard human rights and non-discrimination of ethnic, linguistic and religious minorities? In particular, what have been the main achievements/promising practices in ensuring the rights of minorities? |
| Section 5. | <b>Potential contribution of the EU rule of law, democracy and fundamental rights Pact and other relevant EU instruments</b> | What could be the potential contribution of establishing an EU's mechanism on rule of law, fundamental rights and democracy, and how would an EU Pact on democracy, rule of law and fundamental rights apply to the minority protection domain? What can be learned from the process of complying with the Copenhagen criteria in pre-accession countries? What are other important and underused international, regional and EU instruments?   |
| Section 6. | <b>Conclusions &amp; evidence-based policy recommendations</b>   | How could the EU's role in monitoring the compliance of Member States and European institutions with the democratic rule of law and fundamental rights of minorities be further enhanced? How can accountability in the effective implementation of EU, regional and international legal standards be ensured? What should be the specific role of the European Parliament?   |

Source: Authors, 2017.

## 1. SETTING THE SCENE: MAPPING INTERNATIONAL AND REGIONAL MONITORING ACTORS AND INSTRUMENTS

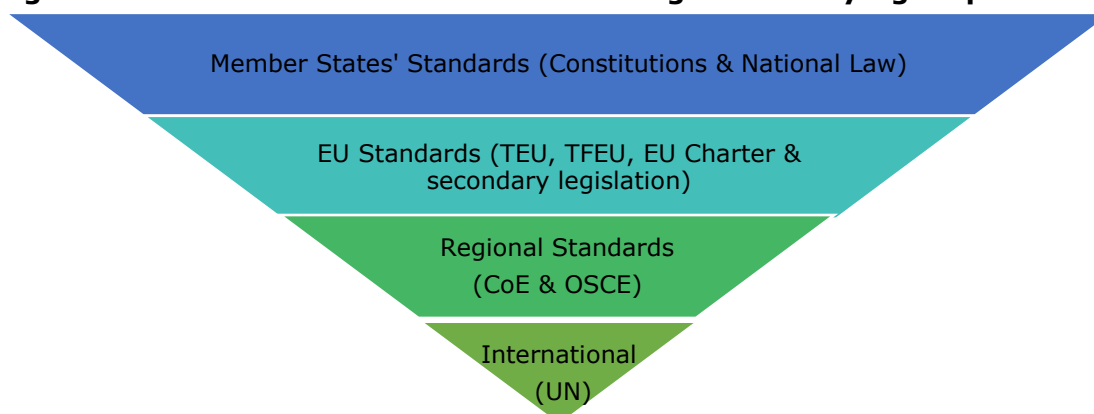
### KEY FINDINGS

- There is a fragmented scene of actors and instruments at the levels of the UN, CoE and OSCE for monitoring, to different degrees, the implementation of minority protection by EU Member States.
- Unlike the EU, international and regional actors count with specialised monitoring instruments to protect various minority groups on different grounds.
- Non-ratification and obstacles to practical implementation along with weak follow-up are some of the main challenges affecting a majority of these instruments. They also lack consideration of the specificities of the EU legal framework.

### 1.1. What are the main international and regional actors in standard-setting on minority protection?

In the area of 'minority protection', the EU finds itself in a large and fragmented landscape of international actors, regional actors and instruments that have set minimum standards for minority and human rights protection. Some of these actors were established by specific treaties and have been entrusted with a mandate to monitor the compliance and implementation of the agreed human rights standards by states' parties. International and regional actors provide key legal foundations that states' parties need to comply with in their domestic actions and activities. When implementing EU law, and as part of their broader activities as members of the EU complying with Article 2 TEU values, EU Member States must comply with these international and regional standards too<sup>48</sup> (see section 3 for an in-depth discussion). The current subsection seeks to map these actors and their personal scope.

**Figure 3. A multi-level and multi-actor setting of minority rights protection**



**Source:** Authors, 2017.

EU Member States have clear legal commitments to the various UN and CoE instruments and mechanisms, as well as the OSCE guidelines in the areas of the rule of law, minority protection and human rights. Whereas international actors provide the very minimum standards and national ones the maximum, regional bodies placed in between are important

<sup>48</sup> Arnulf, A., *The European Union and its Court of Justice*, Oxford: Oxford European Union Law Library, 2006, pp. 364-366.

in filling the gaps, for example, in interpretations and definitions (see Figure 3 above). Judicial and quasi-judicial supranational actors and treaty bodies play a fundamental role in scrutinising Member State compliance with the agreed standards as well as in interpreting them in light of new societal developments.<sup>49</sup> They also provide legal and complaint procedures through which members of minorities can seek protection of their rights. Table 2 below provides a mapping of relevant actors and their monitoring instruments.

Yet effective application and protection of these standards in the EU context remains a challenge, specifically for minorities' rights and their non-discrimination from the perspective of the specifics characterising the EU's legal framework and competences. Chiefly, there are important implications for Member States in the EU context in the areas of fundamental rights and freedoms enshrined in the EU Charter of Fundamental Rights and the added value of citizenship of the Union (and its attached bundle of rights) stipulated in Part Two of the TFEU (mainly Articles 18-21).

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<sup>49</sup> Droshout, D., Bell, M., Choudhury, T., De Schutter, O., Gerards, J., McColgan, A., Moon, G., Schiek, D. and Waddington, L., *Non-discrimination law*. Portland: Hart. 2007.

**Table 2. Mapping of existing non-discrimination/minority protection instruments**

|                                       | Area  | CoE  | OSCE  | UN   |
|---------------------------------------|---|--|---|--|
| Rule of law                           | Rule of law instruments                       | Monitoring: Venice Commission of the CoE <sup>50</sup>   | Monitoring: Office for Democratic Institutions and Human Rights (ODIHR)                         | Monitoring: Human Rights Council (HRC)/Office of the High Commissioner on Human Rights (OHCHR)   |
| Non-discrimination on various grounds | General non-discrimination/equality framework | European Convention on Human Rights (ECHR), Article 14 & Optional Protocol 12<br><br>European Social Charter (revised), Article E<br><br>Complaints: European Committee of Social Rights (ERSC)<br><br>Courts: ECtHR | N/A<br><br>Research: TANDIS – Tolerance and Non-Discrimination Information System <sup>51</sup> | International Covenant on Civil and Political Rights (ICCPR) Article 2 and Article 26<br><br>International Covenant on Economic, Social and Cultural Rights (ICESCR Article 2(2))<br><br>Monitoring and complaints: Human Rights Committee (CCPR)/Committee on Economic, Social and Cultural Rights (CESCR)<br><br>Monitoring: Universal Periodic Review (UPR), CCPR, CESC |
|                                       | Discrimination on the ground of ethnicity     | ECHR Article 14 & Optional Protocol 12<br><br>Monitoring: European Commission Against Racism and Intolerance (ECRI) <sup>52</sup><br><br>Courts: ECtHR   | Monitoring: ODIHR   | International Convention on Elimination of All forms of Racial Discrimination (ICERD)<br><br>Monitoring and complaints: Committee on Elimination of Racial Discrimination (CERD)   |
|                                       | Discrimination on the basis of religion       | ECHR Article 14 & Optional Protocol 12<br><br>Courts: ECtHR<br><br>Monitoring: ECRI <sup>53</sup>  | Monitoring: ODIHR   | ICCPR, Article 18 and Article 27<br><br>Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief of 1981<br><br>Monitoring and complaints: CCPR  |

<sup>50</sup> CoE, Venice Commission. ([http://www.venice.coe.int/WebForms/pages/?p=01\\_Presentation&lang=EN](http://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN)).

<sup>51</sup> OSCE, TANDIS. (<http://tandis.odihr.pl/?p=home>).

<sup>52</sup> OSCE, Office for Democratic Institutions and Human Rights. ([http://www.coe.int/t/dghl/monitoring/ecri/activities/mandate\\_en.asp](http://www.coe.int/t/dghl/monitoring/ecri/activities/mandate_en.asp))

<sup>53</sup> For example, ECRI, General policy recommendation No. 5 on Combating intolerance and discrimination against Muslims, Strasbourg, 27 April 2000.

|                 |  |  |   |  |
|-----------------|--|--|---|--|
|                 | Discrimination of speakers of minority languages | ECHR Article 14 & Optional Protocol 12<br>European Charter for Regional or Minority Languages (ECRML)<br><br>Supervision: Committee of Experts on ECRML<br>Courts: ECtHR   | Supervision: High Commissioner on National Minorities                                 | ICCPR Article 27<br>Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992<br>Article 27 of the Universal Declaration of Human Rights (UDHR)<br>Article 13 and Article 15 of the ICESCR<br><br>Monitoring and complaints: CCPR and CESCR  |
| Minority rights | Ethnic minorities                                | The Framework Convention on the Protection of National Minorities (FCNM)<br><br>Supervision: Advisory Committee on the Framework Convention for the Protection of National Minorities                                    | Supervision: High Commissioner on National Minorities <sup>54</sup>                   | ICCPR Article 27<br>Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992<br><br>Article 30 of the Convention on the Rights of the Child (CRC)<br>ICERD as a whole<br>Article 27 of the UDHR<br>Article 13 and Article 15 of the ICESCR<br><br>Monitoring and complaints: CCPR, CESC, CERD, CRC Committee. |
|                 | Religious minorities                             | Article 9 (Freedom of thought, conscience and religion) of the ECHR<br><br>Article 7 of the Framework Convention on the Protection of National Minorities<br><br>Court: ECtHR<br>Supervision: Advisory Committee on FCNM | Supervision: Advisory Panel of Experts on Freedom of Religion or Belief <sup>55</sup> | ICCPR, Article 18 and Article 27<br>Article 30 of CRC<br><br>Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992<br>Article 27 of the UDHR<br>Article 13 and Article 15 of the ICESCR<br><br>Monitoring and complaints: CCPR, CRC Committee, CESC  |

<sup>54</sup> OSCE High Commissioner on National Minorities, (<http://www.osce.org/hcnm>)

<sup>55</sup> OSCE, Office for Democratic Institutions and Human Rights. (<http://www.osce.org/odihr/freedom-of-religion-or-belief>)

|  |                                   |  |  |  |
|--|-----------------------------------|--|--|--|
|  | <p>Minority language speakers</p> | <p>European Charter for Regional or Minority Languages</p> <p>Supervision: Committee of Experts of the European Charter for Regional or Minority Languages</p> | <p>Monitoring: High Commissioner on National Minorities<sup>56</sup></p> | <p>ICCPR Article 27<br/>                 UNESCO, Universal Declaration on Cultural Diversity of 2001<sup>57</sup><br/>                 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992<br/>                 Article 27 of the UDHR<br/>                 Article 13 and Article 15 of the ICESCR</p> <p>Monitoring and complaints: CCPR, CDESCR<br/>                 Supervision: UNESCO Ad Hoc Expert Group on Endangered Languages<sup>58</sup></p> |
|--|-----------------------------------|--|--|--|

**Source:** Authors, own assessment, 2017.

<sup>56</sup> OSCE High Commissioner on National Minorities. ( <http://www.osce.org/hcnm>), for example OSCE High Commissioner on National Minorities, "Report on the Linguistic Rights of Persons Belonging to National Minorities in the OSCE Area", OSCE, 1999, (<http://www.osce.org/hcnm/42060>)

<sup>57</sup> UNESCO. ([http://portal.unesco.org/en/ev.php-URL\\_ID=13179&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html))

<sup>58</sup> UNESCO. (<http://unesdoc.unesco.org/images/0018/001836/183699E.pdf>)



### 1.1.1. United Nations

There are four main UN conventions directed at ensuring a principle of non-discrimination on general grounds, although non-discrimination clauses can be found in all the main UN conventions. When it comes to minority protection, the following ones are the most relevant:

- first, the International Covenant on Civil and Political Rights of 1966 (ICCPR) Articles 2 and 26, providing the prohibition of discrimination in civil and political life, as well as Article 27, which provides that persons belonging to ethnic, religious and linguistic minorities shall not be denied the rights “to enjoy their own culture, to profess and practise their own religion, or to use their own language”;
- second, the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR) Article 2(2), covering work life and social activities;
- third, the International Convention on Elimination of All forms of Racial Discrimination of 1965 (ICERD), covering all aspects of life, including interpersonal relations; and
- fourth, the Convention on the Rights of the Child (CRC), Article 30, which provides that a child belonging to an ethnic, religious or linguistic minority shall not be denied the rights “to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language”.

There are four corresponding bodies addressing individual and/or interstate complaints and monitoring the implementation of rights enshrined in these documents. For example, complaints under the ICCPR could be submitted to the Human Rights Committee, and respectively under the ICESCR to the Committee on Economic, Social and Cultural Rights (CESCR), and under the ICERD to the Committee on Elimination of Racial Discrimination (CERD). However, all of the individual or collective complaint mechanisms are optional, as further described below when analysing the CERD.

In addition to individual complaint mechanisms, there is peer-to-peer review happening between states, on the obligations they have undertaken to respect human rights, which is known as the Universal Periodic Review (UPR). The mechanism was established in 2006 by the UN General Assembly by Resolution 60/251, which established the Human Rights Council.<sup>59</sup> The UPR process foresees a cycle of 4.5 years, where all 193 of the UN Member States are invited to undergo a review of their human rights situation by their peers under the auspices of the Human Rights Council. The countries are currently undergoing their third cycle of review (2017–21).

The UPR process opens possibilities for civil society to engage with their governments and with third states to advance specific recommendations. Still, one of the main criticisms emerging from civil society is that the process is very much steered by the governments themselves, leaving little space to civil society, the UN and other independent monitors, and that there is a lack of follow-up to make sure that the recommendations accepted are implemented<sup>60</sup> (see also subsection 4.1).

- **Special procedures of the Human Rights Council**

The UN Human Rights Council (HRC) has established a number of mandates of special rapporteurs or working groups, which at the UN level are referred as ‘special procedures’. As of March 2017, there were 43 thematic and 13 country procedures.<sup>61</sup> Among the thematic ones, below are the most relevant ones to minority rights.

<sup>59</sup> UN General Assembly, Resolution 60/251, 15 March 2006.

<sup>60</sup> Rathgeber, T., “Performance and Challenges of the UN Human Rights Council: An NGOs’ View”, FES, February 2013. (<http://library.fes.de/pdf-files/iez/global/09680.pdf>)

<sup>61</sup> <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>.

**A special rapporteur** in this context is an **independent human rights expert** tasked with a thematic focus. Independent experts report regularly, advise states and the international community, conduct country visits and send communications to states on violations of human rights covered by their mandate. In 2005 a **Special Rapporteur on Minority Issues** was established, although a **Special Rapporteur on Racism** (responsible for ethnic and racial minorities) has been active since 1993. In addition, a **Special Rapporteur on freedom of religion and belief** has been dealing with religious minorities since 1986. A **Working Group on People of African Descent** has been addressing Afrophobia since 2002. Other special rapporteurs also work on intersections between their specific thematic mandates and minority issues: that has been the case for instance of the respective special rapporteurs on the human rights of migrants, on the human rights of defenders, on freedom of expression, and on human rights while countering terrorism, to name only a few.

**Special procedures of the HRC offer unique opportunities for right-holders to claim their rights through the communication process.** Such a process applies to any country (unless it is country-specific) and is open to any victim of human rights violations, his or her family or legal representative. Upon receipt of a complaint from one of these persons, and with the consent of the victim, the communication process starts. It allows any of the above-mentioned UN special rapporteurs, alone or jointly, to send an official letter to the country concerned and as its authorities to react to the allegations received. The process is confidential but communications are disclosed and made public after a few months. Publicity is a main threat for states to take action and remedy the violation.

Besides international conventions, at the UN level there are also soft law instruments like declarations adopted by the UN General Assembly – legally non-binding, yet authoritative documents elaborating on international standards. For example, Article 27 of the Universal Declaration of Human Rights of 1948 presents cultural rights: “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.” For minority rights of particular importance there are the three following international declarations:

- Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992;
  - Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief of 1981; and
  - UNESCO Declaration on Universal Declaration on Cultural Diversity of 2001.
- **The Committee on Elimination of Racial Discrimination**

The CERD was established by Article 14 of the ICERD and is composed of 18 members. It has the function of monitoring implementation of the ICERD by states' parties. The Committee, just like any other UN Treaty Body, has two main tools to address individual and/or systemic violations by state parties: 1) Periodic reviews of each state party's compliance with the Convention (Article 9, ICERD) and 2) an individual or collective complaint mechanism (Article 14, ICERD).

• **Periodic reviews**

Under Article 9 of the ICERD, state parties are invited to submit a report “on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention” (Article 9). Reports are then analysed by the members of the CERD, who rely on information submitted by civil society groups (called ‘alternative reports’ or ‘shadow reports’), UN information and other publicly available sources. The periodic review in practice is a full day, interactive dialogue between the members of the Committee and a delegation representing the state under review. Following this dialogue, the Committee adopts **concluding observations**, which contain both **conclusions** and **recommendations**. In the conclusions, the Committee welcomes the steps taken, new laws,

policies and practices, and also expresses concern about the state not meeting the ICERD standards. **Recommendations** suggest what the state should do to put its legislation, policies and practices in line with the ICERD.

This periodic review process allows the Committee to analyse in detail the legislative and regulatory framework of a given state, as well as the policies and the practices documented on the ground. Thus, the CERD has tools to underscore systemic violations rooted in laws, policies and practices, and collective representations, as well as patterns of violations. Individual cases are rarely mentioned in concluding observations; they can be raised during the interactive dialogue between the Committee and the state, and inform specific conclusions and recommendations.

The periodic review process is open for civil society participation. Any association, trade union or even academic institution, can submit a written contribution ahead of the review. The submissions, then are brought to the attention of the members of the Committee and can be used for their concluding observations.

The committee has an individual complaints mechanism, for those state parties that have opted in and accepted the CERD's competence by making a declaration under Article 14. As part of its functions, the CERD delivers additional interpretations of the definitions in the area of addressing racism and what it entails.<sup>62</sup> Article 14 of the Convention established the first of a kind of 'complaints mechanism', which was afterwards replicated in other international human rights covenants and conventions. Adopted in 1965, this clause in the Convention was pushed through by African and Asian countries in hopes of accelerating decolonialisation and ending apartheid, as "they were taking into account the clear connection that existed between racism and colonialism".<sup>63</sup>

They feared weakening the 'communications procedure' or discouraging overall ratification of the Convention by European countries; thus, the compromise was reached that it is of an **opt-in nature**. Nevertheless, all of the EU Member States have made this declaration, with the exceptions of Croatia, Greece, Latvia, Lithuania and the UK.

This opt-in nature for individual complaints included in ICERD under Article 14 became a format for subsequent complaint mechanisms – a declaration under Article 22 of the UN Convention against Torture, (CAT), ratification of or accession to the First Optional Protocol to the ICCPR, to the Optional Protocol to the Convention on the Rights of Persons with Disabilities (CRDP) and an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), among others.

Furthermore, the CERD, on the basis of the Article 14 of ICERD, could explicitly accept complaints not only from 'individuals', but also from 'groups of individuals' (see subsection 1.2. on the scope of complaints). Moreover, the CERD, on the basis of complaints, takes a decision (called an 'opinion') on the existence or not of a violation of the Convention, and can issue specific 'suggestions and recommendations' to the state concerned and to other state parties to the ICERD.<sup>64</sup> The CCPR and other bodies, issue and interpret the 'views' of a comparable nature, and thus practitioners often do not distinguish between the two. As section 4 elaborates further, the international complaints mechanisms face challenges in follow-up and they also lack EU specificity.

<sup>62</sup> Van Boven, T. "The Committee on the Elimination of Racial Discrimination: Trends and Developments", ERRC, 10 May 2003 (<http://www.errc.org/article/the-committee-on-the-elimination-of-racial-discrimination-trends-and-developments/1432>)

<sup>63</sup> Van Boven, T., "The Petition System under the International Convention on the Elimination of All Forms of Racial Discrimination: A Sobering Balance-sheet", 2000. ([http://www.mpil.de/files/pdf2/mpunyb\\_vanboven\\_4.pdf](http://www.mpil.de/files/pdf2/mpunyb_vanboven_4.pdf))

<sup>64</sup> Van Boven, T., "The Petition System under the International Convention on the Elimination of All Forms of Racial Discrimination: A Sobering Balance-sheet", 2000 ([http://www.mpil.de/files/pdf2/mpunyb\\_vanboven\\_4.pdf](http://www.mpil.de/files/pdf2/mpunyb_vanboven_4.pdf))

Prior to Optional Protocol 12 to the European Convention on Human Rights (ECHR), the CERD was the only international mechanism that could redress on the discrimination on the basis of race and ethnicity as such (without having violated other rights of the Convention, such as Article 14 of the ECHR). Interestingly enough, as 18 of the EU Member States have not yet accepted Optional Protocol 12, as grounds for a case under the ECHR, the CERD could still be used as one of the mechanisms of redress by individuals or groups.

### 1.1.2. Council of Europe

The CoE provides for two main constitutive documents, furthering and complementing the rights enshrined under UN instruments:

- the European Convention on Human Rights of 1950, and
- the European Social Charter (revised) of 1996.

Both instruments proscribe discrimination on the grounds of "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". ECHR Article 14, in relation to any other article of the ECHR, can give rise to a case in the European Court of Human Rights. Yet Optional Protocol 12, as an innovation, provides an opportunity to lodge complaints about discrimination in any other areas of life, going beyond the ECHR. This is further discussed in section 1.3.2 in greater detail. Non-discrimination in the EU legal framework is a broader one – it is seen as a general principle (see section 3).

In the European Social Charter (revised), Article E prohibits discrimination in relation to the rights described in the Charter. It states that "the enjoyments of the rights set forth in this Charter shall be secured without discrimination on any ground". Individual and collective complaints can be lodged against a quasi-legal body, the European Committee of Social Rights (ECSR). The ECSR has made decisions in the cases of Roma housing and eviction. Many European and international civil society organisations have submitted collective complaints, including for violations against Roma. For example, the European Roma Rights Centre has been using this venue for its strategic litigation on Roma discrimination in housing and social protection.<sup>65</sup>

ECHR is enforced through judgements by the ECtHR (see section 3 for more discussion). Both CoE human rights treaties, in particular the ECHR, contain provisions for persons who do not understand the language of the judiciary and on the freedom of expression, but not minority language rights, neither as an individual nor as a group.<sup>66</sup> This gap in the rules has been discussed in the CoE several times since 1957, but no agreement on a protocol has been reached for national minorities in relation to languages.

Besides the ECHR and European Social Charter, there are two documents targeting the specificities of minority rights that count with their own instruments:

- The Framework Convention on the Protection of National Minorities (FCNM) of 1995 provides some human rights, which can be found in the ECHR with particular implications for minorities. Its main contribution has been the adoption of a set of specific minority rights, such as a qualified right for members of a minority to use their language when dealing with public officials and courts and a right to receive education in that language. According to de Witte (2000), the Framework Convention "constitutes an important stage in international standard-setting".

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<sup>65</sup> *ERRC v Greece*, Collective Complaint 15/2003; *ERRC v Bulgaria*, Collective Complaint 31/2005; *ERRC v France*, Collective Complaint No 51/2008; Strategic Litigation: *ERRC v Portugal*, Collective Complaint No 61/2010; *ERRC v Ireland*, Collective Complaint No. 100/2013.

<sup>66</sup> Schreuder, J.-P., 'Minority protection within the concept of self-determination', *Leiden J. of Int.L.*, 1995, p. 54-80.

- The European Charter for Regional or Minority Languages (ECRML) of 1992 has the main purpose of protecting languages and not protecting minorities. The explanatory report foresees “the standardization of modern society, especially in the media, and the threatening influence of state policy aimed at assimilation as the biggest threat to Regional and Minority languages” (para. 2). Thus, the ECRML does not grant individual or collective rights to citizens speaking a regional or minority language. However, it obliges the participating countries through regulatory or other measures to ensure and improve the position of these languages. “Emphasis is placed on languages, and by using a sliding scale menu-system, states have the possibility to choose the most appropriate protection they want to give to Regional and Minority languages.”<sup>67</sup> Nevertheless, Article 1 implies that the ECRML does not cover dialects nor the languages of third-country nationals.

The FCNM is closely monitored by the Advisory Committee on the Framework Convention for the Protection of National Minorities (ACFC), whereas implementation of the ECRLM is overseen by the Committee of Experts of the European Charter for Regional or Minority Languages (ECRML Committee).

Finally, there are two additional bodies that have a monitoring mandate, but which are not bound to a specific document: i) the European Commission against Racism and Intolerance (ECRI),<sup>68</sup> notably on racism and racial discrimination;<sup>69</sup> ii) CoE Commissioner for Human Rights<sup>70</sup> and iii) the European Commission for Democracy through Law (the Venice Commission).<sup>71</sup> Although the Venice Commission generally covers rule of law issues, it has also produced an important overview on minority rights in the form of two key compilation reports, on the protection of national minorities<sup>72</sup> and on freedom of religion and belief.<sup>73</sup> However, the Venice Commission lacks EU specificity when assessing minority protection in the EU.

### 1.1.3. Organization for Security and Co-operation in Europe

In OSCE, there are two main bodies:

- the Office for Democratic Institutions and Human Rights (ODIHR), which sets standards, including on rule of law issues; and
- at the OSCE, there is also a position of a High Commissioner on National Minorities (HCNM), who makes recommendations and provides reports on linguistic rights<sup>74</sup> as well as on the importance of participation of national minorities in public life.<sup>75</sup>

<sup>67</sup> Van der Velden, B. D., 2017, See Annex 3 for more precise analysis.

<sup>68</sup> [http://www.coe.int/t/dghl/monitoring/ecri/activities/mandate\\_en.asp](http://www.coe.int/t/dghl/monitoring/ecri/activities/mandate_en.asp)

<sup>69</sup> For example, ECRI General Policy Recommendation No. 1 on Combating racism, xenophobia, antisemitism and intolerance, 4 October 1996, Strasbourg.

<sup>70</sup> <https://www.coe.int/en/web/commissioner>

<sup>71</sup> <http://www.venice.coe.int/webforms/events>

<sup>72</sup> Compilation of Venice Commission opinions and reports concerning the protection of national minorities, CDL(2011)018-e. (<http://www.venice.coe.int/webforms/documents/?pdf=CDL%282011%29018-e>)

<sup>73</sup> Compilation of Venice Commission Opinions and Reports concerning Freedom of Religion and Belief, CDL-PI(2014)005-e, (revised July 2014). (<http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI%282014%29005-e>)

<sup>74</sup> OSCE HCNM, Oslo Recommendations regarding the Linguistic Rights of National Minorities (1998); OSCE HCNM, “Report on the Linguistic Rights of Persons Belonging to National Minorities in the OSCE Area”, OSCE, 1999. (<http://www.osce.org/hcnm/42060>)

<sup>75</sup> OSCE HCNM, Lund Recommendations on the Effective participation of national minorities in public life (1999).

## **1.2. What is the personal scope of monitoring instruments in non-discrimination/minority protection?**

Many challenges and knowledge gaps exist when it comes to the practical meaning of monitoring instruments and implementation at the national level. These relate for instance to precisely 'what' is protected and 'who' is protected by the above-described actors. Thus, definitions of traditional, 'autochthonous' or indigenous<sup>76</sup> minorities are important, as it gives rise to their recognition at the national level.

Section 2 of this study provides an in-depth mapping of these actors and instruments, which will allow for a comparison between relevant definitions and standards that exist in international and regional fora alongside the EU legal framework. Notably, the UN, CoE and OSCE provide authoritative venues and monitoring instruments.

Table 3 looks at two main themes prevailing in this domain across the international and regional instruments covered in this section: i) **freedom from discrimination** and ii) **specific group rights**. These two themes, under international and regional bodies, are elaborated in section 2, whereas the role of the EU is analysed in section 3.

## **1.3. What is the 'record' of states' ratification of the international and regional instruments?**

### **1.3.1. United Nations**

Table 3 illustrates the diverse picture of states' signature and ratification of the three most relevant mechanisms under the First Optional Protocol to the ICCPR, the Optional Protocol to the ICESCR and Article 14 of the ICERD, and the Optional Protocol to the CRC on a communications procedure and CEDAW Optional protocol giving the right for individual complaints.

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<sup>76</sup> The term 'indigenous' minorities carries different protection than just recognised traditional minorities, such as for example, intellectual property rights. In the EU there are just a few indigenous people minorities, such as the Sami in Norway, Sweden and Finland. (See more: <http://minorityrights.org/minorities/overview-of-europe/>).

**Table 3. Ratifications of the most relevant UN individual or collective complaint instruments**

| Countries       | ICCPR, First Optional Protocol | ICESCR, Optional Protocol | ICERD, Article 14 | CRC, Optional Protocol | CEDAW, Optional Protocol |
|-----------------|--------------------------------|---------------------------|-------------------|------------------------|--------------------------|
| Estonia         | Yes                            | No                        | No                | No                     | No                       |
| Finland         | Yes                            | Yes                       | Yes               | Yes                    | Yes                      |
| France          | Yes                            | Yes                       | Yes               | Yes                    | Yes                      |
| Greece          | Yes                            | No                        | No                | No                     | Yes                      |
| Hungary         | Yes                            | No                        | Yes               | No                     | Yes                      |
| Italy           | Yes                            | Yes                       | Yes               | Yes                    | Yes                      |
| Romania         | Yes                            | No                        | Yes               | No*                    | Yes                      |
| Serbia          | Yes                            | No                        | Yes               | No*                    | Yes                      |
| Slovak Republic | Yes                            | Yes                       | Yes               | Yes                    | Yes                      |
| Spain           | Yes                            | Yes                       | Yes               | Yes                    | Yes                      |
| Sweden          | Yes                            | No                        | Yes               | No                     | Yes                      |

\* Only signed, not ratified

Source: Authors, 2017, based on the official data.<sup>77</sup>

- **Collective or individual nature of a complaint?**

The First Optional Protocol of the ICCPR, speaks only about 'individuals', who claim to be victims of violations enshrined in the Covenant (Article 2). However, four remaining treaty bodies, covered in Table 3 above consider complaints made by individuals and **groups of individuals** (the CEDAW Optional Protocol, the CRC Optional Protocol, Article 14 of the ICERD and the ICESCR Optional Protocol). In addition, the CRC Committee, CEDAW Committee and CESCR can receive complaints made **on behalf** of an individual or a group of individuals. Still, all three treaty bodies, while allowing other actors to act on behalf of an individual, actually require the consent of the individual "unless the author can justify acting on their behalf without such consent", as for example established in the CRC, Article 5 para. 2.

The collective nature of complaints indicates the possibility to challenge the institutional nature of violations. It also gives rise to actions from various ethnic minority groups to protect themselves from the violations. Thus, for example, CERD has been used to uphold the rights

<sup>77</sup> See for example: <http://indicators.ohchr.org> ; <http://www.osce.org/hcnm/42060?download=true>; [https://web.archive.org/web/20110211223019/http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&lang=en](https://web.archive.org/web/20110211223019/http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en) .

of different minorities, such as *Roma*<sup>78</sup> and Jewish minorities,<sup>79</sup> as well as naturalised or not naturalised persons of foreign origin.<sup>80</sup> **Collective nature of complaints or *actio popularis* is a particularly important instrument for watchdog civil society to held the governments accountable for institutional discrimination against ethnic, religious and linguistic minorities.**

Besides the individual or group complaints at the UN level there are two other important mechanisms:

- **Interstate complaints** foresee that as peers, state parties of the relevant treaty can ask a peer about compliance with human rights standards. Nevertheless, this instrument is used very rarely, as states contemplating starting a procedure do not want to be targeted themselves.

All five treaty bodies covered in this section have some sort of interstate complaints facility. Article 10 of the Optional Protocol to the ICESCR and Article 12 of the Optional Protocol to the CRC provides that the treaty body itself could review such interstate claims. The ICERD, ICCPR and the CRC foresee a special procedure – the establishment of an *ad hoc conciliation commission*. In addition, the CERD, ICERD and CEDAW also foresee a possibility to refer unsolved disputes to the International Court of Justice; however, the interstate complaints procedure has never been used.<sup>81</sup>

- **The inquiry procedure** is another UN complaints procedure that may be used by the UN treaty bodies, which can be invoked upon “a receipt of reliable information on serious, grave or systematic violations by a State party of the conventions they monitor”.<sup>82</sup> This provision is in Article 8 of the Optional Protocol to CEDAW, Article 11 of the Optional Protocol to ICESCR and Article 13 of the Optional Protocol to the CRC. State parties nonetheless have a possibility to opt out of this clause when ratifying the Convention (Optional Protocol to the CEDAW) or at any time (Optional Protocol to the ICESCR). The key feature of this procedure is confidentiality and that the state party is involved or at least that “the cooperation of the State party shall be sought at all stages of the proceedings”.<sup>83</sup>

### 1.3.2. Council of Europe

The desk research reveals that at the CoE level, expanding the scope of a general non-discrimination principle, as foreseen in Article 14 of the ECHR, seems to be quite challenging (see Table 4). Out of 11 countries selected for this study, only 4 have ratified Optional Protocol 12 of the ECHR.<sup>84</sup> Finland and Spain were among the selected EU-15 countries that have ratified Optional Protocol 12. Serbia, a pre-accession country, has done so, as has Romania, a post-2014 EU enlargement country. This could be related to EU accession, as later discussed in this subsection.

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<sup>78</sup> CERD, Communication No. 31/2003: *L.R. v Slovakia*. 10/03/2005. UN CERD. 10 March 2005; CERD, Communication No 13/1998: *Koptova v Slovakia*. 01/11/2000.

<sup>79</sup> CERD, Communication No. 30/2003 *The Jewish community of Oslo et al. v. Norway*. UN CERD. 15 August 2005.

<sup>80</sup> CERD, Communication No. 34/2004: *Gelle v. Denmark*. 15/03/2006". UN CERD. 15 March 2006 – a case pertaining to a Danish citizen and resident of Somali origin; CERD, Communication No 4/1991: *L.K. v. Netherlands*. 16/03/93". UN CERD. 16 March 1993. A case concerning a Moroccan citizen currently residing in Netherlands.

<sup>81</sup> Office of the UN High Commissioner for Human Rights, “Human Rights Bodies - Complaints Procedures”. (<http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx>).

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No.177, opened for ratifications in Rome, 04/11/2000.



**Table 4. Ratifications of the relevant CoE instruments**

| <b>Countries</b>       | <b>Party of the European Charter on Regional or Minority Languages (ECRML)</b> | <b>Party of the Framework Convention on the Protection of Minorities (FNCM)</b> | <b>Party of the European Convention on Human Rights, Optional Protocol 12</b> |
|------------------------|--|---|---|
| <b>Estonia</b>         | No   | <b>Yes</b>  | No*   |
| <b>Finland</b>         | <b>Yes</b>   | <b>Yes</b>  | <b>Yes</b>  |
| <b>France</b>          | No*  | No  | No  |
| <b>Greece</b>          | No   | No*   | No*   |
| <b>Hungary</b>         | No*  | <b>Yes</b>  | No*   |
| <b>Italy</b>           | No*  | <b>Yes</b>  | No*   |
| <b>Romania</b>         | <b>Yes</b>   | <b>Yes</b>  | <b>Yes</b>  |
| <b>Serbia</b>          | <b>Yes</b>   | <b>Yes</b>  | <b>Yes</b>  |
| <b>Slovak Republic</b> | <b>Yes</b>   | <b>Yes</b>  | No*   |
| <b>Spain</b>           | <b>Yes</b>   | <b>Yes</b>  | <b>Yes</b>  |
| <b>Sweden</b>          | <b>Yes</b>   | <b>Yes</b>  | No  |

\* Only signed, not ratified

**Source:** Authors, 2017, based on the official data.<sup>85</sup>

Only three (Finland, Romania and Spain) out of the ten EU Member States investigated in this study have ratified the Optional Protocol 12 as well as Serbia, being the eleventh country covered in this report.

- **Optional Protocol 12 to the European Convention on Human Rights**

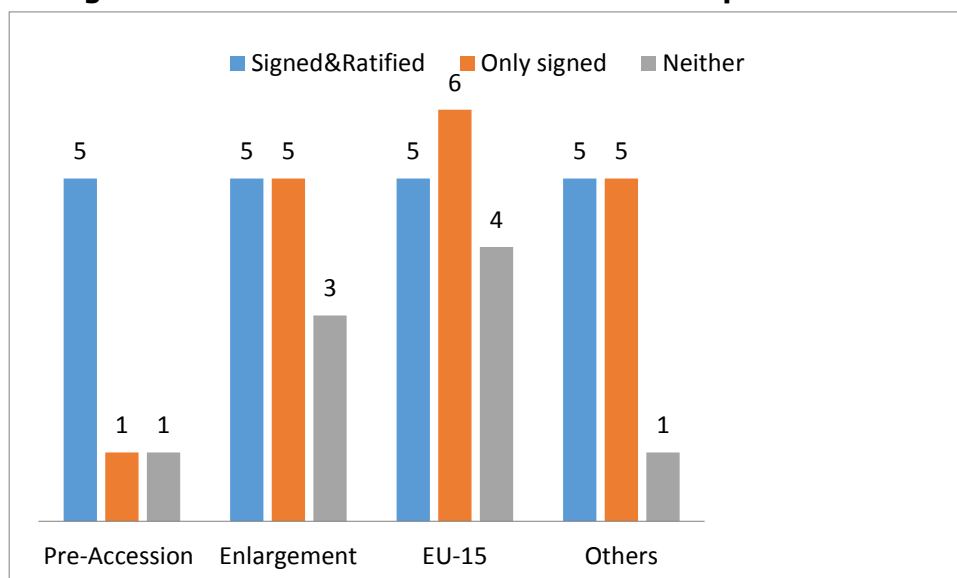
Protocol 12 provides for a general prohibition of discrimination. The current non-discrimination provision – Article 14 – of the European Convention on Human Rights is of a limited kind because it only prohibits discrimination in relation to at least one of the other rights guaranteed by the Convention. Article 14 on the prohibition of discrimination provides that “[t]he 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, property, birth or other status”.

Protocol 12 removes this limitation and guarantees that no one shall be discriminated against on any ground by any public authority.<sup>86</sup> This is of particular importance to emerging minority groups and situations falling outside the protection of the ECHR, such as discrimination in employment.

<sup>85</sup> [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/148/signatures?p\\_auth=ibCYOAMt](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/148/signatures?p_auth=ibCYOAMt); [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/157/signatures?p\\_auth=3TzJ5wto](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/157/signatures?p_auth=3TzJ5wto); [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p\\_auth=RmUUVblf](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=RmUUVblf).

<sup>86</sup> <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177>.

**Figure 4. Ratification rate of current EU and pre-accession countries\***



\* **Pre-Accession** refers to seven Balkan countries that are in negotiations with the EU; **enlargement** refers to recent EU enlargements after 2004; **EU-15** refers to 'old EU' Member States that joined the EU before 2004; **others** are the remaining CoE countries.

**Source:** Authors, own compilation on the basis of CoE, Chart of signatures and ratifications of Treaty 177, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, status as of 26.5.2017 ([https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p\\_auth=RmUUUVblf](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=RmUUUVblf)).

Figure 4 above indicates that among the current pre-accession countries there have been comparably higher rates of ratification (five out of seven), whereas for Member States that participated in EU enlargements since 2004 or made up the EU-15 (old EU Member States), approximately just a third have ratified Optional Protocol 12.

**All in all, only 10 out of 28 EU Member States have ratified the Optional Protocol 12 accepting the ECtHR competence to decide on the discrimination cases, without necessarily invoking another ECHR right.** This is an interesting finding, in light that non-discrimination is indeed the key element of the EU legal framework (see section 3).

## 2. INTERNATIONAL AND REGIONAL LEGAL STANDARDS FOR MINORITY PROTECTION

### KEY FINDINGS

- Minority grounds involving race, ethnicity, nationality, culture, religion and language are closely linked and interrelated. For the purposes of clarity, this study suggests that ethnic, linguistic and religious grounds should be seen from an intersectional viewpoint.
- Historically, the category of 'national minorities' in Europe emerged in relation to non-Europeans, thus immigrants or persons/groups of foreign origin. Europeans enjoyed more rights than the latter. Therefore, in general non-citizens are not included in the protections on the grounds of being a national minority.
- ICCPR Article 27 protection extends to ethnic, linguistic and religious minorities, who are non-citizens. Broad provisions proscribing hate speech in the ICCPR Article 18 and CERD Article 4, are important for protecting ethnic, linguistic and religious minorities, without having a particular victim, as hate speech is often directed at larger 'groupings' such as migrants, asylum seekers or refugees.
- Ethnic, linguistic and religious rights have evolved in two ways, advanced by those who claim protection of the cultural heritage, language or religion as a cultural value on the one hand (i.e. UNESCO Conventions), and on the other protection of individuals who use or practise in minority languages from discrimination in various fields of life (i.e. ICCPR). The human rights actors and instruments at the international and regional levels underscore the second approach that it is indeed about protecting the rights of individuals and groups.
- At the regional level, case law of the ECtHR and ECSR suggests more precise and detailed interpretations of the European standards, whereas the specialised bodies – ECRML Committee and ACFC along with ECRI - clarifies and promote key definitions and minority protection standards.

This section will provide a synthesis of the findings emerging from the desktop research and from the thematic case studies provided in Annexes 1-3. It mainly aims to answer the following research question: What are corresponding legal standards foreseen by international instruments and regional bodies/actors regarding the three themes of i) ethnic, ii) linguistic minorities and iii) religious minorities?

### UN standards for the protection of minority rights

The UN has developed a conceptual framework to protect minority rights. This framework has three pillars: 1) protection; 2) non-discrimination and 3) participation.

- **Protection:** The UN's actors and instruments seek to protect minorities from genocide, ethnic cleansing or even forced assimilation.
- **Non-discrimination:** The UN recognises that persons belonging to minorities should be protected from discrimination. This applies both to **direct and indirect discrimination**. Indirect discrimination happens when a practice, rule, requirement or condition outwardly appears to be neutral but it impacts negatively on a particular group in a disproportionate way.
- **Participation:** Minorities have a right to participate in decision-making on issues that affect the minority, but also in all aspects of public life, as well as in economic progress and the benefits of development.

## Council of Europe standards on minority protection

In addition is the ECtHR, which has developed standards on **protection and non-discrimination** of various ethnic, linguistic and religious minorities. The FCNM and ECRML started a new stage in the development of the minority protection system at the regional level. Instead of elaborating basic standards for minority protection, the regional efforts were concentrated on **participation and follow-up** – on monitoring mechanisms and raising the efficiency of institutions and procedures aimed at ensuring compliance with these basic principles by all CoE member states.

### 2.1. Ethnic minorities

There is no internationally agreed definition as to which groups constitute or fall within the normative category of 'minorities'. For example, Article 27 of the International Covenant on Civil and Political Rights (ICCPR) provides a threefold characterisation of minorities – ethnic minorities, religious minorities and linguistic minorities.<sup>87</sup> These categories are also repeated in other UN instruments, such as the CRC, UN Declaration on the Rights of Persons belonging to Minorities.

The scholarly literature has underlined that "racial and ethnic origin shall be applied as a 'super category', rather than race or ethnicity alone. It purports to show that the quest for identifying differences between racial and ethnic origin has been futile and urges [the] legal profession to refrain from pursuing such endeavour."<sup>88</sup> In this way, social scientists warn lawyers, who risk buying into 'essentialising' the difference and engaging too much in processes of 'racialisation' by requiring the individuals to self-identify with a given set of stereotyped communities or 'minorities'. In a similar way, the current report calls for 'ethnic, linguistic and religious' grounds as to be seen from an intersectional viewpoint.

Lila Farkas (2017) argues for instance that "national origin is an inherent part of the composite categories of origins", thus racial origin should not be "reducible to colour and physical appearance".<sup>89</sup> Her analysis indicates the privileged position of 'national minorities' as European, as opposed to 'immigrant' or 'foreign' origins as non-European. Such divisions were created when building the protection for national minorities after World War I, to protect nationals within the territory of another European country.<sup>90</sup>

This goes hand in hand with the interpretation of the UN Human Rights Committee on the scope of the minority protection in Article 27 ICCPR in its General Comment 23, and the interpretation of the CoE Venice Commission. Annex 1 of this study highlights that "a more dynamic tendency to extend minority protection to non-citizens has developed over the recent past".<sup>91</sup> The CoE Venice Commission assesses that "governments should not be allowed to exclude minorities or define them away by non-acknowledgement or by arbitrary denial of citizenship".<sup>92</sup> This is also illustrated in the Table 5.

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<sup>87</sup> See Office of the High Commissioner for Human Rights. *CCPR General Comment No 23: Article 27 (Rights of Minorities)*, paras. 5.1. and 5.2.

<sup>88</sup> Farkas, L. "The meaning of racial or ethnic origin in EU law: between stereotypes and identities", European Network of Legal Experts in Gender Equality and Non-Discrimination, Luxembourg: Publications Office of the European Union, 2017, p.8.

<sup>89</sup> Farkas, L. "The meaning of racial or ethnic origin in EU law: between stereotypes and identities", European Network of Legal Experts in Gender Equality and Non-Discrimination, Luxembourg: Publications Office of the European Union, 2017, p.8.

<sup>90</sup> Balibar, E, and I. M. Wallerstein. *Race, nation, class: Ambiguous identities*, Verso, 1991.

<sup>91</sup> European Commission for Democracy through Law (Venice Commission). *Compilation of Venice Commission Opinions and Reports Concerning the Protection of National Minorities*. CDL (2011)018, p. 6.

<sup>92</sup> *Ibid.*, p. 13.

**Table 5. Main standards for protection of minorities - personal scope**

| Actors            | Relevant articles   | Personal Scope  |
|-------------------|---|---|
| <b>CCPR (UN)</b>  | <p>ICCPR, Article 27:<br/>           "In those States in which <b>ethnic, religious or linguistic minorities exist</b>, persons belonging to such minorities shall not be denied the right, <b>in community with the other members of their group</b>, to enjoy their own culture, to profess and practise their own religion, or to use their own language."</p> <p>ICCPR, Article 26:<br/>           "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall <b>prohibit any discrimination</b> and guarantee to all persons equal and <b>effective protection</b> against discrimination on any ground such <b>as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.</b>"</p> | <p>Thus, ICCPR effectively covers all people in all areas of civil and political life. The only exception is <b>Article 25</b> reserved for citizens.</p> <p><b>General Recommendation No.23</b>, which explains that <b>non –citizens</b> are included under <b>Article 27 provision</b>.</p> <p>ICCPR <b>Article 26</b> also protects all individuals and groups from discrimination.</p> <p><b>CCPR General Comment No. 15</b> also affirms the principle that the <b>protection against discrimination should be applied to <u>all</u> people within the State's territory.</b></p>   |
| <b>CERD (UN)</b>  | <p><b>ICERD, Article 1.1</b> provides a definition of "racial discrimination" as "any distinction, exclusion, restriction or preference based on <b>race, colour, descent, or national or ethnic origin</b> that has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms <b>in the political, economic, social, cultural or any other field of public life.</b>"</p>   | <p>The preamble refers to "<b>all human beings</b>"; the only exception applies to Articles relating to the rights reserved to citizens (voting, standing elections).</p> <p>ICERD Article 1.2. elaborates that ICERD must be construed so as to avoid undermining the basic prohibition of discrimination" and that "<b>differential treatment based on citizenship or immigration status will constitute discrimination</b> if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim."</p> |
| <b>ECRI (CoE)</b> | <p>General Policy Recommendation No. 7 defines "racism" as a belief about superiority in para. 1(a), "direct racial discrimination" in para. 1(b) and "indirect racial discrimination" in 1(c). Racial discrimination is defined as "any differential treatment based on a ground such as <b>race, colour, language, religion, nationality or national or ethnic</b></p>  | <p>The recommendation on criminal code requirements, in reason – paras 18a), b), c), and d) – chooses to speak of larger "grouping[s]" of persons (as opposed to 'groups'), which tackle expressions aimed at asylum</p>  |

|                   |   |   |
|-------------------|---|---|
|                   | <b>origin</b> , which has no objective and reasonable justification". <sup>93</sup>   | seekers or foreigners in general. <sup>94</sup><br>ECRI Recommendation provides that, exceptions could be justified as "objective and reasonable" only in an "extremely limited number of cases". <sup>95</sup> |
| <b>FCNM (CoE)</b> | Framework Convention for the Protection of National Minorities (FCNM) does not contain a definition of 'national minority', just certain protection standards, although the Convention on Nationality (1996), Article 2(a) defines ' <b>nationality</b> ' as "the legal bond between a person and a State". | Advisory Committee on the Framework Convention (ACFC) in its opinions has been critical towards states which exclude non-citizens from the scope of the Convention (see Annex 3).                               |

Source: Authors, 2017.

- **United Nations**

As Table 5 above provides, the most relevant clauses of the ICCPR are Article 27 establishing minority rights as well as Articles 2.1 and 26 establishing the dual non-discrimination standards on the proscribed grounds. Article 2.1. relate to non-discrimination in enjoyment of rights guaranteed by the ICCPR, whereas Article 26 establish a non-discrimination as equal protection of the law.

CCPR General Comments No. 23 provides a definition of minority rights, as established in Article 27. CCPR explains that this right is of distinct nature and should not be confused with self-determination or general non-discrimination clauses.<sup>96</sup>

Besides Article 26, The CCPR also has a General Comment No.18 on non-discrimination. In addition, the CESRC General Comment No.20 on non-discrimination, is very elaborate and speaks about **systemic discrimination**.

Table 5 indicates that at the UN level minority and non-discrimination standards generally cover **all the persons within the State's territory, and thus are including documented and undocumented migrants and refugees as well as temporary workers:**

Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practise their religion and speak their language. **Just as they need not be nationals or citizens, they need not be permanent residents.** Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights.<sup>97</sup>

The detailed explanations in the CCPR General Comments No. 15 and No.23 show that any exceptions and limitations should be justified. A similar provision is established in the ICERD Article 1.2.

<sup>93</sup> ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, CRI(2003)8, adopted 13 December 2002, para. 1(b).

<sup>94</sup> Explanatory Memorandum of ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, CRI(2003)8, para. 38.

<sup>95</sup> Ibid., para. 8.

<sup>96</sup> CCPR General Comment No.23, Article 27 (Rights of Minorities), adopted on 8 April 1994, CCPR/C/21/Rev.1/Add.5, para. 2.

<sup>97</sup> Ibid, para. 5.2.

At the UN level, the ICCPR and ICESCR, the ICERD, reiterate the prohibited grounds of discrimination on “**race, colour, descent, or national or ethnic origin**”. The list is expanded to “**race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth, age or other status**” in the following instruments: Convention on the Rights of the Child (CRC) (Art.2(1)), and Convention on the Rights of Persons with Disabilities (CPRD) (Preamble, (p)).

- **Council of Europe**

At the regional level, ECRI is the authoritative institution to suggest definitions at the CoE level that are often taken over by the EU and vice versa. For example, the definition provided in ECRI’s General Policy Recommendation No. 7 refers back to the EU Racial Equality Directive (2000/43/EC)<sup>98</sup> (see also section 3).

Nevertheless, regional mechanisms, in particular, the ECtHR and the European Social Charter go further in explaining what is prohibited and under what circumstances. For example, under ECHR Article 14, in the case of *Timishev v Russia*, as part of its decision the Court elaborated on the interlinked nature of the grounds of ethnicity and race:<sup>99</sup>

Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds.

Therefore, Article 14 guarantees the enjoyment of the rights and freedoms contained in the ECHR without discrimination on a non-exhaustible list of grounds, including, inter alia, race, colour and association with a national minority. While the scope of Article 14 is limited, as it may only be invoked in relation to another substantive provision of the ECHR, Protocol No. 12 provides an autonomous application of the principle of non-discrimination “to any right set forth by law”. Such an exemplary case would be on the right to stand in elections without discrimination on the basis of ethnic origin.<sup>100</sup>

The ground of ‘nationality’ as shown in Table 5 above indicates the present relationship with a state. ‘National origin’ is broader and could cover stateless persons, as national origin may be taken to denote a person’s former nationality, which they may have lost or added to through naturalisation, or to refer to the attachment to a ‘nation’ within a state (such as Scotland in the UK).<sup>101</sup> The academic literature and recent studies further establish the close link between minorities, nationality and statelessness.<sup>102</sup>

The FCNM sets out a spectrum of guarantees for national minorities.<sup>103</sup> These mainly focus on the rights of individuals belonging to minorities.<sup>104</sup> For example, Article 4 encourages

<sup>98</sup> Explanatory Memorandum of ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, CRI(2003)8, para. 8.

<sup>99</sup> ECtHR, *Timishev v Russia* (Nos. 55762/00 and 55974/00), 13 December 2005, para. 55.

<sup>100</sup> ECtHR, *Sejdić and Finci v Bosnia and Herzegovina* [GC] (Nos. 27996/06 and 34836/06), 22 December 2009.

<sup>101</sup> European Union Agency for Fundamental Rights, and European Court of Human Rights, Council of Europe, Handbook on European non-discrimination law, Luxembourg: Publications Office of the European Union, 2011. (<http://fra.europa.eu/en/publication/2011/handbook-european-non-discrimination-law> ).

<sup>102</sup> Cahn, C., “Minorities, Citizenship and Statelessness in Europe”, European Journal of Migration and Law 14, No. 3, 2012, pp. 297-316.

<sup>103</sup> Framework Convention for the Protection of National Minorities (ETS No. 157, in effect since 1997) (Article 5(1), 6, 8 and 10-15.

<sup>104</sup> Framework Convention for the Protection of National Minorities (ETS No. 157, in effect since 1997) (Article 5(1), 6, 8 and 10-15.

Member States to introduce positive measures in favour of particularly disadvantaged minorities, and here linguistic or religious claims of such minorities could be considered.<sup>105</sup> Nevertheless, only Roma and Jews were acknowledged Europe-wide as national minorities, without an actual link to any state.

- **Focus on Roma rights and combating anti-Gypsyism**

As the analysis in Annex 1 shows, the Council of Europe has introduced a definition of 'Roma' that has been commonly adopted also by the European Union institutions.<sup>106</sup> This definition refers to various Roma, Sinti, Kale and other groups in Europe, including Travellers and persons who identify themselves as Gypsies.<sup>107</sup>

In addition, ECRI successfully adopted the definition of 'anti-Gypsyism' in its General Policy Recommendation No. 13 on combating anti-Gypsyism and discrimination against Roma.<sup>108</sup> A recent study showed that such a conceptualisation of combating anti-Gypsyism and in particular its institutional forms is gaining ground among EU policy-makers.<sup>109</sup> Civil society is advocating a more nuanced understanding of the 'antigypsyism' phenomenon.<sup>110</sup>

The ECtHR has delivered a number of judgements on individual Roma cases.<sup>111</sup> The Strasbourg court has often acknowledged the vulnerable position of Roma complainants and the need for special consideration of their situation, and referred to the volume of concerns and recommendations by international bodies.

As illustrated in Annex 1, these cases have established important standards, such as the following ones:

- a positive duty on the state to investigate racial motives in cases of violence against Roma whether committed by the state or non-state actors;<sup>112</sup>
- "special vigilance and vigorous reaction" by the state in cases of racial discrimination;<sup>113</sup>
- racial discrimination may attain the severity of inhuman and degrading treatment, which is prohibited in absolute terms by the ECHR;<sup>114</sup>
- segregation of Roma in education – whether through the placement in special remedial schools or in Roma-only schools and classes – is racial discrimination, which is prohibited under the ECHR;<sup>115</sup> and

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<sup>105</sup> Opinion on Hungary, 22 September 2000, ACFC/INF/OP/I(2001)004, §4; Opinion on Croatia, 6 February 2002, ACFC/INF/OP/I(2002)003, §26; Opinion on the Czech Republic, 25 January 2002, ACFC/INF/OP/I(2002)002, §29.

<sup>106</sup> See Annex 1.

<sup>107</sup> See Council of Europe Descriptive Glossary of terms relating to Roma issues, 18 May 2012.

<sup>108</sup> ECRI General Policy Recommendation No. 13, CRI(2011)37, ([http://www.coe.int/t/dgh/monitoring/ecri/activities/GPR/EN/Recommendation\\_N13/e-RPG%2013%20-%20A4.pdf](http://www.coe.int/t/dgh/monitoring/ecri/activities/GPR/EN/Recommendation_N13/e-RPG%2013%20-%20A4.pdf))

<sup>109</sup> Carrera, S., I. Rostas and L. Vosyliute, "Combating Institutional Anti-Gypsyism Responses and Promising Practices in EU and Selected Member States", CEPS, 2017. (<https://www.ceps.eu/publications/combating-institutional-anti-gypsyism-responses-and-promising-practices-eu-and-selected>)

<sup>110</sup> Alliance against Antigypsyism, "Antigypsyism—a reference paper", July 2016 (<http://antigypsyism.eu/wp-content/uploads/2016/10/Antigypsyism-reference-paper-Layouted-version.pdf>)

<sup>111</sup> ECtHR, Factsheet "Roma and Travellers", June, 2017. ([http://www.echr.coe.int/Documents/FS\\_Roma\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Roma_ENG.pdf))

<sup>112</sup> State's responsibility under Article 14 ECHR involves obligation to investigate possible racist motives in cases of violence. See European Court of Human Rights. *Case of Nachova and Others v Bulgaria*. Application nos. [43577/98](#) and [43579/98](#). para. 145. See also European Court of Human Rights. *Case of Šečić v Croatia*. Application no. 40116/02. 31 May 2007, para. 67.

<sup>113</sup> European Court of Human Rights (Grand Chamber). *Case of D.H. and Others v The Czech Republic*. Application No. 57325/00)DH. Judgement of 13 November 2007, para. 176.

<sup>114</sup> European Court of Human Rights. *Case of Moldovan and others v Romania*. Applications nos. 41138/98 and 64320/01. Judgement 2 of 12 July 2005, para.113.

<sup>115</sup> See the Roma education cases decided by the ECtHR as of 2017: *DH and Others v the Czech Republic*; *Sampanis et autres c. Grèce*, Requête no 32526/05. Arrêt. 5 juin 2008 ; *Orsus and Others v Croatia*. Judgement of 16 March



- states have a positive obligation to tackle structural discrimination.<sup>116</sup>

The case law of the European Committee on Social Rights has also provided important interpretations of the principle of non-discrimination (see Annex 1):

- states violate the non-discrimination principle if they fail to implement positive measures to ensure equality;<sup>117</sup>
- states have a responsibility to collect equality data in order to monitor the extent of the problem with discrimination;<sup>118</sup>
- states have the ultimate responsibility for policy implementation;<sup>119</sup> and
- states have a positive obligation to encourage citizens' participation.<sup>120</sup>

The key difference between the ECtHR and the ECSR is that the latter has a possibility to consider collective complaints. This is of crucial importance, as 'race' remains a contested social construct, which makes it difficult to break it down into legal terms, particularly because of its 'collective' nature, while legal processes are often only ready to deal with individual complaints as opposed to group claims.<sup>121</sup> Therefore, the ECSR seemed to be a more viable avenue to prove cases of institutional anti-Gypsyism, as it has a collective complaints mechanism.

## 2.2. Linguistic minorities

Annex 2 highlights that "language policy is considered an internal affair, based on the territoriality principle, and international law leaves state sovereignty unaffected. At the same time, the use of a language in the 'private domain' is protected by freedom of expression and association.<sup>122</sup> International law protects historic language minorities against assimilation processes."

The expert in Annex 2 highlights that the key challenge is to reconcile international law and linguistic justice, as "international law addresses states on the one hand, and gives individuals certain guarantees for the protection of human rights, but it is restrained from allotting collective rights to groups".<sup>123</sup> Certain individual language rights are recognised, like the right of suspects and accused persons to receive information about their rights in court proceedings, etc.<sup>124</sup> As Annex 2 shows,

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2010, Application No. 15766/03; *Sampani et autres c. Grèce* 59608/09. 11 décembre 2012; *Horváth and Kiss v Hungary* Application no. 11146/11. Judgement 29 January 2013; *Lavida et autres c. Grèce*. Requête no 7973/10. Arrêt 13 mai 2013. For a detailed discussion of these cases see: Lilla Farkas. *Report on Discrimination of Roma Children in Education*. European Commission Directorate-General for Justice, April 2014.

<sup>116</sup> European Court of Human Rights (Grand Chamber). *Case of Orsus and Others v Croatia*. Judgement of 16 March 2010, Application No. 15766/03, para. 181. See also European Court of Human Rights. *Case of Horváth and Kiss v Hungary*. Judgement of 29 January 2013, para. 116.

<sup>117</sup> See for e.g. European Committee of Social Rights. *Decision on the Merits, ERRC v Bulgaria Collective Complaint 46/2007*, para. 49.

<sup>118</sup> European Committee of Social Rights. *ERRC v Greece*, Complaint No. 15/2003, decision on the merits of 8 December 2004, para. 27.

<sup>119</sup> *Ibid.*, para. 29.

<sup>120</sup> European Committee of Social Rights. *Centre on Housing Rights and Evictions (COHRE) v Italy, Complaint No. 58/2009*. Decision on the merits of 6 July 2010, para. 106.

<sup>121</sup> Farkas, L. "The meaning of racial or ethnic origin in EU law: between stereotypes and identities", European Network of Legal Experts in Gender Equality and Non-Discrimination, Luxembourg: Publications Office of the European Union, 2017, p. 7.

<sup>122</sup> van der Jeught, S., *EU Language Law*, Groningen: Europa Law Publishing 2015, p. 263.

<sup>123</sup> Spiliopoulou Åkermark, A., *Justifications of minority protection in international law*, London, 1997, pp. 43-48.

<sup>124</sup> Article 6, lid 3, EVRM; The right to use one's own language in court are codified in EU Directive 2012/13/EU on the right to information in criminal proceedings.

when their language is the main characteristic of individuals belonging to a minority, the loss of this language due to assimilation implies the end of the minority.<sup>125</sup> The protection of the home language – when it is spoken by a small group of people – is important to safeguard the intangible heritage of mankind (...). Access to the democratic process in local government bodies is only possible when all the languages spoken in the region are taken into account. It is also important to educate children in their home language to have an effective learning process.

Therefore, the two types of instruments and standards will be assessed – those on human rights and those on linguistic justice or preservation of heritage (see Table 6 below).

**Table 6. Provisions relevant for linguistic minorities – personal & material scope**

| <b>Actor</b>                   | <b>Relevant Provisions</b>   | <b>Personal Scope</b>   | <b>Material Scope</b>   |
|--------------------------------|--|---|---|
| <b>CRC Committee</b>           | <b>Article 29, para. 1(c)</b> specifies positive obligations for states on language rights in the field of education of children: “the development of respect for (...) <i>his or her own cultural identity, language and values</i> ”.<br><b>Article 30</b> separately mentions the <b>right of minorities to use their languages</b> . | CRC Article 1 states that it covers “ <b>every human being below the age of eighteen years</b> ”. CRC guarantees rights under <b>Article 29</b> and protections related to minority groups ( <b>Articles 17 and 30</b> ) to <b>non-citizen and migrant children</b> . | <b>Article 17(d)</b> provides another obligation: “Encourage the mass media to have particular regard to the <b>linguistic needs</b> of the child who <b>belongs to a minority group or who is indigenous</b> .”<br><b>Article 29.2</b> also protects “the <b>liberty of individuals and bodies to establish and direct educational institutions</b> ”. |
| <b>ECRML Experts Committee</b> | ECRML defines and protects <b>regional and minority languages</b> .<br>The qualification of ‘minority’ in the ECRML refers to the language spoken by a numerical minority of the inhabitants of a state; the majority speaks the official language. <sup>126</sup>   | The ECRML does not protect language <b>speakers</b> , but <b>languages</b> .  | <b>Dialects and migrant languages fall outside the scope</b> of the ECRML protection, even languages of the naturalised migrants.   |

Source: Authors, 2017.

### • United Nations

At the UN level, the key instrument is the ICCPR, which protects the **rights of persons belonging to a linguistic minority** in Article 27, although the ICCPR does not define the ‘national minority’ itself nor does it state the circumstances in which a minority community could use the language (see Annex 2).

Similarly, in the UN Convention on the Rights of the Child (CRC), Article 30 reiterates the right of a child of “ethnic, religious or linguistic minorities or persons of indigenous origin” to use his/her language more generally. However, Article 29 para. 1(c) specifies positive obligations for state parties on language rights in the field of children’s education:

<sup>125</sup> Advisory Committee on the FCNM, Thematic Commentary No. 3, The Language Rights of Persons Belonging to National Minorities under the Framework Convention (ACFC/44DOC(2012)001 rev) par. 16.

<sup>126</sup> Blair, P., *The protection of regional or minority languages in Europe*. Fribourg: Ed. Univ. Fribourg, 1994, p. 56.

mandate to monitor that the education of the child shall be directed to: (...)

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own.

The UNESCO Convention against Discrimination in Education (1960) outlines the right of national minorities to carry on their own educational activities, including the use of their own language (Article 5.1(c)).<sup>127</sup> Subsequently, UNESCO conventions, such as the Universal Declaration on Cultural Diversity, stress the importance of protecting minority languages from the viewpoint of preserving cultural heritage.<sup>128</sup>

At the European regional level, both the CoE and OSCE have developed several instruments to monitor minority languages and to observe the rights of minority language speakers.

- **Council of Europe**

The specific instrument at the CoE level is the **ECRML**. The developments towards the ECRML show that at the time it was not necessary to arrive at a definition of 'minority' or 'minority language' (see Annex 2). According to van der Velden, "[t]erminology that could lead to discussion was avoided, including names such as 'Volksgruppen', 'national minorities' and 'groupes ethniques'.<sup>129</sup> Since dialects of an official language fall outside the scope of the ECRML, there can still be discussion if a language is a minority language or a dialect."<sup>130</sup>

At the Council of Europe level, the most authoritative document is the **ECHR**. Article 14 of the ECHR prohibits discrimination based on language, but this article is only applicable to individuals. It does not include language rights in such areas as the language of education and media in regional and minority languages, except as these relate to other ECHR rights. However, there are the relevant provisions, such as the right of suspects and accused persons to receive information about their rights in a language they understand.<sup>131</sup>

The **CoE's Venice Commission** recognises the importance of education in the mother tongue. The Venice Commission's thematic report outlines, "it is the keystone of safeguarding and promoting minority languages of a minority group".<sup>132</sup> Such promotion requires positive steps to be taken by the state and its financial support for minority groups. Yet, positive obligations and issues of recognition fall "within the framework of national sovereignty and territorial integrity".<sup>133</sup> As outlined in Annex 2, "[o]n the other hand, 'the obligation to use only the majority language in the public sphere, and the fact that education is conducted in

<sup>127</sup> The UN General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992. (Article 1, 2(2) & 2(3)) on the one hand attributes to States the right to use their own language, on the other hand 'positively' requests States to provide for the promotion of ethnic, cultural, religious and linguistic identities.

<sup>128</sup> UNESCO, Universal Declaration on Cultural Diversity, 2 November 2001. ([http://portal.unesco.org/en/ev.php-URL\\_ID=13179&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html))

<sup>129</sup> Grin, F., *Kalmykia: From Oblivion to Reassertion?*, European centre for minority issues 2000, p. 17; Blair, P. *The protection of regional or minority languages in Europe*, Fribourg: Editions Univ. Fribourg, 1994, p. 57.

<sup>130</sup> See Annex 2.

<sup>131</sup> Article 6, lid 3, EVRM; The right to use one's own language in court are codified in EU Directive 2012/13/EU on the right to information in criminal proceedings.

<sup>132</sup> Council of Europe, Compilation of Venice Commission Opinions and Reports Concerning the Protection of National Minorities (CDL(2011)018) p. 16 & 20; Venice Commission Opinion on the provisions of the ECRML (CDL-INF(1996)003) paras.1 and 2.1; Venice Commission, Summary report on participation of members of minorities in public life (CDL-MIN(1998)001rev) para. 2.1.

<sup>133</sup> Compilation of Venice Commission Opinions and Reports Concerning the Protection of National Minorities (CDL(2011)018) p. 16; Venice Commission Opinion on the provisions of the ECRML (CDL-INF(1996)003) para. 2.

that language, may arguably be considered discriminatory”<sup>134</sup> Stipulating knowledge of the country’s official language in order to hold an appointment in public administration might constitute a form of indirect discrimination against minorities.<sup>135</sup>

- **OSCE**

The **High Commissioner on National Minorities** is another actor at the OSCE. The HCNM has issued some recommendations with regard to language.<sup>136</sup> The OSCE Commissioner primarily acts when interstate relations are involved, as in the case of the Hungarian-speaking minority in Slovakia. In addition to this, OSCE has been active in developing important guidelines on minority languages to be used in media.<sup>137</sup>

In all, language-related issues are deemed highly sensitive for ‘nation states’, as they are a way of forming and maintaining national identities. International actors, while defining the importance of ‘minority languages’ in education and media, as well as state support, create a two-layered distinction between those minorities that are recognised or not. The ‘autochthonous’ minority groups as well as those from neighbouring European countries usually enjoy a level of recognition. Nevertheless, foreign or immigrant languages fall outside the scope of such protection, although in light of the CRC provisions, one could see that it is in the interest of every child to be taught in his/her own language. Whereas as a principle it is accepted, section 5 will highlight actual and practical limitations to implementing this provision.

### 2.3. Religious minorities

**Table 7. Provisions relevant for protection of religious minorities/addressing islamophobia**

| <b>Actors</b>     | <b>Relevant Provision/Definition</b>   |
|-------------------|--|
| <b>CCPR (UN)</b>  | Article 27 ICCPR contains <b>the right to practise religion</b> for individuals belonging to ethnic, religious or linguistic minorities.<br>In addition, <b>Article 18</b> and provisions to combat discrimination and in particular, it <b>prohibits inciting religious hatred</b> and requires criminalising hate speech in Article 20(2) of the ICCPR: <sup>138</sup> “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” |
| <b>ECRI (CoE)</b> | <b>Recommendation No. 5</b> on Combating Intolerance and Discrimination of Muslims, aims “to ensure that Muslim communities are not discriminated against as to the circumstances in which they organise and practice their religion”.   |

**Source:** Authors, 2017.

<sup>134</sup> Compilation of Venice Commission Opinions and Reports Concerning the Protection of National Minorities (CDL(2011)018) p. 19; Venice Commission Opinion on the provisions of the ECRML (CDL-INF(1996)003) para.1.1.1.

<sup>135</sup> Venice Commission, Summary report on participation of members of minorities in public life (CDL-MIN(1998)001rev) para. 1.2 A.

<sup>136</sup> For example, OSCE HCNM, The Hague Recommendations regarding the Education Rights of National Minorities (1996) containing standards for the use of the language or languages of national minorities in the field of education; OSCE HCNM, Oslo Recommendations regarding the Linguistic Rights of National Minorities, 1998; OSCE HCNM, Lund Recommendations on the Effective Participation of National Minorities in Public Life, 1999.

<sup>137</sup> Guidelines on the use of minority languages in the broadcast media by the Organization for Security and Cooperation in Europe (OSCE), 2003.

<sup>138</sup> UN, CCPR General Comment 11 of 1983 on propaganda for war and inciting national, racial or religious hatred CCPR/C/GC/11.

- **United Nations**

At the UN level, the key documents are the ICCPR and ICERD (see Table 7). The ICCPR sets the international standard for any person belonging to any religion or belief to practise his/her religion. The clause applies to citizens as well as to migrants and refugees. However, this clause does not prevent the state from making special arrangements for the dominant or recognised religious institutions, as for example in tax law.

Whereas both the ICCPR and CERD prohibit discrimination, they also contain clauses on hate speech. While the ICCPR requires states to criminalise “national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”, the CERD seems to go a step further and calls for punishment of any racist propaganda. The CERD again goes a step further on the personal scope. **Article 4 of the ICERD** prohibits propaganda and organisations based on any kind of racist idea: “States should condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form.”

As elaborated in Annex 3, the ICERD contains prohibitions on hate speech and discrimination against non-citizens.<sup>139</sup> Although the ICERD does not name religion as one of prohibited grounds, it is seen as inter-related issue. In many cases, those most susceptible to discrimination in the form of Islamophobia are non-citizens,<sup>140</sup> therefore protections for these groups are particularly relevant.

- **Council of Europe**

At the CoE level, two key institutions protecting persons belonging to religious minorities from discrimination and religious groups from hate speech are the ECtHR and ECRI. As elaborated in Annex 3, “[t]he European Court of Human Rights has issued various rulings relating to discrimination against religious minorities, in particular structural differences in treatment between a national majority religion and minority denominations”.

At the same time, ECtHR case law on hate speech has considered the limitations of free speech with respect to other rights and the limitation of Article 17 on the abuse of ECHR rights. Below some examples of ECtHR standards:

- The ECtHR has found that freedom of expression and freedom of association cannot be used to defend hate speech aimed at denying crimes against humanity and anti-Semitism.<sup>141</sup>
- In *Norwood v UK*, the ECtHR declared that freedom of speech should not be abused, as in this case Muslims were linked with the act of terrorism, which the ECtHR declared to be incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.<sup>142</sup>

**The Venice Commission** has produced a compilation<sup>143</sup> of issues concerning freedom of religion and belief. This gives an overview of the doctrines of the Venice Commission in this

<sup>139</sup> Articles 4 and 5 of ICERD.

<sup>140</sup> See FRA report on Muslims in Europe that indicates a significant drop in the likelihood of suffering from Islamophobic discrimination for citizens as opposed to non-citizens: <http://fra.europa.eu/en/publication/2010/eu-midis-data-focus-report-2-muslims>.

<sup>141</sup> See for example: European Court of Human Rights, *Garaudy v France* (no. 65831/01), Admissibility Decision of 24 June 2003.

<sup>142</sup> European Court of Human Rights, *Norwood v UK*, (Application no. 23131/03), Admissibility Decision of 16 November 2004.

<sup>143</sup> CDL-PI(2014)005 (revised July 2014).

field on a variety of issues, including religious insults and religious hatred, education, clergy and religious leaders, and religious or belief organisations.

- **Focus on combating Islamophobia and anti-Semitism**

Annex 3 highlights “the difficulty in defining both Islamophobia and anti-Semitism as strictly related to a person’s religion, as both concepts include elements of discrimination based on perceived religious affiliation and elements of discrimination on basis of ethnic origin as well as, in the case of Islamophobia, discrimination and intolerance against migrants in general”.

**ECRI** has also issued a General Policy Recommendation No. 5 on Combating Intolerance and Discrimination against Muslims,<sup>144</sup> which provides guidance on the requirements for preventing discrimination at work, in education and other spheres of life on the basis of religion. In addition, it sets out requirements for ensuring that religious observance is facilitated, for example it identifies the state’s obligations: “[I]n this context particular attention should be directed towards removing unnecessary legal or administrative obstacles to both the construction of sufficient numbers of appropriate places of worship for the practice of Islam and to its funeral rites.”<sup>145</sup>

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<sup>144</sup> ECRI, General Policy Recommendation No 5 on Combating Intolerance and Discrimination of Muslims, Adopted 16 March 2000, CRI(2000)21, [http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation\\_N5/Rec5%20en21.pdf](http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N5/Rec5%20en21.pdf) .

<sup>145</sup> Ibid.

### 3. MINORITY RIGHTS PROTECTION IN THE EU LEGAL SYSTEM

#### KEY FINDINGS

- Non-discrimination on the basis of nationality has been a key part of the EU legal framework since 1957.
- The Lisbon Treaty, coming into force in 2009, brought new and important changes to the legal framework of minority rights. Article 2 TEU articulates for the first time “respect for human rights including the rights of persons belonging to minorities”, a value on which the Union is founded, and the Charter brought a right to respect for cultural, religious and linguistic rights.
- ‘Protection of minorities’ is a key element of Copenhagen criteria, and it has consistently been applied to countries of the 2004 and later enlargements. Yet minority protection is not subsequently followed up once a country joins the EU, as the European Commission officially ‘loses’ competence on the matter of national minorities.
- Three directives are central: the Racial Equality Directive (2000/43), the Equal Treatment Directive (2000/78) and the Citizens’ Rights Directive (2004/38). Their application has been widespread regarding discrimination on the ground of nationality but less developed in respect of minority rights.
- A convergence of the EU’s Fundamental Charter and European Convention on Human Rights changed EU Member States’ approach, in particular on minority and Roma rights, from a matter of non-discrimination in respect of an individual to minority rights.

#### 3.1. What are the EU’s approaches to minority protection and the rights of minority groups?

This subsection of the study examines the present EU approaches to minority protection from the perspective of Union citizenship, free movement and fundamental rights protection. It places the discussion within the broader conceptual framework of a triangular relationship between the rule of law, democracy and fundamental rights outlined in section 1 above. This section investigates the various pieces making up the wider EU framework on minority protection in light of the changing paradigm of minority rights. The gaps arising between the non-discrimination and minority rights approaches raise a central question: Should EU citizens of a minority background be protected differently, depending on the country they live in? The answer, according to the current state of EU law, is yes.

Action in respect of discrimination has been a key part of EU law since the European Economic Community Treaty entered into force in 1957. The establishment of a common market was based first on the principle of non-discrimination on the ground of nationality. This has worked particularly well in all areas – goods, persons, services and capital, although in this study it is only people who are at issue. The principle that all EU nationals coming within the scope of EU law are entitled to the same treatment as nationals of the state has been effective in diminishing discrimination against EU nationals who are not citizens of the host Member State – mobile EU citizens.

There is a fundamental difference between minority rights and non-discrimination, in particular non-discrimination on the basis of nationality. There is greater convergence between minority rights and non-discrimination on other grounds such as ethnicity. But to understand the development of minority rights in the context of EU principles regarding discrimination it is necessary to examine the principle of non-discrimination on the basis of

nationality, as it is the starting point in EU law. Furthermore, ethnic and other minorities who enjoy EU citizenship may be able to benefit from the prohibition on discrimination on the basis of nationality notwithstanding that as citizens of one Member States they do not constitute a minority in the context of this study.

Non-discrimination on the basis of nationality was something of a novelty in 1957. As studied in section 2 above, international instruments such as the ECHR did not explicitly prohibit discrimination on this ground. Instead, discrimination was prohibited only on the basis of (Article 14) "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

The idea that discrimination on the basis of nationality should also be unlawful was new. The extension of the non-discrimination provision in the ECHR to nationality would not take place until 1996 (*Gayguzuz v Austria*).<sup>146</sup> EEC law also included a prohibition on discrimination on the basis of sex from 1957, which would be extremely important in providing equality for women in a period during which discrimination on the basis of gender was still common in national legislation.

The prohibition of discrimination on the basis of nationality has served many EU citizens very well as they moved around the EU in search of work and better living conditions. It served as the foundation for the provision in **Regulation (EEC) No. 1612/68 on the rights of EU migrant workers**, which required equal treatment for EU workers in all areas of social and tax advantages.<sup>147</sup> The CJEU took workers' entitlement to equal treatment very seriously and developed its jurisprudence in a way that protected EU workers from discrimination in all social and tax matters, which, some Member States argued, were tangential to the free movement of workers and thus should not be covered by the prohibition.<sup>148</sup>

The changes to EU law brought about by the Maastricht Treaty entering into force in 1993 included the creation of citizenship of the Union, a status held by every national of a Member State. This was followed by a new Treaty basis for non-discrimination, which entered into EU law with the Amsterdam Treaty in 1999. The grounds of prohibited discrimination were sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Article 13 TFEU).

The entry into force of the Amsterdam Treaty in 1999 and the necessity to develop the rights of EU citizens opened the way for three directives to be adopted to give effect to the new rights (at least according to the classification by the Commission):

- Directive 2000/43/EC<sup>149</sup> (hereinafter the Racial Equality Directive) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin;
- Directive 2000/78/EC<sup>150</sup> establishing a general framework for equal treatment in employment and occupation (hereinafter the Equal Treatment Directive); and
- Directive 2004/38/EC<sup>151</sup> on citizens' rights (hereinafter the Citizens' Rights Directive). This directive is relevant notwithstanding the fact that it sets out the

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<sup>146</sup> *Gayguzuz v Austria*, 39/1995/545/631, Council of Europe: European Court of Human Rights, 23 May 1996. (<http://www.refworld.org/cases,ECHR,3ae6b6f12c.html>)

<sup>147</sup> Article 7(2) Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257, 19.10.1968, pp. 0002 – 0012 (now repealed).

<sup>148</sup> For a full investigation of the development of this jurisprudence see: Martin, D. and E. Guild. *Free Movement of persons in the European Union*. London: Butterworths, 1996.

<sup>149</sup> 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, 19.7.2000, pp. 22–26. (<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0043&from=EN>)

<sup>150</sup> Council Directive [2000/78/EC](#) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L 303, 2.12.2000.

<sup>151</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC,



rights of EU citizens – as will be shown below, the right to move and reside in another Member State on the basis of EU citizenship can be an important mechanism to exercise minority rights that are not recognised in the home state or where the home state has failed to protect minority rights.

This legislation, while appearing at times when the enlargement of the EU was being planned for 2004, was fairly autonomous from it (with the exception of the Citizens' Rights Directive). In 2008 a proposal was made for a 'Horizontal Equal Treatment Directive' – a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation outside the labour market.<sup>152</sup> At the time of writing this proposal, requiring unanimity in the Council and the consent of the European Parliament, was still pending in the Council. The next key development was the legal force given to the EU Charter of Fundamental Rights by the Lisbon Treaty in 2009, which is dealt with more in detail below.

The prohibition on nationality discrimination was never presented as an issue regarding minority rights. Indeed, until the prospect of enlargement of the EU to the Central and Eastern European countries appeared on the EU horizon, minority rights were considered a purely internal matter of each Member State and the diversity of approaches to be a matter of national cultural perspectives. The inclusion in the Amsterdam Treaty of a new provision prohibiting discrimination on a wider range of grounds – sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Article 19 TFEU) – was an enormous innovation brought about by pressure from civil society and it launched the EU into a much wider range of activities regarding discrimination.

**Non-discrimination is the first and traditional EU approach to minority protection.**

Article 3(3) TEU states that the aim of the Union includes combating social exclusion and discrimination, and promoting social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. Article 10 TFEU states that the foundation of the EU is representative democracy and that every citizen is entitled to participate in the democratic life of the Union. The Charter of Fundamental Rights clarifies the right of equality first as one before the law (Article 20) and second as the right to non-discrimination on grounds of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.<sup>153</sup>

Following the logic of individual rights, the Racial Equality Directive, the Equal Treatment Directive and the Citizens' Rights Directive start from the position of the individual and his or her right to non-discrimination. This is also the case for the pre-Lisbon measure, the Framework Decision on racism and xenophobia,<sup>154</sup> which requires the Member States to criminalise public incitement of violence or hatred against a group of persons defined on the basis of race, colour, descent, religion or belief, or national or ethnic origin (including through dissemination of material and publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes). Once again, the logic is to identify and punish the individual for perpetrating the act of discrimination.

This logic results in individual rights – provisions of the Treaties that prohibit discrimination and secondary legislation, which gives effect to the principle. The adoption of this legislation

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75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004). ([http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32004L0038R\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32004L0038R(01)))

<sup>152</sup> European Commission, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM/2008/0426 final – CNS 2008/0140, Brussels, 2008.

<sup>153</sup> Peers, S., et al., eds. *The EU Charter of fundamental rights: a commentary*. Bloomsbury Publishing, 2014. See Chapter 21.

<sup>154</sup> Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law OJ L 328, 6.12.2008.

then shifts the implementation of non-discrimination to national authorities to transpose the relevant EU obligations and to ensure their application. The end point of this approach is legal challenges by individuals or organisations claiming to be the victims of discrimination on prohibited grounds and ultimately the interpretation of EU law by the Court of Justice.

Thus, The EU legal system has added its own specific tools or layers of protection, chiefly embodied in the EU Charter of Fundamental Rights and a set of secondary legislation instruments on non-discrimination and on combatting racism and xenophobia. When implementing EU law, and as part of their broader activities as members of the EU complying with Article 2 TEU values, EU Member States must comply with these standards too.<sup>155</sup>

**The second approach is that of minority rights.** This framework tends towards the collective – often represented by struggles regarding cultural, religious and linguistic rights. The EU appears to have been less confident about this approach until 2009, when it was incorporated into EU law with the Charter of Fundamental Rights, in particular its Article 22 and its wide obligation of respect for cultural, religious and linguistic diversity. This legal step took place only a year before the so-called 'French Roma affair', which placed the (then) EU Commissioner at loggerheads with the (then) French president regarding the expulsion of Bulgarian and Romanian nationals from France in 2010, marking a turning point in the EU's engagement with this alternative approach.<sup>156</sup>

The minority rights approach can be derived from the EU Charter. Article 22 of the Charter requires the Union to respect cultural, religious and linguistic diversity. However, the key issue regarding this obligation of respect is the EU issue of competence. Member States are free to reject a minority rights approach, which Article 22 supports so long as the area under consideration is outside the scope of EU law. Respect for cultural, religious and linguistic diversity only arises where the EU has competence, such as on consumer protection or working conditions, and where an issue of respect for cultural, religious or linguistic rights arises. Below is the recent case law of the CJEU considered on the respect for cultural and religious rights regarding working conditions (and its ECtHR counterpart).

As regards linguistic diversity, the issue is complicated by the limit of EU competence to the determination of the official languages of the EU.<sup>157</sup> There has been some academic literature about how the Charter obligation to respect linguistic diversity could be given effect, for instance through EU consumer protection legislation,<sup>158</sup> but this literature is limited. The European Commission has declared 26 September a European Day of Languages<sup>159</sup> under its linguistic diversity programme. The programme highlights the EU's Lifelong Learning Programme, Erasmus Plus, and the EU's culture programme, Creative Europe.<sup>160</sup> Increasing use of sign language is one of the concerns. The promotion of multilingualism is carried out by the Eurydice programme and the European Language Label awards.<sup>161</sup>

While the spark that ignited a juridical approach to minority protection within the competence of the EU was in respect of one EU minority – Roma – its value for other minorities is key. Instead of focusing on the individual and his or her treatment by state (or private) actors as discriminatory vis-à-vis a control group (the majority, however defined) the entitlement of a

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<sup>155</sup> Arnull, A., *The European Union and its Court of Justice*, Oxford: Oxford European Union Law Library, 2006, pp. 364 – 366.

<sup>156</sup> Carrera, S. "Shifting Responsibilities for EU Roma Citizens: The 2010 French affair on Roma evictions and expulsions continued", Brussels: CEPS, 2013.

<sup>157</sup> Regulation 1/58 EEC Council: Regulation No 1 determining the languages to be used by the European Economic Community (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31958R0001:EN:HTML>).

<sup>158</sup> Duivenvoorde, Bram B. *The consumer benchmarks in the unfair commercial practices directive*. Vol. 5. Springer, 2015.

<sup>159</sup> [http://ec.europa.eu/education/policy/multilingualism/linguistic-diversity\\_en](http://ec.europa.eu/education/policy/multilingualism/linguistic-diversity_en)

<sup>160</sup> Ibid.

<sup>161</sup> [http://ec.europa.eu/education/policy/multilingualism/evidence-based-policy\\_en](http://ec.europa.eu/education/policy/multilingualism/evidence-based-policy_en)

minority to enjoy their group rights became an issue. Still, this minority rights approach has not been successfully transposed to claims regarding cultural and religious freedom in either the CJEU or the ECtHR regarding the issue of headscarves, *niqabs* and burqas – all elements of women’s clothing related to cultural and religious minority status.

The adoption of an EU Framework for National Roma Integration Strategies, now in the form of national action plans on Roma integration, has been the main manifestation of the development of this complementary approach.<sup>162</sup> The Commission’s report of 7 April 2010, “Roma in Europe: The implementation of the European instruments and policies for Roma inclusion – Progress report” is the first comprehensive attempt at using the second approach, that of minority rights.<sup>163</sup>

The Lisbon Treaty coming into force in 2009 brought new and important changes to the legal framework of minority rights. Article 2 TEU states for the first time that “respect for human rights including the rights of persons belonging to minorities” is a value on which “the Union is founded”. The references to pluralism, non-discrimination and tolerance as values that must prevail reinforce the new direction.

The Lisbon Treaty has also been important for minority inclusion through the legal force provided to the EU Charter of Fundamental Rights. Article 21 of the EU Charter repeats the traditional prohibition on discrimination but includes as a prohibited ground membership of a national minority. Article 22 of the Charter extends protection at least in the form of respect for cultural, religious and linguistic diversity. The arrival of other group rights, such as social rights, in the field of EU ‘hard’ law has prepared the way for a reconsideration of how minority rights can be more than just ‘soft’ guidance, but also take enforceable legal form available to groups and individuals. These developments have been flanked by a very substantial change in direction in the ECtHR on minority rights as regards Roma in particular, which began to take shape in the mid-2000s.<sup>164</sup> The association of EU law through the EU Charter with the ECHR and its jurisprudence has made this development particularly important for the EU.

### 3.2. What are the relevant EU policies, legal framework and instruments?

This subsection examines how the EU enlargement project and the concerns of numerous actors about progress towards achievement of the Copenhagen criteria and further EU instruments, including CJEU preliminary rulings, has transformed the treatment of minority issues in the EU Treaties, policies and practice, as well as the EU Framework for National Roma Integration Strategies (NRIS).

#### 3.2.1. Copenhagen criteria

In 1993 the EU set out for the first time what candidate countries needed to do in order to be accepted for accession to the EU. Key among these criteria, which have become known as the Copenhagen criteria, are that the state must have the following in place:

<sup>162</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, An EU Framework for National Roma Integration Strategies up to 2020 COM(2011)173. (<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1444910104414&uri=CELEX:52011DC0173>)

<sup>163</sup> European Commission. Communication on the social and economic integration of the Roma in Europe. COM/2010/0133 final, 2010. (<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1444909812175&uri=CELEX:52010DC0133>)

<sup>164</sup> O’Nions, H. *Minority rights protection in international law: The Roma of Europe*. Routledge, 2016; Ippolito, F., and S. Iglesias Sanchez, eds. *Protecting Vulnerable Groups: The European Human Rights Framework*. Bloomsbury Publishing, 2015. Bowring, B., “Case-Law of the European Court of Human Rights Concerning the Protection of Minorities, July 2012 to August 2014.” *European Yearbook of Minority Issues Online* 12.1 (2015): 197-222.

- stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- a functioning market economy and the capacity to cope with competition and market forces in the EU; and
- the ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union.<sup>165</sup>

Thus, respect for and protection of minorities has been among of the most important of the Copenhagen criteria for all states seeking to join the EU since that date. It includes all linguistic, religious and other national minorities – a wide description of groups. The Copenhagen criteria applied to the Member States that joined in 1995 (Austria, Finland and Sweden) but little comment has been made in respect of this first enlargement test of the criteria.

The road towards the 2004 enlargement was seen as a challenge for EU minority protection policy. The enlargement process is highly institutionalised with specific steps and actions at each stage along the way. These steps and actions are recorded in reports on how a state is progressing, which are compiled annually. In respect of the candidates for accession in 2004 and subsequently, in each of the reports on the efforts towards accession of a candidate state, a section on minority protection has been included. While not all observers have been satisfied that the importance of minority protection has been attributed sufficient weight in accession decisions by the EU,<sup>166</sup> nonetheless, its inclusion as a criterion has been important as part of the process.

Yet, after accession the Copenhagen criteria no longer apply, as the country has become a Member State and thus can no longer be made subject to an assessment of its compliance with extra-Treaty requirements, such as the Copenhagen criteria. For instance, in the 2003 “Comprehensive monitoring report on the Czech Republic’s preparations for membership” (the year before the Czech Republic became a Member State), the Commission noted that “as regards the Roma minority, the multi-faceted discrimination and social exclusion faced by the Roma minority continues to give cause for concern” (p. 34).<sup>167</sup> Specific concerns are raised in the report about the so-called ‘special schools’ to which Roma children were being channelled out of the common state school system into conditions very substantially inferior as regards educational standards. The failure to address the problem became fully apparent in 2007 when the ECtHR found the Czech Republic in breach of the right to education regarding the placement of Roma children in special schools.<sup>168</sup> This example is not unusual. While before accession the EU institutions could point to the Copenhagen criteria as the standard applicable, after accession, states have no minority protection obligations in EU law.

A civil society group, including the Local Government and Public Service Reform Initiative, OSI<sup>169</sup> and EURAC Research,<sup>170</sup> was particularly concerned about the post-2004 enlargement treatment of minorities, especially Roma, in Central and Eastern Europe. Accordingly, they issued the Bolzano Declaration on 1 May 2004 on the Protection of Minorities in the Enlarged European Union.<sup>171</sup> The approach adopted in the Declaration is that of group protection.

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<sup>165</sup> Conditions for Membership, European Neighbourhood Policy and Enlargement Negotiations ([https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership_en)).

<sup>166</sup> Groenendijk, K., C. Arnoldus, E. Guild, and H. Dogan. *Security of residence of long-term migrants: A comparative study of law and practice in European countries*. Council of Europe, 1998.

<sup>167</sup> [https://www.czso.cz/csu/czso/comprehensive\\_monitoring\\_report\\_on\\_the\\_czech\\_republics\\_preparations\\_for\\_membership\\_2003](https://www.czso.cz/csu/czso/comprehensive_monitoring_report_on_the_czech_republics_preparations_for_membership_2003)

<sup>168</sup> *D. H. & Ors v Czech Republic* 13 November 2007 ECtHR.

<sup>169</sup> Open Society Institute, a member of the Open Society Foundations (<https://www.opensocietyfoundations.org/>).

<sup>170</sup> Eurac Research was founded in 1992 undertaking research in the areas of Language and Law, Minorities and Autonomous Regions as well as the Alpine Environment (<http://www.eurac.edu/en/aboutus/Pages/default.aspx>).

<sup>171</sup> Bolzano Declaration, 2004. ([http://www.academia.edu/30427126/The\\_BOLZANO\\_BOZEN\\_DECLARATION\\_on\\_the\\_protection\\_of\\_minorities\\_in\\_the\\_enlarged\\_European\\_Union\\_1.5.2004](http://www.academia.edu/30427126/The_BOLZANO_BOZEN_DECLARATION_on_the_protection_of_minorities_in_the_enlarged_European_Union_1.5.2004))

Signed on 1 May 2004, the day enlargement took effect for ten new Member States, the Declaration notes that the number of minority groups in the EU will double (though no figure is put on this). Furthermore, the Declaration notes the end of pressure regarding treatment of minorities that the accession process had exerted on the new Member States and warns that “the new and old Member States [will] opt to retreat into a tacit consensus and disregard the problems faced by minorities in their midst”, calling instead for the enlargement process to stimulate a constructive effort to improve minority protection.

The Bolzano Declaration was one of a number of initiatives coming from civil society raising concerns and attention about the situation of minorities after enlargement of the EU and insisting on the new responsibilities of the EU for their treatment. Notably, **the Declaration not only includes the protection of linguistic and ethnic minorities, but also expresses measures necessary for equal treatment of third-country nationals.** The Bolzano Declaration has not been a one-off effort. Ten years later, another concerted effort by civil society actors to create a document to lead and drive EU policy towards greater inclusion of minorities and minority languages produced a Minority Safepack Initiative.

In 2013, the Federal Union of European Nationalities (FUEN), which includes among its directors a number of elected officials in Germany and Central Europe, developed the **Minority Safepack Initiative.** The FUEN is based on a CoE context (rather than EU) but the initiative is EU-oriented: designed to convince the EU to improve the protection of persons belonging to national and linguistic minorities and strengthen cultural and linguistic diversity in the Union. It calls upon the EU to adopt a set of legal acts for these purposes, including policy actions in the areas of regional and minority languages, education and culture, regional policy, participation, equality, audio-visual and other media content, and also regional (state) support.<sup>172</sup>

This European Citizens Initiative’s focus on respect and promotion of linguistic and cultural diversity, as enshrined in Article 167 TEU, is to be interpreted broadly.<sup>173</sup> Notwithstanding, it acknowledges that the biggest challenge for the EU is Roma inclusion. Regarding minority languages, it calls for the EU to facilitate exchange of best practices between language communities in Europe, and especially between those speaking a regional or minority language, as short-term funding of networks is neither efficient, nor effective enough. This parenthesis in the chronology of the legal developments bears attention, not least as it indicates that despite the legal measures adopted from 2003 until 2013, civil society actors continue to see a pressing need for action in this field. In considering the legal developments from 2004 onwards, this is worth bearing in mind.

In the early 2000s, it was this pressure regarding the respect for human rights of minorities in general and Roma in particular that pushed the EU to widen Article 2 TEU to include the rights of persons belonging to minorities and the addition of the value of the EU as a society of pluralism.

The concerns arising from the enlargement of the EU to include countries in Central and Eastern Europe with substantial minority populations were shared also by EU law- and policy makers. In particular, the need for an EU response to minority rights after the end of the application of the Copenhagen criteria as obligatory standards for the new Member States became acute in 2004 – with many actors expressing concern and determination that there should be no backsliding in the area of minority rights.

**At the time and ever since, the largest single minority in the EU whose human rights are systemically violated are Roma.** As discussed in subsection 3.3, one cannot examine the issue of minority protection in the EU without focusing on the Roma and this focus includes a number of 2004, 2007 and 2013 enlargement states as well as primarily southern

<sup>172</sup> “Minority SafePack” Booklet (<http://www.minority-safepack.eu/downloads/booklet-minority-safepack-en.pdf>)

<sup>173</sup> Ahmed, T. *The impact of the EU Law on Minority Rights*, Hart: Oxford/Portland, 2011.

European states, such as Greece, Italy and Spain. Another group, 'non-citizens' in Estonia and Latvia, who are effectively Russian speakers, came into the EU pre-accession debate: "The situation of non-citizenship came under closer scrutiny in order to try to identify a working solution for yet an uncharted problem at the time – the status of non-citizens being unique and without precedent in prior cases in the international law."<sup>174</sup>

### 3.2.2. EU secondary legislation on non-discrimination

Between 1999 and 2009 the EU adopted secondary legislation regarding non-discrimination. This section examines that legislation and how it became the subject of various kinds of judgements by the CJEU.

The addition to the EU Treaties in 1999 of competence for non-discrimination in a wide range of areas was subject to the adoption of secondary legislation. As the wording of the Treaty provision could not have direct effect there was a race to put in place secondary legislation. The Commission was quick to present a proposal for the **Racial Equality Directive**, adopted in 2000 (2000/43). Its scope was racial and ethnic-origin discrimination, prohibiting both direct and indirect discrimination and using for the first time a new approach to the burden of proof, which includes a mechanism to shift it from the alleged victim to the alleged perpetrator on the basis of a reasonable case. The objective of the directive is to protect all persons against discrimination on grounds of racial or ethnic group.

The **Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law** was adopted in 2008.<sup>175</sup> Its objective was to require Member States to criminalise certain forms of conduct as outlined below punishable as criminal offences:

- public incitement to violence or hatred directed against a group of persons or a member of such a group defined on the basis of race, colour, descent, religion or belief, or national or ethnic origin;
- the above-mentioned offence when carried out by the public dissemination or distribution of tracts, pictures or other material; and
- publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in the Statute of the International Criminal Court (Articles 6, 7 and 8) and crimes defined in Article 6 of the Charter of the International Military Tribunal, when the conduct is carried out in a manner likely to incite violence or hatred against such a group or a member of such a group.

It was the subject of a Commission report on implementation by the Member States of 27 January 2014.<sup>176</sup> The Commission makes clear from the start of the report that it was obliged to examine and report on national implementation by the Framework Decision itself. At that time the Commission concluded that a number of Member States had not fully or correctly transposed the provisions of the Decision. Gaps were revealed regarding the motivation of crimes in national legislation. The Commission undertook to enter into bilateral dialogues with Member States about their transposition particularly in light of the Charter's right to freedom of expression and association. It would seem from the careful wording of the Commission report that concerns had been raised about compliance of the ways in which some Member States were using their new criminal powers and the jurisprudence of the

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<sup>174</sup> Mihaita G. and M. Sebe, 2015, Paper "Estonia's Non-Citizens, Citizens of the European Union?", 2015. (<https://citizenrights.eurolalter.com/wp-content/uploads/2016/03/Mihaita-and-Sebe-Estonia%E2%80%99s-Non-Citizens-Citizens-of-the-European-Union-2015.pdf>).

<sup>175</sup> Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law 2008/913/JHA OJ L 328, 6.12.2008. (<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:I33178>).

<sup>176</sup> European Commission. Report on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, COM/2014/027, Brussels, 2014. (<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0027>)

ECtHR on the entitlement to tolerance and respect for the equal dignity of all human beings (see para. 3.6).

The **Equal Treatment Directive** (2000/78) has been the subject of very extensive jurisprudence before the CJEU, but this has mainly been around the issues of age discrimination and disability discrimination. Starting with the case of C-144/-04 *Mangold* (ECR [2005] I-9981), the questions that have been referred regard equal treatment in work on the basis of age (or disability) in conjunction with wages and social security benefits. (A few cases have lately been referred on the right of religious institutions to hire co-believers.)<sup>177</sup> This continues to be the case.<sup>178</sup> Meanwhile, the case law concerning disability discrimination has resulted in important extensions of the personal scope of protected groups. In *Coleman*, Advocate General Maduro advocated an inclusive approach covering also persons connected to people belonging to protected groups. The Court of Justice took over this argumentation (C-303/06 *Coleman v Attridge Law*)<sup>179</sup> and extended the prohibition of direct discrimination to Ms Coleman who was the primary carer of a disabled child. Yet, the wording of the directive leaves a number of crucial issues, such as definitions of protected characteristics or the nature of dissuasive, proportionate and effective sanctions, up to the Member States. In the field of disability discrimination, EU ratification of the UN Convention on the Rights of Persons with Disabilities significantly contributed to legal clarity and put an end to unreasonably narrow domestic definitions of disability.<sup>180</sup> Recently, however, the directive has been relied upon by a woman who wished to wear a headscarf, a symbol of cultural and religious identity at her workplace, which will be discussed below.

The **Citizens' Rights Directive** (2004/38) includes a preamble (31) stating that the directive respects fundamental rights including the Charter. The Member States should implement the directive, according to this preamble, without discrimination on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation. Nevertheless, the content of this preamble was not transposed into a binding provision of the directive. Instead, a right to equal treatment on the basis of nationality was included (Article 24). As mentioned above, this right to non-discrimination on the basis of nationality can be a proxy right used by ethnic minority nationals of one Member State to go to work in another Member State. From the names of the parties in some of the cases one might suspect that ethnic origin could be relevant. There has been some academic work in this regard but less empirical study.<sup>181</sup>

Finally, regarding third-country nationals, the **Long-term Residents Directive**<sup>182</sup> (2003/109) provides for a secure status for third-country nationals who have lived lawfully in the EU for five years and can support themselves and their family members, have comprehensive sickness insurance and if required, complied with integration requirements.

<sup>177</sup> See for instance C-68/17 IR; C-414/16 Egenberger.

<sup>178</sup> See the following pending cases: C-261/15 Demey (age); C-406/15 Milkova (disability); C-539/15 Bowman (age); C-548/15 de Lange (age); C-270/16 Conejero (disability); C-24/17 Orsterreichischer Gewerkschaftsbund (age); C-653/16 Svobodova (judges on call pay); C-482/16 Stollwitzer (age).

<sup>179</sup> 2008 I-05603.

<sup>180</sup> See Joined Cases C-335/11 and C-337/11, HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S 11 April 2013, ECLI:EU:C:2013:222. Case C-354/13 FOA acting behalf of Karlsten Kaltoft v KL18 December 2014, ECLI:EU:C:2014:2463.

<sup>181</sup> Carrera, S. "What does free movement mean in theory and practice in an enlarged EU?", *European Law Journal* 11.6 (2005): 699-721. Ahrens, J., M. Kelly, and I. Van Liempt. "Free movement? The onward migration of EU citizens born in Somalia, Iran, and Nigeria." *Population, Space and Place* 22.1 (2016): 84-98. Jileva, E., "Visa and free movement of labour: the uneven imposition of the EU *acquis* on the accession states." *Journal of Ethnic and Migration Studies* 28.4 (2002): 683-700.

<sup>182</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents *OJ L 16, 23.1.2004, p. 44-53 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV)* (<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003L0109&from=en>)

It includes a mobility provision for residence in other Member States. Preamble (5) provides that Member States should give effect to the directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of a national minority, fortune, birth, disabilities, age or sexual orientation. As in respect of the Citizens' Rights Directive, this preamble was not transposed into the operative provisions of the directive. Article 11 nonetheless provides for equal treatment of long-term residents with nationals of the host state in a wide range of areas.<sup>183</sup>

### 3.2.3. Judicial consideration & petitions to the EP

Notwithstanding the importance of the **Racial Equality Directive**, there has not been a substantial amount of jurisprudence in respect of it. Perhaps the most noteworthy judgement from the Court of Justice has been in the case of *Feryn* (C-54/07)<sup>184</sup> regarding the hiring practices of an employer in Belgium. The Court held that where an employer publicly states that it will not recruit employees of a certain racial or ethnic origin this constitutes direct discrimination contrary to the directive. The next case, C-391/09 *Runevič-Vardyn* ECR [2011] I-3787, related to the use of names, which as a result of national rules indirectly discriminate against individuals on grounds of their ethnic origin. Once again, the Court was sympathetic to placing this issue in the context of the directive. These cases were all referred to the Court either before or at the time of the entry into force of the Lisbon Treaty and indicate a strongly individual, non-discrimination approach to the directive.

The most substantial judgement following the Lisbon Treaty has been in the case of C-83/14 *CHEZ*,<sup>185</sup> where the Court seems to take into account the new minority rights approach introduced in the TEU. The case related to the practice of a Bulgarian electricity company to place in some neighbourhoods its electricity meters indicating consumption and cost so high on poles that residents were unable to read them. The neighbourhoods where this disadvantageous practice was used were those with predominantly Roma residents, thus stigmatising the neighbourhood as a Roma one. The case was brought by a woman who was not of Roma ethnic origin, a local shopkeeper concerned that her bill was inflated but who was unable to read the meter. The Court found that the practice was discriminatory as it targeted actual or perceived Roma districts. The burden of proof was on the company to disprove the presumption.

Yet the Court went further in the minority rights approach – it found that even if the company's choice of neighbourhood in which to place the meters so high could be proven to have been taken on the basis of considerations completely free of racial or ethnic origin, it would still be unlawful as it would constitute indirect discrimination. The reason for this is because the practice would promote racist assumptions about Roma people (i.e. that they break the meters to avoid paying for their electricity). Such a policy has the effect of disproportionately and negatively affecting the Roma community living in the neighbourhood and there was no objective or reasonable justification. In so far as there might be legitimate concerns about theft, these must be dealt with on a case-by-case basis and not by stigmatising a whole community.

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<sup>183</sup> These include access to employment, education, recognition of qualifications, social security and assistance, tax benefits, access to goods and services, freedom of association, free access to the territory (with possible exceptions for a small number of fields). For a discussion about the directive see Halleskov, Louise. "The Long-Term Residents Directive: A Fulfilment of the Tampere Objective of Near-Equality?", *European Journal of Migration and Law* 7.2 (2005): 181-202. Boelaert-Suominen, Sonja. "Non-EU Nationals and Council Directive 2003/109/EC on the Status of Third-Country Nationals Who are Long-Term Residents: Five Paces Forward and Possible Three Paces Back." *Common Market L. Rev.* 42 (2005): 1011.

<sup>184</sup> *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV* C-54/07, OJ C 223, 30.8.2008.

<sup>185</sup> C83/14, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, 16 July 2015, ECLI:EU:C:2015:480 (Grand Chamber).



**Thus, there is both a shift in the EU legal framework of the Treaties towards minority rights protection and a substantial strengthening of EU non-discrimination tools, which include ethnic minority discrimination.** These new dimensions have been the subject of judicial interpretation by the Court of Justice, which appears to be willing to adjust its reasoning to include a minority protection approach as well as a strong non-discrimination one.

It is perhaps surprising that the **Racial Equality Directive** (2000/43) should be the subject of so little jurisprudence; moreover, the only minority group that appears to have sought to rely on its provisions are Roma. As mentioned above, the Equal Treatment Directive has been widely used in respect of age discrimination, both regarding the young and the old, some discrimination against persons with disabilities and a couple of references to the Court of the rights of religious groups to give preference to their co-believers in hiring practices. Still, it may be that the most egregious wrongs to minority groups in the EU relate to Roma as many predicted in the lead-up to enlargement. It may also be a consequence of the capacity of Roma communities to transform wrongs into legal challenges.

The **Equal Treatment Directive** (2000/78) as mentioned above has given rise to much jurisprudence from the CJEU but little of it is actually relevant for minority rights as such. The cases are primarily about age discrimination with some cases on disability discrimination. All of them are in the context of labour rights or social security entitlements and while they resolve important rights issues these are primarily addressed from the perspective of the individual not the minority as such. Furthermore, age as a minority characteristic is a complex issue, as the passage of time means that most people will come within the minority (which is defined by time) and then die.

A more directly important decision of the CJEU on this directive regarding minority rights related to a woman who was dismissed by her employer (in France) because she insisted on wearing a cultural and religious symbol (a headscarf), including during her interactions with the public.<sup>186</sup> In this case she relied on the directive in her claim that her dismissal was inconsistent with EU law. The CJEU held that the prohibition on wearing an Islamic headscarf, which arises from an internal rule of a private undertaking prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, does not constitute direct discrimination based on religion or belief within the meaning of the directive. But such an internal rule of a private undertaking may constitute indirect discrimination if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a specific disadvantage, unless it is objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim are appropriate and necessary.

The **Citizens' Rights Directive** has been much litigated regarding the right to non-discrimination of EU citizens.<sup>187</sup> The key issue of much of the litigation has been access to social assistance and the right to reside in a host Member State.<sup>188</sup> It might be possible to imagine EU citizens who are not nationals of the host Member State as a minority of a kind, but this is an unusual definition of a minority. In any case, this is not the approach adopted in this study.

<sup>186</sup> C-157/15 Achibita 14 March 2017.

<sup>187</sup> For an analysis of the jurisprudence see Guild, E., S. Peers, and J. Tomkin. *The EU citizenship directive: a commentary*. Oxford University Press, 2014.

<sup>188</sup> For example, C-140/12 Brey 19 September 2013; C-507/12 St Prix 19 June 2014; C-333/13 Danos 11 November 2014; C-67/14 Alimanovic 15 September 2015.

The **Long-term Residents Directive** has been the subject of some jurisprudence regarding the non-discrimination provision.<sup>189</sup> Perhaps the most important decision has been that in case C-571/10 *Kamberaj*,<sup>190</sup> concerning the entitlement of a third-country national with long-term resident status to equal treatment regarding a housing benefit. The CJEU had regard to the Charter provision (Article 34(3)) on the objective to combat social exclusion and poverty, and "recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by European Union law and national laws and practices" (see para. 80). On this basis, it found in favour of an interpretation of the directive as excluding measures that prevent long-term resident third-country nationals from receiving equal treatment in housing benefits. However, the decision is very much based on the situation of the individual and his rights.

**Once again, the construction of third-country nationals as a minority raises complex issues.** Within the category of third-country nationals there may be groups that could be classified as minorities, but this is beyond the objective of this section. For instance, is there any recognition of similarity, let alone solidarity, without the group? Does a US millionaire in the EU consider himself to be in the same minority as a very poor Malian care worker in the EU and vice versa? An analysis of the Long-term Residents Directive as a measure capable of aiding minority rights is beleaguered by these questions.

Finally, on the basis of Articles 20 and 227 of the TFEU and Article 44 of the EU Fundamental Rights Charter, it is foreseen that "all European citizens have the right to write to the European Parliament on the various types of problems they encounter in their everyday lives, as long as the issues fall within the field of activity of the European Union".<sup>191</sup> The petitions are submitted to the European Parliament's Petitions Committee. For example, in 2015 PETI Committee received 1,431 petitions, out of which 943 were found admissible (falling within the scope of the EU law). At the same time, only 84 petitions or 4.4% of all petitions were related to fundamental rights issues.<sup>192</sup>

A study recently conducted for the European Parliament's PETI Committee assessed a sample of five petitions from national minority communities in the period from 2013 to 2016 in the area of national and linguistic minorities.<sup>193</sup> Four of them were related to the usage of national minority languages – in education (by a Lithuanian minority in Poland),<sup>194</sup> in administrative proceedings (by a Hungarian minority in Romania),<sup>195</sup> bilingual or trilingual signs in public spaces (by Hungarian minorities in Romania and in Slovakia)<sup>196</sup> and suspension of re-transmission of channels in minority language from a third country (for a Russian-speaking minority in Lithuania).<sup>197</sup> However, one of the petitioners claimed to experience violations in national administrative and judicial authorities on grounds of ethnicity and national minority

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<sup>189</sup> Peers, S. "Court of Justice Lays the Foundation for the Long-Term Residents Directive: *Kamberaj*, *Commission v Netherlands*, *Mangat Singh*", *Common Market L. Rev.* 50 (2013): 529.

<sup>190</sup> 24 April 2012.

<sup>191</sup> Official page of the European Parliament's Petitions Committee, (<http://www.europarl.europa.eu/committees/en/peti/home.html>).

<sup>192</sup> European Parliament, "Fact Sheets on the European Union: Respect for fundamental rights in the European Union", PE600.415, Brussels, June, 2017. ([http://www.europarl.europa.eu/RegData/etudes/PERI/2017/600415/IPOL\\_PERI\(2017\)600415\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/PERI/2017/600415/IPOL_PERI(2017)600415_EN.pdf))

<sup>193</sup> Study for the Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, by Favilli, C. and N. Lazzarini "Discriminations emerging from petitions received", Brussels: European Union, 2017. However, there was another petition received by the Austrian deaf national, living in Austria, about the deaf signs language being German, not Austrian.

<sup>194</sup> EP Petition No.0609/2013.

<sup>195</sup> EP Petition No. 0111/2016.

<sup>196</sup> EP Petition No. 0111/2016 and No.0141/2016.

<sup>197</sup> EP Petition No. 0839/2014.

background (a Polish minority in Lithuania).<sup>198</sup> The above-mentioned study highlighted that “the views expressed by the European Parliament and Commission on EU competence and the scope of application of antidiscrimination law are sometimes rather, if not radically, different”.<sup>199</sup> Thus one of the key findings, of the previous study is that Parliament’s PETI Committee applies an ‘overbroad’ interpretation, whereas the Commission an ‘excessively narrow’ one.<sup>200</sup> Such a creation of ‘grey zones’ where the EU is unwilling or unable to act can be counterproductive for the protection of minorities.

#### 3.2.4. Role of the European Court of Human Rights in the EU’s legal framework

The European Convention on Human Rights of 1950 has a special place in EU law. Adherence to the convention is a requirement for all member states of the Council of Europe, including the EU Member States. Accession by the EU to the ECHR is a requirement of the TEU but at the moment this has not been completed. Thus, the Union and its institutions are not directly bound by the ECHR as such and it is through the Charter that the jurisprudence of the European Court of Human Rights is relevant to the application of EU law. The convention consists of 14 substantive human rights, along with procedural provisions and has 15 protocols that extend the substantive and procedural rights.

All EU Member States have ratified the convention but not all have ratified all the protocols. The correct application of the ECHR is adjudicated by the ECtHR, which has jurisdiction to receive complaints by states or individuals who consider that their human rights as contained in the convention have been violated. There is a requirement that the individual has exhausted all (if any) domestic remedies before making a complaint to the ECtHR. The convention has a special place in EU law as it is included in the TEU in Article 6(3) – those rights constitute general principles of EU law. Furthermore, where there is a convergence of Charter rights and ECHR rights, the interpretation given to the ECHR rights by its court forms the threshold below which any interpretation or application of the similar Charter right cannot fall.

The human rights of minorities have been an issue of substantial jurisprudence before the ECtHR. Key issues have been gender equality, gender identity, homosexuality in particular as regards criminal aspects, sexual orientation and Roma. There is also a series of cases on cultural and religious freedom which are considered under Articles 8 (the right to respect for private life) and 9 (the right to respect for freedom of thought, consciences and religion) both of which are qualified rights.<sup>201</sup> The cases in respect of Roma are of specific concern, as the variety of issues and the severity of the issues engaged has been increasing rather than diminishing, especially as regards EU Member States.

**The ECtHR from 2005 onwards began to adjust its jurisprudence on minority rights, particularly on Roma rights, to encompass a new approach regarding harm and the right to a remedy.** It is important here to recall that some issues at stake in the ECtHR judgements are outside the scope of EU law as it currently stands. Nonetheless, what is at stake here and the reason for including an analysis of this jurisprudence is the change in the direction of the jurisprudence from an individual discrimination or human rights violation one to an approach recognising minorities’ rights. This is of central importance to this study, as this approach is consistent with the interpretation of Article 22 Charter as constituting a minority rights framework for the EU. The acknowledgement that police and vigilante violence against Roma is motivated by ethnic discrimination took on greater clarity from 2004 onwards in a series of judgements on forced sterilisation of Roma women in some Central and Eastern

<sup>198</sup> EP Petition No. 0217/2014.

<sup>199</sup> Study for the Policy Department for Citizens’ Rights and Constitutional Affairs, European Parliament, by Favilli, C. and N. Lazzarini “Discriminations emerging from petitions received”, Brussels: European Union, 2017. p.8.

<sup>200</sup> Ibid.

<sup>201</sup> In this context ‘qualified’ means that violations can be justified on grounds set out in the provision itself.

European countries. The gradual opening of an approach to group wrongs is considered in this subsection.

Human rights issues in respect of people of Roma ethnicity have come before the ECtHR continually since the 1990s and against many Member States. The most common human rights complaint made by people of Roma ethnicity before the ECtHR is that the state has failed to protect them from torture, inhuman and degrading treatment or punishment (Article 3).<sup>202</sup> These complaints are against state officials but also include the failure of state officials (usually the police) to protect them against vigilante violence. These complaints also include numerous alleged breaches of Article 2 on the right to life – deprivation usually at the hands of state officials (shooting incidents by police and so forth).<sup>203</sup> The Article 3 complaints include a series of breaches regarding the compulsory sterilisation of Roma women primarily in Slovakia.<sup>204</sup> It may be worth noting that the ECtHR's acknowledgement of forced sterilisation of Roma women as a gross human rights violation took place at the same time as the UN's Committee on the Elimination of Discrimination against Women (CEDAW) made a similar finding.<sup>205</sup>

Violations of Articles 2 and 3 by EU Member States in respect of Roma have been found by the ECtHR in 29 cases at the time of writing with numerous cases pending.<sup>206</sup> There are many complaints as well about breaches of the right to education (Article 2 Protocol 1), primarily about excluding Roma children from the normal education system by pushing them into schools for the mentally handicapped. Five violations on this ground have been found against EU Member States.<sup>207</sup>

The ECtHR was slow in recognising violations of human rights where Roma ethnicity was involved. A series of cases coming from the UK primarily around the right to private life and property of Roma between 1996 and 2004 were rejected by the court. However, in 2004 the ECtHR found that the UK was in breach of Article 8 on the right to private life where a Roma family was evicted without sufficient procedural guarantees – commencing an opening of the judicial doors to human rights claims by Roma, including on the basis of their minority status.<sup>208</sup> The 2004 accession states had signed and ratified the convention between 1992 and 1997 but complaints against them by Roma only really got going from 2005 onwards. This coincided with the acceptance by the ECtHR that human rights violations against Roma were indeed motivated by their ethnic origin.

Bulgaria was first found in violation of Roma rights in 2002 and has been found again in violation seven times.<sup>209</sup> Romania was found in violation of Article 3 in respect of Roma in

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<sup>202</sup> *Bekos and Koutropoulos v Greece* (15250/02) 13 December 2005; *Cobzaru v Romania* (48254/99) 26 July 2007; *Petropoulou-Tsakiris v Greece* (44803/04) 6 December 2007; *Stoica v Romania* (42722/02) 4 March 2008; *Adam v Slovakia* (68066/12) 26 July 2016; *Gheorghita and Alexe v Romania* (32163/13) 31 May 2016.

<sup>203</sup> *Anquelova v Bulgaria* (38361/97) 13 June 2002; *Ognyanova and Choban v Bulgaria* (46317/99) 23 February 2006; *Mizigarova v Slovakia* (74832/01) 14 December 2010.

<sup>204</sup> *VC v Slovakia* (18968/07) 8 November 2011; *NB v Slovakia* (29518/10) 12 June 2012; *IG, MK and RH v Slovakia* (15966/04) 13 November 2012.

<sup>205</sup> The Committee on the Elimination of Discrimination against Women (CEDAW) is the body of independent experts that monitors implementation of the UN Convention on the Elimination of All Forms of Discrimination against Women and which subject to state acceptance received complaints from individuals regarding state action. *A.S. v Hungary* (Communication No 4/2004 UN Doc CEDAW/C/36/D/4/2004 29 August 2004.

<sup>206</sup> Violations have been found in respect of Bulgaria, Croatia, France, Greece, Hungary, Slovakia and Romania.

<sup>207</sup> Croatia, Czech Republic, Greece and Hungary: *DH and Others v Czech R* (57325/00) 13 November 2007; *Sampanis and others v Greece* (32526/05) 5 June 2008; *Orsus and others v Croatia* (15766/03) 16 March 2010; *Horvath and Kiss v Hungary* (11146/11) 29 January 2013.

<sup>208</sup> *Connors v UK* (66746/01) 27 May 2004.

<sup>209</sup> *Angelova and Iliev v Bulgaria* (55523/00) 26 July 2007; *Nachova and others v Bulgaria* (43577/98) 6 July 2005; *Anguelova v Bulgaria* (38361/97) 13 June 2002; *Ognyanova and Choban v Bulgaria* (46317/99) 23 February 2006; *M and others v Italy and Bulgaria* (40020/03) 31 July 2012.

2005.<sup>210</sup> Since then it has been condemned eight times of violating Articles 2 and 3.<sup>211</sup> Slovakia was first found in violation of Roma rights in 2009 and six times since.<sup>212</sup> Hungary was first found in violation in 2012 and five times since.<sup>213</sup> Greece has been found in violation five times starting in 2005<sup>214</sup> and Croatia four times from 2007.<sup>215</sup>

**The willingness of the ECtHR to entertain claims by Roma of human rights violations against them on the basis of their minority status has been important in facilitating a change in way European states have approached Roma rights from a matter of non-discrimination to one of minority rights.** The clustering of judgements by the ECtHR on Roma rights after 2005 and around EU Member States that joined the EU in 2004 and 2007 is a strong indicator that the concerns of civil society actors about how to replace the virtuous spiral required by the Copenhagen criteria were justified. The impetus on the Commission and other EU institutions to engage seriously with the problem of violations of Roma rights, however, did not find specific expression until 2010. The approach the CJEU has adopted may also be of use to other minorities, such as religious and linguistic minorities, where there has been little jurisprudence.

The next most substantial area (in terms of numbers of cases) in which the ECtHR has examined minority rights is in respect of disabilities. Over 60 judgements have been handed down linked to the issue of treatment of people with disabilities but the subject matter is extremely varied and the linkages are less clear. For instance, a violation of the right to life was found against Latvia regarding the death of a deaf and mute son in custody.<sup>216</sup> Bulgaria was found also to have violated the right to life of 15 disabled children who died from the effects of cold, shortages of food, medicine and basic needs in a care home.<sup>217</sup> The UK breached the prohibition on torture, inhuman and degrading treatment for a thalidomide victim with very severe deformities because of the conditions in which she was held in prison.<sup>218</sup> Similarly, France was in breach of the same provision regarding the prison conditions of a man suffering from paraplegia.<sup>219</sup> **Thus, a key challenge is how these cases are followed up and remedies implemented by states' parties.**

The treatment of cultural and religious minorities has also been a matter of concern to the ECtHR but has given rise to a limited number of violations. Of importance here, however, is *Dimitras and others v Greece*, where people who were not Orthodox were required to take an oath in criminal proceedings on the Bible (to which they objected).<sup>220</sup> Recently there have been two cases where the ECtHR found violations of the right to freedom of religion against EU Member States and the right to freedom of association on the basis of minority status.

<sup>210</sup> *Moldovan (no 2) and others v Romania* (41138/98 and 64320/01) 12 July 2005.

<sup>211</sup> *Center of Legal Resources on behalf of Valentin Campeanu v Romania* (47848/08) 17 April 2014; *Ion Balasoiu v Romania* (70555/10) 17 February 2015; *Cobzaru v Romania* (48254/99) 26 July 2007; *Stoica v Romania* (42722/02) 4 March 2008; *Carabulea v Romania* (45661/99) 13 July 2010.

<sup>212</sup> *KH and others v Slovakia* (32881/04) 28 April 2009; *Koky and others v Slovakia* (13624/03) 12 June 2012; *Mizigarova v Slovakia* (74832/01) 14 December 2010; *VC v Slovakia* (18968/07) 8 November 2011; *NB v Slovakia* (29518/10) 12 June 2012; *IG, MK and RH v Slovakia* (15966/04) 13 November 2012; *Adam v Slovakia* (68066/12) 26 July 2016.

<sup>213</sup> *Borbola Kiss v Hungary* (59214/11) 26 June 2012; *RB v Hungary* (64602/12) 12 April 2016; *Kiraly and Domotor v Hungary* (10851/13) 17 January 2017; *Horvath and Kiss v Hungary* (11146/11) 29 January 2013; *Balazs v Hungary* (15529/12) 20 October 2015.

<sup>214</sup> *Bekos and Koutropoulos v Greece* (15250/02) 13 December 2005; *Petropoulou-Tsakiris v Greece* (44803/04) 6 December 2007; *Sampanis and others v Greece*, (32526/05) 5 June 2008; *Sampani and others v Greece* (59608/09), 11 December 2012; *Lavida and others v Greece* (7973/10) 28 May 2013.

<sup>215</sup> *Secic v Croatia* (40116/02) 31 May 2007; *Beganovic v Croatia* (46423/06) 25 June 2009; *Skorjanec v Croatia* (25536/14) 28 March 2017; *Orsus and others v Croatia* (15766/03) 16 March 2010.

<sup>216</sup> *Jasinskis v Latvia* (45744/08) 21 December 2010.

<sup>217</sup> *Nencheva and others v Bulgaria* (48609/06) 18 June 2013.

<sup>218</sup> *Price v UK* (33394/96) 10 July 2001.

<sup>219</sup> *Vincent v France* (381325 /09) 24 October 2006.

<sup>220</sup> 3 June 2013.

On 8 June 2017 Bulgaria was found in violation of the freedom of assembly because the state refused to register an association promoting the rights of the Muslim minority in Bulgaria.<sup>221</sup> The ECtHR found that there was no pressing social need to require any association wishing to pursue political aims to constitute a political party if it was not the intention of the founders to take part in elections (as the Turkish Union did not). Similarly, the ECtHR found no action of the association or its members that might have compromised the territorial integrity or unity of Bulgaria. It also found that the Turkish Union had not undertaken any action or speech that might have been regarded as a call to hatred or violence. Therefore, the association had a right to respect of its right of association, which Bulgaria has violated by refusing to register it as an association.

The ECtHR has been less sympathetic to claims by Muslim women that bans on wearing certain items of clothing relating to their cultural and religious beliefs constitute discrimination. There have been a number of challenges before the ECtHR, the most recent of which is the SAS case against France.<sup>222</sup> The ECtHR found that the French ban on the burqa and *niqab* (items of clothing with religious connotations) was lawful and not a breach of Articles 8 (the right to private life) and 9 (the right to freedom of expression) examining three reasons: i) respect for gender equality, ii) human dignity and iii) respect for the minimum requirements of life in society ('living together'). While arguments on (i) and (ii) were not decisive, (iii) was central to the Court's finding of no violation. The ECtHR held that the objective of 'living together' as a society was a sufficient justification for a ban on the two items of clothing without breaching Articles 8 or 9 ECHR.

### 3.2.5. The EU Framework for National Roma Integration Strategies and other 'soft' policy instruments

As introduced above, the EU NRIS was originally developed as the EU response to the forced evictions and expulsions of EU Roma citizens by French and Italian governments back in 2010. Since then, the academic literature and civil society organisations have expressed a number of concerns and criticism regarding its effectiveness and comprehensiveness.<sup>223</sup>

A recent study on combatting anti-Gypsyism<sup>224</sup> has demonstrated that the EU Framework for National Integration Strategies does not satisfactorily address systemic challenges or structural violations by EU Member States' actors and institutions to democratic rule of law or structural obstacles developed. The Framework equally presents far-reaching limitations on the coverage of unlawful practices, such as forced evictions and expulsions of mobile Roma EU citizens. What is more, the EU NRIS Framework does not expressly foresee institutional forms or racism against Roma communities falling under the wider notion of 'anti-Gypsyism'.

The Framework does not constitute a rigorous form of review, accountability or enforcement for EU Member States' practices and policies. It does not either ensure any form of independent monitoring and assessment of Member State actions or inactions against objective goals and EU values and legal principles enshrined in Article 2 TEU. The focus is

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<sup>221</sup> *National Turkish Union and Kungyun v Bulgaria* (No. 4776/08) 8 June 2017.

<sup>222</sup> *SAS v France* (43835/11) 1 July 2014.

<sup>223</sup> Carrera, S., "The Framing of Roma as Abnormal EU Citizens: Assessing European Politics on Roma Evictions and Expulsions in France", in E. Guild, C. Gortazar and D. Kostakopoulou (eds), *The Reconceptualization of EU Citizenship*, Leiden: Martinus Nijhoff Publishers, 2013. Carrera, S., D. Bigo and E. Guild, *Foreigners, Refugees or Minorities? Rethinking People in the Context of Border Controls and Visas*, Farnham: Ashgate, 2013. See also ERPC – European Roma Policy Coalition, Report "Analysis of the National Roma Integration Strategies", March 2012. ([http://www.ergonet.org/media/userfiles/media/Final%20ERPC%20Analysis%202011%2003%2012\\_FINAL.pdf](http://www.ergonet.org/media/userfiles/media/Final%20ERPC%20Analysis%202011%2003%2012_FINAL.pdf))

<sup>224</sup> Carrera, S., I. Rostas and L. Vosyliute, "Combating Institutional Anti-Gypsyism Responses and Promising Practices in EU and Selected Member States", CEPS, 2017. (<https://www.ceps.eu/publications/combating-institutional-anti-gypsyism-responses-and-promising-practices-eu-and-selected>)

instead on the individual belonging to the Roma minority to 'integrate' in his/her presumed country of origin and/or nationality. Previous research has equally acknowledged that the shifting of focus towards Roma instead of the state in complying with EU principles and values has had profound implications for the kinds of EU policies that have developed under the EU NRIS umbrella. There is also the issue of financial accountability of the exact ways in which EU-funded projects do actually contribute to addressing the inclusion of Roma communities in compliance with EU values and principles laid down in Article 2 TEU and the EU Charter of Fundamental Rights.<sup>225</sup>

The EU also counts with other soft tools and fora aimed at supporting and coordinating the exchange of information and 'promising practices' between several national and EU actors on issues of direct and indirect relevance to minorities' protection. This is the case for instance of the European Commission's European Platform for Roma Inclusion.<sup>226</sup> It is coordinated by the Commission and brings together representatives and experts from national governments, the EU, international organisations and Roma civil society organisations. It is noticeable that few meetings of this Platform have covered issues such as anti-Gypsyism and recommended the need to broaden the EU NRIS so that it would cover the fight against institutional anti-Gypsyism, so that it would also focus on governments' accountability for their actions.

The outputs of the Platform are not legally binding, however, and there is no effective follow-up method of supervising and monitoring Member States' implementation. While these kinds of initiatives provide interesting potential for exchanging information and informally promoting 'policy change' at expert levels, they present profound limitations regarding relevance and actual impact on the ground, particularly when it comes to institutional manifestations of anti-Gypsyism.

Another interesting but similarly 'weak' EU policy body is the EU High-Level Group on combating racism, xenophobia and other forms of intolerance, which was set up in June 2016.<sup>227</sup> This group is also coordinated by the Commission and includes representatives from Member States, international organisations and civil society. Additionally, there is yet another High-level Group on Non-Discrimination, Equality and Diversity, again led by the Commission, which appears to have likewise covered during its discussions issues related to institutional manifestations of discrimination and racism against the Roma.<sup>228</sup>

A crosscutting concern surrounding the proliferation and development of these informal groups and platforms is not just their lack of transparency, weak methodology behind the discussions (non-independent research based debates) and the risks of inconsistency in action by the Commission. There is also a high degree of uncertainty as regards their actual contribution and input (if any at all) to the European Commission's role in monitoring and enforcing Member States' "timely and due" implementation of EU secondary legislation on non-discrimination and free movement, as well as current EU instruments monitoring EU Member States' compliance with democratic rule of law and fundamental rights (see section 5 of this study).

<sup>225</sup> European Court of Auditors, "EU policy initiatives and financial support for Roma integration: significant progress made over the last decade, but additional efforts needed on the ground", Special Report No. 14/2016, 2016. ([www.eca.europa.eu/Lists/ECADocuments/SR16\\_14/SR\\_ROMA\\_EN.pdf](http://www.eca.europa.eu/Lists/ECADocuments/SR16_14/SR_ROMA_EN.pdf))

<sup>226</sup> The European Platform for Roma Inclusion is set up by the European Commission (namely, DG JUST D1) together with national governments, the EU, international organisations and Roma civil society representatives ([http://ec.europa.eu/justice/discrimination/roma/roma-platform/index\\_en.htm](http://ec.europa.eu/justice/discrimination/roma/roma-platform/index_en.htm))

<sup>227</sup> European Commission's Official Register (<http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3425>)

<sup>228</sup> That notwithstanding, the European Commission's official registry provides no information on any follow-up activity after its inauguration back in May 2015 (<http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3328>)

### **3.3. What is the added value of Union citizenship, freedom of movement and the EU Charter of Fundamental Rights to minority protection?**

This subsection will focus on the added value of Union citizenship through free movement of persons and the Charter to minority protection. As can be seen from the analysis of EU legislation, the Charter and the jurisprudence of the CJEU and the ECtHR, the most substantial impact that they have had on minority rights has been in respect of one particular minority – Roma.

This section will first deal with Roma and then examine the added value of EU citizenship for cultural, religious and linguistic minorities. The EU Charter provides in Article 22 that the Union shall respect cultural, religious and linguistic diversity. The text of the explanatory note on Article 22 states that it is based on Article 6 TFEU, Article 151(1) and (4) EC Treaty now replaced by Article 167(1) and (4) TFEU and Article 3 TEU. It is also inspired by Declaration No. 11 of the Final Act of the Amsterdam Treaty, now taken over in Article 17 TFEU.

#### **3.3.1. Ethnic minorities and focus on Roma**

No single minority group has attracted the attention of the EU institutions as fully as the Roma. From 2007, a series of Council conclusions were adopted in which the EU Member States endorsed the Commission's assessment that there is a powerful EU framework of legislative, financial and policy coordination tools already available to support Roma inclusion but more needed to be done. From 2010, the focus was first on developing a set of model approaches for the social and economic integration of Roma, and second, on ensuring that the preparation of measures to implement the EU 2020 Strategy as well as of programmes in the new financing period to provide specific solutions to the problems of the different types of Roma communities. As mentioned above, this development of a specific Roma integration strategy was given extra impetus because of a rise in the number of Bulgarian and Romanian nationals of Roma ethnicity being expelled from France in 2010.

The expulsion of Bulgarian and Romanian Roma from France (and Italy) in 2010 had numerous sources. The first was that following the accession of Bulgaria and Romania to the EU on 1 January 2007, France applied transitional restrictions on workers from the two countries, meaning that nationals of those two countries could only move to France if they were economically self-sufficient, self-employed or service providers. The first period of the restrictions was for two years, complemented by a second period of three years if justified and a final two years were absolutely necessary to protect the domestic labour market (to a total of seven years). Hence, Bulgarian and Romanian nationals had the right to move to France but possibilities to support themselves once there were limited to self-employment.

In addition, the Citizens' Rights Directive (2004/38), which was adopted just as the big enlargement of 2004 was about to take place, was less than crystal clear on the grounds on which EU citizens could be expelled from one Member State to another, specifically when those EU citizens could be deemed an unreasonable burden to the social assistance system of the host state (Article 14(1) Directive 2004/38). The fact that the target group for expulsion were Roma (as revealed by the interior ministry instructions of August 2010) added a new dimension. The frameworks of EU citizens' rights and of minority rights introduced by the Lisbon Treaty the year before (2009) had to be reconciled. The policy choice of the EU institutions and in particular the Commission was to recognise that EU citizenship rights are a key tool available to all EU citizens to improve their lives and find a better future in another Member State. At the same time, it developed a Roma Integration Strategy to be negotiated in conjunction with the Member States and implemented by them, although assessed by the Commission on a regular basis.



This was intended to mean that EU citizens of Roma ethnicity could move to another Member State if they wished but were not driven from their home state by lack of physical protection, economic possibilities, education for their children, substandard housing and all the myriad of social woes that the Fundamental Rights Agency in its reports on the situation of Roma in the EU highlight.<sup>229</sup> The Commission's assessment of the National Roma Integration Strategies was published in May 2012, followed by a report in 2014. In 2015 questionnaires were again sent to the Member States followed by an assessment of the implementation of the strategies on 27 June 2016. The Commission has designated its role as a supporting one with Member States in the lead. Specific attention is paid to 'enlargement' countries. The EU contribution is foremost in financing – €90 billion available between 2014 and 2020 – with the investment priority the integration of marginalised communities.

Thus, the reconciliation of EU citizens' rights of free movement and minority rights has taken place in two ways. The first is through the gradual acquisition of full rights to move (including as workers) for EU citizens from the 2004, 2007 and 2013 accession states. Minorities have gradually been incorporated as EU workers and entitled to their rights (but only in their capacity as nationals of a Member State). This strategy has been fairly successful for those members of ethnic minorities (who are citizens of a Member State) able and willing to move to another Member State, including for the purpose of escaping racism and social exclusion. A previous study for the European Parliament has gathered evidence that Roma EU citizens were discriminated in the following areas, related to the EU's competence: "access to employment, education, financial services, accommodation/housing and social protection in a number of Member States. They are also prevented from registering in another Member State, or from living in caravans, and are subjected to evictions, expulsions and deportations as a result."<sup>230</sup> A recent study on combatting anti-Gypsyism went further, in looking for ways to address such situations, particularly institutional discrimination and what could be the potential role for the EU to play.<sup>231</sup>

The second track pursued by the EU institutions has been an emphasis on minority protection in the form of Roma integration in their home state. This policy has been driven by the EU chequebook – paying states to implement policies to reduce the social exclusion of minorities (mainly Roma) and then checking what they have done and how effective it has been. The rule of law has worked fairly well as regards Member States implementing their obligations to permit free movement of EU citizens and their access to the labour market. The chequebook policy towards Roma integration has been more controversial as it has run into the issue of democracy – the majorities in some Member States are willing to vote for politicians who espouse anti-minority opinions, even extreme ones.<sup>232</sup> Chequebook policies do not always take precedence over turbulent populist rhetoric that brings to power politicians who openly espouse anti-minority sentiments as more important than money.

In this acquisition of rights, the EU Charter has played a mainly symbolic role. Neither in the legislation nor the decisions of the CJEU regarding Roma has it been central.

<sup>229</sup> <http://fra.europa.eu/en/theme/roma>

<sup>230</sup> Study for the Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Ballesteros M. and G. Kelly, N. Meurens, A. Perego, "Obstacles to the right of free movement and residence for EU citizens and their families: Comparative Analysis", 2016 ([http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571375/IPOL\\_STU\(2016\)571375\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571375/IPOL_STU(2016)571375_EN.pdf)) pp. 87–92.

<sup>231</sup> Carrera, S., I. Rostas and L. Vosyliute, "Combating Institutional Anti-Gypsyism Responses and Promising Practices in EU and Selected Member States", CEPS, 2017 (<https://www.ceps.eu/publications/combating-institutional-anti-gypsyism-responses-and-promising-practices-eu-and-selected>).

<sup>232</sup> See *Le Pen v France* (45416/16) before the ECtHR which was declared inadmissible on 28 February 2017 regarding a claim by Le Pen that his conviction for anti-Roma statements at a Front National Summer School violated his right to freedom of expression.

### 3.3.2. Religious minorities and focus on Muslims

The TFEU does not establish any specific competence of the EU in the field of religion other than as regards non-discrimination. However, Article 17 TFEU does require the EU to respect the status under national law of churches and religious, as well as philosophical and non-confessional organisations.<sup>233</sup> The EU's scope is limited to the status of religious organisations and associations under national law. Article 167(4) TFEU could require the EU to take into account the impact of EU law on religious diversity. The Article 13 TFEU obligation that the EU respect Member States' customs regarding religious rites, cultural traditions and regional heritage relates to animal welfare and national concerns about religious beliefs (see also Protocol 35 TFEU on abortion in Ireland).<sup>234</sup> Similarly, the Treaty basis for respect of linguistic diversity has been characterised as 'thin' by academics.<sup>235</sup> It is a form of cultural expression (see also Article 22 of the Charter).

There are EU efforts in addressing hate crimes and hate speech against religious minorities, including Islamophobia and anti-Semitism. Nevertheless, the overall EU role on religious minority protection should be assessed critically. Recently, CJEU has considered two cases<sup>236</sup> of discrimination on the grounds of religion in the area of employment. Both cases related to female employees wearing hijabs who were fired after refusing to remove them. In the *Achbita v G4S Secure Solutions* case, the company had a neutrality rule. Thus, the Luxembourg court found that such a rule could constitute not direct, but rather indirect discrimination on the ground of religion, but it was proportionate to the company's image and freedom to run the business.<sup>237</sup> The judgement raises interesting questions about the balancing of individual rights with what is *strictly necessary*, as on the other hand people wearing comparable items simply for fashion would not be found in non-compliance with the neutrality rule, and hence not fired.

In the *Bougnaoui and ADDH v Micropole SA* case, on the other hand, the firm had no such policy and it was rather clients' wishes not to be served by a design engineer wearing an Islamic headscarf.<sup>238</sup> In the latter case, the Luxembourg court found a breach with the Equal Treatment Directive.<sup>239</sup>

A comparison between the CJEU and ECtHR reasoning in a similar case, *Eweida, and others v UK*,<sup>240</sup> finds a "lack of emphasis or weight which it places on the value of a diverse, tolerant and plural society and on the individual's right to manifest his or her religion"<sup>241</sup> Such CJEU case-law could have adverse impacts on highly visible religious minorities, such as Muslim women wearing headscarves or Sikh men wearing turbans in finding and keeping the employment.

<sup>233</sup> Peers, S., et al., eds. *The EU Charter of fundamental rights: a commentary*. Bloomsbury Publishing, 2014.

<sup>234</sup> Ibid.

<sup>235</sup> See for instance R. Crauford Smith in Peers, S., et al., eds. *The EU Charter of fundamental rights: a commentary*. Bloomsbury Publishing, 2014.

<sup>236</sup> European Court of Justice, *Bougnaoui and ADDH v Micropole SA*, Case C-188/15 Judgement of 14 March 2017 and *Achbita v G4S Secure Solutions*, Case C-157/15, Judgement of 14 March 2017.

<sup>237</sup> *Achbita v G4S Secure Solutions*, Case C-157/15, Judgement of 14 March 2017.

<sup>238</sup> *ADDH v Micropole SA*, Case C-188/15 Judgement of 14 March 2017.

<sup>239</sup> Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

<sup>240</sup> *Eweida, Chaplin & ors v UK*, Applications 48420/10, 59842/10, 51671/10 and 36516/10, Chamber decision 15 January 2013.

<sup>241</sup> Jolly S. QC, "Achbita & Bougnaoui: A strange kind of equality" Blog Article, 15 March 2017 (<https://www.cloisters.com/blogs/achbita-bougnaoui-a-strange-kind-of-equality>)

### 3.3.3. Linguistic minorities and focus on Regional and Minority languages

The protection of linguistic minorities does not easily find resolution in the free movement of EU citizens, as movement from one Member State to another is unlikely to resolve linguistic issues unless the host Member State shares the language of those moving. The respect for cultural and religious minorities may benefit from a move to a host Member State. As the case law indicates, the issue of women's clothing may be subject to substantial restrictions in some Member States (sanctioned by both the CJEU and the ECtHR) but not in others.

Therefore, use of free movement rights may provide women who wish to wear culturally and religiously dictated clothing with the option to live in a Member State where their cultural and religious tenets are not subject to limitations by the Member State. The protection of minority linguistic and cultural rights is revealed also in the speech by Commissioner Navracsics on 18 May 2017 regarding the contribution of autochthonous minorities to European Cultural Heritage.<sup>242</sup> **The use of the term 'autochthonous' needs to be considered as the assumptions which underlie it can be questionable. How a community becomes autochthonous is a matter of concern to many political scientists.**<sup>243</sup>

A previous study for the European Parliament on obstacles to free movement for EU citizens has indicated that EU citizens are discriminated against on the basis of nationality. The report paid particular attention to Bulgarian and Romanian EU citizens experiencing discrimination in another EU Member State while accessing employment and other public services after the transitional period was over.<sup>244</sup> As mentioned above, the European Parliament's PETI Committee is receiving petitions regarding discrimination on the grounds of national minority background or minority language, on which there is no EU legal act in force.<sup>245</sup>

There is no difficulty in identifying serious problems regarding minority protection in Europe. EU concern about minority protection in respect of cultural, religious and linguistic minorities, as well as ethnic minorities such as the Roma, has been well justified in light of the experiences of Roma and their treatment in a number of EU Member States. **The exercise of free movement rights of citizens can provide a mechanism whereby minorities whose rights are not protected in their home Member State may enjoy those rights in another Member State.** This may be an accidental effect of the rights of EU citizens, but that notwithstanding, it is of central importance to many members of minorities in the EU.

The interplay of EU law and national law in areas of competence permit variations in the definition of cultural, religious and linguistic rights, which have the effect of allowing in principle at least a wider range of options for EU citizens than may be available in their home Member State. However, this also raises questions about the consistency of EU law regarding discrimination and minority rights. The next section will examine the challenges and promising practices in effective minority protection in selected states.

<sup>242</sup> [https://ec.europa.eu/commission/commissioners/2014-2019/navracsics/announcements/contribution-autochthonous-minorities-european-cultural-heritage\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/navracsics/announcements/contribution-autochthonous-minorities-european-cultural-heritage_en).

<sup>243</sup> Ragazzi, F. and K. Balalovska. "Diaspora politics and post-territorial citizenship in Croatia, Serbia and Macedonia." (2011). Jacobs, Dirk, and Andrea Rea. "'Allochthones" in the Netherlands and Belgium." *International migration* 50.6 (2012): 42-57.

<sup>244</sup> Study for the Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Ballesteros M. and G. Kelly, N. Meurens, A. Perego, "Obstacles to the right of free movement and residence for EU citizens and their families: Comparative Analysis", Brussels: European Union, 2016. ([http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571375/IPOL\\_STU\(2016\)571375\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571375/IPOL_STU(2016)571375_EN.pdf)).

<sup>245</sup> Study for the Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, by Favilli, C. and N. Lazzarini "Discriminations emerging from petitions received", Brussels: European Union, 2017.

## 4. CHALLENGES AND PROMISING PRACTICES IN EFFECTIVE MINORITY RIGHTS PROTECTION IN SELECTED COUNTRIES

### KEY FINDINGS

- The assessment of 11 countries reveals that compliance with international and regional minority protection and non-discrimination standards **remains challenging in all the 11 countries under review**.
- Civil society questionnaire underscores the concerns of the protection of **migrants and refugees**, as well as, **Roma and Muslim** communities.
- There is a lack of follow-up on the progress or actions taken by governments after judgements, decisions and recommendations have been issued. Thus, a key challenge is the **lack of political willingness** among governments to address minority rights violations. At the same time, current international and regional monitoring instruments **overly rely on the 'good will'** of governments and lack powers to scrutinise them.
- There is a lack of representation of minority groups at the national level and **a self-silencing effect** of civil society involved in the representation of minorities at the EU and national levels.
- International and regional instruments **do not distinguish the 'institutional' or 'systemic and persistent'** nature of discrimination of minorities or other minority rights violations.
- The majority of promising practices undertaken by the governments concern areas where there is EU funding for Roma minority, as well as fighting hate crime and hate speech.
- There are very few promising practices for the protection of migrant and refugee rights.

This section is based on the findings and analysis provided in the Annexes 1-3 of this study covering the three cases studies of ethnic, religious and linguistic minorities. It also incorporates results from an online questionnaire sent to civil society and equality bodies, highlighting the main cross-country issues in minority protection. A focus group discussion contributed to verifying some of the challenges and identifying ways to address them (subsection 4.1). This section also provides a selection of 'promising practices' in addressing cases of institutional manifestations of racism, xenophobia and non-discrimination, notably involving anti-Gypsyism, Islamophobia and autochthonous linguistic minorities (subsection 4.2).

### 4.1. What are the key challenges in compliance with minority protection and non-discrimination standards?

What are the challenges in relation to minority protection in each of the 11 European countries covered by this study? What are the main issues arising for international and regional instruments?

Section 1 has already highlighted the issue of non-ratification of optional clauses establishing individual or group complaints procedures at the UN and CoE levels. That notwithstanding, a majority of the UN- and CoE-level actors monitor state's compliance with established standards (section 2). On this basis, **11 countries covered by this study** were assessed in **Annexes 1-3**. **A first important finding emerging from the assessment is that compliance and implementation of international and regional minority protection**

**and non-discrimination standards remain problematic to varying degrees in all the countries under review.**

- **Ethnic minorities**

This is particularly (and perhaps most) evident in respect of the case of national and ethnic minorities, and specifically for Roma communities (see Annex 1). The cross-country review of the situation of ethnic minorities indicates that adoption of various legal and soft policy measures at the EU level (see subsection 3.3.1) aimed at promoting Roma integration and tackling discrimination **have not led to a significant reduction in discrimination** and anti-Gypsyism in all key areas of life. The European Commission has reached a similar conclusion in its first assessment of the implementation of the 2013 Council Recommendation on effective Roma integration measures in the Member States.

The European Commission in this case noted that “anti-Gypsyism is on the rise” and that the “**reluctance of Member States to act** contributes to the acceptance of intolerance in societies”.<sup>246</sup> Similarly, the FRA, based on the findings of EU MIDIS II,<sup>247</sup> concluded that a number of goals set by the 2013 Council Recommendation on effective Roma integration measures were “far from being achieved” and that “much remains to be done to ensure the effective and **practical enforcement** of the Racial Equality Directive (2000/43/EC)”.<sup>248</sup>

A more proactive approach was taken by the CoE Human Rights Commissioner, who on 16 February, 2016 published seven letters targeting relevant ministers of Albania, Bulgaria, France, Hungary, Italy, Serbia and Sweden and later on – to Romania and Czech Republic, who were in serious non-compliance with the European Human Rights Standards.<sup>249</sup>

These findings of the EU’s own institutions hint at widespread and institutional forms of anti-Gypsyism in the EU and pre-accession countries. Annex 1 summarises the following situation in the 11 countries covered:

- States do not prevent racially-motivated violence, including violence by law enforcement officers, from continuing and remaining unpunished (in France, Greece, Hungary, Italy, Romania, Slovakia and Serbia).
- Racial segregation in education not only persists without remedy, but also it is growing (in Greece, Hungary, Romania, Slovakia and Serbia).
- Racial segregation in housing also continues unabated and is growing (in Finland, France, Greece, Hungary, Italy, Romania, Serbia, Slovakia and Sweden).
- Forced evictions without safeguards and lack of access to housing persist (in France, Greece, Hungary, Italy, Romania, Serbia, Spain and Sweden).
- Discrimination in access to health care is not addressed (especially in France, Greece, Hungary, Italy, Romania, Serbia and Slovakia), and there are striking health inequalities between Roma and non-Roma in all countries covered.
- Roma women and girls are affected by multiple disadvantages and discrimination to a lesser or greater extent in all the countries covered.

<sup>246</sup> See European Commission. *Effective Roma integration measures in the Member States 2016. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, p. 8. ([http://ec.europa.eu/justice/discrimination/files/roma-report-2016\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/roma-report-2016_en.pdf)).

<sup>247</sup> Fundamental Rights Agency. *EU-MIDIS II: Second European Union Minorities and Discrimination Survey*. (<http://fra.europa.eu/en/project/2015/eu-midis-ii-european-union-minorities-and-discrimination-survey>)

<sup>248</sup> See Fundamental Rights Agency. *Second European Union Minorities and Discrimination Survey. Roma – Selected Findings*. 2016, pp. 9-11 (<http://fra.europa.eu/en/publication/2016/eumidis-ii-roma-selected-findings>)

<sup>249</sup> Muižnieks, N., Annual activity report 2016, Commissioner for Human Rights, Council of Europe, 2017. (<https://rm.coe.int/168070ad23>)

- **Religious minorities**

The cross-country comparative review in the area of religious minorities (see Annex 3) highlights the intersectionality of minority protection grounds. In many of the countries under assessment it is difficult in practice to distinguish between discrimination based on grounds of race, ethnicity or national minority origin and discrimination based on religion, as anti-Semitism and Islamophobia often include aspects of both. In addition, the laws have traditionally favoured the 'majority religion'. Such national laws give rise to dilemmas about applicable tax law, burial rites and applications for building new places of worship, which may discriminate against religious minorities (see Annex 3).

At the EU level, mainly civil society warns about the rise of reported Islamophobic incidents and hate crimes related to so-called 'refugee and security crises', for instance in the Brexit debate in the UK.<sup>250</sup> The phenomenon takes shape in "increasing anti-Muslim remarks in public discourse by far-right and even mainstream political leaders, and attacks on mosques throughout Europe".<sup>251</sup> Discrimination of Muslim women in employment is of particular concern as well as overly broad CJEU interpretation of 'religious neutrality' rules, forbidding the display of religious symbols.<sup>252</sup> The CJEU decisions, according to some focus group discussion participants, raised more questions than answered and created "a negative case law".

- **Speakers of minority and regional languages**

The dominance of the national language arises as an issue in the area of linguistic minorities (see Annex 2). The promotion of the 'official language' gives fewer opportunities for minority languages (for example in access to public policy or government jobs). While the ICCPR represents the opinion that usage of minority languages in the private sphere is tolerable, in official settings (according to the ICCPR) it is not self-evident. However, as analysis in Annex 2 indicates, it is hard to say when non-compliance becomes discrimination against the speakers of minority and regional languages.

National governments have a high level of discretion, even after ratifying relevant international and regional instruments. The dominance of main nationality(-ies), official language(s) and religion(s) is by default a challenge, entrenched in national laws and policies, and a fact accepted under the minority protection regime. Thus, further discussion focuses on the challenges identified in states' compliance with international and regional minority standards, which are keeping the thin line between 'majority-favouring policies' and discrimination of minorities.

#### 4.1.1. Key challenge 1: Lack of independent follow-up on the progress or actions taken by governments after judgements, decisions and recommendations

The examples provided in Annexes 1-3 (in particular Table A1.1 and Table A3.1) show that there is some level of repetition of issues highlighted for the states concerned over time under the same monitoring instrument, or even across different monitoring instruments and actors.

Whereas the repetition of issues could indicate the existence of 'systemic' or at least 'institutional' discrimination of minorities (see section 5 for more elaboration on this), several

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<sup>250</sup> European Network Against Racism, Briefing, Islamophobia in Europe: recent developments, January, 2017. ([http://www.enar-eu.org/IMG/pdf/islamophobia\\_data\\_2016.pdf](http://www.enar-eu.org/IMG/pdf/islamophobia_data_2016.pdf))

<sup>251</sup> Ibid.

<sup>252</sup> Bougnaoui and ADDH v Micropole SA, Case C-188/15 Judgement of 14 March 2017 and Achbita v G4S Secure Solutions, Case C-157/15, Judgement of 14 March 2017.

civil society online questionnaire respondents warned about the **'fatigue' and 'normalisation' of the non-compliance by governments**. One civil society respondent from Sweden pointed to the "[l]ack of interest by government to follow up on recommendations by CERD [Committee] and EU monitoring bodies. The [Swedish] Courts blatantly reject precedents set by regional and international treaty bodies."<sup>253</sup>

Interestingly, fading commitment among the governments to the international and regional standards was one of the key messages of the CoE Human Rights Commissioner's Annual Report. He called governments to (emphasis added):

"<...> treat **non-co-operation** [of the states] **with the utmost seriousness** as a **fundamental threat to the system**, and consider far-reaching steps to bring Europe's human rights house in order and maintain its integrity."<sup>254</sup>

At the same time, there is a high degree of reliance in the international and regional monitoring instruments that governments will assume their human rights obligations and remedy the situation of minority groups or individual complainants. A **majority of the international and regional instruments and actors covered to a higher or lesser degree rely on the assumption of governments' 'good will to improve the situation'**. De Frouville's analysis of the UN UPR shows how this limitation is inherent in the very design of this states' peer review instrument (emphasis added):

The global efficiency of the mechanism is wholly dependent **upon the good will of the state under** review. (...) States who want to take it seriously will be very much involved in the process and will certainly profit from it. (...) But on the contrary, it is very doubtful that the UPR can be of any use in the case of those who are not really willing to participate and who only will be striving to escape criticism as much as they can.<sup>255</sup>

De Frouville's analyses of the UPR make a distinction between 'honest' and 'dishonest' states under the UPR review; the former are heavily criticised, while the latter are merely tapped by their like-minded counterparts.<sup>256</sup> Indication of 'honesty' lies precisely in the 'willingness' to engage with the independent and critical civil society (emphasis added):

One aspect that seems crucial, in particular, is **how the state will interact with its domestic civil society along the process**. The participation of national civil society is key to get some positive results. But this will never happen in states where the only kind of relationship existing in between the government and the civil society is that of repression or denial.<sup>257</sup>

This requires digging deeper into their representation and independence at the national level, which relates to the second challenge and links back to the general rule of law approach (see section 5).

<sup>253</sup> Civil Society Survey on Minority Protection (<https://www.surveymonkey.com/r/minorities>), answers collected by CEPS & MRG, 2017 May – July.

<sup>254</sup> Muižnieks, N., Annual activity report 2016, Commissioner for Human Rights, Council of Europe, 2017. (<https://rm.coe.int/168070ad23>)

<sup>255</sup> See de Frouville, O. "Building a Universal System for the Protection of Human Rights: The Way Forward", (Part II, Chapter 1) in Cherif Bassiouni M. and W. A. Schabas (eds), "New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?", Intersentia: Cambridge, 2011.

<sup>256</sup> Ibid, p. 253.

<sup>257</sup> Ibid, p. 253.

**Figure 5. Ranking of the main obstacles to minority protection**

\* Weighted Average – when the least relevant option had – 1 point, to the most relevant – 5 points.

**Source:** CEPS & MRG, Civil Society Questionnaire on Minority Protection, 2017 May-July.

As Figure 5 above indicates, the lack of the good will from governments was ranked by the online questionnaire respondents as a key difficulty in their work, followed by weak monitoring mechanisms. Therefore, we can conclude that institutional and regional mechanisms are running on the assumption of good will on behalf of governments and often lack 'teeth' in their monitoring and follow-up practices.

The focus group discussion with legal experts showed a broad consensus that compliance should not be left to 'good will' alone. One of the discussants claimed that international and regional instruments are 'lacking the teeth' to scrutinise the states under the review, for example, when 'watchdog' civil society is incapable of playing its role. A suggestion from a minority rights organisation actively working at the UN level stressed the need for independent monitoring of the states under the UN UPR process. An independent experts' committee was seen as a way to address the 'question' of countries' willingness to undergo the review. As section 5 elaborates, the EU Pact for DRF suggested by the EP also relies on a similar independent body of experts.

At the CoE level, in the theme of speakers of minority and regional languages (Annex 2), there is an ongoing discussion on 'the speed' of monitoring processes of the ECRML. While it is regarded as 'too quick' on the side of governments, it is seen as too slow by organisations and the minorities at stake. Similar discussions arise with regard to the other UN mechanisms, such as the UPR, whose slow nature and lack of progress since 2008 (it is currently on the third cycle), may lead to a review itself.<sup>258</sup>

Annex 3 of this study captures the difference in the depth and breadth of the coverage of different international and regional instruments (see also section 3), particularly related to the aspects outlined below. For example, monitoring at the UN level through the UPR process or by the Treaty bodies, such as the CERD Committee, due to the breadth of issues is likely to be relatively superficial and could only highlight very serious problems. At the other end of the spectrum remains the courts, such as the ECtHR and the CJEU, which are able to issue binding judgements on particular minority protection issues. However, even their impact remains limited due to the issues of follow-up by the states concerned (see section 5 for further discussion). Somewhere in between could be located specialised regional bodies, such

<sup>258</sup> Rathgeber, T., "Performance and Challenges of the UN Human Rights Council: An NGOs' View", FES, February 2013. (<http://library.fes.de/pdf-files/iez/global/09680.pdf>)



as the ECRI, ACFC and ECRML Experts Committee as well as the CoE Commissioner for Human Rights, providing detailed country reports and highlighting systemic problems.

At the EU level, the FRA provides the most nuanced and relevant research, through opinions and analysis of data it gathers. Still, the focus group participants remained sceptical on the influence of FRA reports and opinions on policy change in their countries due to its currently limited legal mandate. Some of the focus group participants raised the issue that the FRA, as one of the EU's official agencies, is by design highly politicised and its mandate makes it somehow dependent on EU Member States. This lack of independence in the EU processes makes it difficult for the agency to engage in independent monitoring of EU Member States and European institutions performance on democracy, rule of law and fundamental rights.

Another focus group discussant raised the issue of 'infringement procedures' against the Member States not being applied equally. The discussant stressed that infringements for segregation of Roma children in education do not extend to Romania and Bulgaria (although the situations are similar to those in the Czech Republic, Slovakia and Hungary), nor to France or Italy (on the segregation in housing and forced evictions). Interestingly, that the CoE Commissioner for Human Rights, has raised similar concerns by sending the letters to ministers of the respective governments.<sup>259</sup>

Some of the focus group participants suggested linking government commitments to minority rights to Sustainable Development Goals (SDGs). SDGs foresee that states have to reach clear targets and benchmarks. Yet there was no consensus on whether benchmarking alone could lead to better results, though this interesting parallel is worth cautious exploration. Already in 2010, the EU 2020 Strategy had an Anti-poverty Flagship Initiative "designed to help **EU** countries reach the headline target of lifting **20 million people** out of **poverty** and **social exclusion**".<sup>260</sup> It targeted Roma as one of the main groups. Nevertheless, related scrutiny during the European Semesters, looking at socio-economic structural reforms in member states every six months, remained largely invisible for the civil society representing Roma communities.<sup>261</sup> As Annex 1 also reveals, the socio-economic situation of Roma has remained challenging. The focus on benchmarking leads to a quest among the policy-makers to gather more '**equality data**', but this has left the focus group discussants divided. (See the further discussion subsection 4.1.3.)

#### 4.1.2. Key challenge 2: Lack of capacity among minority groups, watchdog civil society and equality bodies

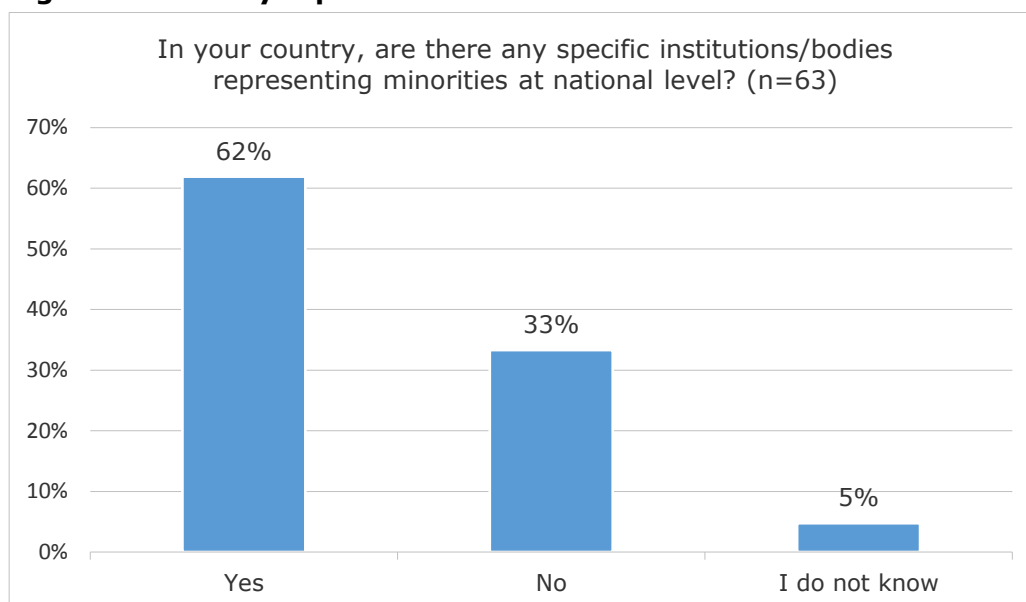
- **Who decides on representatives of minority groups?**

Among respondents to the online questionnaire, 62% acknowledged that there are special institutions or bodies representing different minority groups (see Figure 6 below). It looks like a positive development itself, as minorities have an official forum to engage with those in power. Moreover, it shows that civil society is quite aware of such venues, as the results correspond to those of Equality Bodies online questionnaire.

<sup>259</sup> Muižnieks, N., Annual activity report 2016, Commissioner for Human Rights, Council of Europe, 2017. (<https://rm.coe.int/168070ad23>).

<sup>260</sup> European Commission. European platform against poverty and social exclusion. (<http://ec.europa.eu/social/main.jsp?catId=961>)

<sup>261</sup> Carrera, S., I. Rostas and L. Vosyliūtė, "Combating Institutional Anti-Gypsyism: Responses and promising practices in the EU and selected Member State", CEPS Research Report No. No 2017/08, May 2017.

**Figure 6. Minority representation bodies at the national level**

**Source:** CEPS & MRG, Civil Society Questionnaire on Minority Protection, 2017 May-July.

However, further analysis reveals the 'limits' of such representation, as it leads to a question: Who gets included or excluded in this process and under what conditions? In addition, what are the safeguards for civil society independence in accessing funding and taking part in state consultations, without being silenced or engaging in 'self-censorship' regarding their watchdog roles? In a comment provided in the civil society questionnaire, a respondent from Serbia highlighted the links between the ruling party and 'chosen' representatives to National Councils of National Minorities:

[they] are financially supported by the state and are close to the ruling political party. They are small but powerful groups of people who usually do not consider the opinion of other minority representatives but only their particular interests. [...] The independent NGOs and minority representatives are forgotten and not taken into consideration.<sup>262</sup>

- **Self-censorship of civil society – From watchdogs to service providers**

The civil society survey and focus group discussion revealed concerns by civil society representatives about what is '*politically feasible today*' at the EU and national levels. There are worrying symptoms of the absorption and silencing of civil society, which is willing to engage in the EU's processes and funding schemes. The EU's 'soft' policies, such as the EU Framework for National Roma Integration Strategies, opened doors for civil society to engage with national and EU policy-makers, as well as to obtain funding, mainly through nationally administrated EU structural and investment funds.<sup>263</sup>

In return, as classical interest group theory shows,<sup>264</sup> civil society is used for legitimisation of a given policy. The observations of recent debates at the EU level on Roma issues indicate that once civil society is part of the existing 'soft policy', it gets more difficult to openly criticise the very premises and assumptions of such policies, in particular, as it might affect their own activities and securing access to funding.

<sup>262</sup> CEPS & MRG, Civil Society Survey on Minority Protection, 2017 May-July.

<sup>263</sup> Carrera, S., I. Rostas and L. Vosyliūtė, "Combating Institutional Anti-Gypsyism: Responses and promising practices in the EU and selected Member State", CEPS Research Report No. No 2017/08, May 2017.

<sup>264</sup> Edwards, M., *Civil society*. Polity, 2009.

Focus group participants observed how differently funding calls are framed within and outside the EU for civil society in minority protection. According to a discussant, outside the EU calls favoured the profile of a 'watchdog'-type of vigilant civil society, more often than not challenging the state, whereas within, more 'service provider'-types of calls prevail.

Figure 5 (in subsection 4.1.1) also confirms that one of the main challenges for civil society is their own capacity. The online questionnaire revealed that civil society representatives are critical about their possibilities, for example to engage in legal and strategic litigation, as at the moment there are no EU funds directly and clearly supporting such activities within the EU Member States.

One discussant highlighted that funding for the EU's external efforts in human rights is disbursed directly by the EU, whereas within the EU, the majority of EU funding goes through national management governmental authorities and bodies. National management authorities of EU funds include (or are requested to include) civil society representatives.

However, a CEPS study on anti-Gypsyism indicated the lack of awareness among Roma civil society organisations and a lack of transparency in the civil society selection procedures and weight in decision-making of these bodies.<sup>265</sup> This might give rise to competition to be governments' 'darlings', rather than to report and challenge the funding decisions taken and their actual value and effects on the ground.

- **Challenges in capacity and in the financial and political independence of equality bodies**

The issues concerning capacity, as well as financial and political independence, are also relevant to equality bodies. In their respective questionnaire, equality bodies identified the importance of an independent mandate and funding for their institutions, as they are placed in a very inconvenient position: "between two fires – civil society representing minorities and government".<sup>266</sup> The focus group discussion revealed that equality bodies lack the capacity to meet the expectations of the society.

For example, one equality body consisted of ten persons, only three of whom are lawyers dealing with the complaints. Some equality bodies can and do engage in strategic litigation, but this can be at the cost of individual complaints. In addition, equality bodies are tasked with gathering information about the situation in the country and to report it to international and regional actors. Yet, the majority of the equality bodies are heavily dependent on state funding, whereas in other cases equality bodies are proactive in obtaining additional funding from EU-level projects.

During the focus group discussion, the equality bodies representatives noted that even though their decisions may be quasi-legally binding, governments may not want to comply in practice because they lack enforcement powers. In Serbia, an equality body had positive experiences with releasing information about the government's non-compliance in the media. In Estonia, such a strategy has not proved to have visible outputs as both media and society seemed to be 'fatigued' with the negative decisions coming from the equality body. Such structural and contextual challenges need to be taken into account when proposing and applying 'promising practices' in these domains.

- **Residence status as an obstacle to apply minority protection standards**

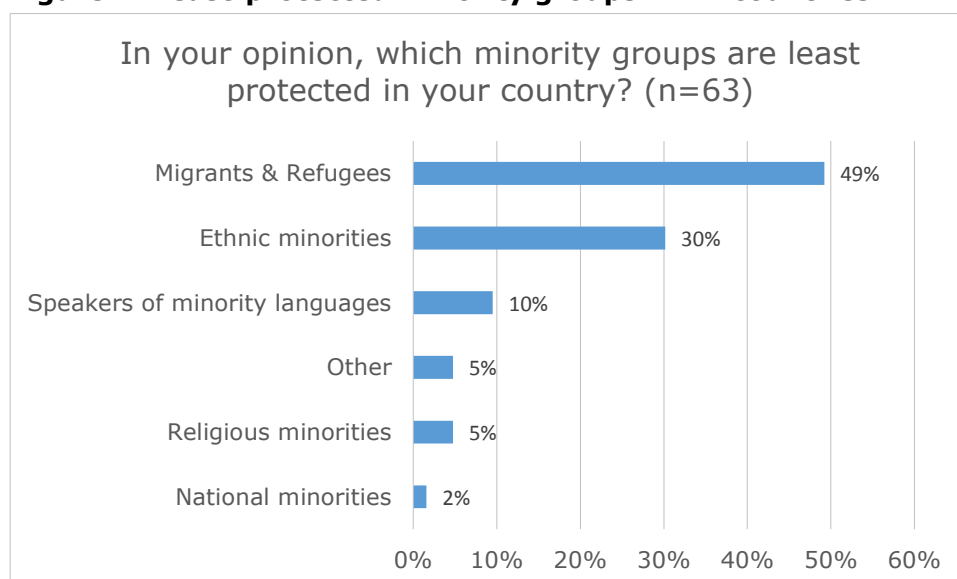
Another issue relates to the residence and status of a minority. As Figure 7 reveals, half of the civil society respondents agreed that migrants and refugees are the least-protected group. Respondents from Estonia, France, Greece, Hungary, Italy, Romania, Serbia,

<sup>265</sup> Carrera, S., I. Rostas and L. Vosyliūtė, "Combating Institutional Anti-Gypsyism: Responses and promising practices in the EU and selected Member State", CEPS Research Report No. No 2017/08, May 2017.

<sup>266</sup> CEPS & Equine, Equality Bodies Survey on Minority Protection, 2017 June-July.

Slovakia, Spain and Sweden indicated that this is a critical issue in their country. Some of them explained that precisely the lack of their recognition as a minority or lack of representation in any of the governmental bodies due to their residence status is an obvious obstacle to their protection.

**Figure 7. Least-protected minority groups in 11 countries**



**Source:** CEPS & MRG, Civil Society Questionnaire on Minority Protection, 2017 May-July.

Similarly, one of the Equality Bodies questionnaire respondents shared that although the official mandate extends to all people in the territory of the country concerned, they can offer only limited protection to migrants and refugees. The same respondent mentioned that not many cases are coming from Third Country Nationals:

[W]e for example had a case of Turkish students who were denied accommodation services due to their origin and we issued non-binding expert opinion on discrimination.<sup>267</sup>

Annex 3 highlights that many Muslims are migrants or refugees, as for example in Hungary, Sweden, Finland, Estonia and Greece. Thus indirectly, measures that discriminate on the basis of nationality or residence status are likely to have a disproportionate impact on Muslim populations. This is of particular concern to victims of hate crimes submitting claims, especially in situations under effective state control, such as in open or closed detention centres or when implementing the EU hotspots approach.<sup>268</sup>

In addition, a FRA report of 2010 on discrimination against Muslims highlights that Muslims who are not citizens are much more likely to suffer discrimination than those who are citizens. The report finds that long-term residence significantly reduces the likelihood of suffering discrimination.<sup>269</sup> Nonetheless, increased hate speech and hate crimes against Muslims after the terrorist attacks in France, Belgium, Germany and recently, the UK and Sweden, have led to the adoption of overbroad surveillance and imprecise definitions of counter-terrorism measures, including sharing the information of EU and non-EU nationals entering and exiting the EU.<sup>270</sup>

<sup>267</sup> CEPS & Equine, Online Equality Bodies Questionnaire on Minority Protection, 2017 June-July.

<sup>268</sup> Human Rights Watch. World Report 2016: European Union. (<https://www.hrw.org/world-report/2017/country-chapters/european-union>)

<sup>269</sup> <http://fra.europa.eu/en/publication/2010/eu-midis-data-focus-report-2-muslims>

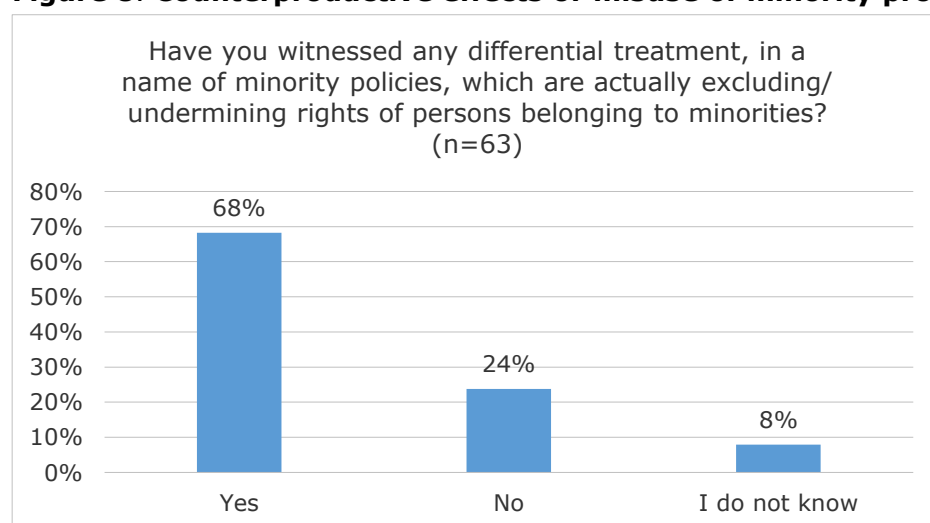
<sup>270</sup> Human Rights Watch. World Report 2016: European Union. (<https://www.hrw.org/world-report/2017/country-chapters/european-union>)

A similar trend has already been happening in some of the anti-radicalisation measures, such as targeting Muslim boys. Anecdotal evidence of the UK's Prevent programme suggests "a 10-year-old Muslim boy was quizzed by police after he mistakenly wrote that he lived in a 'terrorist house' rather than a 'terraced house'".<sup>271</sup> How often does a ten-year old get questioned about terrorism?

A third of civil society respondents also ranked 'ethnic minorities' as being in the most vulnerable situation. From the comments submitted it is clear that they had in mind the Roma community when making this choice. Annex 1 indicates some of the ongoing issues in a number of EU Member States, despite the EU's own standards and soft law policies.

A previous study on combatting anti-Gypsyism<sup>272</sup> underscored the especially vulnerable position of 'foreign' Roma, including Roma EU citizens within another EU Member State, but also Roma third-country nationals and asylum seekers, whose residence status becomes another 'excuse' for institutional discrimination. For example, Roma individuals coming from Balkan countries and making asylum-seeker claims in the EU are portrayed *prima facie* as 'abusing the asylum system' and not in real need of international humanitarian protection; hence, they are returned to situations of poverty and abuse.<sup>273</sup>

**Figure 8. Counterproductive effects or misuse of minority protection policies**



**Source:** CEPS & MRG, Civil Society Questionnaire on Minority Protection, 2017 May-July.

When civil society respondents to the online questionnaire were asked a question about the misuse or counterproductive effects of minority policies, two-thirds of respondents were aware of such instances (see Figure 8 above). Among the examples provided were placing Roma children in 'special schools' for persons with disabilities, having minority language schools that also serve the purpose of separating foreigners and Roma from nationals, and separating migrant/foreign children from local children in 'welcoming classes' and thereby lowering their chances to obtain the same quality of education.

In addition, civil society respondents to the online questionnaire as well as the focus group participants acknowledged that hate speech or hate-crime clauses are being applied more often against Roma or migrants and refugees than against right-wing groups. Focus group participants from Belgium and France highlighted the misconception of Muslim women

<sup>271</sup> Harris, S. A., "Prevent Strategy Is 'Used To Target Young Muslims', Teachers' Union Motion Claims", Huffington Post, 28.03.2017. ([http://www.huffingtonpost.co.uk/entry/prevent-strategy-target-young-muslims-teachers-union-motion-claims\\_uk\\_56f4f68fe4b0ca](http://www.huffingtonpost.co.uk/entry/prevent-strategy-target-young-muslims-teachers-union-motion-claims_uk_56f4f68fe4b0ca))

<sup>272</sup> Carrera, S., I. Rostas and L. Vosyliūtė, "Combating Institutional Anti-Gypsyism: Responses and promising practices in the EU and selected Member State", CEPS Research Report No. No 2017/08, May 2017.

<sup>273</sup> Ibid.

wearing a headscarf as in opposition to the gender equality policies of the French "living together" principle.

Annex 2 points out that indeed minority language policies could have counterproductive effects, as the ECRML contains standards for education in minority languages, but they could be conflicting with the Racial Equality Directive and European Court of Human Rights case-law.

A focus group participant from Estonia confirmed that the situation of the Russian-speaking minority and related legislation remains very politicised within the country. An example is the apparently neutral requirement of a language proficiency level in employment, which has negative effects on the employment of Russian-speakers.

The examples above demonstrate how crucial it is to have effective monitoring mechanisms and sound rule of law safeguards. Even the best intended minority protection standards can be counterproductive, if they are intentionally misplaced or misinterpreted at the national level. This can happen more easily when voices of minority representatives are not heard, when otherwise vigilant civil society engages in (self) censorship, and when equality bodies are not sufficiently independent from the 'good will' or 'bad will' of governments.

#### 4.1.3. Key challenge 3: International and regional instruments do not distinguish the 'institutional' or 'systemic and persistent' nature of discrimination of minorities or other minority rights violations

A review of Annexes 1-3 reveals that the very nature of complaints before the courts (being mostly individual) is hindering the possibility to illuminate the systemic nature of the issue as opposed to mere incident. Most of the monitoring bodies and instruments under review make no or little distinction between interpersonal or institutional discrimination. Finally, there is no clear regional or international standard for assessing systemic and persistent breaches or violations of minority rights (see more suggestions in section 5).

Some of the focus group discussants suggested establishing systemic violations by gathering equality data. The focus group discussants remained divided on whether it could inject more 'willingness' on behalf of governments. Some discussants argued that data and numbers could give more power to the persons belonging to minorities to advocate for change at the European level and highlight the discrimination issues that minorities are experiencing. Other discussants remained cautious, due to the fact that some minority representatives, as for example Roma in Germany and Sweden, object to gathering such data, as they fear that it could be misused.

Another discussant argued that the 'quest for more data' is a smokescreen, masking the very unwillingness by the states and European institutions to act upon existing reports, court decisions and data already gathered by the FRA, equality bodies or civil society. Again, the situation of Roma was given as an example, where there is ample evidence and decisions by international and regional actors on the ongoing violations in various fields of life, including in institutional discrimination. Thus, the Commission has not initiated infringement proceedings against states **despite** the ample of evidence collected by international and regional actors, not because the lack of it. Hence, the discussion focused on whether equality data would solve more questions than it would raise, including those on personal data protection and the possibility to misuse the information by politicians engaging in hate speech and 'hate politics'.

The study commissioned by the OSF concludes that: "in all the seven Member States reviewed, **political will to collect equality data is lacking**. The overwhelming majority of

national stakeholders supporting equality data collection looks to the EU level for leverage.<sup>274</sup>

Even if the EU is in support of equality data equality through its funding and guidance,<sup>275</sup> there is a **heavy reliance on the Member States' good will, not only to collect data but also to act correctly upon the data collected**. Thus, as section 5 continues to demonstrate, 'equality data' without a proper and functioning 'rule of law' mechanism and independence of bodies for gathering such data could constitute a risk to minorities, not just looking at the governments of today, but in foreseeing the implications for the governments of tomorrow.

## 4.2. Promising practices in minority protection

This subsection gathers a set of promising practices in minority protection in the 11 European countries covered by this study. As noted in the introduction, the purpose of presenting promising practices is to inspire policy-makers and civil society about what works in a certain context.

The study relies on the answers to the online questionnaires for civil society and equality bodies, as well as the focus group discussion held for the purpose of this study. None of the promising practices are evaluated on their actual impacts, but rather on potential that could be regarded as promising or interesting. Limitations of such practices are acknowledged, where possible.

The promising practices, should not be 'overestimated' as to give an easy solution at the national contexts where institutionalised and often serious and systemic violations of minority rights are happening. Thus promising practices, should rather be seen as an additional component of the broader EU framework on Democracy, the Rule of Law and Fundamental Rights (section 5).

### 4.2.1. Strengthening watchdog civil society

The strengthening of civil society in representing minorities has been reiterated by a number of civil society respondents and equality bodies. Focus group discussants have highlighted the challenges for civil society in the EU in accessing funding for a watchdog mission. The EU external dimension could nonetheless be an interesting precedent on how more vigilant activities of civil society, as for example strategic litigation, or even on how the associated costs of participating in international and regional meetings could be covered, without compromising the independence and watchdog mandate of such organisations. Experiences at the UN show that strengthening the capacity of domestic watchdogs could make a crucial difference for some of the existing mechanisms to actually work in practice:

That is certainly the case for those who held **prior consultations with civil society in preparation of the report** at the domestic level, and who would thereafter **set up a domestic inclusive process oriented to the implementation of the recommendations**.<sup>276</sup>

<sup>274</sup> Chopin I., L. Farkas, and C. Germaine, "Ethnic Origin and Disability Data Collection in Europe: Measuring Inequality - Combating Discrimination", Policy Report of the OSF Equality Data Initiative, OSF, 2014.

<sup>275</sup> European Commission. "New European Handbook on the Data Equality", 24.02.2017. ([http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=54849](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54849))

<sup>276</sup> See de Frouville, O. "Building a Universal System for the Protection of Human Rights: The Way Forward", (Part II, Chapter 1) in Cherif Bassiouni M. and W. A. Schabas (eds), "New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?", Intersentia: Cambridge, 2011, p. 253.

A previous study on combatting anti-Gypsyism highlighted how the EU Framework for National Roma Integration Strategies led to setting up various EU-led fora – from the European Roma Platform to National Roma Platforms.<sup>277</sup> Such networks are tasked with representing and defending the interests of the Roma communities in different stages of policy-making – from design to implementation and follow-up. Governmental authorities also got involved in setting up parallel networks, notably the European Network of National Roma Integration Contact Points, as well as those within the European Commission.

The creation of networks could have a positive contribution in terms of intellectual and social capital. However, as indicated among the challenges in the previous section, it is important to insert 'safeguards' and to enable civil society to play the role of 'watchdog'.

Interestingly, this approach has been taken by governments of some of the countries covered in this study. An example is that mentioned by a respondent from civil society in Sweden (emphasis added):

The Swedish government is revising the **minority legislation** in a newly published report. 'The task of the investigation is essentially to conduct an analysis of minority policies to demonstrate strengths and challenges, as well as to propose how to **ensure compliance** with national minority rights while **strengthening their opportunities for influence and participation [of persons belonging to minorities]**.'<sup>278</sup>

This study does not have the capacity to assess the potential and actual impact of such legislation. However, the respondent working in the area of civil society in Sweden seems to welcome the government's commitment to the '**influence and participation**' of minority communities.

At the same time, one of the solutions to promote the sustainability and independence of civil society needs to be seen in light of allocated budgets. Another civil society respondent from Slovakia shares a promising practice in this regard – **a fund to support national minority cultures**:

#### **A semi-independent fund to support national minority cultures (Slovakia)**

One of the most recent action[s] was the adoption by the parliament of the Act on the Fund to Support National Minority Cultures, which can be seen as an upgrade of the Donation Scheme to Support National Minorities Culture. The Fund is a **semi-independent authority** with an element of self-administration on the part of the single **national minority communities**.<sup>279</sup>

One needs to remain cautious on how independent in practice such a 'semi-independent' fund will be. On a positive note, the creation of a separate fund instead of a donation scheme indicates the priority and relevance given to protection of minority cultures in Slovakia. Yet neither civil society questionnaire respondents nor focus group discussants could name a specific national fund aimed at supporting watchdog activities by civil society. Focus group participants regarded direct EU funding as a way to fund both watchdog civil society and Equality Bodies.

Nevertheless, the recent CEPS study revealed that in the area of relevance to combating anti-Gypsyism – only DG for Migration and Home Affairs (DG HOME) and DG for Justice and Consumers (DG JUST) have some direct funding schemes, where Civil Society can access

<sup>277</sup> Carrera, S., I. Rostas and L. Vosyliūtė, "Combating Institutional Anti-Gypsyism: Responses and promising practices in the EU and selected Member State", CEPS Research Report No. No 2017/08, May 2017.

<sup>278</sup> Civil Society Survey on Minority Protection (<https://www.surveymonkey.com/r/minorities>), answers collected by CEPS & MRG, 2017 May – July.

<sup>279</sup> Civil Society Survey on Minority Protection (<https://www.surveymonkey.com/r/minorities>), answers collected by CEPS & MRG, 2017 May – July.



funds directly from the Commission or from the decentralised National Agency of Education, Audiovisual and Culture Executive Agency (EACEA).<sup>280</sup> DG JUST leads **The Rights, Equality and Citizenship (REC) Programme**, whereas, DG HOME leads **“Remembrance Strand” of the “Europe For Citizens” Programme**. The Remembrance strand aims finance projects reflecting on the causes of **totalitarian regimes**, such as Nazism, Fascism, Stalinism that led to the Holocaust, crimes against humanity and other severe violations of minority rights.<sup>281</sup>

#### 4.2.2. Institutional responses to discrimination of minorities

Some governments are proactive in stepping up their responsibilities in the area of minority protection. They set up special bodies, procedures and/or legislation to address widespread, systemic or institutional violations of minority rights.

One Finnish civil society respondent mentioned **positive action measure on behalf of Roma** undertaken by the government.<sup>282</sup> Similarly, in the CEPS study on combatting anti-Gypsyism, the Swedish **Commission against Anti-Gypsyism** was identified as one of the key promising practices.<sup>283</sup>

#### Commission against Anti-Gypsyism<sup>284</sup> (Sweden)

The Swedish government set up a Commission against Anti-Gypsyism (in Swedish – *antiziganism*).<sup>285</sup> The work of this commission lasted from 2014 to 2016 in combatting anti-Gypsyism.<sup>286</sup> The commission was composed of nine members, five of whom were Roma. It also included such qualified people as ex-Commissioner on Human Rights (CoE), Thomas Hammarberg.

The commission concluded its work with a proposal to establish a national centre to address Roma issues, and to monitor anti-Gypsy incidents, but the proposal was not taken up by the government.

The main criticism from Swedish civil society was that the scope of the commission was limited, while the work against anti-Gypsyism cannot be restricted to those who are Swedish citizens because there are many Roma EU citizens and non-EU Roma asylum seekers living in Sweden. Its final report is currently available for review by various institutions and organisations.

Main limitation, however, was the period of the Swedish **Commission against Anti-Gypsyism** mandate, which lasted for two years and was discontinued. Similarly, another respondent from Finland remained sceptical about the overall commitment to advance the rights in minority, especially in light of their sustainability, as:

<sup>280</sup> Carrera, S., I. Rostas and L. Vosyliūtė, "Combating Institutional Anti-Gypsyism: Responses and promising practices in the EU and selected Member State", CEPS Research Report No. No 2017/08, May 2017.

<sup>281</sup> See [http://eacea.ec.europa.eu/europe-for-citizens/strands/european-remembrance\\_en](http://eacea.ec.europa.eu/europe-for-citizens/strands/european-remembrance_en)

<sup>282</sup> Civil Society Survey on Minority Protection (<https://www.surveymonkey.com/r/minorities>), answers collected by CEPS & MRG, 2017 May – July.

<sup>283</sup> Carrera, S., I. Rostas and L. Vosyliūtė, "Combating Institutional Anti-Gypsyism: Responses and promising practices in the EU and selected Member State", CEPS Research Report No. No 2017/08, May 2017.

<sup>284</sup> Ibid.

<sup>285</sup> For more information, see: [www.minoritet.se/user/motantiziganism/index.html](http://www.minoritet.se/user/motantiziganism/index.html) <http://www.minoritet.se/user/motantiziganism/english/about-us/index.html>. See also the Third Interim Report issued in February 2016, [www.minoritet.se/user/motantiziganism/wp-content/uploads/2015/11/Third-interim-report.pdf](http://www.minoritet.se/user/motantiziganism/wp-content/uploads/2015/11/Third-interim-report.pdf).

<sup>286</sup> Before setting up this Commission, the Swedish government had already set up a Delegation for Roma Issues between 2007 and 2010 which focused on ways to improve the situation of Roma communities in Sweden through rights-promotion and countering existing cultural, political and societal marginalisation and segregation. The report which resulted from the work of the Delegation recommended the setting up of a reconciliation committee and put forward around 50 proposals on measures for ensuring the human rights of the Roma in Sweden.

"The state gives funding to a number of programs that aim at promoting integration and best practices. The problem with these is that they are not **funded well enough** and **Finland lacks political will** at the moment to advance minority rights and promote our ever-growing culturally diverse community."<sup>287</sup>

The establishment of the **Council of the Languages in Spain** is another interesting institutional response in the area of linguistic minorities.

#### **Council of the Languages (Spain)**

The Spanish Governments commitment in the area of protection of speakers of minority languages was embodied as Council of the Languages. The Council was created in 2007. This body intended to coordinate different areas of the Spanish national administration as to improve the situation of *co-official languages*.

The civil society questionnaire respondent who proposed this promising practice, remained critical about the activity of this institution:<sup>288</sup>

"Nonetheless, the truth is that it only meets when Spain has to submit its report on the compliance with the European Charter for Regional or Minority Languages. As we said before, all the other areas have worsened or are in the situation they were ten years ago."

#### 4.2.3. Access to justice

Access to justice is a particularly relevant issue for persons belonging to minorities, as they could themselves use national legal frameworks to redress injustice. However, often institutional discrimination and/or poverty is hindering such access. Thus promising practices below show how civil society or governments could better equip or enable persons minorities to use legal proceedings and apply anti-discrimination laws.

The respondent from Spain noted that "[t]he most interesting is in 2013, the creation of a **Public Prosecutor's Office** so that hate crimes can be denounced and prosecuted".<sup>289</sup> *Such promising practices are further elaborated in the CEPS study on combatting anti-Gypsyism.*<sup>290</sup>

#### **Public Prosecutor's Office<sup>291</sup> (Spain)**

In 2009, the Barcelona City Council set up the Office of Hate Crime and Discrimination. The main goal was to provide a specialised response to crimes that threaten the principles of equality and non-discrimination. The institution targeted groups protected by the Spanish penal code according to Article 510: "ethnic, racial, religious, sexual or national minorities and people with disabilities".

The Prosecutor's Office of Barcelona plays a key role in the National Strategy for Equal Treatment and non-discrimination as well as the National Security Strategy. The institution reports to the ministry of justice and the national Public Prosecution Office. Yet the funding comes from the regional authorities – the *Generalitat* of Catalonia and from the City of Barcelona.

<sup>287</sup> Civil Society Survey on Minority Protection (<https://www.surveymonkey.com/r/minorities>), answers collected by CEPS & MRG, 2017 May – July.

<sup>288</sup> Civil Society Survey on Minority Protection (<https://www.surveymonkey.com/r/minorities>), answers collected by CEPS & MRG, 2017 May – July.

<sup>289</sup> Civil Society Survey on Minority Protection (<https://www.surveymonkey.com/r/minorities>), answers collected by CEPS & MRG, 2017 May – July.

<sup>290</sup> Carrera, S., I. Rostas and L. Vosyliūtė, "Combating Institutional Anti-Gypsyism: Responses and promising practices in the EU and selected Member State", CEPS Research Report No. No 2017/08, May 2017.

<sup>291</sup> Carrera, S., I. Rostas and L. Vosyliūtė, "Combating Institutional Anti-Gypsyism: Responses and promising practices in the EU and selected Member State", CEPS Research Report No. No 2017/08, May 2017.

The main strength of Barcelona's Office of Hate Crimes is its collaboration with civil society organisations, which helps raise social awareness of its work to encourage victims to denounce hate crimes, and to increase the security of the protected groups.

Also, it has set an important precedent: since 2013, each province in Spain has had a public prosecutor specifically to combat anti-Gypsyism.

One of the office's main weaknesses is that it does not use specific categories of 'anti-Gypsyism' to cover different cases of racism. Apart from a specific category of anti-Semitic crimes, all other issues of racism are under the same category of crimes against ethnic, racial or national minorities.

The focus group participant has highlighted another promising practice in access to justice in **Hungary**. The successes of the work of civil society in Hungary should be read in the light of Rule of Law challenges relating, not only to the constitutional capture and lack of legal independence, but as well as the very attack on the watchdog civil society and academia engaging in a critical debate.<sup>292</sup>

### "Working Group Against Hatred"<sup>293</sup> (Hungary)

"Working Group Against Hatred" is the Hungarian umbrella organisation. It was established in 2012, when five big Hungarian Human Rights organisations joined forces for a more effective approach against hate crimes, as they faced similar issues when protecting different minorities. The Working Group has agreed on the following goals:<sup>294</sup>

1. establishing a more effective **legal and institutional framework** for state responses to hate crimes;
2. **encouraging victims** to initiate legal proceedings;
3. creating a **social environment** rejecting hate crimes;
4. **represent victims in court proceedings** and organise **judicial trainings**.

The focus group participant shared that "Working Group Against Hatred" successfully influenced the lawmaker when the Hungarian Criminal Code was redrafted as they managed to include the provisions that explicitly protect groups based on sexual orientation, gender identity and disability.

The achievements also include:<sup>295</sup>

- Assessment of the implementation of the UN recommendations for Hungary related to hate crimes;
- Training more than 70 police officers, including all members of the police hate crimes network;
- Influenced law enforcement agencies to **revise** their former, wrong legal classifications in several cases by raising their voice in public;
- Member organizations **provided legal representation to various minorities, among others**, to a Roma mother-to-be who was verbally abused in Gyöngyöspata or to an Ivorian refugee who was brutally assaulted.

Another similar and interesting initiative started as a grass root social movement against racial profiling. A French civil society respondent mentioned the interesting initiative in France **Stop le contrôl au faciès**, which is aimed to raise awareness and to mobilise the resistance among persons belonging to visible minorities against abusive identity checks.<sup>296</sup>

<sup>292</sup> Bárd, P., "The Open Society and Its Enemies: An attack against CEU, academic freedom and the rule of law", CEPS Policy Insights No. 2017/14, April 2017.

<sup>293</sup> <http://gyuloletellen.hu>

<sup>294</sup> <http://gyuloletellen.hu/about-us>

<sup>295</sup> <http://gyuloletellen.hu/about-us>

<sup>296</sup> Civil Society Survey on Minority Protection (<https://www.surveymonkey.com/r/minorities>), answers collected by CEPS & MRG, 2017 May – July.

### **Stop the Facies Control/ *Stop le contrô au faciès*<sup>297</sup> (France)**

The initiators felt that identity checks are overused against persons of African or Arabic descent in France. Therefore, in May 2011, the association announced **an SMS number to which any citizen checked by the police abusively and/or without reason, can send CONTROL**. The association further helps a person to assert his/her rights. The aim is to raise awareness of the problems linked to abusive controls, and in particular to propose a reform of the law governing identity checks carried out on the ground in France. The initiative thus, aims to increase justice, transparency and police efficiency of such reform.

The association innovatively combine social media (Facebook group,<sup>298</sup> Youtube videos<sup>299</sup>) with appearances on the media, rap music celebrities and street actions in various districts of Paris, Lille and Lyon. Other associations interested in this approach made similar activities in Bordeaux, Marseilles, Tours, or Rouen. The civil society representatives, subsequently worked with the Police Training Authority in France.

Such innovative way of monitoring contributed to the protection of rights of the visible ethnic and religious minorities, in particular those, fearing racial profiling based on Afrophobic, Islamophobic bias. Interestingly, the association collects information about the circumstances of the incident, but not about the victims. For example on 12 of April 2012, the association received a dozen SMS messages with the reportings, which led to the case against the state.

Limitations of this initiative are also context-related. The emergency situation declared in France following the terrorist attacks has actually increased the uncertainty among the Muslim community, as elaborated in the sub-section 4.1.

<sup>297</sup> <http://stoplecontroleaufacies.fr/slcaf/historique-de-l%e2%80%99action/>

<sup>298</sup> <https://www.facebook.com/stoplecontroleaufacies>

<sup>299</sup> [https://www.youtube.com/watch?v=BGG\\_vCFdiYk](https://www.youtube.com/watch?v=BGG_vCFdiYk)

## 5. A DEMOCRATIC RULE OF LAW WITH FUNDAMENTAL RIGHTS APPROACH TO ENSURING COMPREHENSIVE PROTECTION OF MINORITIES

### KEY FINDINGS

- Deterioration of the rule of law in the Member States hits minorities particularly hard.
- Current mechanisms to address deterioration of the rule of law in the Member States can neither prevent problems culminating in systemic breaches of human rights and rule of law violations, nor can they serve as the basis of mutual trust and recognition.
- When establishing an effective mechanism for enforcing the rule of law, existing sources within and outside the EU legal framework should be relied on.
- Special consideration should be given to the EU Pact for democracy, the rule of law and fundamental rights proposed by the European Parliament.
- The EU Pact should be seen as a comprehensive tool, the sub-elements of which are co-constitutive.
- The EU Pact should uphold the specificities of EU law, i.e. the EU should not allow a third party to determine exclusively how European values should be construed in the EU's multi-level constitutional system. Furthermore, the EU should be allowed to set higher standards than other international mechanisms.
- EU accession to the ECHR should contribute to the implementation of certain minority rights.
- The EU Charter of Fundamental Rights should be turned into an EU bill of rights, covering minority rights across Member States, by either abolishing Article 51 of the Charter, or by allowing it to be invoked whenever the existence and scope of a material EU competence can be established.
- The possibility for systemic infringement actions should be created.
- The Court of Justice of the EU should be generous in granting third-party intervention in minority rights cases. NGOs should have legal standing on behalf of victims and the way for collective actions should be granted. The Court should also make use of preventive enforcement proceedings.
- Effective sanctions should be introduced for rule of law violations by making use of Article 7 TEU. The Article 7 and pre-Article 7 procedures should be made operational. The viability of the pre-Article procedure should be assessed, and in light of the outcome, it should either be actively used or abandoned.
- The threshold for initiating cases for enforcing EU values should be significantly lower than the one for determining breaches. When initiating cases for systemic breaches of EU values, both of the existing mechanisms, including court proceedings or an independent EU expert panel, may be relied on.

This section will examine the application of the previously proposed EU mechanism on the rule of law, democracy and fundamental rights in the domain of minority protection. It will test the operation of a democratic rule of law and fundamental rights approach to these three domains and evaluate its potential value in comparison with existing standards and monitoring international and regional instruments. It will test the applicability of the EU rule of law mechanism step-by-step to the case of minority protection, and explore other venues and opportunities for 'more EU' in the domain of minorities' protection.

## 5.1. Rule of law as an EU value

The European Union is founded on a set of common principles of democracy, the rule of law, and fundamental rights enshrined in Article 2 of the TEU, which expressly mentions the rights of persons belonging to minorities as shared Union values. Member States are vetted for their compliance with European values, including minority rights *before* they accede to the Union;<sup>300</sup> nevertheless, no similar mechanism exists to supervise and regularly monitor adherence to these foundational values *after* accession. This has been referred to as the 'Copenhagen dilemma'.<sup>301</sup>

EU history has shown that the Copenhagen dilemma is not a hypothetical one. Member States do infringe EU values, including minority rights, in many ways. With respect to the principle of conferral the EU can intervene to protect its constitutional core, and what is more, it is also unequivocally obliged by the Treaties to act. At the same time, deterioration of the rule of law at the domestic level is also a European matter. A state's departure from the European consensus on democratic rule of law and fundamental rights standards will ultimately hamper the exercise of individuals' rights EU-wide.

Issues of minority rights and the rule of law are intrinsically interlinked and mutually reinforcing each other.<sup>302</sup> Whereas the present study focuses on minority rights, it is vital to recognise intersections with democratic rule of law principles, and to embed the discussion into a broader debate about EU values and the political rationale of integration. State violations of minority rights – even if taken alone they could not prove a serious and persistent violation of EU values – can be an element in evidencing deconstruction of the rule of law and systemic, institutional violations of fundamental rights. And vice versa, if a breach of the rule of law is established, it is likely to hit harder on minorities – a fact that can be proven by way of a meticulous, contextual assessment, even in the lack of well-documented infringements of hard laws.

## 5.2. Landscape of instruments supervising the rule of law in the Member States

The EU possesses a number of dispersed instruments assessing – to varying degrees and scope – Member States' compliance with the rule of law or its elements, as well as the legally binding EU Charter of Fundamental Rights.<sup>303</sup> These include for example (since 2012) the EU Justice Scoreboard,<sup>304</sup> which feeds into the EU yearly cycle of economic policy coordination, or 'European semester', to foster structural reforms at national levels.<sup>305</sup> It only encompasses data that deal with civil, commercial and administrative justice, and the rights of minorities are not scrutinised.

<sup>300</sup> Article 49 (1) TEU. The so-called 'Copenhagen criteria' established in 1993 are meant to ensure that all new EU Member States are in line with the Union's common principles before joining the EU.

<sup>301</sup> European Parliament, Plenary debate on the political situation in Romania, statement by V. Reding, Brussels, 12 September 2012. See also V. Reding, "The EU and the Rule of Law: What Next?", speech delivered at CEPS, Brussels, 4 September 2013.

<sup>302</sup> See for example the European Parliament resolution of 13 December 2016 on the situation of fundamental rights in the European Union in 2015 (2016/2009(INI)), P8\_TA-PROV(2016)0485, which discusses simultaneously the state of the rule of law (paragraphs 5-19) and the rights of minorities (paragraphs 96-104).

<sup>303</sup> Carrera, S., E. Guild and N. Hernanz, *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU, Towards an EU Copenhagen Mechanism*, Study for the Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2013. ([http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE\\_ET%282013%29493031\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET%282013%29493031_EN.pdf)) 4–15, and Annex 1 of the study.

<sup>304</sup> The EU Justice Scoreboard: Towards more effective justice systems in the EU, ([http://ec.europa.eu/justice/newsroom/effective-justice/news/150309\\_en.htm](http://ec.europa.eu/justice/newsroom/effective-justice/news/150309_en.htm))

<sup>305</sup> See Communication from the Commission, Annual Growth Survey 2015, COM (2014) 902 final. For a study of the European semester method refer to 2013 European Parliament Study.

Other instruments, such as the EU anti-corruption reporting mechanism for periodic assessment ('EU Anti-Corruption Report') or the Cooperation and Verification Mechanism (CVM) for Bulgaria and Romania,<sup>306</sup> involve important segments of the rule of law, but on the one hand cannot be seen as formal post-accession 'supervisory mechanisms', and on the other hand are not targeting state obligations to protect minority rights.<sup>307</sup>

The only 'hard law' with a solid Treaty basis that can be invoked to enforce EU values is Article 7 TEU. The Commission has failed to ever activate this procedure owing to both legal and political considerations – even though Member States have offered strong enough reasons to invoke Article 7. It is sufficient to recall the above-mentioned Roma crises in France between 2010 and 2013.

In response to the Copenhagen dilemma and the inoperability of Article 7 TEU, European institutions have called for reforms. The European Commission published a Communication in March 2014 on a New EU Framework to Strengthen the Rule of Law,<sup>308</sup> to enable the Commission to find a solution with a given Member State in order to prevent the emergence of a systemic threat to the rule of law in that Member State which could develop into a "clear risk of a serious breach" within the meaning of Article 7 TEU.<sup>309</sup> While the EU Framework to Strengthen the Rule of Law can be seen as a step in the right direction, it has a number of limitations,<sup>310</sup> and as practice shows, it is also ineffective.

The backsliding in the Polish rule of law<sup>311</sup> provided a chance for the Commission to test the EU Framework procedure – commonly known as the pre-Article 7 procedure.<sup>312</sup> First, the triggering of the EU Rule of Law Framework against one Member State, i.e. Poland, but not another, namely Hungary – where constitutional reforms happened much earlier – called into question the objectivity and impartiality of the EU rule of law system, and the principle of equal treatment of all Member States.<sup>313</sup> Second, since the Commission and Poland were not on the same page about foundational European values, instead of deliberation and discourse, the procedure vis-à-vis Poland has turned into a "dialogue of the deaf"<sup>314</sup> with the Polish Constitutional Tribunal entirely captured by the end of the process.<sup>315</sup> The dialogue is technically still underway, but it has lost its rationale. In the overall assessment, the pre-Article 7 procedure thus failed.

<sup>306</sup> For the latest CVM See [http://ec.europa.eu/cvm/progress\\_reports\\_en.htm](http://ec.europa.eu/cvm/progress_reports_en.htm).

<sup>307</sup> European Commission Decision establishing an EU Anti-Corruption reporting mechanism for periodic assessment ('EU Anti-Corruption Report'), 6 June 2011, [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/pdf/com\\_decision\\_2011\\_3673\\_final\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/pdf/com_decision_2011_3673_final_en.pdf).

<sup>308</sup> European Commission, Communication, A New EU Framework to Strengthen the Rule of Law, COM(2014) 158, 11.3.2014.

<sup>309</sup> Ibid., p. 7. The Communication states: "The Framework will be activated when national 'rule of law safeguards' do not seem capable of effectively addressing those threats."

<sup>310</sup> For further criticism see Bárd, P. Carrera, S., The Commission's Decision on 'Less EU' in Safeguarding the Rule of Law: A play in four acts, CEPS Policy Insights, 2017/08, March 2017. (<https://www.ceps.eu/publications/commission's-decision-less-eu-safeguarding-rule-law-play-four-acts>)

<sup>311</sup> Jan-Werner Müller, 'Safeguarding Democracy inside the EU: Brussels and the Future of Liberal Order', Working Paper No. 3, Washington, DC: Transatlantic Academy, 2013.

<sup>312</sup> [http://ec.europa.eu/news/2016/01/20160113\\_en.htm](http://ec.europa.eu/news/2016/01/20160113_en.htm); [http://europa.eu/rapid/press-release\\_MEMO-16-62\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-62_en.htm)

<sup>313</sup> For immediate criticism, see D. Kochenov, The Commission vs. Poland: The Sovereign State Is Winning 1-0, 25 January 2016, (<http://verfassungsblog.de/the-commission-vs-poland-the-sovereign-state-is-winning-1-0/>); Gotev, G. Tavares, Discussing rule of law in Poland separately from Hungary will lead 'nowhere', 13 January 2016. (<http://www.euractiv.com/sections/justice-home-affairs/tavares-discussing-rule-law-poland-separately-hungary-will-lead>)

<sup>314</sup> Lane Scheppele, K. and L. Pech, "Poland and the European Commission, Part I: A Dialogue of the Deaf?", 3 January 2017, (<http://verfassungsblog.de/poland-and-the-european-commission-part-i-a-dialogue-of-the-deaf/>)

<sup>315</sup> Lane Scheppele, K. and L. Pech, "Poland and the European Commission, Part II: Hearing the Siren Song of the Rule of Law, *VerfBlog*", 6 January 2017. (<http://verfassungsblog.de/poland-and-the-european-commission-part-ii-hearing-the-siren-song-of-the-rule-of-law/>)

The Commission's above initiative was examined by the Council Legal Service in an Opinion issued in May 2014.<sup>316</sup> It concluded that the Commission's initiative was not compatible with the principle of conferral.<sup>317</sup> The General Affairs Council of 16 December 2014 in its Conclusions<sup>318</sup> instead committed itself to establishing an even softer dialogue among all EU Member States to promote and safeguard the rule of law "in the framework of the Treaties". The Council agreed that this dialogue will take place once a year in the General Affairs Council configuration, and consideration will be given to launching debates on thematic subject areas.

### **5.3. Assessment of existing EU instruments supervising the rule of law, with an emphasis on mutual trust**

As proven in the above assessment, for the time being, Article 7 TEU is practically inoperative, whereas other EU-level instruments that evaluate and monitor – yet do not directly supervise – Article 2 TEU-related principles at the Member State level present a number of methodological and efficiency challenges.

Even if the above instruments and procedures were fully functional, they are all – including the ones addressing human, taking in minority, rights violations and the ones tackling rule of law problems – responsive in nature. Neither can they prevent deterioration or the culminating into systemic breaches of human rights and rule of law violations, nor can they serve as the basis of mutual trust and recognition.

In particular, when such problems in the domestic setting are "systemic" in nature,<sup>319</sup> abuses are "exported" and multiplied in the EU criminal cooperation setting, especially with the help of the principle of mutual recognition.<sup>320</sup> In the meanwhile, both the EU legislative and the judiciary refined the principle in an attempt to make sure that the principle does not lead to the multiplication of human rights abuses. In asylum cases, the ECtHR made clear that human rights considerations trump EU law obligations.<sup>321</sup> In the criminal justice field, the Court for a long time insisted on a strict understanding of the general principles of mutual trust and recognition.<sup>322</sup>

Ultimately the Court changed its stance and in April 2016, in *Aranyosi and Căldăraru*,<sup>323</sup> for the first time in the history of EU criminal cooperation it held that mutual trust in the fundamental rights protection mechanisms of all Member States cannot be taken for granted, and even if an EU instrument does not contain a fundamental rights exception for refusing enforcement, the executing judicial authority must not blindly trust the issuing Member State, but it has to assess the fundamental rights situation in that country. Even though the Court

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<sup>316</sup> Council of the EU, Commission's Communication on a new EU Framework to strengthen the Rule of Law: Compatibility with the Treaties, Doc. 10296/14, Brussels, 27 May 2014.

<sup>317</sup> For criticism see Kochenov D. and L. Pech, Upholding the Rule of Law in the EU: On the Commission's Pre-Article 7 Procedure as a Timid Step towards the Right Direction, EUI Working Papers, RSCAS 2015/24, Florence, 2015, p. 11.

<sup>318</sup> [www.consilium.europa.eu/en/meetings/gac/2014/12/16](http://www.consilium.europa.eu/en/meetings/gac/2014/12/16)

<sup>319</sup> See e.g. European Court of Human Rights, *Varga and Others v Hungary*, Application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015.

<sup>320</sup> Article 82(1) TFEU: "Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83."

<sup>321</sup> ECtHR, *M.S.S. v Belgium and Greece*, Application No. 30696/09, 21 January 2011., CJEU, Cases C-411/10 *N.S. v Secretary of State for Home Department* [2010] OJ C 274/21; and C-493/10, *M.E. v Refugee Applications Commissioner* [2011] OJ C 13/18., *Ilias and Ahmed v Hungary* (Application No. 47287/15) of 14 March 2017.

<sup>322</sup> Case C-396/11, *Radu* [2013] ECR 39, paras. 28-31.

<sup>323</sup> Judgement of the Court (Grand Chamber) of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, Requests for a preliminary ruling from the *Hanseatisches Oberlandesgericht in Bremen*, Joined Cases C-404/15 and C-659/15 PPU.



left a number of issues open,<sup>324</sup> the judgement can be seen as a milestone in putting a halt to the proliferation of human rights abuses.

In *Aranyosi*, surrender was allowed to be suspended due to systemic problems in the prison settings of both Hungary and Romania, which resulted in breach of Article 3 ECHR on the prohibition of torture, and inhuman or degrading treatment or punishment. In other words: the black letter law of the framework decision on the European Arrest Warrant<sup>325</sup> was trumped by human rights considerations. One of the issues unanswered is whether the *Aranyosi* doctrine holds, even if not absolute rights are at stake, but for example the right to privacy, the presumption of innocence, access to courts, or institutional discrimination – particularly hot topics with regard to minorities. Highlighting the issue with an example: Could an executing authority postpone surrender on the ground that a Member State's law enforcement system is poisoned by institutional discrimination against Roma? If so, we reach the second issue to be answered, namely what types of evidence could be acceptable to underpin this.

In *Aranyosi* the evidence was particularly strong – several ECtHR judgements against Romania, and an even stronger proof of a systemic problem, a pilot judgement rendered against Hungary. But does a requested state have to wait until a suspect or a prisoner exhausts all domestic remedies and turns to the Strasbourg court, which ultimately renders a decision? Does it have to wait until it can rely on international documents, e.g. until the Council of Europe anti-torture committee visits the issuing country and publishes a negative report? As Didier Bigo, Sergio Carrera and Elspeth Guild suggested back in 2009 “a permanent EU assessment board could be established in order to carry out a constant monitoring of the quality of Member States' criminal justice systems and verify whether they fulfil international and European standards on the rule of law”.<sup>326</sup>

#### 5.4. EU Pact for DRF

The European Parliament came to the same conclusion with regard to a general rule of law scrutiny and in its Resolution of 10 June 2015 the European Parliament called for an annual monitoring of compliance with democracy, the rule of law and the situation of fundamental rights in all Member States through a scoreboard, to be established on the basis of common and objective indicators.<sup>327</sup> Building on this and several other past EP resolutions,<sup>328</sup> in its Resolution adopted in a Plenary session on 8 September 2015,<sup>329</sup> the Parliament called on the Commission to draft an internal strategy on the rule of law “accompanied by a clear and detailed new mechanism”. The European Parliament on 25 October 2016 passed a Resolution calling upon the Commission to initiate legislation on a comprehensive rule of law, democracy, and fundamental rights mechanism (DRF Resolution).<sup>330</sup>

<sup>324</sup> For the details see Wouter Van, B., P. Bárd, Mutual Recognition and Individual Rights: Did the Court get it Right? *New Journal of European Criminal Law* 7:2016, pp. 439-464.

<sup>325</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, O. J. L 190, 18/07/2002, pp. 1-20.

<sup>326</sup> Bigo, D., S. Carrera and E. Guild, The CHALLENGE Project: Final Policy Recommendations on the Changing Landscape of European Liberty and Security, 2009 (<http://aei.pitt.edu/12224/1/1905.pdf>), p.12.

<sup>327</sup> European Parliament resolution of 12 March 2014 on evaluation of justice in relation to criminal justice and the rule of law, European Parliament resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP)), P8\_TA-PROV(2015)0227, especially para. 12.

<sup>328</sup> See, for example, European Parliament resolution of 27 February 2014 on the situation of fundamental rights in the European Union (2012), P7\_TA(2014)0173, 2014; European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012), P7\_TA(2013)0315, 2013.

<sup>329</sup> European Parliament resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014) (2014/2254(INI)), 8\_TA-PROV(2015)0286, 2015.

<sup>330</sup> European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), P8\_TA-PROV(2016)0409, 2016.

The European Parliament's legislative initiative report called on the Commission to submit by September 2017 a proposal for the conclusion of a Union Pact for democracy, the rule of law and fundamental rights (EU Pact for DRF). The document was accompanied by a thorough assessment of European added value.<sup>331</sup> More than a dozen Member States unifying under the slogan "Friends of the Rule of Law" welcomed the idea and took the lead in moving this initiative forward.<sup>332</sup> In the following subsection, we will analyse how minority rights could be protected more effectively if the EU Pact for DRF were put in place.

#### 5.4.1. General considerations, advantages and limits of borrowing from existing sources

- **Relying on existing instruments and data**

The European Parliament recognised that there was no need to reinvent the wheel and proposed to sufficiently rely on existing sources in and outside the EU framework,<sup>333</sup> or to incorporate into the EU Pact for DRF existing EU ones respectively.<sup>334</sup>

As studied in section 2 above, in both the UN and CoE contexts, the monitoring systems focus generally on ensuring that state parties comply with their statuses, conventions/covenants, treaties and legal standards. In the context of minorities, in the UN the Human Rights Council/Office of the High Commissioner on Human Rights (OHCHR) should be paid particular attention. The International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights, the International Convention on Elimination of All forms of Racial Discrimination (ICERD), the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief of 1981, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992 shall be mentioned, with regard to documents issued by the OHCHR Human Rights Committee/UN ECOSOC, the Universal Periodic Review (UPR) and the Committee on Elimination of Racial Discrimination (CERD). In the OSCE setting monitoring done by the Office for Democratic Institutions and Human Rights (ODIHR) should also be paid particular attention.

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For the time being the Commission followed up on this document in a rather hostile manner, which can be regarded as part of an inter-institutional dialogue on the matter. See the Commission's response to the text adopted in plenary, SP(2017)16, 17 February 2017. For an assessment see Petra Bárd, Sergio Carrera (2017) The Commission's Decision on 'Less EU' in Safeguarding the Rule of Law: A play in four acts, CEPS Policy Insights 2017:(08) 1-11, (<https://www.ceps.eu/publications/commission-s-decision-less-eu-safeguarding-rule-law-play-four-acts>).

<sup>331</sup> W. van Ballegooij, T. Evas, An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, Interim European Added Value Assessment accompanying the Legislative initiative report (Rapporteur Sophie in 't Veld), European Parliamentary Research Service, October 2016, PE.579.328; Annex I, L. Pech, E. Wennerström, V. Leigh, A. Markowska, L. De Keyser, A. Gómez Rojo and H. Spanikova, 'Assessing the need and possibilities for the establishment of an EU scoreboard on democracy, the rule of law and fundamental rights'; Annex II, P. Bárd, S. Carrera, E. Guild and D. Kochenov, with a thematic contribution by W. Marneffe, 'Assessing the need and possibilities for the establishment of an EU Scoreboard on democracy, the rule of law and fundamental rights'.

<sup>332</sup> <http://www.liberalforum.eu/en/news/details/interview-with-mep-sophie-int-veld.html>, <https://euobserver.com/opinion/136030>.

<sup>333</sup> According to Article 6 the European DRF Report in the framework of the EU Pact for DRF shall be drawn up using a variety of sources, including Member States authorities; the FRA, in particular the EFRIS instrument; the European Data Protection Supervisor (EDPS); the European Institute for Gender Equality (EIGE); the European Foundation for the Improvement of Living and Working Conditions (Eurofound); and Eurostat; experts, academics, civil society organisations, professional and sectoral associations of, for example, judges, lawyers, and journalists; existing indices and benchmarks developed by international organisations and NGOs; the Council of Europe, in particular the Venice Commission, the Group of States against Corruption (GRECO) and the Congress of Local and Regional Authorities of the Council of Europe, and the European Commission for the Efficiency of Justice (CEPEJ); international organisations such as the United Nations, the Organization for Security and Co-operation in Europe (OSCE) and the Organization for Economic Co-operation and Development (OECD); the case law of the Luxembourg and the Strasbourg courts, and other international courts; resolutions or other relevant contributions by EU institutions.

<sup>334</sup> Cf. Article 5: "The European DRF Report shall incorporate and complement existing instruments, including the Justice Scoreboard, the Media Pluralism Monitor, the anti-corruption report and peer evaluation procedures based on Article 70 TFEU and replace the Cooperation and Verification Mechanism for Bulgaria and Romania."

In the frame of the Council of Europe, opinions of the Venice Commission, resolutions of the Committee of Ministers, documents related to the European Convention on Human Rights, the revised European Social Charter, the Framework Convention on the Protection of National Minorities, the European Charter for Regional or Minority Languages, judgements issued by the European Court of Human Rights, findings of the European Committee of Social Rights, the European Commission Against Racism and Intolerance (ECRI), the Advisory Committee on the Framework Convention for the Protection of National Minorities, and the Committee of Experts of the European Charter for Regional or Minority Languages should be discussed. In addition, other instruments and monitoring bodies, such as the Convention on the Elimination of All Forms of Discrimination against Women or the Committee against Torture, may also highlight problems at the domestic level.

- **The EU Pact for DRF should be seen as a comprehensive tool**

The EU Pact for DRF acknowledges that

approximately 8% of Union citizens belong to a national minority and approximately 10% speak a regional or minority language; whereas there is no Union legal framework to guarantee their rights as a minority; whereas the establishment of an effective mechanism to monitor their rights in the Union is of outmost importance; whereas there is a difference between the protection of minorities and anti-discrimination policies; whereas equal treatment is a basic right, not a privilege, of all citizens. (DRF Resolution, letter T)

The implementation of minority rights shall be incorporated into all possible subparts of the Pact, i.e. i) the annual European report on democracy, the rule of law and fundamental rights (European DRF report); ii) the annual inter-parliamentary debate on the basis of the European DRF report; iii) arrangements for remedying possible risks and breaches; and iv) a DRF policy cycle within the Union institutions (DRF resolution, points 5, 6-7, 15). Participants in the debate shall include international entities, national, regional and local NGOs and state institutions entrusted with minority rights protection, such as equal opportunity bodies, ombudspersons or mediation panels, whenever relevant (DRF Resolution, points 2, 10).

In its follow-up on the DRF Resolution, the Commission rejected most subparts of the proposal, and the only suggestions adopted were the emphasis on an inclusive approach and the setting up of an inter-parliamentary debate.<sup>335</sup> But the EU Pact for DRF is only viable as a comprehensive tool if all its subparts are functioning. Should one cherry-pick from them, the new tool loses its rationale. The EU already possesses a scattered, patchwork-like selection of tools in the area of supervising, evaluating, benchmarking and monitoring EU values – and recent European history shows that it does not work.

The EU Pact for DRF was designed to overcome this dilemma, but arbitrarily selecting parts from it would only replicate the problem. As an example, take the inclusive approach. It should only be followed with Member States acting within the boundaries of democracy, the rule of law and fundamental rights. In a state of a constitutional capture, however, it will not work, simply because the member country in question does not share the same vocabulary for a meaningful dialogue, including separation of powers, constitutional adjudication and judicial independence. In these cases, other prongs of the Pact shall be applicable to make the system operational.

The Pact should also be seen as a comprehensive tool in the sense that both qualitative and quantitative assessments are needed and one cannot be traded off for the other. Whereas assessment through numerical indicators could be an element, it should not constitute the core of the assessment. Instead, emphasis should be placed on a contextual, qualitative evaluation of data and a country-specific list of key issues, in order to grasp interrelations

<sup>335</sup> Commission response to text adopted in plenary, SP(2017)16, 17 February 2017.

between data and the causalities behind them. The contextualisation of a rule of law assessment should be a nuanced exercise and particular care should be taken not to rely on a standardised benchmarking system that could potentially veil or blur problems in the subparts of EU values – thereby doing more harm than good, or even more harm than not having the mechanism at all.

- **Upholding the specificity of EU law**

While relying on sources and mechanisms including external ones, the EU Pact for DRF shall uphold and respect the specificity of EU law. In other words, in line with the concept of autonomy of EU law, the rule of law scrutiny is not 'contracted out' entirely to third parties. External fora, including the Strasbourg court, are relatively insensitive to the specificities of the EU legal system, such as the principle of loyalty, mutual trust or mutual recognition – or at least this is the criticism of the Luxembourg court in Opinion 2/13 vetoing EU accession to the ECHR:<sup>336</sup>

In so far as the ECHR would (...) require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.<sup>337</sup>

If the path taken by the CJEU is to be followed, the EU shall not allow a third party to determine exclusively how European values shall be construed in the EU's multi-level constitutional system. And vice versa: the EU should be allowed to set higher standards than other international mechanisms. EU decision-makers could and should go further than that.

Whereas EU accession to the ECHR could enhance the implementation of fundamental rights (DRF Resolution, point 11) and the non-discrimination principle with regard to Convention rights, addressing the above tension around the EU law's autonomy and the question of *Kompetenz-Kompetenz* is a critical step in making accession happen. The problem could only be overcome if the CJEU had a chance to scrutinise all EU cases with a human rights element before the ECtHR would do so. Should EU laws – or the case law for that matter – establish a judicial review for human rights cases that corresponds to Strasbourg tests, the fears over the ECtHR disrespecting or indeed violating the EU law principles, such as the primacy, unity and effectiveness of EU law, would become mute. The ECtHR has already paved the way for such a mechanism by establishing the *Bosphorus* presumption and making sure that only cases which the CJEU had had a say on end up in Strasbourg.<sup>338</sup> The ECtHR still adheres to the *Bosphorus* presumption, even after the delivery of Opinion 2/13 and even though the mentioned opinion was fairly hostile to human rights and the Strasbourg court in more particular.<sup>339</sup>

However, for the *Bosphorus* presumption to survive, and so as to grant individuals meaningful rights equivalent to the protection afforded by the Strasbourg mechanism, the EU's legislative and judicial powers will have to clarify how they wish to reconcile the protection of fundamental rights with EU values, such as mutual trust, mutual recognition, (see subsection 5.3) respect for national identities and the primacy of EU law, and how they wish to share

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<sup>336</sup> Court of Justice of the European Union, Opinion 2/13 of 18 December 2014.

<sup>337</sup> Court of Justice of the European Union, Opinion 2/13 of 18 December 2014, not yet published. Opinion pursuant to Article 218(11) TFEU – draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties, para. 194.

<sup>338</sup> ECtHR, *Bosphorus v Ireland*, Application no. 45036/98, 20 June 2005; *Michaud v France*, Application no. 12323/11, 6 December 2012.

<sup>339</sup> ECtHR, *Avotiņš v Latvia*, Application no. 17502/07, 23 May 2016.

responsibility between the Member States, and the Member States and the EU when ensuring liberty and security.<sup>340</sup>

Three main arguments for respecting EU law autonomy are that i) the EU shall not be at the mercy of other mechanisms indicating a breach of the EU's foundational values (e.g. the EU should not have to wait until the ECtHR or the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) have indicated a systemic problem), and ii) the EU shall be allowed to set higher standards than other international mechanisms.

#### 5.4.2. Recognising and proving systemic problems

*A serious and persistent breach of EU values or a risk of a serious breach* allows the EU to act in line with Article 7 TEU. In addition, the EU Framework to Strengthen the Rule of Law,<sup>341</sup> which was adopted in the form of a Commission Communication (COM(2014) 158),<sup>342</sup> also seeks "to address and resolve a situation where there is a *systemic threat to the rule of law*".<sup>343</sup>

It should be clarified whether or not the meanings of the different wordings in Article 7 TEU referring to a "serious and persistent breach", the "risk of a serious (but not persistent) breach" and a "systemic threat to the rule of law" in the pre-Article 7 procedure, along with other similar formulations such as José Manuel Barroso's reference to situations of "serious, systemic risks"<sup>344</sup> to the rule of law, are identical or the extent to which they overlap or differ.

An additional source of confusion may come from the fact that national courts and institutions also use the terms "systemic" or "serious" when it comes to fundamental rights violations. The meanings of these terms in the domestic and the EU settings may differ significantly.

For the time being one can subsume from the existing documents that "Article 7 TEU should be a last resort"<sup>345</sup> when no other mechanisms are available to enforce EU values. Since the EU Framework, being the stepping stone for an Article 7 procedure, mentions systemic breaches, it follows logically that Article 7 may also only be invoked if breaches of EU values are systemic, i.e. when breaches are not 'just' a series of individual cases, and if in addition they are serious and persistent. The seriousness of a breach of EU values could potentially "be based on the vulnerability of the social group affected (immigrants, ethnic groups, etc.) or the range of EU values affected (fundamental rights, rule of law, democracy, liberty)".<sup>346</sup> As a consequence, the high threshold for tolerating violations of EU values before triggering the Article 7 or pre-Article 7 processes is somewhat lower when it comes to minorities, or at least certain vulnerable minorities.

<sup>340</sup> "If used lightly and carelessly, the national security exception can be a much stronger centrifugal force in Europe than cries of constitutional identity could ever be." Uitz, Renáta (2017) The Return of the Sovereign: A Look at the Rule of Law in Hungary – and in Europe, VerfBlog, 2017/4/05, <http://verfassungsblog.de/the-return-of-the-sovereign-a-look-at-the-rule-of-law-in-hungary-and-in-europe/>.

<sup>341</sup> [http://ec.europa.eu/justice/effective-justice/rule-of-law/index\\_en.htm](http://ec.europa.eu/justice/effective-justice/rule-of-law/index_en.htm).

<sup>342</sup> European Commission, Communication, A New EU Framework to Strengthen the Rule of Law, COM(2014) 158, 11.3.2014.

<sup>343</sup> *Id.*

<sup>344</sup> J.M.D. Barroso, State of the Union address 2013, European Parliament, 11 September 2013, Speech/13/684.

<sup>345</sup> Darren Neville, Udo Bux, Commitments made at the hearing of Frans Timmermans, First Vice-President of the Commission, Commissioner for Better Regulation, Inter-Institutional Relations, the Rule of Law and the Charter of Fundamental Rights, 7 October 2014, Brussels: European Parliament, PE 509.994.

<sup>346</sup> Eva-Maria Poptcheva, Member States and the rule of law Dealing with a breach of EU values, Briefing March 2015, Brussels: European Parliamentary Research Service, PE 554.167.

Due to the confusion and discrepancies with terms, one should handle pieces of evidence carefully. In an ideal case, the EU establishes its own mechanism to determine scenarios where it has to intervene, for which the framework of the EU Pact for DRF would be an ideal tool. But irrespectively of the Pact, and also while the idea is pending in front of the various EU institutions, there are tools that help in determining systemic, serious and persistent breaches of EU values.

Before enumerating these tools two preliminary remarks deserve attention. First, ultimately it should be up to an independent commission at the heart the DRF Pact or the Court of Justice to *determine* what a systematic rule of law and human rights deficiency is. Therefore, when *triggering* either Article 7, pre-Article 7 (or systemic infringement procedures discussed *infra*, in 5.4.4), a lesser certainty shall suffice. Second, speed might be an important factor in putting a halt to the deterioration of the fundamental rights situation of a country or to rule of law backsliding. Indices and indicators may be used as one factor, but reliance on them should never go to the detriment of the accuracy of the information or the scientific, methodologically sound and context-specific analysis of interpretation of data. Without contextualisation and detailed qualitative descriptions, it is impossible to derive any methodologically sound and valid conclusions from indices.

Pieces of evidence underpinning a potential triggering of Article 7 or pre-Article 7 processes could be gathered from various sources and *bundled* in order to prove foundational problems.<sup>347</sup> Some pieces of evidence, however, determine a serious and persistent breach *per se* without the need of pointing towards additional sources.

In the United Nations setting, the Universal Periodic Review should be the starting point for determining recurring and thereby potentially systemic violations of fundamental rights. Especially where problems mentioned by the UPR are backed up by positions by UN special rapporteurs, and even more when joint positions are issued, this should be seen as strong evidence to underpin the existence of systemic problems.

In the Council of Europe setting, one could as a first step look into the statistics. But not just any type of statistics,<sup>348</sup> since even if numerous cases could be traced, it might just be a sign of individuals' access to justice, knowledge of their Convention rights or the high-quality work of attorneys and NGOs taking up human rights cases. The existence of pilot judgement proceedings<sup>349</sup> – the objective of which is to identify structural problems underlying repetitive cases – might already indicate systemic deficiencies, without the need of further evidence. Judgements not executed,<sup>350</sup> especially with regard to repetitive and leading cases, and also the Committee of Ministers' implementation reviews<sup>351</sup> might as well show that systemic problems persist in a country. The number of cases the execution of which is under enhanced supervision is also an indicator.<sup>352</sup> Furthermore, interim measures employed by the ECtHR pursuant to Rule 39 are also indicative of the fact that the Strasbourg court had good reasons to believe that human rights violations are likely to occur in a country.<sup>353</sup>

A heavy emphasis should be placed on international organisations' and domestic NGOs' reports and bodies within the EU framework as well. (See also 5.4.5.)

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<sup>347</sup> Just like in cases of systemic infringement procedures discussed *infra*.

<sup>348</sup> [http://www.echr.coe.int/Documents/Stats\\_violation\\_1959\\_2016\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_violation_1959_2016_ENG.pdf).

<sup>349</sup> [http://www.echr.coe.int/Documents/FS\\_Pilot\\_judgments\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf).

<sup>350</sup> CoE Hudoc database provides information about the ECtHR judgements and status of their execution. See: <http://hudoc.exec.coe.int/>.

<sup>351</sup> See for example: <http://www.coe.int/en/web/execution/-/the-committee-of-ministers-reviews-the-implementation-of-judgments-of-the-european-court-of-human-righ-3> and <https://rm.coe.int/indicative-list-of-cases-for-1294th-meeting/1680721ea8>.

<sup>352</sup> <https://rm.coe.int/168065156a>.

<sup>353</sup> [http://www.echr.coe.int/Documents/Stats\\_art\\_39\\_02\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_art_39_02_ENG.pdf).

### 5.4.3. Turn the Charter into an EU bill of rights and/or go beyond international standards

Another reason for having a specific EU mechanism for supervising democratic rule of law with fundamental rights – beyond upholding the specificities and autonomy of EU law – is to lay down higher standards for the EU than those provided by international law, so as to become a trendsetter in democracy and the rule of law. As a first step towards this objective, the EU should be equipped with the necessary tools in guaranteeing at least the level of international protection for minorities in the Member States. Technically, the Charter of Fundamental Rights could be turned into a fully-fledged bill of rights for the EU by abolishing Article 51 of the Charter, which limits the field of application of the Charter to EU institutions, bodies, offices and agencies and to Member States whenever they are implementing EU law (see also the DRF Resolution, point 20).

Should such a modification not enjoy the support of Member States, as a second-best solution we recommend taking over the suggestions by Advocate General Eleanor Sharpston in the *Zambrano* case.<sup>354</sup> According to the Advocate General's Opinion, the applicability of the Charter shall be dependent "on the existence and scope of a material EU competence", or in other words "provided that the EU had competence (whether exclusive or shared) in a particular area of law, EU fundamental rights should protect the citizen of the EU even if such competence has not yet been exercised"<sup>355</sup> (emphasis in original).

Preferably, emphasis on the EU element should also mean that the EU – relying primarily on the Charter of Fundamental Rights – goes beyond what is required in terms of minority protection by international entities and documents.

### 5.4.4. Systemic infringement actions

Kim Lane Scheppele proposed "systemic infringement procedures"<sup>356</sup> to ensure that breaches of EU values do not remain under the radar of EU institutions. She suggested enabling the bundling-up of infringement processes as regulated by Article 258 TFEU, which are traditionally powerful tools in the enforcement of EU law. "By grouping together related complaints thematically under Article 2 TEU, however, the Commission would add the argument that the whole is more than the sum of the parts and that the set of alleged

<sup>354</sup> C-34/09 *Ruiz Zambrano*, 8 March 2011.

<sup>355</sup> *Ibid.* at para. 163.

<sup>356</sup> Scheppele, K.L. "Enforcing the Basic Principles of EU Law through Systemic Infringement Actions", in: Closa, C. and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016; her proposal has been analysed in the *Verfassungsblog* in great detail. For the details of the proposal, see Scheppele, K.L., "What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systematic Infringement Actions", 2013. ([http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion\\_en.pdf](http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf)); for the proposal in brief, see Scheppele, K.L. "EU Commission v Hungary: The Case for the "Systemic Infringement Action"", *Verfassungsblog*, 22 November 2013, (<http://www.verfassungsblog.de/en/the-eu-commission-v-hungary-the-case-for-the-systemic-infringement-action/#.Uw4mfPuzm51>). For the discussion, see, *Verfassungsblog*, 'Hungary – Taking Action, Episode 2: The Systemic Infringement Action', (<http://www.verfassungsblog.de/en/category/focus/ungarn-vertragsverletzungsverfahren-scheppele/#.Uw4m4Puzm5J>). See also Scheppele, K.L. "The EU Commission v Hungary: The Case for the "Systemic Infringement Action".' Assizes de la Justice, European Commission, November 2013. ([http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion\\_en.pdf](http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf)) and Scheppele, K.L. 'Making Infringement Procedures More Effective: A Comment on Commission v Hungary, Case C-288/12' *Eutopia*, 29 April 2014. (<http://eutopialaw.com/2014/04/29/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary-case-c-28812-8-april-2014-grand-chamber/>).

infringements rises to the level of a systemic breach of basic values"<sup>357</sup> (also proposed by the DRF Resolution, Annex, Article 10).

Dimitry Kochenov further developed this theory when introducing the concept of "biting intergovernmentalism".<sup>358</sup> According to this suggestion, the Member States would be empowered to employ the systemic infringement procedure against their fellow countries as explained by Scheppele, extending their powers under Article 259 TFEU. The former provision allows the Member States themselves to bring to court their peers violating the Treaties.

#### 5.4.5. The role of the Court of Justice: Third-party interventions, standing, interim measures and determining systemic breaches

Courts should be generous in granting the third-party intervention (also known as *amicus curiae*) of national or international NGOs and other actors in the field of human rights protection. Research has shown that the cases where civil society organisations intervene might be rare, but they turn out to be landmark cases.<sup>359</sup> Whenever appropriate – and this is what the Fundamental Rights Agency promotes with regard to hate crimes – NGOs should have legal standing on behalf of victims.<sup>360</sup>

In addition, natural and legal persons who are directly and individually affected by an action could be enabled to bring actions before the Court of Justice for alleged violations of the Charter either by the EU institutions or by a Member State, by amending Articles 258 and 259 TFEU (see also the DRF Resolution, point 20). A suggestion is to consider permitting collective complaints to be lodged, just like in the Council of Europe's framework in relation to the European Committee of Social Rights.<sup>361</sup>

**As mentioned before, current mechanisms in the EU – including the ones in front of courts, such as infringement or fundamental rights proceedings – are all responsive, and are not capable of preventing breaches.** The EU should therefore develop its own preventive enforcement proceedings, or interim reliefs, and make use of them while an infringement proceeding is pending. When introducing such a system, the EU could borrow solutions from the Council of Europe, such as the Rule 39 procedure in the framework of the Strasbourg mechanism.<sup>362</sup> The CJEU should become generous when allowing such measures, permitting on the one hand civil society members to intervene, and on the other accepting a wide range of evidence substantiating the potential fundamental rights breach.<sup>363</sup>

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<sup>357</sup> Scheppele, K.L., "What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions", November 2013. ([http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppesystemicinfringementactionbrusselsversion\\_en.pdf](http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppesystemicinfringementactionbrusselsversion_en.pdf)).

<sup>358</sup> Kochenov, D., "Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool", 7 *The Hague Journal of the Rule of Law* 2, 153–174 (2015).

<sup>359</sup> Carrera, S., M. De Somer and B. Petkova, "The Court of Justice of the European Union as a Fundamental Rights Tribunal. Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice", CEPS Liberty and Security Papers No. 49/August 2012, p. 9.

<sup>360</sup> Fundamental Rights Agency, *Ensuring justice for hate crime victims: professional perspectives*, Luxembourg: Publications Office of the European Union, 2016, p. 9.

<sup>361</sup> Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, ETS No.158, 1995.

<sup>362</sup> For such a suggestion see Sergio Carrera and Anaïs Faure Atger, *L'affaire des Roms: A Challenge to the EU's Area of Freedom, Security and Justice*, CEPS Liberty and Security in Europe, September 2010; Sergio Carrera, Marie De Somer and Bilyana Petkova, *The Court of Justice of the European Union as a Fundamental Rights Tribunal. Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice*, CEPS Liberty and Security Papers No. 49/August 2012, 11–14.

<sup>363</sup> As was stated in Judgement of the Court (Grand Chamber) of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, Requests for a preliminary ruling from the *Hanseatisches Oberlandesgericht in Bremen*, Joined Cases C-404/15 and C-659/15 PPU.



Furthermore, the Court of Justice could get involved in the EU scoreboard mechanism, particularly when determining *what* is a systematic rule of law deficiency. The EU Rule of Law Framework Communication by the Commission states that “[t]he main purpose of the Framework is to address threats to the rule of law, which are of a systemic nature”.<sup>364</sup> However, the definition of the notion of systematic deficiencies is missing. If an EU rule of law commission determines that there was a systematic deficiency, one could consider calling upon the Court to make an assessment even before initiating Article 7 TEU, especially when human rights are at stake.<sup>365</sup> An option is to make use of the urgent preliminary ruling procedure laid down in the CJEU’s Rules of Procedure.<sup>366</sup>

#### 5.4.6. Introducing effective sanctions

Systematic democratic rule of law deficiencies by a majoritarian government have profound consequences for minorities, who are often misrepresented or lacking any representation in the democratic processes. Some are simply not part of the electorate (asylum seekers), others are, but are too small as a group and – in the eyes of the majority – insignificant so as to be meaningfully represented, while others belong to unpopular minorities and as a consequence fall victim to majoritarianism. Infringements of minorities’ rights may become graver, extend to more and more groups, and sooner or later be followed by a systemic deconstruction of the rule of law.

We may differentiate three scenarios of respect for European values in a given Member State. In the *first scenario*, the boundaries of democracy, the rule of law and fundamental rights are correctly set by national constitutional law and domestic bills of rights. Domestic courts, ombudspersons, equality bodies, civil society and other fora and entities designed to protect minorities perform their tasks. In a *second scenario* a Member State still adhering to European values might be in violation of minority rights, due to individual mistakes or structural and recurrent problems. In such cases, as a general rule, if domestic mechanisms (such as a constitutional court, civil society or media pressure) are not remedying the violations and cannot put a halt to further rights infringements, the national law will be overwritten by international law and deficiencies in application of the law will be corrected to some extent by international apex courts. The *third scenario* is qualitatively different from the previous two. This is the state of a constitutional capture with a systemic breach of European values (for the definition of systemic see the subsection *supra*).<sup>367</sup>

Should the internal and external fora mentioned in relation to the second scenario fail in the protection of minority rights, this may serve as evidence of the failure of separation of powers, access to courts or judicial remedy, or in other words of a serious and persistent breach or a risk of it in line with the wording of Article 7 TEU. This threshold is supposed to be higher than the one in individual cases of fundamental rights infringements, which in a functioning rule of law context can be dealt with in the framework of courts and other fora. Instead, there needs to be a more systematic problem. As the Commission made clear, ‘risk’ must not be of a precautionary type – it must have materialised. In order to determine ‘seriousness’ a number of criteria may be considered, such as the purpose or result of the

<sup>364</sup> Council of the European Union, Commission’s Communication on a new EU Framework to strengthen the Rule of Law: Compatibility with the Treaties, Doc. 10296/14, Brussels, 27 May 2014, 7.

<sup>365</sup> Questions soon to be answered by the CJEU in Case C-404/15 *Aranyosi*, request for a preliminary ruling lodged on 24 July 2015. See also Opinion of AG Bot in C-404/15 *Aranyosi* and C-659/15 PPU *Căldăraru*, ECLI:EU:C:2016:140.

<sup>366</sup> See Chapter 3 and in particular Article 107 of the Rules of Procedure of the Court of Justice.

<sup>367</sup> W. van Ballegooij, T. Evas, An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, Interim European Added Value Assessment accompanying the Legislative initiative report (Rapporteur Sophie in ‘t Veld), European Parliamentary Research Service, October 2016, PE.579.328; Annex II, P. Bárd, S. Carrera, E. Guild and D. Kochenov, with a thematic contribution by W. Marneffe, ‘Assessing the need and possibilities for the establishment of an EU Scoreboard on democracy, the rule of law and fundamental rights’.

breach, the social classes affected and their vulnerability, "as in the case of national, ethnic or religious minorities or immigrants".<sup>368</sup>

Even if, taken separately, none of the values are severely violated, in the overall assessment (especially if several EU values are simultaneously affected) the breach may be serious in the meaning of EU law. This might be the case of a combination of health inequalities, discrimination in housing, segregation in education and bias crimes. The 'persistent' nature of the breach means it has to last for some time, but rights infringements may also be repetitive over a certain time span. The fact that a Member State has been condemned for a certain type of a breach over and over again by international courts, may also be decisive.<sup>369</sup> Systemic problems identified or pilot judgement proceedings conducted by the ECtHR might prove that the separation of powers doctrine or the supremacy of international law do not hold in the given state, and accordingly be evidence that a country may be on the borderline between a second and a third scenario.<sup>370</sup>

When a state systematically undermines democracy, deconstructs the rule of law and engages in massive human rights violations, there is no reason to presume the good intentions of those in power to engage in a sunshine approach involving a dialogue and soft measures in order to make the entity return to the concept of limited government – a notion that those in power wished to abandon. Just like a persistent breach may lead to a member's expelling from the United Nations, or a serious one may lead to suspension in the Council of Europe, a serious and persistent breach should also trigger appropriate, i.e. dissuasive and effective responses in the EU framework. Due to rising populism in various parts of Europe it is unlikely that Member States could agree on Treaty change so as to introduce novel types of sanctions,<sup>371</sup> but the existing sanctioning prong of Article 7 TEU allows for some creativity.

An illiberal state is unlikely to be persuaded to return to EU values by way of diplomatic attacks, political criticism, discussions and dialogue. Proposals "adding bite to the bark"<sup>372</sup> therefore typically point to the power of the purse, i.e. operating with quasi-economic sanctions, such as the suspension, withholding or deduction of EU funds, or pecuniary sanctions.<sup>373, 374</sup>

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<sup>368</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based, Brussels 15 October 2003, COM(2003) 606 final, 8.

<sup>369</sup> *Ibid.*

<sup>370</sup> See Resolution of the Committee of Ministers on judgements revealing an underlying systemic problem (adopted by the Committee of Ministers on 12 May 2004 at its 114th session), CM/Res(2004)3; Rule 61 of the Rules of Court.

<sup>371</sup> Dimitry Kochenov, EU minority protection: A modest case for a synergetic approach, *Amsterdam Law Forum* 3 (4), p. 33-53 (2011), 38.

<sup>372</sup> W. Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider' 16 *Columbia Journal of European Law* 3, 385–426 (2010).

<sup>373</sup> Scheppele, K.L. "Enforcing the Basic Principles of EU Law through Systemic Infringement Procedures", in: Closa, C. and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming; Scheppele, K.L., "The EU Commission v Hungary: The Case for the "Systemic Infringement Action," Assizes de la Justice, European Commission, November 2013, at ([http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppesystemicinfringementactionbrusselsversion\\_en.pdf](http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppesystemicinfringementactionbrusselsversion_en.pdf)) and Scheppele, K.L. "Making Infringement Procedures More Effective: A Comment on Commission v Hungary, Case C-288/12" *Eutopia*, 29 April 2014, (<http://eutopialaw.com/2014/04/29/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary-case-c-28812-8-april-2014-grand-chamber/>). Building on the above suggestions, see also J.-W. Müller, Why the EU Needs a Democracy and Rule of Law Watchdog, *Aspen Review* 2/015, (<http://www.aspeninstitute.cz/en/article/2-2015-why-the-eu-needs-a-democracy-and-rule-of-law-watchdog/>).

<sup>374</sup> See most recently a German proposal (<https://www.euractiv.com/section/central-europe/news/germany-to-propose-cutting-funds-to-eu-members-that-violate-rule-of-law/>). The proposal is rather controversial, President of the European Commission Jean-Claude Juncker, for example, harshly opposed it (<https://www.ft.com/content/d1b69d8a-46cf-11e7-8519-9f94ee97d996?mhq5j=e2>).

## 6. CONCLUSIONS AND RECOMMENDATIONS

This section will conclude and put forward a set of policy recommendations to the European Parliament.

### 6.1. Conclusions

This study has examined the state of play of minority protection in a selection of 11 European countries in light of existing international and regional legal standards, monitoring human rights bodies and instruments. The focus has been on three different thematic areas and collectives of direct relevance to the state of minority protection in the EU: ethnic, religious and linguistic minorities. In addition, attention has been paid to the situation of Roma, Muslim and autochthonous linguistic communities respectively under each thematic heading. They all include vulnerable and disadvantaged groups facing specific and institutional manifestations of discrimination, xenophobia and injustice.

Individuals and groups falling within the scope of each of these categories – which include EU citizens and residents – have often been analysed and discussed in previous research in a compartmentalised or group-specific fashion. This study has applied a cross-minority group analytical approach to the selected countries in an attempt to capture cases or circumstances where different minority protection grounds may overlap, or where special policies aimed at addressing specific minority protection rights may actually have negative, harmful or even indirectly discriminatory consequences for other vulnerable categories of minorities. This multi-theme approach has enabled an assessment of cases where there may be *'intersectionality'* of discrimination grounds.

The study has adopted and put into effect a democratic rule of law with fundamental rights approach when assessing the state of minority protection in the 11 countries covered. In this way, it has aimed at showing the 'added value' that a new EU mechanism on rule of law, democracy and fundamental rights would bring to the specific case of minority protection. The respect of the legal principles in Article 2 TEU, and in particular 'democratic rule of law and fundamental rights', constitutes a prerequisite or starting point for effectively ensuring minority rights protection in the EU. The protection of minorities cannot find any solid ground in the absence of democratic rule of law and fundamental rights.

The study has therefore addressed the following question: How could an EU approach addressing minority rights standards offer more comprehensive protection across the EU while respecting the current division of competences between the EU and its Member States?

The research has revealed the existence of a number of outstanding legal issues/challenges and practical gaps in the delivery and effective enforcement of current standards on minority rights in the three thematic areas under examination. While there is a plethora of international and regional actors, and instruments, covering directly and/or indirectly the monitoring and supervision of state party compliance with minority protection standards, such a constellation of standards and bodies is largely fragmented, dispersed and often sector-specific. Furthermore, state participation (ratification and signature) of the relevant legal instruments remains uneven and lacking uniformity. Two central limitations characterising existing UN, CoE and OSCE instruments and actors are first, their weaknesses when it comes to follow-up measures against the state concerned; and second, their lack of coverage of EU legal system-specific features and principles.

The EU lacks a comprehensive approach on minority protection encompassing institutional manifestations of discrimination, racism and xenophobia. There are at present a multiplicity of policy and legal approaches covering several dimensions of relevance for minority protection, which mainly relate to non-discrimination and equality of treatment as envisaged in the Treaties and secondary legislation. A central dilemma – often referred to as 'the EU Copenhagen dilemma' – of current EU approaches is that the protection of minorities is a key

element of the applicable Copenhagen criteria in the context of enlargement, but minority protection is not subsequently followed up once a country joins the EU, as the European Commission officially 'loses' competence on the matter of national minorities.

The study reveals that there has been a shift in the EU legal framework of the Treaties towards minority rights protection as well as a substantial strengthening of EU non-discrimination tools, which include discrimination of ethnic minorities. That notwithstanding, the present EU policy and legal framework do not generally ensure a uniform approach to EU democratic rule of law with fundamental rights, covering systematic threats to minority rights in the form of anti-Gypsyism, Islamophobia and minority languages. A clear example of the above-mentioned shift has been the development of non-legally binding or soft tools and fora – such as the EU NRIS or high-level groups and platforms – aimed at supporting and coordinating the exchange of information and 'promising practices' among several national and EU actors on issues of direct and indirect relevance to minorities' protection.

Yet the outputs of these platforms, high-level groups and frameworks are not legally binding and there is no effective follow-up method of supervising and monitoring Member States' implementation of international, regional and EU legal standards on minority protection. These initiatives have profound limitations in terms of relevance and actual impact. These forms of EU intervention have in turn led to some civil society actors becoming centrally involved in their implementation and therefore increasingly dependent on EU funding in a framework that 'by design' limits public accountability venues and leads to 'self-restraint' regarding their critical role in liberal democracies as 'watchdogs' of states' compliance with fundamental human rights.

Deterioration of the rule of law in the Member States hits minorities, disadvantaged groups and individuals particularly hard. The deficiencies of current EU instruments, such as the EU Framework on the Rule of Law, to address deterioration of Article 2 TEU values in the Member States are vividly apparent in the field of minority rights. This calls for the development of a new system that could prevent problems culminating into persistent and systemic breaches of fundamental rights and rule of law in the EU. When establishing an effective mechanism for monitoring and enforcing the rule of law, special consideration should be given to *putting into effect* the EU Pact for democracy, the rule of law and fundamental rights (EU Pact for DRF) proposed by the European Parliament.

This study has suggested specific ways in which the Pact could apply to these domains and evaluates its potential added value and contribution in comparison with existing international and regional standards as well as current EU instruments and tools. The EU Pact for DRF is capable of upholding the specificities of EU law, so that the EU remains the final arbiter in determining how European values are to be construed in the EU's multi-level constitutional system.

Every person, including those some populist politicians often frame as 'unpopular minorities', is entitled to equal protection of their fundamental human rights even though some 'majorities' may be reluctant to guarantee and provide that protection. It is the responsibility of liberal democratic governments to protect minorities consistent with their obligations to counter racism, hate crimes and xenophobia and to respect the values enshrined in the Treaties and the EU Charter of Fundamental Rights, even where politically this may be considered unpopular.

The EU should play a leading role in laying down the need for higher standards of minority protection, democratic rule of law and fundamental rights than those currently provided by international law. The EU should become a 'trendsetter' in democracy, the rule of law and fundamental rights globally. This is particularly crucial in light of recent populist and extreme-right political developments in some European countries and across the Atlantic.

## 6.2. Recommendations

1. The European Parliament should call for the development of a comprehensive and consistent EU approach to minority protection. The point of departure should be a solid safeguarding of democratic rule of law and fundamental rights across EU Member State governments and European institutions. A democratic rule of law and fundamental rights-based approach to the protection of minorities in the EU legal system, from an 'intersectional' viewpoint is the *sine qua non* of effective minority protection in the EU. Deterioration of the rule of law in the Member States hits on minorities particularly hard. This would be particularly pertinent when addressing instances of institutional and structural manifestations of discrimination, racism and xenophobia by states and institutional actors, such as cases of anti-Gypsyism, anti-Semitism and Islamophobia.

The European Parliament should reiterate its calls for establishing an EU Pact for DRF, which would comprise the setting-up of a new EU mechanism on the rule of law following some of the parameters previously outlined by the European Parliament's DRF Resolution. It should call on the European Commission to provide more substantive and objective grounds showing that the EU Pact for DRF would not add value to existing instruments and tools in light of the findings of the comprehensive European Added Value Assessment study,<sup>375</sup> which accompanied the legislative initiative report prepared by the Parliament's LIBE Committee.

This study has shown that minority protection could prove to be a test case demonstrating the added value of setting up such a mechanism in contrast with other international and regional instruments and monitoring actors. Existing EU tools like the EU Rule of Law Framework have proved to be inefficient in addressing persistent and systematic threats to the rule of law by certain EU Member States.

A key piece of the EU Pact for DRF would be the setting-up of an 'EU rule of law, democracy and fundamental rights (DRF) commission'. The DRF commission would be a body of scholars (independent from any European institution or EU agency) that would make context-specific/qualitative assessments and examine key thematic issues regarding the compliance of all EU Member States and EU institutions with fundamental rights and minorities' protection in light of data available from the UN, CoE, OSCE and other EU-related actors and sources. It could also gather extra information on EU issue-specific questions and challenges.

The DRF commission could activate a 'shift in the burden of proof' in the scrutiny procedure in cases where its assessments reveal indications of persistent and systemic breaches of Article 2 TEU values. It would have the power to ask relevant representatives of EU Member State governments to provide all pertinent evidence about their compliance with key findings and recommendations emerging from the DRF commission's work.

The EU DRF commission would have the competence to determine the extent to which there are indicia of persistent and systematic rule of law and human rights deficiencies in EU Member States, which would be then referred to the European Commission (for initiating ordinary or systemic infringement proceedings), and the CJEU for the urgent preliminary ruling procedure and the eventual 'freezing' of EU Member States' actions alleged to contravene Article 2 TEU values.

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<sup>375</sup> van Ballegooij, W. and T. Evas, "An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights", Interim European Added Value Assessment accompanying the Legislative initiative report (Rapporteur Sophie in 't Veld), European Parliamentary Research Service, October 2016, PE.579.328.

2. Particular attention should be paid by the EU in addressing institutional, structural and systematic manifestations of discrimination, racism, xenophobia and other kinds of violence against minority groups. The EU should take up its responsibility in ensuring that Member States comply more effectively with their obligations under the Treaties when it comes to minority protection. In the same vein, the EU should operationalise the term 'anti-Gypsyism', and explicitly include it among the different prohibited EU grounds of discrimination and racism.

The EU Charter of Fundamental Rights should become a fully-fledged bill of rights for EU citizens and residents. EU fundamental rights should protect citizens and residents even in domains where the EU has not yet exercised legal competence but which are of central relevance for the foundations of the EU legal edifice and its AFSJ. This should go hand in hand with more consistent and evidence-based enforcement of current EU legal standards by the European Commission in cases where fundamental rights and intersecting challenges on minorities' protection are at stake.

The CJEU needs to become a fully-fledged fundamental rights court and should be more centrally involved in monitoring the compliance of EU Member States and European institutions and agencies with Article 2 TEU values. Natural and legal persons who are directly and individually affected by any action/inaction could be enabled to bring actions before the CJEU for alleged violations of the EU Charter either by the EU institutions or by a Member State. NGOs should be also granted legal standing on behalf of victims.

This should go along with permitting collective complaints to be lodged before the CJEU on issues related to fundamental rights protection and the establishment of a formal procedure for third-party interventions similar to the one for the European Court of Human Rights in Strasbourg.

3. The scope of the EU Framework for National Roma Integration Strategies should be reframed as the '*EU Framework for National Roma Inclusion and Combating Anti-Gypsyism*'. The EU NRIS should in this way be expanded to include addressing systematic and institutional manifestations of anti-Gypsyism, so that reported cases of, for instance forced evictions and unlawful expulsions of EU Roma citizens, institutional racism or segregation policies, would be regularly monitored and effectively addressed. The European Parliament could call for the development of a monitoring and scrutiny arm on EU Member States' compliance with international, regional and EU legal standards on minority protection, fundamental rights and non-discrimination.

Similarly, other 'soft' initiatives, such as the EU High-Level Group on combatting racism, xenophobia and other forms of intolerance, should be broadened to include *institutional forms of racism*. These 'soft' forms of EU cooperation should go alongside an independent evidence-based discussion on institutional challenges to minority protection and be subject to rigorous accountability by the European Parliament.

4. The European Parliament should call on the Commission to further support minority group representatives and civil society and ensure that they are centrally and actively engaged on the monitoring committees of domestic managing authorities in Member States, to better assure the monitoring of EU funding instruments.

There should be a fundamental change in the ways in which the EU financially supports the work of civil society, equality and human rights bodies working on minority protection within the EU. EU funding should no longer be channelled exclusively through national governments. Instead, a key priority should be

increased and further efforts by the EU to directly support national equality and human rights bodies and ombudspersons, as well as NGOs and civil society actors.

The European Parliament should guarantee that EU funding plays a more active and comprehensive role in reaching out to civil society and equality bodies when performing monitoring and supervisory tasks/roles concerning states' compliance with EU-relevant international, regional and EU legal standards on minority protection and the EU Charter of Fundamental Rights.

The EU Pact for DRF should be utilised to strengthen the current weaknesses in monitoring national bodies as regards 'follow-up' and enforcement of findings and recommendations aimed at ensuring minority protection and non-discrimination. The EU should also put efforts into further ensuring the independence of equality bodies falling within the scope of EU non-discrimination law. Promoting strategic litigation and a *regular civil society monitoring system* of compliance by Member States and EU institutions with existing protection standards should be a central priority.

The European Parliament should call for more *ex post* evaluations of EU-funded projects covering minorities. It should also call for the establishment of a new mechanism whereby civil society would play a role in providing additional information or 'shadow' reports to assess *ex ante* conditionalities, which in turn would feed into the DRF mechanism described above. A new electronic tool should additionally be set up so that civil society actors could lodge complaints with the European Commission on the grounds of minority protection and fundamental rights violations.

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## **ANNEX 1. PROTECTION OF ETHNIC MINORITIES (A FOCUS ON ROMA AND ANTI-GYPSYISM)**

### ***Thematic Case Study***

***Prepared by Savelina Roussinova***

### **A1.1. Introduction**

#### **A1.1.1. Methodological note**

There is no internationally agreed definition as to which groups constitute minorities. Article 27 of the International Covenant on Civil and Political Rights (ICCPR) provides a threefold characterisation of minorities – ethnic minorities, religious minorities and linguistic minorities.<sup>376</sup> It is commonly accepted that recognition of minority status is not solely for the state to decide, but should be based on both objective and subjective criteria.<sup>377</sup> Furthermore, as noted by the Venice Commission, “a more dynamic tendency to extend minority protection to non-citizens has developed over the recent past”<sup>378</sup> and “governments should not be allowed to exclude minorities or define them away by non-acknowledgement or by arbitrary denial of citizenship (...).<sup>379</sup> The Council of Europe has introduced a definition of ‘Roma’ that has been commonly adopted also by the European Union institutions. It refers to Roma, Sinti, Kale and related groups in Europe, including Travellers and the Eastern groups (Dom and Lom); it covers the wide diversity of the groups concerned, including persons who identify themselves as Gypsies.<sup>380</sup>

International human rights law recognises two types of rights with respect to the protection of minorities: universal protection against discrimination and specific minority rights. This thematic case study reviews compliance of the selected countries with international and European norms for the protection of ethnic minorities against discrimination as assessed by the respective monitoring bodies<sup>381</sup> and enforced by judicial bodies, with a focus on the Roma minority. The review includes two major sources: i) the regular assessment of states’ compliance conducted by monitoring bodies and ii) judgements by the European Court of Human Rights and decisions on collective complaints by the European Committee on Social Rights.

Assessment of a state’s compliance is provided in the Concluding Observations of the state’s periodic reports by the UN treaty bodies; the Opinions of the Advisory Committee on the Framework Convention for the Protection of National Minorities (ACFC), followed by

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<sup>376</sup> See Office of the High Commissioner for Human Rights. *CCPR General Comment No 23: Article 27 (Rights of Minorities)*, paras. 5.1. and 5.2.

<sup>377</sup> *CCPR General Comment No 23*, para.5.2. See also the Advisory Committee of the Framework Convention for the Protection of National Minorities: “[T]he applicability of the Framework Convention does not necessarily mean that the authorities should in their domestic legislation and practice use the term “national minority” to describe the group concerned.” (Opinion on Norway, 12 September 2002, ACFC/INF/OP/I (2002)003, para.19) See also European Commission for Democracy through Law (Venice Commission). *Compilation of Venice Commission Opinions and Reports Concerning the Protection of National Minorities*. CDL (2011)018, p.13.

<sup>378</sup> European Commission for Democracy through Law (Venice Commission). *Compilation of Venice Commission Opinions and Reports Concerning the Protection of National Minorities*. CDL (2011)018, p. 6.

<sup>379</sup> *Ibid.*, p. 13.

<sup>380</sup> See Council of Europe Descriptive Glossary of terms relating to Roma issues, 18 May 2012.

<sup>381</sup> The relevant monitoring bodies at UN level are: Human Rights Committee (for the ICCPR); Committee on the Elimination of Racial Discrimination (for the ICERD); Committee on Social, Economic, and Cultural Rights (for ICESCR); Committee on the Rights of the Child (for CRC); Committee on the Elimination of Discrimination against Women (for CEDAW); and Committee on the Rights of Persons with Disabilities (for CRPD). The relevant monitoring bodies at CoE level are: Council of Europe Committee of Ministers (CM), Advisory Committee on the Framework Convention for the Protection of National Minorities (ACFC), European Commission against Racism and Intolerance (ECRI); Council of Europe Commissioner on Human Rights, and the European Commission for Democracy through Law (Venice Commission). The relevant bodies at EU level are: the European Commission, EU Fundamental Rights Agency, and the European network of legal experts in gender equality and non-discrimination.

resolutions of the Council of Europe Committee of Ministers; the country-by-country assessment by the European Commission against Racism and Intolerance (ECRI); the country reports of the Council of Europe Commissioner for Human Rights following his country visits; reports by the European Commission, the EU Fundamental Rights Agency and the EU network of legal experts on gender equality and non-discrimination.

#### A1.1.2. International and regional standards to protect ethnic minorities

- International standards

The core UN treaties contain both autonomous as in Article 26 of the ICCPR and accessory provisions on equality and non-discrimination pertaining to the specific rights protected under the respective treaty as in Article 2(1) ICCPR and Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both the ICCPR and ICESCR provide a non-exhaustive list of prohibited grounds of discrimination (concluding with "or other status"), which include "race", "language" and "national origin" with relevance to ethnic minorities/Roma. In addition, racial/ethnic discrimination is prohibited in specialised treaties – the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CRC), and the Convention on the Rights of Persons with Disabilities (CPRD, disability).

- Regional standards

The basic standard-setting instrument of the Organization for Security and Co-operation in Europe (OSCE) on minority rights is the Copenhagen Document on the Human Dimension of the CSCE (now OSCE) of June 1990, which commits states to "protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory (...) in conformity with the principles of equality and non-discrimination".<sup>382</sup> The principles of equality and non-discrimination are clarified by the Venice Commission in its explanatory report on the proposal for a European Convention for the Protection of Minorities, which emphasised that, "the very nature of minorities implies that special measures should be taken in favour of persons belonging to them. Therefore, non-discrimination within the meaning of the proposal does not denote formal equality between individuals belonging to the minority and the rest of the population, but rather substantive equality."<sup>383</sup> The Council of Europe Framework Convention on the Protection of National Minorities (FCNM) that was adopted subsequently gave a legally binding force to these principles. Article 4 prohibits discrimination based on belonging to a minority (4(1)); obliges states' parties to undertake additional and adequate measures to promote the full and effective equality between persons belonging to minorities and those belonging to the majority and to take into account the specific needs of persons belonging to minorities (4(2)); and clarifies that any measures taken to promote effective equality are not to be regarded as discrimination themselves (4(3)). The European Convention on Human Rights and Fundamental Freedoms (ECHR) provides protection of persons belonging to minorities in its Article 14, which guarantees the enjoyment of the rights and freedoms contained in the ECHR without discrimination on a non-exhaustible list of grounds, including, inter alia, race, colour and association with a national minority. While the scope of Article 14 is limited as it may only be invoked in relation to another substantive provision of the ECHR, Protocol No. 12 provides an autonomous application of the principle of non-discrimination "to any right set forth by law". The European Social Charter signed in 1961 supplemented the European Convention on Human Rights in the field of economic and social rights. It imposed a protection from discrimination in employment under the right to

<sup>382</sup> Document of the Copenhagen meeting of the Conference on the Human Dimension of the CSCE, Paragraph 33, available at: <http://www.osce.org/odihr/elections/14304?download=true>

<sup>383</sup> European Commission for Democracy through Law (Venice Commission). *Compilation of Venice Commission Opinions and Reports Concerning the Protection of National Minorities*. CDL (2011)018, p. 19.

work (Article 1(2)).<sup>384</sup> The protection beyond the sphere of employment is guaranteed by the general non-discrimination clause of Article E of the Revised European Social Charter of 1996.<sup>385</sup>

A number of judgements delivered by the European Court of Human Rights on individual Roma cases acknowledged the vulnerable position of Roma and the need for special consideration of their situation and referred to the volume of concerns and recommendations by international bodies.<sup>386</sup> These cases established important standards, such as: i) the positive duty on the state to investigate racial motives in cases of violence against Roma whether committed by the state or non-state actors;<sup>387</sup> ii) "special vigilance and vigorous reaction" by the state in cases of racial discrimination;<sup>388</sup> iii) racial discrimination may attain the severity of inhuman and degrading treatment, which is prohibited in absolute terms by the ECHR;<sup>389</sup> iv) segregation of Roma in education – whether through the placement in special remedial schools or in Roma-only schools and classes – is racial discrimination that is prohibited under the ECHR;<sup>390</sup> v) states have a positive obligation to tackle structural discrimination.<sup>391</sup>

The case law of the European Committee on Social Rights also made important interpretations of the principle of non-discrimination such as: i) states violate the non-discrimination principle if they fail to implement positive measures to ensure equality;<sup>392</sup> ii) states have a responsibility to collect equality data in order to monitor the extent of the problem with discrimination;<sup>393</sup> iii) states have the ultimate responsibility for policy implementation;<sup>394</sup> iv) states have a positive obligation to encourage citizens' participation.<sup>395</sup>

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<sup>384</sup> The Committee of Independent Experts (later renamed European Committee on Social Rights), has interpreted this Article in combination with the Preamble of the Charter as prohibiting all forms of discrimination in employment. See, for example, *Conclusions 2002*, pp. 22-28 (France).

<sup>385</sup> The Revised European Social Charter embodies in one instrument all rights guaranteed by the Charter of 1961, and adds new rights and amendments adopted by the Parties. It is gradually replacing the initial 1961 treaty.

<sup>386</sup> See European Court of Human Rights (Grand Chamber). *Case of D.H. and Others v The Czech Republic*. Application No. 57325/00)DH. Judgement of 13 November 2007, para. 181.

<sup>387</sup> State's responsibility under Article 14 ECHR involves obligation to investigate possible racist motives in cases of violence. See European Court of Human Rights. *Case of Nachova and Others v Bulgaria*. Applications nos. [43577/98](#) and [43579/98](#). para. 145. See also European Court of Human Rights. *Case of Šečić v Croatia*. Application no. 40116/02. 31 May 2007, para. 67.

<sup>388</sup> European Court of Human Rights (Grand Chamber). *Case of D.H. and Others v The Czech Republic*. Application No. 57325/00)DH. Judgement of 13 November 2007, para. 176.

<sup>389</sup> European Court of Human Rights. *Case of Moldovan and others v Romania*. Applications nos. 41138/98 and 64320/01. Judgement 2 of 12 July 2005, para.113.

<sup>390</sup> See the Roma education cases decided by the ECtHR as of 2017: *DH and Others v the Czech Republic*; *Sampanis et autres c. Grèce*, Requête no 32526/05. Arrêt. 5 juin 2008 ; *Orsus and Others v Croatia*. Judgement of 16 March 2010, Application No. 15766/03; *Sampani et autres c. Grèce* 59608/09. 11 décembre 2012 ; *Horváth and Kiss v Hungary* Application no. 11146/11. Judgement 29 January 2013; *Lavida et autres c. Grèce*. Requête no 7973/10. Arrêt 13 mai 2013. For a detailed discussion of these cases see: Lilla Farkas. *Report on Discrimination of Roma Children in Education*. European Commission Directorate-General for Justice, April 2014.

<sup>391</sup> European Court of Human Rights (Grand Chamber). *Case of Orsus and Others v Croatia*. Judgement of 16 March 2010, Application No. 15766/03, para. 181. See also European Court of Human Rights. *Case of Horváth and Kiss v Hungary*. Judgement of 29 January 2013, para. 116.

<sup>392</sup> See for e.g. European Committee of Social Rights. *Decision on the Merits, ERRC v Bulgaria Collective Complaint 46/2007*, para. 49.

<sup>393</sup> European Committee of Social Rights. *ERRC v Greece*, Complaint No. 15/2003, decision on the merits of 8 December 2004, para. 27.

<sup>394</sup> *Ibid.*, para. 29.

<sup>395</sup> European Committee of Social Rights. *Centre on Housing Rights and Evictions (COHRE) v Italy, Complaint No. 58/2009*. Decision on the merits of 6 July 2010, para. 106.

- EU standards

Racial/ethnic minorities, including Roma, in the EU Member States are protected against discrimination in EU primary law through the EU Charter of Fundamental Rights,<sup>396</sup> and in EU secondary law, through Directive 2000/43/EC of the Council of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (hereinafter the 'Race Equality Directive') and the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law (2008/913/JHA). The 1993 Copenhagen political criteria<sup>397</sup> that an applicant country for EU membership must meet include "respect for and protection of minorities".<sup>398</sup>

### A1.1.3. Roma-specific recommendations

In addition to assessment of states' compliance with the general international standards,<sup>399</sup> monitoring bodies also make reference to recommendations with specific regard to Roma, which were issued by a number of bodies at the UN level,<sup>400</sup> the OSCE,<sup>401</sup> Council of Europe,<sup>402</sup> and the EU.<sup>403</sup> The focus of these recommendations is on i) measures to combat racist violence against Roma, including violence by law enforcement officials, and measures to combat hate speech, including racist political discourse; ii) measures to combat segregation and discrimination against Roma in education, employment, housing, health care and access to citizenship; iii) implementation of positive action to ensure full and effective equality for Roma, as well as special measures to address multiple discrimination against women and children; and iv) measures for the preservation of Roma identity and culture.

<sup>396</sup> Article 6(1) TEU. As part of primary EU law the Charter is binding on EU institutions and Member States when they implement EU law.

<sup>397</sup> The criteria were named after the European Council in Copenhagen in 1993, which adopted them.

<sup>398</sup> See European Commission. *Accession. Criteria at:* [https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria_en)

<sup>399</sup> All selected countries are bound by the 6 core UN treaties (ICCPR, ICESCR, ICERD, CRC, CRPD, CEDAW), but not all of the states allow individual complaints under the respective treaties. With the exception of France and Greece, all states ratified the Framework Convention for the Protection of National Minorities (FCNM); all states ratified the European Convention on Human Rights (ECHR) but only Finland, Romania, Serbia and Spain ratified Protocol 12 of the ECHR. EU Member States are bound by Directive 2000/43 on Racial Equality, by the EU Charter of Fundamental Rights and by the Framework Decision on Combating Racism and Xenophobia. Countries which are candidates for accession to the EU are bound by the Copenhagen political criteria named after the European Council in Copenhagen in 1993 which adopted them.

<sup>400</sup> The Committee on the Elimination of Racial Discrimination (CERD) issued a special recommendation on Roma. See CERD *General Recommendation XXVII on Discrimination Against Roma*, adopted on 16 August 2000, document A/55/18 annex 5. See also *Report of the UN Special Rapporteur on minority issues, Rita Izsák. Comprehensive study of the human rights situation of Roma worldwide, with a particular focus on the phenomenon of anti-Gypsyism*. 11 May 2015. A/HRC/29/24

<sup>401</sup> The High Commissioner on National Minorities addressed specific recommendations regarding the Roma. See for e.g. OSCE/HCNM. *Report on the situation of Roma and Sinti in the OSCE Area*. March 2000, at: <http://www.osce.org/hcnm/42063?download=true>

<sup>402</sup> Specific recommendations on Roma were formulated by the Committee of Ministers and the European Commission against Racism and Intolerance. See [Recommendation No. R \(2000\) 4 of the Committee of Ministers to member states on the education of Roma/Gypsy children in Europe](#); [Recommendation Rec\(2001\)17 on improving the economic and employment situation of Roma/Gypsies and Travellers in Europe](#); [Recommendation Rec\(2004\)14 of the Committee of Ministers on the movement and encampment of Travellers in Europe](#); [Recommendation Rec\(2005\)4 of the Committee of Ministers to Member States on Improving the Housing Conditions of Roma and Travellers in Europe](#); [Recommendation Rec\(2006\)10 of the Committee of Ministers to member states on better access to health care for Roma and Travellers in Europe](#); [Recommendation CM/Rec\(2008\)5 of the Committee of Ministers on policies for Roma and/or Travellers in Europe](#); [Recommendation CM/Rec\(2012\)9 of the Committee of Ministers to member States on mediation as an effective tool for promoting respect for human rights and social inclusion of Roma](#). See also [ECRI General Policy Recommendation N°3 on combating racism and intolerance against Roma/Gypsies](#); [ECRI General Policy Recommendation N°13 on combating anti-Gypsyism and discrimination against Roma](#). See also the country-specific Opinions of the Advisory Committee on the Framework Convention for the Protection of National Minorities (ACFC) and the country-specific reports by the Council of Europe Commissioner for Human Rights.

<sup>403</sup> See Council of the European Union. *Council recommendation on effective Roma integration measures in the member states*, 2013/C 378/01, 9 December 2013.

## A1.2. Country-specific review

**Estonia:**<sup>404</sup> Monitoring bodies acknowledge concrete steps to increase awareness and acceptance of Roma within the majority population and to combat prejudice against the small Roma community in Estonia.<sup>405</sup> However, it is noted that Roma children without mental disabilities are placed in special remedial schools.<sup>406</sup>

**Finland:**<sup>407</sup> Monitoring bodies acknowledge efforts of the state to combat hate speech and hate crime, however, they express concern about intensifying hostility towards minorities, including Roma.<sup>408</sup> The Roma population in Finland, comprising both nationals and citizens of the EU,<sup>409</sup> is among the groups most likely to be victims of racism.<sup>410</sup> They suffer discrimination in various fields, including education, employment and housing, especially by private persons.<sup>411</sup> Discrimination against Roma in access to housing – both municipal and private – is problematic in Finland, as a 2013 study of the ombudsman for minorities has revealed.<sup>412</sup> Patterns of discrimination in housing result in de facto segregation of Roma in areas with social housing, which also causes their segregation at school.<sup>413</sup> Discrimination in education is signalled by overrepresentation of Roma in special schools<sup>414</sup> and limited access of Roma to upper secondary and higher education.<sup>415</sup> Racist insults against Roma children at school are one of the factors in the high levels of absenteeism among them.<sup>416</sup> Limited access to employment opportunities as a result of negative attitudes and stereotyping of Roma by employers is a matter of serious concern.<sup>417</sup> Discrimination against Roma, especially Roma

<sup>404</sup> The estimated number of Roma is 1,050 persons or 0.08% of the entire population according to Council of Europe data as of July 2012. In the 2009 census, 584 persons were identified as Roma.

<sup>405</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities. *Fourth Opinion on Estonia adopted on 19 March 2015*, para. 54.

<sup>406</sup> European Commission against Racism and Intolerance. *ECRI Report on Estonia, fifth monitoring cycle*, published on 13 October 2015, paras. 87-89. See also Committee on the Elimination of Racial Discrimination. *Concluding observations on the combined tenth and eleventh periodic reports of Estonia*, CERD/C/EST/CO/10-11, para. 13.

<sup>407</sup> The estimated number of the Roma population is 11,000 persons or 0.21% of the entire population according to Council of Europe data as of July 2012.

<sup>408</sup> Committee on the Elimination of Racial Discrimination. *Concluding observations on the twenty-third periodic report of Finland*, 12 May 2017, para. 10.

<sup>409</sup> In addition to the traditional Finnish Roma minority, it is estimated that some 500 people belonging to the Roma minority come annually to Finland from Romania and Bulgaria. See European network of legal experts in gender equality and non-discrimination. *Country Report. Non-Discrimination. Finland*. 2016, p. 5.

<sup>410</sup> Council of Europe Commissioner for Human Rights. *Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe Following his visit to Finland from 11 to 13 June 2012*, p. 2.

<sup>411</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities. *Fourth Opinion on Finland*. Published on 6 October 2016, para. 4. See also European Commission against Racism and Intolerance. *ECRI report on Finland, fourth monitoring cycle*, published on 9 July 2013, CRI(2013)19, p. 8.

<sup>412</sup> A study published by the ombudsman for minorities showed that 48.5% of the Roma respondents who have been active on the housing market, have experienced discrimination on the ground of their ethnic origin when applying for rental housing financed through state subsidies and 54.7% note that they have been discriminated against on the grounds of their ethnic origin when attempting to rent or buy housing on the private housing market. See European network of legal experts in gender equality and non-discrimination. *Country Report. Non-Discrimination. Finland*. 2016, p. 46.

<sup>413</sup> European Commission against Racism and Intolerance. *ECRI report on Finland, fourth monitoring cycle*, para. 75.

<sup>414</sup> Committee on the Elimination of Racial Discrimination. *Concluding observations on the twentieth to twenty-second periodic reports of Finland*, adopted by the Committee at its eighty-first session, CERD/C/FIN/CO/20-22, para. 15, 23 October 2012.

<sup>415</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities. *Fourth Opinion on Finland*. Published on 6 October 2016, para. 10.

<sup>416</sup> European Commission against Racism and Intolerance. *ECRI report on Finland, fourth monitoring cycle*, para. 61. See also Council of Europe Commissioner for Human Rights. *Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe Following his visit to Finland from 11 to 13 June 2012*, para. 54.

<sup>417</sup> European Commission against Racism and Intolerance. *ECRI report on Finland, fourth monitoring cycle*, para. 65. Committee on the Elimination of Racial Discrimination. *Concluding observations on the twentieth to twenty-second periodic reports of Finland, adopted by the Committee at its eighty-first session (6–31 August 2012)*, CERD/C/FIN/CO/20-22, para. 15.

women, in access to public places is a widespread problem, but it is not adequately addressed.<sup>418</sup>

Monitoring bodies note information about incidents of police violence against Roma during arrest and racial profiling by the police.<sup>419</sup>

**France:**<sup>420</sup> Monitoring bodies have paid particular attention to rising anti-Gypsyism and patterns of discrimination by state authorities against both Travellers who are French citizens, and migrant Roma who are citizens of other EU Member States.<sup>421</sup> Of particular concern is the stigmatising political discourse that associates Roma with criminality.<sup>422</sup> In recent years, anti-Romani racism has escalated into violent attacks on Roma by extremist groups.<sup>423</sup> There are also reports of police ill-treatment of Roma, involving intimidation, destruction of property and violent expulsion by the police of Roma families from several towns.<sup>424</sup> In the case *Guerdner v France*<sup>425</sup> concerning the death of a Traveller man in police custody who was shot dead while trying to escape, the European Court of Human Rights found that France violated the right to life on account of the use of lethal force.

Travellers are subjected to discrimination as a result of a special legal regime, established by a law from 1969, which restricts their freedom of movement and creates obstacles for the exercise of civil and political rights, especially the right to vote.<sup>426</sup> In the case *ERRC v France* the European Committee of Social Rights (ECSR) expressed the view that this regime is discriminatory and leads to marginalisation and social exclusion.<sup>427</sup> In the same case, the Committee also found that inadequate implementation of the existing legislation on housing arrangements for Travellers discriminated against them with regard to access to housing in violation of the Revised European Social Charter (RESC).<sup>428</sup> Failure of the authorities to provide suitable parking sites for Travellers exposes families to substandard housing conditions and forced evictions.<sup>429</sup> These problems were brought before the European Court

<sup>418</sup> European Commission against Racism and Intolerance. *ECRI report on Finland, fourth monitoring cycle*, para. 85.

<sup>419</sup> *Ibid.*, para. 114.

<sup>420</sup> The estimated number of Roma in France is 400,000 or 0.62% of the entire population according to Council of Europe data as of July 2012.

<sup>421</sup> Committee on the Elimination of Racial Discrimination. *Concluding observations of the Committee on the Elimination of Racial Discrimination. France. CERD/C/FRA/CO/17-19*, 23 September 2010, para. 14. See also European Commission against Racism and Intolerance. *ECRI Report on France, fifth monitoring cycle*, published on 1 March 2016, CRI(2016)1, para. 22.

<sup>422</sup> *Report by Nils Muižnieks Council of Europe Commissioner for Human Rights following his visit to France from 22 to 26 September 2014*, para. 171.

<sup>423</sup> European Commission against Racism and Intolerance. *ECRI Report on France, fifth monitoring cycle*, para. 47. See also *Report by Nils Muižnieks Council of Europe Commissioner following his visit to France*, para. 174.

<sup>424</sup> *Report by Nils Muižnieks Council of Europe Commissioner for Human Rights following his visit to France*, para. 175.

<sup>425</sup> European Court of Human Rights. *Affaire Guerdner et Autres c. France*. Requête no [68780/10](#). Arrêt 17 avril 2014.

<sup>426</sup> Council of Europe Commissioner for Human Rights. *Report by Nils Muižnieks Council of Europe Commissioner for Human Rights following his visit to France*, para. 10. The Commissioner regretted that as of the time of his visit to France the law proposal to repeal this legal regime which was tabled in the French National Assembly already in 2013, was not adopted. (*Ibid.* para. 147.)

<sup>427</sup> Council of Europe. Committee of Ministers. *Resolution CM/ResChS(2010)5 Collective complaint No. 51/2008 by the European Roma Rights Centre (ERRC) against France*. Adopted by the Committee of Ministers on 30 June 2010, para. vi.

<sup>428</sup> European Committee of Social Rights. *European Roma Rights Centre (ERRC) v France* (No. 51/2008), Decision on the merits of 19 October 2009. See also ECSR, *European Roma and Travellers Forum v France* (No. 64/2011), Decision on the merits of 24 January 2012. See also EU Fundamental Rights Agency. *Housing Conditions of Roma and Travellers in the EU*. October 2009, pp. 64-65.

<sup>429</sup> European network of legal experts in gender equality and non-discrimination. *Country Report. Non-Discrimination. France*. 2016, pp. 74-75.

of Human Rights in the case *Winterstein and Others v France*,<sup>430</sup> which concerned the decision of local authorities to evict Travellers from land on which they had lived for a very long period of time. The Court found that the failure of the authorities to provide the evicted families with an alternative accommodation, violated their right to respect for private and family life and home.

Migrant Roma face rejection and violence in France, and in some instances they are subjected to violence by the police.<sup>431</sup> Monitoring bodies have expressed concern about discrimination of Roma migrants in access to education, health care and housing, which is compounded by forced evictions without adequate resettlement solutions.<sup>432</sup> The repeated concerns expressed by various human rights bodies taken together with the findings of non-compliance of France with the revised European Social Charter could potentially point to institutional human rights violations against migrant Roma. In the case *Médécins du Monde International v France*<sup>433</sup> the ECSR found that the French authorities discriminated against migrant Roma with regard to the exercise of a number of rights protected under the RESC due to, among others, limited access to adequate housing for migrant Roma lawfully resident or working regularly in France; the eviction of migrant Roma from sites where they are installed; a lack of sufficient measures to provide emergency accommodation and reduce homelessness of migrant Roma; a lack of access to education; and difficulties of access to health care for migrant Roma.

The expulsion practices by the French authorities with respect to Roma EU citizens from Romania and Bulgaria have raised serious human rights concerns among various monitoring bodies.<sup>434</sup> A decision of the ECSR in the case *European Roma and Travellers Forum v France*<sup>435</sup> held that the administrative decisions for the expulsion of Romanian and Bulgarian Roma from France violated the RESC because they were not founded on an examination of the personal circumstances of the affected people, did not respect the proportionality principle and were discriminatory in nature since they targeted the Roma community.

**Greece:**<sup>436</sup> Hate speech targeting Roma in the media, on the Internet and in social media is a persistent problem that has been on the increase since 2009, coinciding with the rise of the Golden Dawn party.<sup>437</sup> Particularly worrisome is the stigmatisation of Roma in political discourse, which encourages popular anti-Roma sentiment.<sup>438</sup> Monitoring bodies have expressed concern about police violence against Roma and the lack of adequate investigation of such cases, including adequate investigation of possible racial motives behind the acts of

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<sup>430</sup> European Court of Human Rights. *Case of Winterstein and Others v France*. Application no. [27013/07](#). Judgement 17 October 2013.

<sup>431</sup> Human Rights Committee. *Concluding Observations on the fifth periodic report of France*, CCPR/C/FRA/CO/5, 17 August 2015, para. 13. See also *Report by Nils Muižnieks Council of Europe Commissioner for Human Rights following his visit to France*, p. 4.

<sup>432</sup> See Human Rights Committee. *Concluding Observations on the fifth periodic report of France*, para. 13. See also Committee on the Rights of the Child. *Concluding observations on the fifth periodic report of France*, 23 February 2016.

<sup>433</sup> European Committee of Social Rights. *Médécins du Monde International v France*, Complaint No. 67/2011, Decision on the merits adopted on 11 September 2012.

<sup>434</sup> Committee on the Elimination of Racial Discrimination. *Concluding observations of the Committee on the Elimination of Racial Discrimination. France*. CERD/C/FRA/CO/17-19, 23 September 2010, para. 14. See also Council of Europe Commissioner for Human Rights and OSCE High Commissioner for National Minorities. *Recent Migrations of Roma in Europe*. Second edition, October 2010, pp. 52-53.

<sup>435</sup> European Committee of Social Rights. *European Roma and Travellers Forum v France* Complaint No. 64/2011. Decision on the Merits, 24 January 2012, para. 66.

<sup>436</sup> The estimated number of the Roma population in Greece is 175,000 persons or 1.55% of the entire population according to Council of Europe data as of July 2012.

<sup>437</sup> Committee on the Elimination of Racial Discrimination. *Concluding observations on the twentieth to twenty-second periodic reports of Greece*, CERD/C/GRC/CO/20-22, 3 October 2016, para. 16.

<sup>438</sup> European Commission against Racism and Intolerance (ECRI). *ECRI Report on Greece, fifth monitoring cycle*. Published 24 February 2015, para.43.



violence.<sup>439</sup> Reiteration of such concerns by various monitoring bodies as well as a number of cases brought before the European Court of Human Rights could potentially indicate the institutional nature of such violations. In *Bekos and Koutropoulos v Greece*<sup>440</sup> the European Court of Human Rights found that Greece had violated the prohibition of inhuman and degrading treatment of the ECHR due to police ill-treatment of Roma. Failure to investigate possible racist motives behind the actions of the police constituted a violation of the non-discrimination provision of the ECHR. In *Petropoulou-Tsakiris v Greece*<sup>441</sup> again the Court found that Greece had violated the non-discrimination provision of the ECHR due to the lack of an effective investigation into the possible racist motives behind the actions of the police.

Lack of effective integration measures and deep-rooted prejudice against Roma in Greek society are the causes of persistent segregation of Roma, especially in education and housing.<sup>442</sup> With respect to the failure of the central authorities to take action against municipal authorities to prevent housing segregation, the European Committee of Social Rights found that such inaction constituted a breach of the state's obligation to promote the right of families to adequate housing.<sup>443</sup> The segregation of Roma in education, refusal to enrol children at school and other forms of discriminatory treatment in education are serious human rights violations that have been criticised by a number of monitoring bodies in recent years.<sup>444</sup> School segregation of Roma has been condemned by the European Court of Human Rights as a violation of the non-discrimination provision of the ECHR in three cases brought by Roma before the Court.<sup>445</sup> Substandard conditions in Roma settlements and repetitive forced evictions are also serious concerns relating to the right to adequate housing of Roma, which have been criticised by monitoring bodies.<sup>446</sup> Greece has been found two times in violation of the European Social Charter due to failure to deal with the extremely challenging situation of access to housing of Roma.<sup>447</sup>

<sup>439</sup> Human Rights Committee. *Concluding observations on the second periodic report of Greece*, CCPR/C/GRC/CO/2, 3 December 2015, para. 15. See also Committee on the Elimination of Racial Discrimination. *Concluding observations on the twentieth to twenty-second periodic reports of Greece*, CERD/C/GRC/CO/20-22, 3 October 2016, para. 20 c.

<sup>440</sup> European Court of Human Rights. *Case of Bekos and Koutropoulos v Greece*. Application no. 15250/02. Judgement 13 December 2005.

<sup>441</sup> European Court of Human Rights. *Case of Petropoulou-Tsakiris v Greece*. Application no. 44803/04. Judgement 6 December 2007.

<sup>442</sup> European Commission against Racism and Intolerance. *ECRI Report on Greece, fifth monitoring cycle*. Published 24 February 2015, paras. 99, 103.

<sup>443</sup> European Committee of Social Rights. *ERRC v Greece, Complaint No. 15/2003*. Decision on the merits of 8 December 2004, paras. 29 and 42.

<sup>444</sup> European network of legal experts in gender equality and non-discrimination. *Country Report. Non-Discrimination. Greece*. 2016, pp. 55-58. See also Committee on the Rights of the Child. *Consideration of reports submitted by States parties under article 44 of the Convention. Concluding Observations. Greece*, CRC/C/GRC/CO/2-3. 13 August 2012, paras. 26, 60. See also Committee on the Elimination of Racial Discrimination. *Concluding observations on the twentieth to twenty-second periodic reports of Greece*, CERD/C/GRC/CO/20-22, 3 October 2016, para. 20. See also: Human Rights Committee. *Concluding observations on the second periodic report of Greece*, CCPR/C/GRC/CO/2, 3 December 2015, para.18; See also ECRI Report on Greece, paras 105-108, 114. See also Fundamental Rights Agency. Education: *Roma Survey Data in Focus. The Situation of Roma in 11 Member States*. 2014, pp. 44-48.

<sup>445</sup> All decisions are in French. See Cour Européenne des droits de l'homme. *Sampanis et autres c. Grèce*, Requête no 32526/05. Arrêt. 5 juin 2008; *Sampani et autres c. Grèce* 59608/09. 11 décembre 2012; *Lavida et autres c. Grèce*. Requête no 7973/10. Arrêt 13 mai 2013.

<sup>446</sup> European network of legal experts in gender equality and non-discrimination. *Country Report. Non-Discrimination. Greece*. 2016, pp. 60-64. See also European Commission against Racism and Intolerance (ECRI). *ECRI Report on Greece, fifth monitoring cycle*. Published 24 February 2015, paras 111-113. See also Committee on the Rights of the Child. *Consideration of reports submitted by States parties under article 44 of the Convention. Concluding Observations. Greece*, para. 58. See also EU Fundamental Rights Agency. *Housing Conditions of Roma and Travellers in the EU*. October 2009, p. 61-62.

<sup>447</sup> See European Committee of Social Rights. *ERRC v Greece, Complaint No. 15/2003*, Conclusion, p. 15. In 2009, the European Committee of Social rights found, for the second time in five years, violations of Article 16 of the European Social Charter on the grounds that a significant number of Roma families continued living in conditions that failed to meet minimum standards, and that Roma families continued to be forcibly evicted in breach of the Charter. See European Committee of Social Rights. *INTERIGHTS v Greece, Complaint 49/2008*. Decision on the merits adopted on 11 December 2009.

**Hungary:**<sup>448</sup> Monitoring bodies are concerned that despite appropriate measures by the Hungarian state to investigate and bring to justice persons responsible for the murderous attacks against Roma in 2008–09, racially-motivated violence against Roma by extremist groups and citizens continued in the following years.<sup>449</sup> In its judgement on the case *Vona v Hungary*, the European Court of Human Rights paid specific attention to the fact that the activities of the banned Hungarian Guard amounted to intimidation of the Roma minority, with its implied threat of paramilitary violence.<sup>450</sup> Despite the reinforcement of legislative provisions, including additional police powers, to combat and prevent hate crime, Hungary has been criticised for failing to identify and respond effectively to hate crimes.<sup>451</sup> In *Balasz v Hungary*<sup>452</sup> the European Court of Human Rights found a violation of the non-discrimination provision of the ECHR in connection with the prohibition of inhuman and degrading treatment due to the failure of Hungarian authorities to conduct an effective investigation into the racist attack against a Romani man as well as to establish a possible racist motive for the assault.

Hate speech against Roma occurs on a daily basis.<sup>453</sup> “The campaign of prejudice and hate speech against Roma” on the part of the Jobbik party has also influenced the mainstream political discourse, which has embraced elements of their extremist discourse.<sup>454</sup> Police ill-treatment of Roma is also a problem for which Hungary was found in violation of the ECHR in the cases *Balogh v Hungary*<sup>455</sup> and *Borbála Kiss v Hungary*<sup>456</sup> (in both cases the Court found a violation of the prohibition of inhuman and degrading treatment due to ill-treatment of Roma by the police).<sup>457</sup>

Roma in Hungary continue to suffer systemic racial discrimination in all fields of life including education, housing, health care, employment and participation in social and economic life.<sup>458</sup> Repeated criticism by monitoring bodies as well as condemnation by the European Court of Human Rights signal that school segregation of Roma in Hungary is a serious institutional problem. It has a variety of manifestations<sup>459</sup> and is rising, among others as a result of the exemption of faith-based school segregation from the anti-discrimination law and the

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<sup>448</sup> The Roma population in Hungary is estimated at 750,000 persons or 7.49% of the entire population according to Council of Europe data as of July 2012.

<sup>449</sup> Advisory Committee on the Framework Convention. *Fourth Opinion on Hungary, adopted on 25 February 2016*. Strasbourg, 12 September 2016, paras. 10-11. See also *Report by Nils Muižnieks Council of Europe Commissioner for Human Rights following his visit to Hungary from 1 to 4 July 2014*. CommDH(2014)21, paras. 68-70.

<sup>450</sup> European Court of Human Rights. *Case of Vona v Hungary*. Application 35943/10. Judgement of 9 July 2013, paras. 63-70.

<sup>451</sup> *Report by Nils Muižnieks Council of Europe Commissioner for Human Rights following his visit to Hungary from 1 to 4 July 2014*. CommDH(2014)21, paras. 82-85.

<sup>452</sup> European Court of Human Rights. *Case of Balázs v Hungary*. Application no. 15529/12. Judgement 20 October 2015.

<sup>453</sup> See *Report by Nils Muižnieks Council of Europe Commissioner for Human Rights following his visit to Hungary from 1 to 4 July 2014*. CommDH(2014)21, para. 70.

<sup>454</sup> Advisory Committee on the Framework Convention. *Fourth Opinion on Hungary, adopted on 25 February 2016*. Strasbourg, 12 September 2016, para. 11. See also *Report by Nils Muižnieks Council of Europe Commissioner for Human Rights following his visit to Hungary from 1 to 4 July 2014*. CommDH(2014)21, para. 78.

<sup>455</sup> European Court of Human Rights. *Case of Balogh v Hungary*. Application no. 47940/99. Judgement 20 July 2004.

<sup>456</sup> European Court of Human Rights. *Case of Borbála Kiss v Hungary*. Application no. 59214/11. Judgement 26 June 2012.

<sup>457</sup> See Advisory Committee on the Framework Convention. *Fourth Opinion on Hungary, adopted on 25 February 2016*. Strasbourg, 12 September 2016, para. 104.

<sup>458</sup> Advisory Committee on the Framework Convention. *Fourth Opinion on Hungary, adopted on 25 February 2016*. Strasbourg, 12 September 2016, para. 12.

<sup>459</sup> *Report by Nils Muižnieks Council of Europe Commissioner for Human Rights following his visit to Hungary from 1 to 4 July 2014*. CommDH(2014)21, para. 105. See also Fundamental Rights Agency. Education: *Roma Survey Data in Focus. The Situation of Roma in 11 Member States*. 2014, pp. 44-48.

permission of de facto “benevolent segregation”.<sup>460</sup> In the case *Horváth and Kiss v Hungary*<sup>461</sup> the European Court of Human Rights found that Hungary violated the ECHR by the wrongful placement of Roma children in special schools due to the systematic misdiagnosis of mental disability. This practice was condemned as discrimination against Roma on racial grounds. Furthermore, in 2016 the European Commission started infringement proceedings against Hungary for non-conformity with Directive 2000/43/EC on Racial Equality and requested Hungary to ensure that Roma children enjoy access to quality education on the same terms as all other children.<sup>462</sup>

Segregation of Roma is not limited to education but is also evident in housing and health care. Patterns of segregation and discrimination against Roma in housing remains very challenging as signalled by the high number of complaints submitted to the ombudsman’s deputy responsible for minority issues.<sup>463</sup> The Roma population in the country side, which is about 60% of the total Roma population in the country, lives predominantly in segregated localities with poor living conditions and limited access to services, including health services.<sup>464</sup> Some local authorities have reportedly applied discriminatory measures to Romani settlements.<sup>465</sup> Romani women in these localities suffer from multiple disadvantages, being disproportionately affected by poverty, lack of employment and health care.<sup>466</sup> International bodies have expressed concern about the segregation of Romani women and children in hospital facilities.<sup>467</sup>

**Italy:**<sup>468</sup> Roma have been victims of racially-motivated violence by law enforcement and private individuals.<sup>469</sup> Anti-Roma rhetoric in political discourse promotes tolerance for discrimination against Roma.<sup>470</sup> The state did not provide legal remedies for the Roma whose rights were violated by the implementation of a ‘nomad emergency decree’ (May 2008-November 2011).<sup>471</sup>

<sup>460</sup> See Advisory Committee on the Framework Convention. *Fourth Opinion on Hungary adopted on 25 February 2016*. Strasbourg, 12 September 2016. Para. 39.

<sup>461</sup> European Court of Human Rights. *Case of Horváth and Kiss v Hungary* Application no. 11146/11. Judgement 29 January 2013.

<sup>462</sup> See European Commission Press Release Data Base at: [http://europa.eu/rapid/press-release MEMO-16-1823\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-1823_en.htm).

<sup>463</sup> See European network of legal experts in gender equality and non-discrimination. *Country Report. Non-Discrimination. Hungary*. 2016, pp. 70-72.

<sup>464</sup> Advisory Committee on the Framework Convention. *Fourth Opinion on Hungary adopted on 25 February 2016*. Strasbourg, 12 September 2016, para. 53. See also Committee on the Rights of the Child. *Concluding observations on the combined third, fourth and fifth periodic reports of Hungary, CRC/C/HUN/CO/3-5*, para. 46. See also *EU Fundamental Rights Agency. Housing Conditions of Roma and Travellers in the EU*. October 2009, p. 68.

<sup>465</sup> *Report by Nils Muižnieks Council of Europe Commissioner for Human Rights following his visit to Hungary from 1 to 4 July 2014*. CommDH(2014)21, para. 107.

<sup>466</sup> Committee on the Elimination of Discrimination against Women. *Concluding observations on the combined seventh and eighth periodic reports of Hungary*, adopted by the Committee at its fifty-fourth session (11 February–1 March 2013), 26 March 2013, CEDAW/C/HUN/CO/7-8, para. 36.

<sup>467</sup> Committee on the Rights of the Child. *Concluding observations on the combined third, fourth and fifth periodic reports of Hungary, CRC/C/HUN/CO/3-5/14*, October 2014.

<sup>468</sup> The group of Roma, Sinti and Camminanti is estimated at 150,000 persons or 0.25% of the entire population according to Council of Europe data as of July 2012. It includes Italian citizens; citizens from other EU countries, Non-EU citizens; foreigners who were granted asylum or subsidiary protection; (de facto) stateless people, born in Italy from stateless parents.

<sup>469</sup> *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe Following his visit to Italy from 26 to 27 May 2011*. CommDH(2011)26, paras. 28-30.

<sup>470</sup> Advisory Committee on the Framework Convention. *Fourth Opinion on Italy adopted on 19 November 2015*, para. 9 and para. 49.

<sup>471</sup> Human Rights Committee. *Concluding observations on the sixth periodic report of Italy*, para. 14. 1 May 2017.

Despite the adoption of measures for the integration of Roma,<sup>472</sup> access to rights by Roma (including Sinti and Camminanti) in Italian society remains limited and varies considerably with national origin and place of residence.<sup>473</sup> The state has not solved the problem with thousands of Roma children born in Italy who are de facto stateless and have no access to social rights.<sup>474</sup> Despite the formal ending of the nomad emergency decree in 2011, the segregation of Roma continued with the construction of new camps.<sup>475</sup>

Roma in informal settlements as well as in many authorised camps are enduring substandard conditions; they are excluded from education and employment opportunities, and have few prospects for integrating into society.<sup>476</sup> Roma are de facto excluded from social housing.<sup>477</sup> The vulnerability of Roma to human rights violations is increased by a pattern of forced evictions, leaving many of them homeless or forcing them into segregated camps.<sup>478</sup> Failure of the Italian state to prevent forced evictions and secure permanent dwellings for Roma was held by the European Committee of Social Rights to be discrimination in access to housing in violation of the Revised European Social Charter in the cases *European Roma Rights Centre (ERRC) v Italy*<sup>479</sup> and in *Centre on Housing Rights and Evictions (COHRE) v Italy*.<sup>480</sup> As noted by the Committee in the latter decision, five years after the first finding of violations of the European Social Charter in 2005, the situation of Roma in Italy has not been brought into compliance; moreover, it has actually worsened and presents an aggravated violation of the European Social Charter because "public authorities not only are passive and do not take appropriate action against the perpetrators of these violations, but they also contribute to such violence".<sup>481</sup>

**Romania:**<sup>482</sup> Stigmatisation of Roma as criminals is present in political discourse and racial stereotyping is widespread in the media.<sup>483</sup> Monitoring bodies have repeatedly expressed concern about the excessive use of force, ill-treatment and racial profiling of Roma by law enforcement officers.<sup>484</sup> Three separate incidents of excessive use of force by the police

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<sup>472</sup> Advisory Committee on the Framework Convention. *Fourth Opinion on Italy adopted on 19 November 2015*, para. 8.

<sup>473</sup> European Commission against Racism and Intolerance (ECRI). *ECRI Report on Italy, fifth monitoring cycle*. Published on 7 June 2016, para. 85.

<sup>474</sup> Human Rights Committee. *Concluding observations on the sixth periodic report of Italy*, paras. 14, 22. 1 May 2017. See also European Commission against Racism and Intolerance (ECRI). *ECRI Report on Italy, fifth monitoring cycle*. Published on 7 June 2016, para. 87.

<sup>475</sup> Advisory Committee on the Framework Convention. *Fourth Opinion on Italy adopted on 19 November 2015*, para. 9 and paras. 40-42.

<sup>476</sup> Council of Europe Commissioner for Human Rights. *Letter to Mr Matteo Renzi, President of the Council of Ministers of the Italian Republic*, CommHR/HB/sf 007-2016, 26 January 2016. See also European network of legal experts in gender equality and non-discrimination. *Country Report. Non-Discrimination. Italy*. 2016, pp. 49, 51-52.

<sup>477</sup> Committee on Social, Economic, and Cultural Rights. *Concluding observations on the fifth periodic report by Italy*. E/C.12/ITA/CO/5, 28 October 2015, para. 40.

<sup>478</sup> Committee on the Elimination of Racial Discrimination. *Concluding observations on the combined nineteenth and twentieth periodic reports of Italy*, 17 February 2017, para. 21. See also EU Fundamental Rights Agency. *Housing Conditions of Roma and Travellers in the EU*. October 2009, p. 61.

<sup>479</sup> Council of Europe Committee of Ministers. *Resolution ResChS(2006)4 Collective complaint No. 27/2004 by the European Roma Rights Centre against Italy*. Adopted by the Committee of Ministers on 3 May 2006.

<sup>480</sup> European Committee of Social Rights. *Centre on Housing Rights and Evictions (COHRE) v Italy, Complaint No. 58/2009*. Decision on the merits of 6 July 2010.

<sup>481</sup> *Ibid.*, paras. 76, 77.

<sup>482</sup> The estimated Roma population in Romania is 1,850,000 persons or 8.63% of the entire population according to Council of Europe data. In the 2011 census, 619,000 declared themselves Roma.

<sup>483</sup> European Commission against Racism and Intolerance (ECRI). *ECRI Report on Romania, fourth monitoring cycle, published 3 June 2014*, CRI(2014)19, para. 91. See also Committee on the Elimination of Racial Discrimination. *Concluding Observations of the Committee on the Elimination of Racial Discrimination. Romania*. 2-27 August 2010, para. 14.

<sup>484</sup> Committee on the Elimination of Racial Discrimination. *Concluding Observations of the Committee on the Elimination of Racial Discrimination. Romania*. 2-27 August 2010, para. 15. See also European Commissioner for Human rights. *Letter to Mr Dacian Cioloș, Prime Minister of Romania*, 23 June 2016.

resulted in three deaths of Roma in 2012.<sup>485</sup> Romania has been found in violation of multiple provisions of the ECHR in a number of cases of mob violence<sup>486</sup> and police violence against Roma. In the case *Carabulea v Romania*<sup>487</sup> concerning the death of a Roma man in police custody, the European Court of Human Rights found that Romania had violated its positive duty to protect life as well as the prohibition of inhuman and degrading treatment because the authorities failed to protect the life of the man in custody and subjected him to ill-treatment resulting in his death. The failure of the authorities to conduct an effective investigation into the man's death in custody was also a violation of the ECHR.

The lack of effective investigation into possible racist motives behind police ill-treatment of Roma has been repeatedly condemned by the European Court of Human Rights. In *Stoica v Romania*,<sup>488</sup> involving the ill-treatment of a minor Roma by the police, the Court found that the state had violated the ECHR, including its non-discrimination provision, because the Roma applicant had suffered ill-treatment at the hands of the police which had been racially motivated and because the subsequent investigation into the conduct of the police had failed to unmask possible racial motives in the violent incident. A similar case is *Cobzaru v Romania*<sup>489</sup> concerning the ill-treatment of a Roma man in police custody. In this case, the ECtHR found a violation of the prohibition of inhuman and degrading treatment, a violation of the right to an effective remedy and a violation of the non-discrimination provision due to failure of the authorities to investigate possible racial motives of the police ill-treatment. In assessing the obligations of the state, the Court noted the institutional character of the violations, emphasising that despite "numerous anti-Roma incidents which often involved State agents" and "evidence of repeated failure by the authorities to remedy instances of such violence" the investigating authorities did not take "special care" in investigating possible racist motives behind the violence.<sup>490</sup> A number of cases pending before the Court<sup>491</sup> at the time of writing that challenge police violence indicate that the problem persists.<sup>492</sup>

Monitoring bodies have acknowledged measures undertaken by Romania in recent years for the integration of Roma; however, it is emphasised that racial discrimination against Roma persists in education, housing, employment, health and social services.<sup>493</sup> Racial segregation and discrimination against Roma children in education remain a serious concern.<sup>494</sup> With respect to the right to housing, Roma experience extremely substandard conditions, with

<sup>485</sup> European Commission against Racism and Intolerance (ECRI). *ECRI Report on Romania, fourth monitoring cycle, published 3 June 2014*, CRI(2014)19, para. 154.

<sup>486</sup> For example, in *Moldovan and Others v Romania* the Court found that the Romanian state had violated a number of provisions from the ECHR by failing to provide justice in connection with the 1993 pogrom in the village of Hadareni and the subsequent events.

<sup>487</sup> European Court of Human Rights. *Case of Carabulea v Romania*. Application No. 45661/99. Judgement of 13 July 2010.

<sup>488</sup> European Court of Human Rights. *Case of Stoica v Romania*. No. 42722/02. Judgement (Merits and Just Satisfaction) of 4.3.2008.

<sup>489</sup> European Court of Human Rights. *Case of Cobzaru v Romania*. Application No. 48254/99. Judgement of 26 July 2007.

<sup>490</sup> *Ibid.*, para. 97.

<sup>491</sup> See for e.g., *Cioban v Romania* and *Lingurar v Romania*.

<sup>492</sup> See European Commissioner for Human Rights. *Letter to Mr Dacian Ciolos, Prime Minister of Romania, 23 June 2016*.

<sup>493</sup> European Commission against Racism and Intolerance (ECRI). *ECRI Report on Romania, fourth monitoring cycle, published 3 June 2014*, CRI(2014)19, para. 116. See also European Commissioner for Human rights. *Letter to Mr Dacian Ciolos, Prime Minister of Romania, 23 June 2016*.

<sup>494</sup> European Commission against Racism and Intolerance (ECRI). *ECRI Report on Romania, fourth monitoring cycle, published 3 June 2014*, CRI(2014)19, para. 91. See also Advisory Committee on the Framework Convention for the Protection of National Minorities. *Third Opinion on Romania, adopted 21 March 2012*, para. 27. See also Committee on the Elimination of Racial Discrimination. *Concluding Observations of the Committee on the Elimination of Racial Discrimination. Romania*. 2-27 August 2010, para.14.

about one-third of them living in slums.<sup>495</sup> Forced evictions carried out at variance with human rights norms have become a continual human rights violation that have prompted criticism from monitoring bodies.<sup>496</sup> Extremely inadequate housing conditions, lack of access to adequate health care as well as discrimination by health professionals and the segregation of women in maternity wards exacerbate the health inequalities of Roma.<sup>497</sup> Lack of access to health insurance is a problem that affects at least 46% of the Roma population in Romania.<sup>498</sup>

**Slovakia:**<sup>499</sup> Racist and aggressive anti-Roma discourse is common among politicians in Slovakia and anti-Gypsyism is further instigated through the media. Racially-motivated violence against Roma by law-enforcement officers and by private individuals is a serious human rights challenge in Slovakia.<sup>500</sup> It is aggravated by a repeated failure of the authorities to carry out prompt and thorough investigations of racially-motivated violence and bring charges against perpetrators.<sup>501</sup> In *Adam v Slovakia*,<sup>502</sup> concerning the ill-treatment of a Roma boy by the police and in *Koky and Others v Slovakia*,<sup>503</sup> concerning a racist attack on ten Roma by a group of private persons, the European Court of Human Rights found the state in violation of the prohibition of inhuman and degrading treatment in the ECHR due to lack of investigation of the alleged crimes. In *Mižigárová v Slovakia*,<sup>504</sup> concerning the death of a Roma man during police interrogation, the European Court of Human Rights found that the Slovak state had violated the right to life protected under the ECHR due to the failure of the police to protect the health and well-being of the man while in police custody as well as due to the lack of an effective investigation to establish the facts of the man's death.

The integration of Roma in society is impeded by the widespread segregation of Roma in education.<sup>505</sup> The practice of placement of Roma children in special remedial schools as well as the existence of Roma-only schools looks like an institutional form of human rights violation and has been criticised.<sup>506</sup> The European Commission started infringement

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<sup>495</sup> European Commissioner for Human Rights. *Letter to Mr Dacian Ciolos, Prime Minister of Romania*, 23 June 2016. See also EU Fundamental Rights Agency. *Housing Conditions of Roma and Travellers in the EU*. October 2009, p. 67.

<sup>496</sup> European Commission against Racism and Intolerance (ECRI). *ECRI Report on Romania, fourth monitoring cycle, published 3 June 2014*, CRI(2014)19, para.142.

<sup>497</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities. *Third Opinion on Romania, adopted 21 March 2012*, paras. 81-82, 131.

<sup>498</sup> See European Agency for Fundamental Rights. *Second European Union Minorities and Discrimination Survey. Roma – Selected Findings*. 2016, p. 29.

<sup>499</sup> The estimated number of Roma is 490,000 or 9.02% of the entire population according to Council of Europe data as of July 2012. In the 2001 census, 89,920 declared themselves Roma.

<sup>500</sup> *Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe following his visit to the Slovak Republic from 15 to 19 June 2015*. CommDH(2015)21, para. 68.

<sup>501</sup> See European Commission against Racism and Intolerance (ECRI). *ECRI Report on Slovakia, fifth monitoring cycle*, Published on 16 September 2014, para. 76.

<sup>502</sup> European Court of Human Rights. *Case of Adam v Slovakia*. Application no. 68066/12. Judgement 26 July 2016.

<sup>503</sup> European Court of Human Rights. *Case of Koky and Others v Slovakia*. Application no. 13624/03. Judgement of 12 June 2012.

<sup>504</sup> European Court of Human Rights. *Case of Mižigárová v Slovakia*. Application no. 74832/01. Judgement 14 December 2010.

<sup>505</sup> See Fundamental Rights Agency. *Education: Roma Survey Data in Focus. The Situation of Roma in 11 Member States*. 2014, pp. 44-48.

<sup>506</sup> European network of legal experts in gender equality and non-discrimination. *Country Report. Non-Discrimination. Slovakia*. 2016, pp. 6, 77-82. See also Committee on the Elimination of Racial Discrimination. *Concluding observations on the ninth to the tenth periodic reports of Slovakia*, adopted by the Committee at its eighty-second session, 17 April 2013, para. 44. See also *Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe following his visit to the Slovak Republic from 15 to 19 June 2015*. CommDH(2015)21, paras. 82-84. See also Advisory Committee on the Framework Convention. *Fourth Opinion on the Slovak Republic*, adopted 3 December 2014, para. 60. See also Human Rights Committee. *Concluding observations on the fourth report of Slovakia*, para. 12. 22 November 2016, para. 18. See also European Commission against Racism and Intolerance (ECRI). *ECRI Report on Slovakia, fourth monitoring cycle*, Published on 26 May 2009, para. 44.

proceedings against Slovakia for non-conformity with Directive 2000/43/EC on Racial Equality for discrimination against Roma in education.<sup>507</sup> Patterns of segregation and discrimination against Roma in housing are also a serious challenge noted by monitoring bodies.<sup>508</sup> More than half of the Roma population is plagued by housing segregation and substandard conditions, being concentrated within municipalities, on the edge of municipalities or in segregated settlements outside the municipalities.<sup>509</sup> Many Roma in the settlements have no access to running water and electricity, and face the threat of forced evictions due to a lack of security of tenure.<sup>510</sup> Government programmes for improving the housing conditions of Roma in recent years have achieved some positive results, but they have deepened the segregation of Roma because the new housing was built outside municipalities, in areas with poor infrastructure.<sup>511</sup>

Inequalities in health status and access to health services for Roma persist, caused by a combination of substandard living conditions and the long distances of Roma settlements from health centres as well as discriminatory attitudes by health professionals.<sup>512</sup> Concerns have been expressed also that provisions in the Act on childbirth allowance have discriminatory effects on Roma women in contravention of the Race Equality Directive.<sup>513</sup> Romani women who were subjected to involuntary sterilisation are victims of intersectional discrimination on the grounds of sex and ethnicity.<sup>514</sup> Monitoring bodies call attention to the fact that the Slovak authorities have not acknowledged responsibility for the past practice of forced sterilisation of Roma women and have ignored the issue of compensation to the victims.<sup>515</sup> Several judgements by the European Court of Human Rights in which Slovakia was found in violation of the European Convention on Human Rights indicate a lack of access to justice for Romani women who have undergone forced sterilisations.<sup>516</sup>

**Serbia:**<sup>517</sup> Racially-motivated attacks by private persons against Roma continue to be a problem and although criminal legislation to fight hate crime is in place, it is not implemented

<sup>507</sup> See European Commission database on infringement decisions at: [http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement\\_decisions/?lang\\_code=en](http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en).

<sup>508</sup> European network of legal experts in gender equality and non-discrimination. *Country Report. Non-Discrimination. Slovakia*. 2016, pp. 83-84. See also European Commission against Racism and Intolerance (ECRI). *ECRI Report on Slovakia, fourth monitoring cycle*, Published on 26 May 2009, paras. 65-70.

<sup>509</sup> European network of legal experts in gender equality and non-discrimination. *Country Report. Non-Discrimination. Slovakia*, 2016, pp. 83-86.

<sup>510</sup> European Commission against Racism and Intolerance (ECRI). *ECRI Report on Slovakia, fourth monitoring cycle*, Published on 26 May 2009, paras. 95-97. See also Advisory Committee on the Framework Convention. *Fourth Opinion on the Slovak Republic*, adopted 3 December 2014, para. 84. See also EU Fundamental Rights Agency. *Housing Conditions of Roma and Travellers in the EU*. October 2009, p. 67.

<sup>511</sup> European network of legal experts in gender equality and non-discrimination. *Country Report. Non-Discrimination. Slovakia*, 2016, p. 84.

<sup>512</sup> See Advisory Committee on the Framework Convention. *Fourth Opinion on the Slovak Republic*, adopted 3 December 2014, para. 85. See also European network of legal experts in gender equality and non-discrimination. *Country Report. Non-Discrimination. Slovakia*. 2016, p. 42.

<sup>513</sup> European network of legal experts in gender equality and non-discrimination. *Country Report. Non-Discrimination. Slovakia*. 2016, pp. 73-74.

<sup>514</sup> See European Union Agency for Fundamental Rights. *Inequalities and Multiple Discrimination in Access to and Equality of Health Care*. 2013, p. 8.

<sup>515</sup> Human Rights Committee. *Concluding observations on the fourth report of Slovakia*, CCPR/C/SVK/CO/4, 22 November 2016, para. 26.

<sup>516</sup> See European Court of Human Rights. *Case of K.H. and Others v Slovakia*. Application no. 32881/04. Judgement of 28 June 2009; European Court of Human Rights. *Case of V.C. v Slovakia*. Application no. 18968/07. Judgement of 8 November 2011; European Court of Human Rights. *Case of N.B. v Slovakia*. Application no. 29518/10. Judgement of 12 June 2012.

<sup>517</sup> The estimated number of Roma is 600,000 or 8.23% of the entire population according to Council of Europe data as of July 2012. In the 2002 census, 108,193 declared themselves Roma.

adequately.<sup>518</sup> Authorities do not act with due diligence to investigate and punish such crimes.<sup>519</sup> Underreporting of hate crime also hampers effective measures against it.<sup>520</sup>

Roma suffer from widespread discrimination, poverty and exclusion, and are subjected to de facto segregation in education and housing.<sup>521</sup> It is noted that the number of Roma in special schools has been reduced, yet overrepresentation of Roma in these schools persists.<sup>522</sup> There are schools exclusively attended by Roma children as well as separate classes formed by Roma children from displaced families.<sup>523</sup> Although owing to several programmes aimed at improving the access of Roma to education, primary school attendance of Roma children has increased, attendance of pre-school and primary school is lower than that of non-Roma.<sup>524</sup> Monitoring bodies are concerned about the low rate of completion of primary and secondary school by Roma girls.<sup>525</sup> The number of Roma without identity documents has been significantly reduced;<sup>526</sup> however, there are still people who cannot enjoy human rights due to a lack of identity papers – for example they cannot benefit from the legislation on social housing.<sup>527</sup>

The lack of access of Roma to adequate housing is a problem raised by a number of monitoring bodies. Large numbers of Roma continue to live in segregated informal settlements with substandard accommodation, and many lack access to drinking water and electricity.<sup>528</sup> A lack of detailed provisions with respect to discrimination in the areas of housing and social protection in the anti-discrimination law weakens the effect of this instrument on Roma living in such settlements who are particularly exposed to discrimination.<sup>529</sup> Forced evictions, sometimes accompanied by violence against Roma, and carried out without proper safeguards for the rights of the evicted persons, affect hundreds of Roma families from such settlements.<sup>530</sup> The property of Roma is destroyed and no alternative accommodation is provided.<sup>531</sup> Structural exclusion of Roma from society is also

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<sup>518</sup> See Human Rights Committee. *Concluding observations on the third periodic report of Serbia*, CCPR/C/SRB/CO/3, 10 April 2017, para. 10.

<sup>519</sup> Committee against Torture. *Concluding observations on the second periodic report of Serbia*. CAT/C/SRB/CO/2, 3 June 2015.

<sup>520</sup> European Commission against Racism and Intolerance. *Report on Serbia, fifth monitoring cycle*, 16 May 2017, para. 60.

<sup>521</sup> See Human Rights Committee. *Concluding observations on the third periodic report of Serbia*, CCPR/C/SRB/CO/3, 10 April 2017, para. 14. The difficult situation of Roma was also noted by the EU in the context of the accession negotiations. See *Conference on Accession to the European Union. Accession Document: European Union Common Position on Chapter 23 Judiciary and Fundamental Rights*, 8 July 2016, CONF-RS 5, p. 18.

<sup>522</sup> Advisory Committee on the Framework Convention. *Third Opinion on Serbia*, adopted 28 November 2013, para. 20.

<sup>523</sup> *Ibid.*, para. 160.

<sup>524</sup> *Ibid.*, para. 159. See also European network of legal experts in gender equality and non-discrimination. *Country Report. Non-Discrimination. Serbia*. 2016, pp. 54-55.

<sup>525</sup> Committee on the Elimination of Discrimination against Women. *Concluding observations on the combined second and third periodic reports of Serbia*. CEDAW/C/SRB/CO/2-3, 3 July 2013, para. 28.

<sup>526</sup> European Commission against Racism and Intolerance. *Report on Serbia, fifth monitoring cycle*, 16 May 2017, para. 74.

<sup>527</sup> Advisory Committee on the Framework Convention. *Third Opinion on Serbia*, adopted 28 November 2013, para. 76.

<sup>528</sup> See European network of legal experts in gender equality and non-discrimination. *Country Report. Non-Discrimination. Serbia*. 2016, pp. 57-58. See also Advisory Committee on the Framework Convention. *Third Opinion on Serbia*, adopted 28 November 2013, para. 77.

<sup>529</sup> See Advisory Committee on the Framework Convention. *Third Opinion on Serbia adopted on 28 November 2013*. Para. 54.

<sup>530</sup> See Commissioner for Human Rights. *Letter to Ms. Zorana Mihajlovic, Deputy Prime Minister of Serbia*, CommHR/EB/sf 008-2016, 26 January 2016. See also Advisory Committee on the Framework Convention. *Third Opinion on Serbia*, adopted 28 November 2013, para. 77.

<sup>531</sup> Advisory Committee on the Framework Convention. *Third Opinion on Serbia*, adopted 28 November 2013, para. 77.



demonstrated by the fact that there are no Roma employed in important public service institutions.<sup>532</sup>

**Spain:**<sup>533</sup> Monitoring bodies have acknowledged that the state is active in promoting equality for Roma, and has addressed social exclusion systematically and, in some cases, successfully.<sup>534</sup> Nevertheless, Roma experience discrimination in various fields. In the case *Muñoz Díaz v Spain*,<sup>535</sup> concerning the refusal of the state to provide a survivor pension for a Romani woman on grounds that she had only a traditional marriage, the European Court of Human Rights found that Spain discriminated against the Roma woman in breach of Article 14 in connection with the protection of property (Article 1 Protocol 1). The Court made reference to the requirement in the FCNM that states should pay “due regard” to the needs of minorities. Roma have been disproportionately affected by budget cuts made to the Spanish welfare system in response to the economic crisis. Racial discrimination affects Roma also in relations between private persons in the areas of employment and housing.<sup>536</sup>

Foreign Roma face greater vulnerability of being exposed to discrimination on the grounds of being both Roma and immigrants.<sup>537</sup> For example, amendments to the law on the rights of foreigners restricted housing aid only to “long-term” residents while previously it had been available to all legal residents.<sup>538</sup> Budget cuts affected programmes to promote equal access to education and access to health care for foreign Roma.<sup>539</sup> Monitoring bodies have expressed concerns that the budget cuts may undermine progress achieved in improving the situation of Roma women, among other women in vulnerable situations.<sup>540</sup>

There are significant gaps in educational achievement between non-Roma and Roma children.<sup>541</sup> Spain has achieved positive results in the primary education of Roma, with 94% attending school; however, serious challenges remain with the high rate of Roma children not completing secondary education.<sup>542</sup> The low level of school attendance and the high rate of drop out from school for Roma girls is also noted.<sup>543</sup> Residential segregation of Roma as well as discriminatory admission procedures in some publicly funded private schools have led to the formation of ‘ghetto’ schools for Roma children in some regions of the country, some of which are materially and substantially substandard.<sup>544</sup> Monitoring bodies have

<sup>532</sup> European Commission against Racism and Intolerance. *Report on Serbia, fifth monitoring cycle*, 16 May 2017, para. 86.

<sup>533</sup> The estimated number of Roma is 750,000 or 1.63% of the entire population according to Council of Europe data as of July 2012.

<sup>534</sup> European Commission against Racism and Intolerance. *ECRI report on Spain, fourth monitoring cycle*, adopted 8 February 2011, para. 123.

<sup>535</sup> European Court of Human Rights. *Case of Muñoz Díaz v Spain*. Application No. 49151/07. Judgement 8 December 2009.

<sup>536</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities. *Fourth Opinion on Spain*, 3 December 2014, paras. 20, 29.

<sup>537</sup> European Commission against Racism and Intolerance. *ECRI report on Spain, fourth monitoring cycle*, adopted 8 February 2011, para. 126.

<sup>538</sup> European Commission against Racism and Intolerance. *ECRI report on Spain, fourth monitoring cycle*, adopted 8 February 2011, para. 87.

<sup>539</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities. *Fourth Opinion on Spain*, 3 December 2014, paras. 78, 81.

<sup>540</sup> Committee on the Elimination of Discrimination against Women. *Concluding observations on the combined seventh and eighth periodic reports of Spain*. CEDAW/C/ESP/CO/7-8, 29 July 2015, para. 34.

<sup>541</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities. *Fourth Opinion on Spain*, 3 December 2014, para. 74.

<sup>542</sup> European Commission against Racism and Intolerance. *ECRI report on Spain, fourth monitoring cycle*, adopted 8 February 2011, para. 66. See also Council of Europe Commissioner for Human Rights. *Letter to Ms Leire Pajin, Minister of Health, Social Policy and Equality*, 9 May 2011.

<sup>543</sup> Committee on the Elimination of Discrimination against Women. *Concluding observations on the combined seventh and eighth periodic reports of Spain*. CEDAW/C/ESP/CO/7-8, 29 July 2015, para. 26.

<sup>544</sup> Committee on the Elimination of Racial Discrimination. *Concluding observations of the Committee on the Elimination of Racial Discrimination. Spain*. CERD/C/ESP/CO/18-20, 8 April 2011, para. 15. See also European

acknowledged the positive results of the programmes for relocation of Roma, which have eliminated slums in some parts of the country.<sup>545</sup> Yet it is also noted that 11.7% of the Roma population live in inadequate housing conditions, out of which 3.9% of Roma still live in slums.<sup>546</sup> Migrant Roma face even greater difficulties in access to adequate housing.<sup>547</sup> Health inequalities disproportionately affect Romani women compared with both Romani men and the general population.<sup>548</sup>

Monitoring bodies express concern about incidents of anti-Roma violence involving arson attacks against Roma families and clashes between non-Roma and Roma.<sup>549</sup>

**Sweden:**<sup>550</sup> Deep-rooted prejudices and discrimination against Roma are the causes for their continuing marginalisation in Sweden.<sup>551</sup> Monitoring bodies have acknowledged the measures for the integration of Roma that the state has undertaken but have remained concerned about their limited access to education, employment, housing and health care.<sup>552</sup> The situation of Roma from other EU member states is especially vulnerable because they have limited access to education, health care and social aid.<sup>553</sup>

Discrimination in rented housing affects Roma and creates barriers for them to access adequate housing outside segregated areas.<sup>554</sup> Moreover, selling or renting housing is exempt from the anti-discrimination legislation, although in some cases local courts have established discrimination in relations between owners and tenants.<sup>555</sup> The systemic character of the problem with housing discrimination against Roma is signalled by the numerous cases brought by Roma before the ombudsman.<sup>556</sup> De facto residential segregation results also in school segregation, which causes inequalities in education.<sup>557</sup> Forced evictions of Roma from other EU countries are a matter of serious concern because the evictions have left many people homeless.<sup>558</sup> Roma in Sweden cannot benefit from equal education opportunities due

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Commission against Racism and Intolerance. *ECRI report on Spain, fourth monitoring cycle*, adopted 8 February 2011, para. 63. See also Council of Europe Commissioner for Human Rights. *Letter to Ms Leire Pajin, Minister of Health, Social Policy and Equality*, 9 May 2011. See also Fundamental Rights Agency. *Education: Roma Survey Data in Focus. The Situation of Roma in 11 Member States*. 2014, pp. 44-48.

<sup>545</sup> European Commission against Racism and Intolerance. *ECRI report on Spain, fourth monitoring cycle*, adopted 8 February 2011, para. 83.

<sup>546</sup> Fundamental Rights Agency. *Improving Roma Housing and Eliminating Slums. Spain*. October 2009, p. 11. See also Council of Europe Commissioner for Human Rights. *Letter to Ms Leire Pajin, Minister of Health, Social Policy and Equality*, 9 May 2011.

<sup>547</sup> Council of Europe Commissioner for Human Rights. *Letter to Ms Leire Pajin, Minister of Health, Social Policy and Equality*, 9 May 2011.

<sup>548</sup> See European Agency for Fundamental Rights. *Second European Union Minorities and Discrimination Survey. Roma – Selected Findings*. 2016, pp. 30-31.

<sup>549</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities. *Fourth Opinion on Spain*, 3 December 2014, para. 60.

<sup>550</sup> The Roma population in Sweden is estimated at around 50,000 or 0.53% of the entire population according to Council of Europe data as of July 2012.

<sup>551</sup> European Commission against Racism and Intolerance. *ECRI report on Sweden, fourth monitoring cycle*, 25 September 2012, paras. 111-112.

<sup>552</sup> Human Rights Committee. *Concluding observations on the seventh periodic report of Sweden*. CCPR/C/SWE/CO/7, 28 April 2016, para. 14.

<sup>553</sup> Ibid.

<sup>554</sup> See European network of legal experts in gender equality and non-discrimination. *Country Report. Non-Discrimination. Sweden*. 2016, p. 59.

<sup>555</sup> European Commission against Racism and Intolerance. *ECRI report on Sweden, fourth monitoring cycle*, 25 September 2012, para. 90.

<sup>556</sup> See European network of legal experts in gender equality and non-discrimination. *Country Report. Non-Discrimination. Sweden*. 2016, pp. 59-60.

<sup>557</sup> Ibid., para. 103.

<sup>558</sup> See Council of Europe Commissioner for Human Rights. *Letter to Ms Alice Bah Kuhnke, Minister for Culture and Democracy*, 26 January 2016.

to structural barriers.<sup>559</sup> High levels of absenteeism have a negative impact on the education outcomes of Roma and many Roma are not able to finish compulsory education.<sup>560</sup> Harassment of Roma children at school by teachers or pupils is also a concern as well as the lack of a legal obligation on the part of the authorities to take preventive measures against harassment at school.<sup>561</sup>

Monitoring bodies note that Sweden has been found in violation of the ECHR for returning asylum seekers in breach of the principle of non-refoulement and that the asylum claims of Roma from Serbia have often been found manifestly ill-founded, although in some cases they may not have been.<sup>562</sup>

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<sup>559</sup> See European network of legal experts in gender equality and non-discrimination. *Country Report. Non-Discrimination. Sweden*. 2016, pp. 55-56.

<sup>560</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities. *Third Opinion on Sweden, adopted on 23 May 2012*, para. 105.

<sup>561</sup> *Ibid.*, paras. 104-105.

<sup>562</sup> European Commission against Racism and Intolerance. *ECRI report on Sweden, fourth monitoring cycle*, 25 September 2012, para. 139.

**Table A1.1 Discrimination of ethnic/national minorities – Grounds**

| <b>Country</b>  | <b>Relevant instruments (example – for A1: Ethnic/National Minorities)</b> |  |   |   |  | <b>European Court of Human Rights</b> | <b>ECSR</b>                    |
|-----------------|--|--|---|---|--|---------------------------------------|--------------------------------|
|                 | <b>UN Universal Periodic Review</b>  | <b>UN Treaty Bodies</b>                                  | <b>Council of Europe FCNM</b>   | <b>Council of Europe ECRI</b>   | <b>Council of Europe Commissioner for Human Rights</b>   |                                       |                                |
| <b>Estonia</b>  | Russian-speakers, people (N, non-citizens, TCN)                            | Russian-speakers, people with undetermined citizenship   | Russian-speaking citizens and persons of undetermined citizenship, Roma (N) | Russian-speaking citizens and persons of undetermined citizenship, Roma (N) | Russian-speakers   |                                       |                                |
| <b>Finland</b>  | Roma (N, EC, TCN), Sami (N)  | Roma (N, EC, TCN), Sami (N)                              | Roma (N, EC, TCN), Sami (N)   | Roma (N, EC, TCN), Somalis (N, TCN),  | Roma (N, EC, TCN) Russian-speakers (N), Somalis (N, TCN) |                                       |                                |
| <b>France</b>   | Travellers (N), Roma (EC, TCN), visible minorities (TCN)                   | Travellers (N), Roma (EC, TCN), visible minorities (TCN) |   | Travellers (N), Roma (EC, TCN), visible minorities (TCN)                    | Travellers (N), Roma (EC, TCN)                           | Travellers                            | Travellers (N), Roma (EC, TCN) |
| <b>Greece</b>   | Roma (N)   | Roma (N)   |   | Roma N  | Roma N   | Roma N                                | Roma N                         |
| <b>Hungary</b>  | Roma (N)   | Roma (N)   | Roma (N)  | Roma (N)  | Roma (N)   | Roma (N)                              |                                |
| <b>Italy</b>    | Roma (N, EC, S, TCN)   | Roma (N, EC, S, TCN)                                     | Roma (N, EC, S, TCN), people of African descent (N, TCN)                    | Roma (N, EC, S, TCN)  | Roma (N, EC, S, TCN)                                     |                                       | Roma (N, EC, S, TCN)           |
| <b>Romania</b>  | Roma (N)   | Roma (N)   | Roma (N)  | Roma (N)  | Roma (N)   | Roma (N)                              |                                |
| <b>Serbia</b>   | Roma (N, S)  | Roma (N, S)  | Roma (N, S)   | Roma (N, S)   | Roma (N, S)  |                                       |                                |
| <b>Slovakia</b> | Roma (N)   | Roma (N)   | Roma (N)  | Roma (N)  | Roma (N)   | Roma (N)                              |                                |

|               |   |   |                           |  |              |          |  |
|---------------|---|---|---------------------------|--|--------------|----------|--|
| <b>Spain</b>  | Roma (N, EC),<br>North Africans,<br>Latin Americans | Roma (N, EC),<br>North Africans,<br>Latin Americans | Roma (N, EC)              | Roma (N, EC)   | Roma (N, EC) | Roma (N) |  |
| <b>Sweden</b> | Roma (N, EC),<br>Afro-Swedes (N,<br>TCN), Sami (N)  | Roma (N, EC),<br>Afro-Swedes (N,<br>TCN), Sami (N)  | Roma (N, EC),<br>Sami (N) | Roma (N, EC);<br>Sami (N); Afro-<br>Swedes (N,<br>TCN) | Roma (N, EC) |          |  |

Notes: Categories covered: nationals (N), European Community/EU citizens (EC/EU), third-country nationals (TCN), refugees (R), stateless (S), non-citizens (NC; for Estonia only), naturalised nationals (NN).

**Source:** Thematic expert, 2017.

### A1.3. Key findings

Assessment of states' protection of the Roma minority against discrimination reveals what has/could potentially be evaluated as institutional forms of obligations under human rights law. Various legislative and policy measures adopted by states in recent years have not resulted in reducing high levels of discrimination against Roma in all key social areas, nor have they curbed rampant anti-Gypsyism in all societies.<sup>563</sup>

The UN, Council of Europe and EU bodies have expressed common concerns about the persistence of systemic discrimination against Roma in all fields of life, most importantly,

- states allow **racially-motivated violence, including violence by law enforcement officers**, to continue and to remain unpunished (in France, Greece, Hungary, Italy, Romania, Slovakia and Serbia);
- **racial segregation in education** not only persists without remedy, but it is also growing (in Greece, Hungary, Romania, Slovakia and Serbia);
- **racial segregation in housing** is unabated and is growing (in Finland, France, Greece, Hungary, Italy, Romania, Serbia, Slovakia and Sweden);
- **forced evictions without safeguards and lack of access to housing** persist (in France, Greece, Hungary, Italy, Romania, Serbia, Spain and Sweden);
- **discrimination in access to health care** is not being addressed (especially in France, Greece, Hungary, Italy, Romania, Serbia and Slovakia), and there are **striking health inequalities** between Roma and non-Roma in all countries; and
- Roma women and girls are affected by **multiple disadvantages and discrimination** in all countries.

Council of Europe monitoring bodies (the ECRI, ACFC and Commissioner for Human Rights) have provided comprehensive and detailed reviews of the human rights situation of the Roma minority. The EU Fundamental Rights Agency has explored in depth patterns of discrimination in access to education and housing and provided data about discrimination against Roma in various fields in its EU-MIDIS surveys in 2011 and 2016. UN treaty bodies, especially the CCPR, CERD and the CRC Committees, have consistently highlighted discrimination against Roma in their supervisory practice. Other UN bodies, such as the CEDAW Committee, pay attention to multiple discrimination affecting Romani women. The human rights situation of the Roma minority is raised also by a number of UN special procedures mandate holders. These include the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, who has reported on the causes and consequences of racism against Roma<sup>564</sup> and regularly addresses challenges facing Roma in country reports;<sup>565</sup> the Special Rapporteur on the human right to safe drinking water and sanitation, who made recommendations regarding Roma in her report on stigma<sup>566</sup> and in relevant country reports;<sup>567</sup> and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context,<sup>568</sup> among others.

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<sup>563</sup> See European Commission. *Effective Roma integration measures in the Member States 2016. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, p. 8, available at: [http://ec.europa.eu/justice/discrimination/files/roma-report-2016\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/roma-report-2016_en.pdf). See also Fundamental Rights Agency. *Second European Union Minorities and Discrimination Survey. Roma – Selected Findings*. 2016, pp. 9-11.

<sup>564</sup> See, for example, A/HRC/17/40, paras. 5–25, and A/HRC/26/50.

<sup>565</sup> See, for example, A/HRC/23/56/Add.2, A/HRC/20/33/Add.1, and A/HRC/7/19/Add.2.

<sup>566</sup> See A/HRC/21/42.

<sup>567</sup> See, for example, A/HRC/18/33/Add.2.

<sup>568</sup> See, for example A/HRC/16/42/Add.2, paras. 51–56, and A/HRC/25/54/Add.2, paras. 69–71 and 74–75.

## ANNEX 2. PROTECTION OF LINGUISTIC MINORITIES (A FOCUS ON SPEAKERS OF AUTOCHTHONOUS LANGUAGES)

### *Thematic Case Study*

*Prepared by Bastiaan David Van der Velden*

This thematic case study reviews compliance of the selected countries with international and European norms for the protection of linguistic minorities, as assessed by the respective monitoring bodies and enforced by judicial bodies.

### **A2.1. Introduction**

In many countries, the mother-tongue is the same one as the official language used in schools, by the state, in court and in the mass media. However, when people's home language differs from the official language, and the state does not provide sufficient measures to safeguard this language, human rights issues can be at stake. Language policy is considered an internal affair, based on the territoriality principle, and international law leaves state sovereignty unaffected. At the same time, the use of a language in the 'private domain' is protected by freedom of expression and association.<sup>569</sup> International law protects historic language minorities against assimilation processes.

The problem in the relation between international law and linguistic justice is that international law addresses states on the one hand, and gives individuals certain guarantees for the protection of human rights, but it is restrained from allotting collective rights to groups.<sup>570</sup> Certain individual language rights are generally recognised, like the right of suspects and accused persons to receive information about their rights in a simple and accessible language they understand.<sup>571</sup> Nevertheless, it is quite useless to be allowed to speak your minority language to yourself, and language depends on communication with others. When their language is the main characteristic of individuals belonging to a minority, the loss of this language due to assimilation implies the end of the minority.<sup>572</sup> The protection of the home language – certainly when it is spoken by a small group of people – is important to safeguard the intangible heritage of mankind, because a lot of knowledge on flora, fauna, geography and local history is only accessible in these small languages. Access to the democratic process in local government bodies is only possible when all the languages spoken in the region are taken into account. It is also important to educate children in their home language to have an effective learning process.

The aims of promoting linguistic justice in education are multiple. First, teaching the mother tongue is necessary for the transfer of the language to future generations and safeguards us from the extinction of small languages. Second, mother-tongue education is the best instrument to prevent children from 'dropping out' of the educational system. Yet making education possible in small languages also is an important factor in giving these languages a higher status. The right to education in one's own language is defined in a series of international treaties, for example the International Convention on the Protection of the Right of all Migrant Workers and Members of their Families.

<sup>569</sup> S. van der Jeught, *EU Language Law*, Groningen: Europa Law Publishing 2015, p. 263.

<sup>570</sup> A. Spiliopoulou Åkermark, *Justifications of minority protection in international law* (London 1997) p. 43-48.

<sup>571</sup> art 6, lid 3, EVRM; The right to use one's own language in court are codified in EU Directive 2012/13/EU on the right to information in criminal proceedings.

<sup>572</sup> Advisory Committee on the FCNM, Thematic Commentary No. 3, The Language Rights of Persons Belonging to National Minorities under the Framework Convention (ACFC/44DOC(2012)001 rev) par. 16.

### **History of the European Charter for Regional or Minority Languages (1992)**

The development of protection and anti-discrimination measures regarding minority languages was a national issue until the early 1990s. This changed with the European Charter for Regional or Minority Languages (ECRML) of the Council of Europe (CoE), adopted on 25 June 1992 and entering into force on 1 March 1998. Human rights treaties, in particular the European Convention on Human Rights (ECHR) (1950), contains provisions for persons who do not understand the language of the judiciary and on the freedom of expression, but not an overall approach towards minority language rights, neither as an individual nor as a group.<sup>573</sup> This gap in the rules has been discussed in the CoE several times since 1957, but no agreement on a protocol has been reached for national minorities in relation to languages.

In 1979 a motion was submitted in the European Parliament by G. Arfé (Italy) to draw up a Charter of Ethnic Minorities. Shortly thereafter, J. Hume (UK/Northern Ireland) filed a motion in Parliament to draft a Bill of Rights for the Regional Languages and Cultures of the Community.<sup>574</sup> Based on Recommendation 928 of the Parliamentary Assembly of the CoE in 1981 and two resolutions of the European Parliament (also called Arfé Resolutions) from 1981 and 1983, the Standing Conference of Local and Regional Authorities of Europe decided to draw up a concept for a European treaty for regional and minority (R/M) languages.<sup>575</sup>

### **ECRML protections**

The purpose of the ECRML is the protection of languages and not the protection of minorities. The explanatory report sees the standardisation of modern society, especially in the media, and the threatening influence of state policy aimed at assimilation as the biggest threats to R/M languages (para. 2).

The ECRML does not grant individual or collective rights to citizens speaking a R/M language. However, it obliges the participating countries through regulatory or other measures to ensure and improve the position of R/M languages. Emphasis is placed on languages, and by using a sliding-scale menu system, states have the possibility to choose the most appropriate level of protection they want to give to R/M languages.

Part I of the ECRML defines the R/M language. This is a language that has traditionally been used in a particular area of a state by a group of inhabitants that is smaller than the population of the rest of the state (Article 1). It is of no importance how big the group of citizens speaking a particular language is – the ECRML does not give minimum numbers. In the view of the experts drafting the ECRML, the menu of Part III is flexible enough to create an acceptable (minimum) framework for the protection of these languages and to adopt a higher level for languages spoken by larger groups. Dialects of official languages fall outside the scope of the ECRML. Nor are immigrant languages protected by the ECRML.<sup>576</sup>

Part II sets out a number of general principles and requirements that the ratifying state must apply to all R/M languages spoken in the state (Article 2, para. 1). Part II contains an obligation to respect the administrative unit of language, a non-discrimination principle, the possibility of education in R/M languages and the promotion of contact between users of different languages. A recent development in Spain shows that the Committee of Experts can convince countries to make Part II applicable to languages not 'designated' by the Member State at the moment of ratification.

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<sup>573</sup> J.-P. Schreuder, 'Minority protection within the concept of self-determination', *Leiden J. of Int.L.*, 1995, pp. 54-80.

<sup>574</sup> Motion for a Bill of Rights of the Regional Languages and Cultures of the Community, B3-0016/90.

<sup>575</sup> The draft text is published in: *Archiv des Völkerrechts*, vol. 28 (1990), pp. 154-164.

<sup>576</sup> See also the discussion on this subject in: Venice Commission, Report on non-citizen and minority rights (CDL-AD(2007)001) §§62, 115, 120, 142.



States have to make a choice from the concrete undertakings in seven areas of public life as mentioned in Part III (most of these provisions consist of several options), of increasing degrees of stringency, one of which has to be chosen for the language at stake. This menu ought to fit languages spoken only by several people, languages used by large groups, by citizens living concentrated in one area, or living dispersed all over a country, and this system ought to fit the situation of each language. De Varennes calls this system a "sliding-scale formula": at the bottom of this sliding scale there is minimum protection for R/M languages with a small number of speakers, and at the top of the scale "much more generous rights" in case large groups of minority speakers live in a country.<sup>577</sup>

Part IV gives the CoE two tools to keep up to date on the situation of R/M languages in Member States. First, these countries should report periodically to the secretary-general of the CoE on the measures taken for the benefit of the languages. The obligations of the Member States are monitored by a Committee of Experts every three years. An important source of information is the direct dialogue with the people using R/M languages.<sup>578</sup>

Some opinions on the ECRML are positive and others more critical. The specific attention to minority languages of the ECRML is seen as a positive point, as there is no international treaty that governs this matter so extensively. Simultaneously, there are critical voices. The ECRML does not provide for any enforcement mechanisms in the case of non-compliance by the Member States.<sup>579</sup> De Varennes considers the lack of instruments for citizens to appeal to a judicial institution when language rights are not respected a weak point of the ECRML.<sup>580</sup> Blair is of the opinion that the ECRML "is not dealing with human rights questions but with the protection of a cultural heritage". This could also be a legitimation, according to Blair, for immigrant languages not being protected under the ECRML.<sup>581</sup>

### United Nations

The main problem with the protection of minority languages is the fragmentation of most of the instruments. Only the ECRML gives an overview of all aspects of society where language plays a key function and the role of minority languages, and this is missing in instruments laying down a general principle for the protection of languages.

Article 2 of the Universal Declaration of Human Rights makes this statement: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language." In a criminal charge, "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal" (Article 10). In the articles on freedom of opinion and expression (Article 19) and education (Article 26), language rights are not mentioned, but are included.

The International Covenant on Civil and Political Rights (ICCPR) contains protection of the rights of persons belonging to a linguistic minority. Article 27 ICCPR 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 community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". Article 27 ICCPR tries to make a bridge between individual human rights and

<sup>577</sup> F.J. de Varennes, *Language, minorities and human rights* [S.l.: s.n.] p. 96, p. 195.

<sup>578</sup> E. J. Ruijz Vieztesy, *Working together: NGOs and regional or minority languages* (Strasbourg: CoE 2004).

<sup>579</sup> S. Trifunovska, *Monitoring of Linguistic Rights of Minorities under the European Charter and the Framework Convention*, paper presented during the II Mercator International Symposium: 'Europe 2004: A new framework for all languages?' in Tarragona, 27. – 28 February 2004.

<sup>580</sup> F. De Varennes, 'Language rights as an integral part of human rights', *MOST Journal on Multicultural Societies*, 2001, vol. 3, no. 1, par. 3.2 en 3.4.

<sup>581</sup> P. Blair, *The protection of regional or minority languages in Europe* (Fribourg: Ed. Univ. Fribourg 1994) p. 58.

group rights.<sup>582</sup> But the ICCPR does not contain specific rights with regard to the use of the language in official matters or any other field. Only the right to be informed promptly and in detail in a language one can understand of the nature and cause of the criminal charge and the right to an interpreter in court are mentioned. In this sense, the ICCPR represents the opinion that the usage of minority languages in the home environment is tolerable, but in official places it is not self-evident.<sup>583</sup> In a comparable way, the United Nations Convention on the Rights of the Child has some provisions on language rights in education. The UNESCO Convention against Discrimination in Education (1960) states the right of national minorities to carry on their own educational activities, including the use of their own language (Article 5.1(c)).<sup>584</sup>

### **Organization for Security and Co-operation in Europe and the High Commissioner on National Minorities**

The Organization for Security and Co-operation in Europe (OSCE) has issued some recommendations with regard to language.<sup>585</sup> The OSCE primarily acts when interstate relations are involved, as in the case of the Hungarian-speaking minority in Slovakia.

### **Council of Europe**

The ECHR contains references to linguistic rights. In Article 5.2, the reason for arrest and charges has to be communicated in a language understood by the person. Article 6.3 grants an interpreter for free in a court, if the language used cannot be spoken or understood. The ECHR does not contain rights for the protection of minorities. Only individual rights in conjunction with the non-discrimination provision of Article 14 ECHR could lead to certain substantive rights enforceable by the court.<sup>586</sup>

Article 2 of Protocol No. 1 of the ECHR does not specify the language in which education must be conducted in order for the right to education to be respected. While the right to education would be meaningless if it did not imply, in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, no mention is made of the role of R/M languages in education.<sup>587</sup> The final conclusion is that there is a lacuna in the ECHR with regard to the protection of the rights of linguistic minorities.<sup>588</sup>

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<sup>582</sup> F. Caportorti, the UN special rapporteur stated that '[it] is the individual as member of a minority group, and not just any individual, who is destined to benefit from the protection granted by article 27', in: *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Publication, 1979, § 206-210.

<sup>583</sup> F.J. de Varennes, *Language, minorities and human rights* [S.l.: s.n.] (p. 164), however, points out the importance of Article 27 ICCPR: where the ECRML addresses R/M language, focuses Article 27 on all minorities.

<sup>584</sup> The UN General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) (Article 1, 2(2) & 2(3)) on the one hand attributes to States the right to use their own language, on the other hand 'positively' requests States to provide for the promotion of ethnic, cultural, religious and linguistic identities. The case study does not discuss the UN Declaration on the Rights of Indigenous Peoples (2007) (art. 13, 14, 16) and the United Nations Declaration 47/135 of the General Assembly of the United Nations on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992).

<sup>585</sup> To mention: Document of the Second Meeting of the Conference on the Human Dimension of the CSCE; OSCE /HCNM, The Hague Recommendations regarding the Education Rights of National Minorities (1996) containing standards for the use of the language or languages of national minorities in the field of education; OSCE /HCNM, Oslo Recommendations regarding the Linguistic Rights of National Minorities (1998); OSCE /HCNM, Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999); Document of June 29, 1990 of the Copenhagen Meeting of the Conference of Human Dimension of the Conference on Security and Co-operation in Europe (par. 33 and 35). Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992). Guidelines on the use of minority languages in the broadcast media by the Organization for Security and Cooperation in Europe (OSCE) (2003).

<sup>586</sup> *X v Austria*, 10 October 1979, Commission, Application No. 8142/78, 10.10.1979, admissibility decision.

<sup>587</sup> Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights; Right to education (Updated on 30 April 2017).

<sup>588</sup> The Venice Commission 'agrees with the Assembly rapporteur that there is an unquestionable lacuna in the European Convention on Human Rights with regard to the special protection of the rights of linguistic minorities. Although Article 14 of the Convention together with Article 2 of the Additional Protocol does allow for some degree of protection in this area (cf. judgement of the European Court of Human Rights in the Belgian language case, judgement on the merits on 27 June 1968, Series A No. 6), the Convention does not explicitly guarantee any

The Framework Convention for the Protection of National Minorities (FCNM, ETS No. 157, in effect since 1997) (Article 5(1), 6, 8 and 10-15) sets out a spectrum of guarantees for national minorities, focusing on individual rights. Article 4 encourages Member States to introduce positive measures in favour of particularly disadvantaged minorities.<sup>589</sup> France has neither signed nor ratified the FCNM. Greece has only signed the convention, and the other countries in this survey have signed and ratified it.<sup>590</sup>

### Venice Commission

The Venice Commission recognises that the guarantee of teaching the mother tongue is the keystone of safeguarding and promoting the R/M language of a minority group, thus financial support by the state is necessary.<sup>591</sup> But the role of international organisations is limited according to the Venice Commission: the ECRML is functioning "within the framework of national sovereignty and territorial integrity".<sup>592</sup> On the other hand, "the obligation to use only the majority language in the public sphere, and the fact that education is conducted in that language, may arguably be considered discriminatory".<sup>593</sup> A stipulation of knowledge of the country's official language in order to hold an appointment in the public administration might constitute a form of indirect discrimination against minorities.<sup>594</sup>

### Definitions

The qualification 'minority' in the ECRML refers to the language spoken by a numerical minority of the inhabitants of a state; the majority speaks the official language.<sup>595</sup> In this way, it was not necessary to arrive at a definition of 'minority'. Terminology that could lead to discussion was avoided, including names such as 'Volkgruppen', 'national minorities' and '*groupes ethniques*'.<sup>596</sup> Since dialects of an official language fall outside the scope of the ECRML, there can still be discussion about whether a language is a minority language or a dialect.

The terminology and definitions in the field of languages are highly debated. The term 'regional and lesser-used language' has been chosen by the European Parliament. Other terms could be 'linguistic minority' or 'minority language'.

Article 14 of the ECHR prohibits discrimination based on language, but this article is only applicable to individuals, and does not include language rights in areas such as the language of education or media in R/M languages. Nor does it include rules on the use of language by minorities as a collective, the so-called 'collective rights'.

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linguistic freedom; moreover, the case law of the bodies of the Convention does not appear to specify that such rights might derive from the right to freedom of expression (Article 10; see however the «Sadik Ahmet v Greece» case, currently pending before the Court), freedom of thought and conscience (Article 9) or Article 3 of Protocol No. 1 (cf. the «Mathieu-Mohin and Clerfayt v Belgium» case of 2 March 1987, Series A No. 113). Venice Commission Opinion on the provisions of the ECRML (CDL-INF(1996)003) §1.

<sup>589</sup> Opinion on Hungary, 22 September 2000, ACFC/INF/OP/I(2001)004, §4; Opinion on Croatia, 6 February 2002, ACFC/INF/OP/I(2002)003, §26; Opinion on the Czech Republic, 25 January 2002, ACFC/INF/OP/I(2002)002, §29.

<sup>590</sup> <http://www.coe.int/en/web/minorities/etats-partie>.

<sup>591</sup> Compilation of Venice Commission Opinions and Reports Concerning the Protection of National Minorities (CDL(2011)018) p. 16 & 20; Venice Commission Opinion on the provisions of the ECRML (CDL-INF(1996)003) §1; 2.1; Venice Commission, Summary report on participation of members of minorities in public life (CDL-MIN(1998)001rev) §2.1.

<sup>592</sup> Compilation of Venice Commission Opinions and Reports Concerning the Protection of National Minorities (CDL(2011)018) p. 16; Venice Commission Opinion on the provisions of the ECRML (CDL-INF(1996)003) §2.

<sup>593</sup> Compilation of Venice Commission Opinions and Reports Concerning the Protection of National Minorities (CDL(2011)018) p. 19; Venice Commission Opinion on the provisions of the ECRML (CDL-INF(1996)003) §1.1.

<sup>594</sup> Venice Commission, Summary report on participation of members of minorities in public life (CDL-MIN(1998)001rev) §1.2 A.

<sup>595</sup> P. Blair, *The protection of regional or minority languages in Europe* (Fribourg: Ed. Univ. Fribourg 1994) p. 56.

<sup>596</sup> F. Grin, *Kalmykia: From Oblivion to Reassertion?*, European centre for minority issues 2000, p. 17; P. Blair, *The protection of regional or minority languages in Europe* (Fribourg: Editions Univ. Fribourg 1994) p. 57.

## The EU's approach and its legal and policy frameworks on minority protection

In Article 2 of the TEU the general rule of respect for human rights and non-discrimination is codified. Article 3 states that the EU "shall respect its rich cultural and linguistic diversity". In the field of education, the EU fully respects cultural and linguistic diversity (Article 165(1) TFEU). Since the promotion of mobility and intercultural understanding is an important aim of the EU, it attributes to language learning a high priority. Multilingualism is a key factor for Europe's competitiveness. These aims lead to the 'three languages policy': European citizens should master in addition to their mother tongue two other languages (COM(2008) 0566). These may include a minority language. Van der Jeught observes that "the aim of achieving unity through language is lacking altogether in the EU".<sup>597</sup>

This 'respect' is a recent development; not all national languages of EU Member States have been accorded the status of official EU languages.<sup>598</sup> Irish was granted the status of a 'treaty language' at the time of accession (1973) but only became an official and working language in 2007.<sup>599</sup> In the years 2004–07 there was a temporary derogation from the obligation to draft acts in Maltese and to publish them in the *Official Journal of the European Union*.<sup>600</sup> Catalan, as spoken by millions of citizens, is not an EU Treaty language, whereas far less widely spoken languages, such as Maltese or Irish, do enjoy such status.<sup>601</sup>

A coherent framework is missing. Like in most national legislation, EU rules on language are "scattered about in numerous treaty provisions, regulations, directives rules of procedure and implicit practices".<sup>602</sup> Here the EU's core values, like language diversity and EU integration, clash. In a common market, it is easier for producers to sell products in a monolingual state, than in multi-lingual states. The category of 'easily understood languages' is introduced in EU legislation.

The EU supports two centres for research on languages, the European Centre for Modern Languages and the European Research Centre on Multilingualism and Language Learning (Mercator). The EU also launched a website for multilingualism in Europe, Poliglotti4.eu, promoting best practice in language policy and language learning.

A complex set of languages can be traced:<sup>603</sup>

- English as a lingua franca for transnational communication;
- EU official language status, depending on the 'Treaty languages' (Article 55(1) TEU). Every citizen of the EU has the right to write to any of the institutions or bodies of the EU in one of those languages and to receive an answer in the same language (Article 24 TFEU);
- national or 'official state' languages that are official in the whole territory of a Member State (Article 53 TEU, Article 44 ECFR and Article 20(d) TFEU);
- R/M languages across the EU that are official languages of the EU.<sup>604</sup> As above, every citizen of the EU has the right to write to any of the institutions or bodies of the EU

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<sup>597</sup> S. van der Jeught, *EU Language Law*, Groningen: Europa Law Publishing 2015, p. 263.

<sup>598</sup> These include Luxembourgish, an official language of Luxembourg since 1984, and Turkish, an official language of Cyprus. Act of adaptation of the terms of accession of the United Cyprus Republic to the EU (COM(2004) 189 fin.), Article 8 'Turkish shall be an official and working language of the institutions of the European Union.'

<sup>599</sup> Council Regulation (EC) No 920/2005. Irish has been temporarily derogated as a working language, until 2021 due to difficulty finding qualified translators. OP/B.3/CRI, Interinstitutional style guide, par. 7.2.4.

<sup>600</sup> Council Regulation (EC) No 930/2004 of 1 May 2004 (OJ L 169, 1.5.2004, p. 1).

<sup>601</sup> Individual Member States decide on the 'Treaty language', essential to get EU official language status.

<sup>602</sup> S. van der Jeught, *EU Language Law*, Groningen: Europa Law Publishing 2015, p. 264.

<sup>603</sup> G. Extra & D. Gorter (eds), *Multilingual Europe: Facts and policies*, Berlin: Mouton de Gruyter 2008; M. Nic Craith, *Europe and the Politics of Language*, Hampshire: Palgrave Macmillan 2006.

<sup>604</sup> In the judgement of the CJEU of 27 March 2014 on the use of language rules applicable to civil proceedings, the court decided that an EU national may not be placed in a less favourable position as nationals when the use of

in one of those languages and to receive an answer in the same language, pursuant to Article 24 TFEU;

- R/M languages across the EU;
- dialects of the 'official state' languages;
- immigrant minority languages across the EU that are an official language of the EU. Again, every citizen of the EU has the right to write to any of the institutions or bodies of the EU in one of those languages and to receive an answer in the same language (Article 24 TFEU); and
- immigrant minority languages across the EU.

The European Parliament Resolution of 11 September 2013 on endangered European languages and linguistic diversity in the European Union called on all Member States who have not yet done so to ratify and implement the ECRML. It also called on the Commission to propose concrete policy measures for the protection of endangered languages.<sup>605</sup>

### **EU Charter of Fundamental Rights (2000/2009)**

The Charter of Fundamental Rights (2000) prohibits discrimination on grounds of language (Article 21) and places an obligation on the Union to respect linguistic diversity (Article 22).

### **Case law of the Court of Justice of the European Union**

In the case *Anita Groener v Minister for Education and City of Dublin Vocational Education Committee* (Case 379/87), Groener was refused a permanent teaching post at a Dublin school since she did not speak Irish. Was this a restriction on her right to free movement of workers under TFEU Article 45? The Court of Justice of the European Union (CJEU) held that the language requirement was justifiable: "The EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is both the national language and the first official language."

### **EU Fundamental Rights Agency**

On the website of the EU Fundamental Rights Agency, under the tab of 'themes', regional and minority languages are not an issue of this EU institution, and further research on the keyword of R/M languages shows no involvement of this institution in these fundamental rights.<sup>606</sup> The Fundamental Rights Agency website is available in English, with most content also available in French and German.<sup>607</sup>

### **Roma rights**

The explanatory report of the ECRML explicitly calls for making Part II applicable to two non-territorial languages: Yiddish and the Romani and Sinti languages (para. 36). This leads to problematic situations, since in some countries the speakers of variants of these languages want them to be recognised.<sup>608</sup>

A second problem is more serious. The aim to reach a high level of protection in the menu in the field of education, for example to provide, within primary education, teaching of the R/M languages as an integral part of the curriculum (Article 8(b)(iii)), can lead to exclusion of

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languages is concerned, as was already decided in the case *Bickel and Franz* (C-274/96, para. 20): "a citizen of the European Union, who is a national of a Member State other than the Member State concerned, is entitled, in criminal proceedings, to rely on language rules such as those at issue in the main proceedings on the same basis as the nationals of the latter Member State, and, therefore, may address the court seised in one of the languages provided for by those rules". Grauel Rüffer, C-322/13, ECLI:EU:C:2014:189; see also: ECLI:EU:C:2012:456 and the Opinion AG Fennelly, Case C-334/94 (16 Nov. 1995).

<sup>605</sup> (2013/2007(INI)) (2016/C 093/07).

<sup>606</sup> <http://fra.europa.eu/en/themes>

<sup>607</sup> [http://fra.europa.eu/sites/default/files/fra\\_uploads/fra\\_online\\_language\\_policy\\_0.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/fra_online_language_policy_0.pdf).

<sup>608</sup> In the 5th monitoring cycle of the ECRML, the speakers of the Kalé variant of the Romani languages, having a presence in Sweden since the 16th century, asked for steps to protect and promote specially Kalé as a traditionally used variety. Moreover, Kalé is not mutually intelligible with other varieties of Romani spoken in Sweden. In a similar way, the 'Resande' (Travellers) asked for steps to promote Swedish Romani.

groups, when the overall level of education at such schools is of a lower level than other schools, and integrative goals in the child's best interest are lacking.<sup>609</sup> The difficulty of balancing inclusion duties and human rights on the one hand,<sup>610</sup> and language rights on the other is shown in a report on discrimination of Roma children in education, published by the EU, which does not mention state duties on language rights in the ECRML.<sup>611</sup> For the Romanian government, the Advisory Committee on the FCNM recommended integrating all Roma pupils fully into mainstream education, but also promoting education to preserve their culture and language.<sup>612</sup> Summing up, the issue of Roma has two aspects in this context: First, is the protection of Roma against racial segregation in the education system that is justified as language-based and results in the placement of Roma into 'special schools' or 'special classes' in which the curriculum is substandard (reduced) compared with the regular school curriculum.<sup>613</sup> The second aspect is protection of the right of Roma to study the Roma language. The exclusion of the Roma language from education as a result of inadequate conditions provided by the state for the teaching of the Roma language is also a result of the marginalised position of Roma in society.

### **Muslim communities of different statuses**

In Italy, in a recent 'pact' with the Muslim community (January 2017), mosques agreed to use only Italian, rules apparently also applicable to language minorities like the Albanians. It is not clear to what extent other religious services are involved; it seems German-language Lutheran churches in Italy always have an Italian version of the sermon available.

### **Copenhagen criterion**

Ratification of the ECRML is one of the conditions required by EU institutions for EU membership – prospective members must introduce a high level of protection of minority languages. But for the pre-Copenhagen criterion, Member States' minority language policy is left completely to national discretion. In 2006 MEP Csaba Tabajdi pointed at the 'double standards', with the level of the direct protection of the rights of minorities in the new Member States being higher than in the 'old' EU of 15.<sup>614</sup>

## **A2.2. Country-specific review**

**Estonia:** The language situation in Estonia is influenced by the long Russian occupation of the country. During that period, many Russians emigrated to the country, but were not obliged to learn the language. After the fall of the iron curtain, Estonia developed a policy to revive the Estonian language. Estonia has not signed the ECRML. Estonia has signed and ratified the FCNM.<sup>615</sup>

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<sup>609</sup> See (about the over-representation of Roma children in special schools due to the systematic misdiagnosis of mental disability) on the need to prevent segregation the ECHR: *Horvath and Kiss v Hungary*. See also: Recommendation of the Committee of Ministers to member states on the education of Roma and Travellers in Europe (CM/Rec(2009)4).

<sup>610</sup> See for example also: Venice Commission Opinion on the Draft Law on Languages in Ukraine (CDL-AD(2011)008) §§95-96.

<sup>611</sup> Lilla Farkas, *Report on discrimination of Roma children in education*, European Commission, Directorate-General for Justice, 2014, specially p. 52-53, where only the UN Convention on the Rights of the Child providing the right to education and the use of minority languages, is mentioned.

<sup>612</sup> Report of the Advisory Committee on the FCNM, 4rd Opinion on Romania (ACFC/SR/IV(2016)002) p. 43.

<sup>613</sup> The most important cases in this respect, brought before the ECtHR are *D.H. and Others v the Czech Republic* (Grand chamber judgement, Application no. 57325/00), *Orsus and Others v Croatia* (Grand chamber judgement, Application no.15766/03) and *Horvath and Kiss v Hungary* (Application no. 11146/11), concerning the segregation of Roma children in separate schools/classes on the pretext, among others, of insufficient command of the respective national languages.

<sup>614</sup> MEP Csaba Tabajdi, President of the Intergroup for Traditional National Minorities, Constitutional Regions, and Regional Languages, Strasbourg, 16th of November 2006.

<sup>615</sup> <http://www.coe.int/en/web/minorities/etats-partie>

The purpose of the Estonian Language Act (2011) is to develop, preserve and protect the Estonian language and ensure the use of the Estonian language as the main language for communication in all spheres of public life. It says it is important to protect all Estonian R/M languages.<sup>616</sup> Any language other than Estonian is a 'foreign language', including the language of national minorities, and the use of these languages shall be ensured in compliance with other acts and international agreements. The Language Act also contains a high level of protection for sign language.

The Advisory Committee on the FCNM urged the country to implement the Estonian Language Act "in a flexible way, taking into account the linguistic rights of persons belonging to national minorities; refrain from imposing fines for violations of the Language Act and replace the penalising approach with a policy of positive incentives".<sup>617</sup> The Estonian Language Inspectorate, in charge of enforcing the Language Act of 2011, has for example the power to terminate the employment contracts of employees who do not fulfil certain standards of knowledge of the Estonian language.<sup>618</sup>

The Estonian educational reform resulted in discontinuing the Soviet schooling system. Prior to 2007, speakers of the 'foreign' (de facto Russian) language could graduate from high schools without any knowledge of the state language. Now at least 40% of the curriculum has to be taught in the state languages. Tertiary education has been in Estonian since the end of the 1990s. Some education is offered in Voru.<sup>619</sup> The Advisory Committee on the FCNM noted that it is necessary to come to a strategy pursuant to Article 3 of the FCNM for collecting census data on citizens belonging to a minority.<sup>620</sup>

**Finland:** Finnish language laws set high standards of protection and promotion of R/M languages, but their implementation in practice seems to be deficient in a number of cases.<sup>621</sup> A structural reaction of the Finnish government to the recommendations of the Committee of Ministers with regard to the Charter is lacking, no new legislation or policy has been developed after several recommendations and there is no current system for compliance.<sup>622</sup>

The same problem can be traced in the recommendations of the Committee of Experts. The Finnish authorities presented their 4<sup>th</sup> three-yearly report on 30 September 2010, effectively 18 months after it was due, stating that this was because of slow reactions on the part of the minority-language-speaker NGOs asked to participate in the process of drafting the report.<sup>623</sup> The Finnish Periodical Report of the 5<sup>th</sup> monitoring cycle was due on 1 March 2011. No reports have been delivered by the Finnish government since the 4<sup>th</sup> report. It seems a system to enforce compliance in relation to the monitoring of the ECRML is missing.

Finland has signed and ratified the FCNM.<sup>624</sup> According to the Advisory Committee on the FCNM in their more recent report on Finland, the situation of the Swedish language in Finnish society is deteriorating, and awareness is growing of the insufficient implementation of existing legal guarantees in the field of education, in access to welfare and health services and in public administration in general to achieve a sustainably bilingual Finland.<sup>625</sup>

<sup>616</sup> <https://www.riigiteataja.ee/en/eli/506112013016/>

<sup>617</sup> Report of the Advisory Committee on the FCNM, 4rd Opinion on Estonia (ACFC/OP/IV(2015)002) p. 2 & 18-20.

<sup>618</sup> Report of the Advisory Committee on the FCNM, 4rd Opinion on Estonia (ACFC/OP/IV(2015)002) p. 5-6.

<sup>619</sup> G. Extra & K. Yagmur, *Language rich Europe* (Cambridge: Cambridge University Press 2012) p.31.

<sup>620</sup> Report of the Advisory Committee on the FCNM, 4rd Opinion on Estonia (ACFC/OP/IV(2015)002) p. 9.

<sup>621</sup> Report of the Committee of Experts on the Charter, 2st monitoring cycle, Finland (ECRML (2004) 7) p. 52.

<sup>622</sup> Only on one out of 5 recommendations, progress was made. Report of the Committee of Experts on the Charter, 4th monitoring cycle, Finland (ECRML (2012) 1), p. 8.

<sup>623</sup> Report of the Committee of Experts on the Charter, 4th monitoring cycle, Finland (ECRML (2012) 1), p. 4, 6.

<sup>624</sup> <http://www.coe.int/en/web/minorities/etats-partie>

<sup>625</sup> Report of the Advisory Committee on the FCNM, 4rd Opinion on Finland (ACFC/OP/IV(2016)002) p. 2, 4, 6, 7 & 23.

Providing up-to-date, accurate and reliable figures of the number of minority language speakers (Roma and Russian) was a problem for the Finnish government in their 4<sup>th</sup> periodical ECRML report.<sup>626</sup> The Advisory Committee on the FCNM, in its 4<sup>th</sup> Opinion on Finland, mentions the Estonian language as a minority language that needs attention and support.<sup>627</sup> Quite artificial categories had to be created to separate 'old Russians' from 'new Russians'<sup>628</sup> who are more recent migrants, and the Ingrian returnees.<sup>629</sup> The territorial revision of the municipal and other administrative entities seems to be a process that cannot be stopped, influencing the official languages used in bilingual municipalities, despite the rules in Article 7.1(b) of the ECRML.<sup>630</sup>

A citizens' initiative to abolish mandatory Swedish in schools was rejected by the Finnish parliament with an overwhelming majority in 2015. At that same time, a motion to allow Russian to be taught instead of Swedish in eastern Finland won narrow approval.<sup>631</sup>

**France:** France has declared that Article 27 ICCPR is not applicable to the French Republic, due to Article 2 of the French constitution. Following this declaration, the Human Rights Committee dismissed a case brought by speakers of the Breton language, when they claimed that the legal restrictions on using Breton in their contacts with an administrative tribunal were a violation of Article 27 ICCPR.<sup>632</sup> France has neither signed nor ratified the FCNM.<sup>633</sup>

France has signed the ECRML but has not ratified it yet. A strict interpretation of the principles of equality in France blocked the ratification of the ECRML. In 1992 new provisions of Article 2 were added to the constitution, stating that the language of the Republic shall be French. In 1999 the Constitutional Council decided (Decision No. 99-412, 15 June 1999) that the ECRML could not be ratified by France, due to its incompatibility with the French constitution.<sup>634</sup>

In the process of signing the ECRML, France investigated in-depth the position of the languages spoken in France. For the French government, the constitutional principle is that the French state (including the DOM/TOM regions) is one and indivisible; the ECRML prohibits territorial reservations, and as such must be applicable in the whole of France, on all parts of its territory. In the process of ratification, Bernard Poignant, mayor of Quimper prepared a document for the French parliament. In addition to a number of R/M languages spoken in France, like Dutch in the Département du Nord, Poignant also included in the list of languages to be protected under the ECRML the Creole languages spoken in Guyana, Guadeloupe, Martinique and Réunion.<sup>635</sup> The diversity of languages of France to be protected under the ECRML is also listed in a report prepared by Bernard Cerquiglini. His report on R/M languages in France lists 75 languages spoken in France within the scope of the definition of Article 1 of

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<sup>626</sup> Report of the Committee of Experts on the Charter, 4th monitoring cycle, Finland (ECRML (2012) 1), p. 5.

<sup>627</sup> Report of the Advisory Committee on the FCNM, 4rd Opinion on Finland (ACFC/OP/IV(2016)002) p. 7.

<sup>628</sup> Report of the Committee of Experts on the Charter, 1st monitoring cycle, Finland (ECRML (2001)3) par. 14.

<sup>629</sup> Report of the Committee of Experts on the Charter, 2st monitoring cycle, Finland (ECRML (2004) 7) par. 15; Mia Halonen and others, *Language policies in Finland and Sweden: interdisciplinary and multi-sited comparisons* (Bristol & Buffalo: Multilingual Matters, [2015]) p. 99; Jan Blommaert (e.a ed.), *Dangerous multilingualism: northern perspectives on order, purity and normality*, New York: Palgrave Macmillan, 2012.

<sup>630</sup> Report of the Committee of Experts on the Charter, 4th monitoring cycle, Finland (ECRML (2012) 1).

<sup>631</sup> <https://www.thelocal.se/20150306/finland-mps-vote-to-keep-swedish-in-schools>.

<sup>632</sup> M.K. v France, Communication 222/1987, views of 9 November 1989, (1990).

<sup>633</sup> <http://www.coe.int/en/web/minorities/etats-partie>.

<sup>634</sup> F. Benoît Romer, 'Les langues officieuses de la France', *Revue française de droit constitutionnel* (2001) 45.

<sup>635</sup> Bernard Poignant, *Langues Et Cultures Regionales, Rapport de M. Bernard Poignant, Maire de Quimper, A M. Lionel Jospin, Premier Ministre*, 1er juillet 1998.



the ECRML, languages to which Part II of the ECRML applies, and in some cases languages that are eligible for protection under Part III.<sup>636</sup>

**Greece:** Greece has not ratified the ECRML due to constitutional restrictions. Legislation in Greece states that it is important to protect languages, without mentioning specific R/M languages. Data on R/M language users are not collected in Greece.<sup>637</sup> In Greece, the following R/M languages are used: Pomakika (an eastern Slavic dialect), Romany, Turkish (in the region of Thrace), Vlachika (a Romance dialect of the Wallachian minority), several Slavic dialects in the region of Macedonia, Arvanitika (an Albanian variety), Pontiaka (an Old Greek dialect) and immigrant workers' languages.<sup>638</sup>

Since the Treaty of Lausanne (1923) on the 'exchange' of Greek and Turkish populations, neither Greece nor Turkey recognise the existence of ethnic minorities in their country, only the Muslim inhabitants of Western Thrace are recognised as a religious minority. For example, there are some schools in the Thracian region where Turkish is a subject at school, but this is only to assist the Muslim minorities in this region.<sup>639</sup> In the Thracian region many Roma belong to the Muslim minority. No education is offered in other R/M languages in Greece.<sup>640</sup> Greece has only signed the FCNM.<sup>641</sup>

**Hungary:** The Hungarian constitution of 2011 states that Hungarian is the national language. Thirteen R/M languages are recognised in Hungary (Law LXXVII, 1993): Armenian, Bulgarian, Croatian, German, Greece, Romani and Boiyash, Rumanian, Ruthenian, Serbian, Slovak, Slovenian and Ukrainian. The country has special legislation for the Hungarian sign language. The ECRML is applicable to the Croatian, German, Rumanian, Serbian, Slovak and Slovenian languages. In 2008 Romani and Boiyash were added.

There is a gap between rights and reality. Despite legislation, the use of these languages in administration and the courts remains an exception.<sup>642</sup> Notably, however, television programmes and theatre productions in R/M language are widely available in Hungary. The way data were collected in Hungary on the languages of minorities was criticised by the Committee of Experts.<sup>643</sup> Institutional discrimination is engendered by the government by not making data on minority languages accessible. Hungary has signed and ratified the FCNM.<sup>644</sup>

**Italy:** Before the unification of the peninsula in 1861 Italy was a country with a large variety of R/M languages. The political unification entailed a strong tendency towards language unification, and Italian became the standard language.

Italy has signed and ratified the FCNM.<sup>645</sup> Italy signed the ECRML in 2000 but has not yet ratified it. In 2015, Mara Bizzotto proposed a motion in the European Parliament for a resolution on Italy's ratification of the ECRML.<sup>646</sup> The languages protected in Italy by the law

<sup>636</sup> Bernard Cerquiglini, *Les Langues De La France*, Rapport au Ministre de l'Education Nationale, de la Recherche et de la Technologie, et à la Ministre de la Culture et de la Communication, Avril 1999.

<sup>637</sup> G. Extra & K. Yagmur, *Language rich Europe* (Cambridge: Cambridge University Press 2012) p. 31.

<sup>638</sup> A. Kiliari, 'Sprachliche Heterogenitat im griechischen Sprachraum', *Sociolinguistica* 16 (2002) p. 110-117.

<sup>639</sup> G. Extra & K. Yagmur, *Language rich Europe* (Cambridge: Cambridge University Press 2012) p. 137.

<sup>640</sup> G. Extra & K. Yagmur, *Language rich Europe* (Cambridge: Cambridge University Press 2012) p. 31.

<sup>641</sup> <http://www.coe.int/en/web/minorities/etats-partie>

<sup>642</sup> Report of the Committee of Experts on the Charter, 6th monitoring cycle, Hungary, (ECRML (2016) 6) p. 4, 9. Report of the Advisory Committee on the FCNM, 4rd Opinion on Hungary (ACFC/OP/IV(2016)003) p. 2, 33-34.

<sup>643</sup> Report of the Committee of Experts on the Charter, 6th monitoring cycle, Hungary, (ECRML (2016) 6) p. 7. See also: Report of the Advisory Committee on the FCNM, 4rd Opinion on Hungary (ACFC/OP/IV(2016)003) p. 12.

<sup>644</sup> <http://www.coe.int/en/web/minorities/etats-partie>

<sup>645</sup> <http://www.coe.int/en/web/minorities/etats-partie>

<sup>646</sup> European Parliament, 19.6.2015, B8-0653/2015.

on the protection of historical linguistic minorities, *Norme in materia di tutela delle minoranze linguistiche storiche* (482/1999) are Catalan, Occitan, Albanian/Arberesh, German, Greek, Slovene, Croatian, French, Franco-Provençal, Friulian, Ladin and Sardinian. Furthermore, there are several regions with a statute of autonomy.<sup>647</sup>

The Advisory Committee on the FCNM was of the opinion that ratification of the ECRML would be of great benefit for R/M language speakers outside the regions with a statute of autonomy.<sup>648</sup> There is education in R/M languages in the schools in the regions where these languages are spoken.<sup>649</sup> The definitions in the law on the protection of historical linguistic minorities defines the minorities so strictly that certain small minorities are excluded. The Advisory Committee on the FCNM recommended that the Italian government ought to provide adequate funding for teaching of and in national minority languages and to ensure appropriate provision of qualified teachers and textbooks.<sup>650</sup>

The languages of the Romani and Sinti are excluded from the list of historical linguistic minorities and Roma children have no access to learning their languages.<sup>651</sup> Data on R/M language speakers are not collected in Italy.<sup>652</sup>

The problem in Italy is that the definition of R/M languages in the ECRML is that they are not a dialect of the official language. Italian is a dialect of Latin, like most of the other R/M languages on the peninsula, but these R/M languages are not a dialect of the Florentine version that was the origin of modern Italian.<sup>653</sup> The Italian government will not make the ECRML applicable for Piedmontese.<sup>654</sup> The Advisory Committee on the FCNM called for special attention of the Italian authorities to review the legislative and administrative provisions concerning the right to use surnames and first names in official documents in minority languages.<sup>655</sup>

**Romania:** In Romania, 20 different minorities are recognised. The biggest group are the Hungarians (6.6%), constituting in some municipalities over 20% of the inhabitants. The Roma form the second group, with 2.5%. Romania signed the ECRML in 2007, recognising under Part II Albanian, Armenian, Greece, Italian, Macedonian, Polish, Romani, Ruthenian, Tartar and Yiddish. Under Part III, these languages are protected: Bulgarian, Czech, Croatian, German, Hungarian, Russian, Serb, Slovak, Turkish and Ukrainian. There is no protection for the Aromanian and Hungarian Csango communities.<sup>656</sup>

The Committee of Experts on the ECRML is positive about the initiatives Romania has undertaken in providing an infrastructure for minority language education and culture.<sup>657</sup> The use of minority languages in relations with public authorities is guaranteed by the Romanian constitution and Law No. 215/2001. A threshold is that the minority population must exceed

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<sup>647</sup> For example Valle d'Aosta/Vallée d'Aoste, Friuli Venezia Giulia and Trentino-Alto Adige/Südtirol.

<sup>648</sup> Report of the Advisory Committee on the FCNM, 4rd Opinion on Italy (ACFC/OP/IV(2015)006) p. 5 & 10.

<sup>649</sup> G. Extra & K. Yagmur, *Language rich Europe* (Cambridge: Cambridge University Press 2012) p. 152.

<sup>650</sup> Report of the Advisory Committee on the FCNM, 4rd Opinion on Italy (ACFC/OP/IV(2015)006) p. 2.

<sup>651</sup> Report of the Advisory Committee on the FCNM, 4rd Opinion on Italy (ACFC/OP/IV(2015)006) p. 8; Anna Bogaro, 'Illy, "fare unioni di province"', *Int*, 5. (2003) p. 8

<sup>652</sup> Report of the Advisory Committee on the FCNM, 4rd Opinion on Italy (ACFC/OP/IV(2015)006) p. 8 & 11-12; G. Extra & K. Yagmur, *Language rich Europe* (Cambridge: Cambridge University Press 2012) p. 152.

<sup>653</sup> Paolo Coluzzi, *Regional and Minority Languages in Italy*, Mercator-CIEMEN Working Papers 14.

<sup>654</sup> The Italian Constitutional Court overturned in 2010 a regional law that sought to protect Piedmontese. The judges considered that Piedmontese 'is a dialect' and thus cannot be protected in a similar way to Occitan, Francoprovençal or German, languages that are also spoken in Piedmont.

<sup>655</sup> Report of the Advisory Committee on the FCNM, 4rd Opinion on Italy (ACFC/OP/IV(2015)006) p. 24.

<sup>656</sup> Report of the Advisory Committee on the FCNM, 4rd Opinion on Romania (ACFC/SR/IV(2016)002) p. 12 & 15.

<sup>657</sup> Report of the Committee of Experts on the Charter, 1st monitoring cycle, Romania, (ECRML (2012) 3) p. 159.

20% of the population.<sup>658</sup> Hungarian is used in the municipalities of Lugasu De Jos and Apa. Romani is used in Catane, Ticvanu Mare, Gruia and Cotofenii Din Fata.<sup>659</sup>

The Charter entered into force in Romania on 1 May 2008, yet so far only the first report of the Committee of Experts and the second periodical state report by Romania are available.<sup>660</sup> Romania has signed and ratified the FCNM.<sup>661</sup>

The National Council for Combating Discrimination is dealing with the language-related petitions of citizens.<sup>662</sup> Detailed data are available on the number of court cases in civil and penal matters where a minority language was used, and on the number of civil servants who are able to use a minority language.<sup>663</sup>

**Serbia:** Serbia, in its Declaration contained in the instrument of ratification deposited on 15 February 2006, made the same set of provisions from Part III of the ECRML applicable to the Albanian, Bosnian, Bulgarian, Hungarian, Romani, Romanian, Ruthenian, Slovakian, Ukrainian and Croatian languages. This neglects the 'sliding-scale' system of the ECRML to find the protection level the closest to the actual situation and size of the population speaking the language – for instance a higher level for a language spoken by 138,871 Bosnian mother-tongue speakers than for 1,909 Ukrainian-language speakers.<sup>664</sup>

The 'threshold rules' applied in several countries have been criticised. According to the Serbian Law on the Protection of the Rights and Freedoms of National Minorities (Article 11), a minority language and its script can be introduced into official use; this is compulsory if a national minority accounts for 15% of the population of a municipality. Some municipalities use a lower threshold. The Committee of Experts urged the Serbian government to make the use of minority languages possible in "sufficient numbers".<sup>665</sup>

The high goals of Serbian government in the politics over language, for example in the field of education, are hindered by a lack of financial means.<sup>666</sup> Serbia has signed and ratified the FCNM.<sup>667</sup> The Advisory Committee on the FCNM noted a lack of political will to apply the paragraphs on education in R/M languages in the 2009 Law on National Councils of National Minorities at the local level in some cases, and continued resistance in this respect by some school principals.<sup>668</sup>

**Slovakia:** Shortly after the political turnover of 1989, the Slovak parliament adopted in 1990 a law on the official language. According to this law, Slovak was the only official language. The 1992 constitution stated the following in Article 6, item (1): "The Slovak language is the official language of the Slovak Republic."<sup>669</sup> The 1990 law on the official language indicated

<sup>658</sup> The rigid application of these thresholds is disputed by the Advisory Committee on the FCNM: Thematic Commentary No. 3, The Language Rights of Persons Belonging to National Minorities under the Framework Convention (ACFC/44DOC(2012)001 rev) par. 55-58. Report of the Committee of Experts on the Charter, 1st monitoring cycle, Romania, (ECRML (2012) 3) p. 159.

<sup>659</sup> State Periodical Report, 2nd monitoring cycle, Romania (MIN-LANG (2016) PR 2) p. 13.

<sup>660</sup> Report of the Committee of Experts on the Charter, 1st monitoring cycle, Romania, (ECRML (2012) 3) and the State Periodical Report, 2nd monitoring cycle, Romania (MIN-LANG (2016) PR 2).

<sup>661</sup> <http://www.coe.int/en/web/minorities/etats-partie>

<sup>662</sup> The Council received 10 petitions in on language 2011, 43 in 2012 and 38 in 2013. Report of the Advisory Committee on the FCNM, 4rd Opinion on Romania (ACFC/SR/IV(2016)002) p. 17.

<sup>663</sup> Report of the Advisory Committee on the FCNM, 4rd Opinion on Romania (ACFC/SR/IV(2016)002) p. 40.

<sup>664</sup> 3rd periodical report on the implementation of the ECRML in the Republic of Serbia (MIN-LANG (2015) PR 1) p. 14-16.

<sup>665</sup> Report of the Committee of Experts on the Charter, 3th monitoring cycle, Serbia (ECRML (2016) 1) p. 6.

<sup>666</sup> Report of the Committee of Experts on the Charter, 3th monitoring cycle, Serbia (ECRML (2016) 1) p. 7, 9.

<sup>667</sup> <http://www.coe.int/en/web/minorities/etats-partie>

<sup>668</sup> Report of the Advisory Committee on the FCNM, 3rd Opinion on Serbia (ACFC/OP/III(2013)006) p. 9 & 41.

<sup>669</sup> [www.concourt.sk](http://www.concourt.sk)

that all official documents must be published in Slovak. The Venice Commission stated that such measures might be legitimate to promote unity in newly formed states.<sup>670</sup> The minorities could use their language in contact with authorities only in municipalities where they constituted at least 20% of the population.<sup>671</sup>

The Law on State Language (Law No. 270 of 1995, replacing the 1990 law) prescribes the use of Slovak in all public domains.<sup>672</sup> The restriction set upon minority languages in the Law on State Language led to international protest, including by the CoE, and the intervention of the OSCE High Commissioner on National Minorities.<sup>673</sup> In a series of bilateral treaties with neighbouring countries, the rights of minorities are mentioned.<sup>674</sup> The Slovak Republic is a member state of the Central European Initiative (CEI). It signed the CEI Instrument for the protection of minority rights (1994).

The Slovak Republic signed the ECRML in 2001. The R/M languages in Slovakia are Hungarian, Ruthenian, Ukrainian, Romani, German, Czech, Bulgarian, Croatian, Polish, Russian and Serbian. Since 2004, the Slovak Republic has been a Member State of the EU.

A problem is that language rights are dispersed in all kinds of laws alongside the Slovak State Language Act, including the Act on the use of national minority languages (No. 184 of 1999) and the Act on denomination of communities in the language of national minorities (No. 191 of 1994). The first monitoring cycle of the ECRML mentions 45 laws.<sup>675</sup>

The way the Committee of Experts is conducting its work has been criticised by the Slovak government. An example relates to this Committee note:

Cases have been reported to the Committee of Experts where local authorities have been requested to take down multilingual touristic signs or post office employees were forbidden to use Hungarian. Such situations clearly go against the ECRML's principles to facilitate and encourage the use of minority languages in all domains of public life". (Section 54, 4<sup>th</sup> monitoring cycle)

According to the government, no such ban exists (Appendix II: Comments from the Slovak authorities). In the same way, the Slovak authorities have questioned other statements in the report without "verifying (...) truthfulness" and making "vague and unidentifiable claims". The approach involving 'hearsay' without the burden of proof makes the Committee vulnerable.

The Slovak Republic has signed and ratified the FCNM.<sup>676</sup> The Advisory Committee on the FCNM noted the following: "Some incidents of harassment based on the use of minority languages, mainly Hungarian, in public have been reported."<sup>677</sup> Although the Slovak Republic has made efforts in designated municipalities to accommodate requests made by citizens

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<sup>670</sup> Venice Commission, Opinion on the Act on the State Language of the Slovak Republic (CDL-AD(2010)035) §§40-45, 47, 53, 57, 134.

<sup>671</sup> A reduction of the threshold to 15% is provided for in the law but will take effect in 2021 at the earliest. Report of the Advisory Committee on the FCNM, 4rd Opinion on the Slovak Republic (ACFC/OP/IV(2014)004) p. 5 & 19.

<sup>672</sup> In English at <http://www.gramma.sk>, under the tab 'Language Policy, Linguistic Rights and Wrongs'.

<sup>673</sup> Opinion of the OSCE High Commissioner on National Minorities on amendments to the "Law on the State Language of the Slovak Republic", The Hague, 22 July 2009; OSCE High Commissioner for National Minorities to the Minister for Foreign Affairs of the Slovak Republic, 23 October 1995, REF. HC/9/95; Barbora. Moormann-Kimáková, *Language-related Conflicts in Multinational and Multi-ethnic Settings: Success and Failure of Language Regimes* (Berlin: Springer 2016) p. 193 ff.

<sup>674</sup> Bilateral treaties are concluded by the Slovak Republic (or by Czechoslovakia) with the Polish Republic, the Federal Republic of Germany, the Republic of Hungary, the Ukrainian Republic, and the Czech Republic.

<sup>675</sup> Language legislation is collected at <http://www.gramma.sk>.

<sup>676</sup> <http://www.coe.int/en/web/minorities/etats-partie>.

<sup>677</sup> Report of the Advisory Committee on the FCNM, 4rd Opinion on the Slovak Republic (ACFC/OP/IV(2014)004) p. 14.

belonging to national minorities in minority languages, de facto the number of staff with adequate language proficiency is still limited.<sup>678</sup>

**Spain:** The Spanish constitution deals with linguistic rights. To stress the unity of the country, “Castilian is the official Spanish language of the State”, and “all Spaniards have a right and duty to use it”. However, “other Spanish languages will be official in the respective Autonomous Communities in accordance with their statutes”. According to the 2011 census, 34% of the inhabitants of Spain are at least bilingual. Under the ECRML, 12 R/M languages are recognised. In Spain, the responsibility for the application of the ECRML falls under both the responsibility of the central government and regional authorities.<sup>679</sup>

In Spain, the legislation on the right to have proceedings in the R/M language before judicial and state administration bodies has not been changed in the past years, despite the recommendations made by the Committee of Ministers.<sup>680</sup> Even when institutionalised discrimination in the law is changed in a positive way in new legislation, the government is not willing to spend financial or human resources to meet the objectives of the law.<sup>681</sup>

Upon ratification of the ECRML by Spain, the Berber language as spoken in Melilla and Arabic as spoken in Ceuta were not included.<sup>682</sup> During the 2<sup>nd</sup> monitoring cycle, specific attention was recommended by the Committee of Experts for Tamazight (Berber) as spoken in Melilla.<sup>683</sup> Although the Spanish report on the implementation of the ECRML indicated that these languages are considered to be within the scope of Part II of the ECRML, this statement was not enough for the Council of Ministers. Since 1 August 2001, the Berber language has effectively been a territorial language under Part II of the ECRML. In the third report of Spain on the implementation of the ECRML, the efforts of the Spanish government on behalf of Tamazight in Melilla and the Dariya language in Ceuta (a shift of terminology for the same languages mentioned before) are evaluated and discussed.<sup>684</sup> The most recent recommendation of the Committee of Ministers on the application of the ECRML by Spain is developing this line further.<sup>685</sup> Spain has signed and ratified the FCNM.<sup>686</sup>

**Sweden:** Sweden signed and ratified the ECRML on 9 February 2000. In Sweden, the Sami, Finnish and Meänkieli languages are R/M languages, protected under Part III of the ECRML. Sweden also identified Romani Chib and Yiddish as non-territorial languages spoken in Sweden. The ‘Sami’ languages are recognised as R/M languages, and protected under Part III of the ECRML. After ratification of the FCNM<sup>687</sup> and the ECRML, Sweden introduced two new laws. The Act on National Minorities and National Minority Languages (2009:724) tries to protect those national minorities that have inhabited Sweden for a very long time. Thus, their languages and cultures are part of the Swedish national heritage. The Swedish Language Act (2009:600) declares Swedish to be the principal language in Sweden. The Act also gives special recognition to the R/M languages as mentioned in the ECRML, and to sign language.

<sup>678</sup> Report of the Advisory Committee on the FCNM, 4<sup>rd</sup> Opinion on the Slovak Republic (ACFC/OP/IV(2014)004) p. 20.

<sup>679</sup> Report of the Committee of Experts on the Charter, 4<sup>th</sup> monitoring cycle, Spain (ECRML (2016) 7) p. 11.

<sup>680</sup> Report of the Committee of Experts on the Charter, 4<sup>th</sup> monitoring cycle, Spain (ECRML (2016) 7).

<sup>681</sup> Report of the Committee of Experts on the Charter, 4<sup>th</sup> monitoring cycle, Spain (ECRML (2016) 7).

<sup>682</sup> Report of the Committee of Experts on the Charter, Initial monitoring cycle, Spain (ECRML (2005) 4).

<sup>683</sup> Recommendations of the Committee of Experts, 2<sup>nd</sup> monitoring cycle, Spain (ECRML (2008) 5) Also: A. Nogueira Lopez ea. ed., *Shaping Language Rights – Commentary on the European Charter for Regional or Minority Languages in Light of the Committee of Experts’ Evaluation* (Strasbourg: CoE 2012) p. 57, 63, 128.

<sup>684</sup> Cuarto Informe Sobre El Cumplimiento En España De La Carta Europea De Las Lenguas Regionales O Minoritarias, Del Consejo De Europa, 2010–2013, <http://www.coe.int/>.

<sup>685</sup> Recommendation CM/RecChL(2016)1 on the application of the European Charter for Regional or Minority Languages by Spain (Adopted by the Committee of Ministers on 20 January 2016).

<sup>686</sup> <http://www.coe.int/en/web/minorities/etats-partie>.

<sup>687</sup> <http://www.coe.int/en/web/minorities/etats-partie>.

Only 'some progress' has been made by the Swedish government on the recommendations of the Committee of Ministers.<sup>688</sup> There is a gap between rights and reality. Despite the Swedish Minority Act, the use of minority languages in the courts remains an exception.<sup>689</sup> Even when previous institutionalised discrimination in the law has been changed in new legislation, the government has not been willing to spend financial or human resources to achieve the objectives of the law.<sup>690</sup> Sweden has taken away legal barriers that hindered the access of children belonging to national minorities to teaching in and of their minority language, but teachers are not available and the process develops slowly, according to stakeholders.<sup>691</sup> Another field of attention is the lack of sufficient elderly care in minority languages (which is important since people with dementia tend to be able to use only their mother tongue).<sup>692</sup>

Data concerning the number of users of R/M languages in Sweden are lacking. In its third evaluation report (paras 9-10), the Committee of Experts urged the Swedish authorities to take pragmatic steps to collect reliable data. In the fifth periodical report, the Swedish authorities stated that Sweden does not gather official statistics on the number of people belonging to an ethnic group, since it is against the constitution and the Swedish Personal Data Act to track ethnicity, and in their view the methods of calculating are neither ethically acceptable nor scientifically reliable.<sup>693</sup> The fact that a minority language is an official language of the EU does not improve the position of the language (in the case of Finnish in Sweden).<sup>694</sup>

### A2.3. Key findings

In the field of linguistic rights, there are no comprehensive standards or protection mechanisms for monitoring in the EU. There is no access to justice for minority language-related issues.

The Minority SafePack, a European citizens' initiative from 2017, demands that the EU adopt a systematic approach in its language and culture policy,<sup>695</sup> on the one hand by learning from best practices from all around Europe, and on the other hand by making use of the knowledge that has been gathered by the specialised bodies of the CoE, like the secretariat of the ECRML.<sup>696</sup> The Minority SafePack wants the project on Language Diversity Centres – establishments to raise awareness of the importance of linguistic diversity and language learning – to be taken up again.

The three-year monitoring cycle of the ECRML is too short for governments to come up with the necessary reports, which is partially understandable because the necessary legislative parliamentary procedures normally take longer (and also time is lost due to the time necessary to draft the reports and the recommendations of the Council of Ministers). Yet for NGOs and citizens belonging to a linguistic minority, cycles of three to five years are far too long. Several countries are behind schedule in the three-yearly reporting to the CoE. One solution could be for the Committee of Experts to ask NGOs to deliver an independent report.

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<sup>688</sup> Report of the Committee of Experts, 5th monitoring cycle, Sweden, (ECRML (2015) 1) p. 10-11.

<sup>689</sup> Report of the Committee of Experts on the Charter, 5th monitoring cycle, Sweden, (ECRML (2015) 1) p. 64.

<sup>690</sup> Report of the Committee of Experts on the Charter, 5th monitoring cycle, Sweden, (ECRML (2015) 1) p. 65.

<sup>691</sup> Report of the Advisory Committee on the FCNM, 3rd Opinion on Sweden (ACFC/OP/III(2012)004) p. 2. 4th Report on the FCNM submitted by Sweden (ACFC/SR/IV(2016)004) p. 6 & 13.

<sup>692</sup> 4th Report on the FCNM submitted by Sweden (ACFC/SR/IV(2016)004) p. 12.

<sup>693</sup> Report of the Committee of Experts, 5th monitoring cycle, Sweden, (ECRML (2015) 1) p. 6 and p. 64.

<sup>694</sup> Report of the Committee of Experts on the Charter, 5th monitoring cycle, Sweden, (ECRML (2015) 1) p. 64.

<sup>695</sup> <http://www.minority-safepack.eu/en/>.

<sup>696</sup> The Minority SafePack proposes, on the legal basis of Article 167(5) 2nd indent TFEU and Article 165(4) 2nd indent TFEU to reach this goal via a (Council) Recommendation.

Another problem is the procedure for the recommendations by the Council of Ministers of the CoE. After the on-the-spot visit of the Committee of Experts, their recommendations are discussed in the Council of Ministers, where the objective observations of the experts are dragged into politics, since all the member states of the CoE are allowed to give their opinion (including states that are not a party to the ECRML), which may influence this procedure.

The ECRML contains standards for education in minority languages that could be conflicting with the Racial Equality Directive and the case law of the European Court of Human Rights (as mentioned above in the discussion on Roma Rights).

There is need for a new EU language policy in which the collection of data is one of the key elements.<sup>697</sup> There is no standard with regard to the questions posed in socio-linguistic surveys for data collected in the Member States.<sup>698</sup>

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<sup>697</sup> S. van der Jeught, *EU Language Law*, Groningen: Europa Law Publishing 2015, p. 271. His proposal to use as a lingua franca English seems outdated due to the Brexit. See also the summaries of the countries researched above. See also: Compilation of Venice Commission Opinions and Reports Concerning the Protection of National Minorities (CDL(2011)018) p. 15; Advisory Committee on the FCNM, Thematic Commentary No. 3, The Language Rights of Persons Belonging to National Minorities under the Framework Convention (ACFC/44DOC(2012)001 rev) par. 19-21.

<sup>698</sup> G. Extra & K. Yagmur, *Language rich Europe* (Cambridge: Cambridge University Press 2012) p. 7.

## **ANNEX 3. PROTECTION OF RELIGIOUS MINORITIES (A FOCUS ON ISLAMOPHOBIA)**

### ***Thematic Case Study***

***Prepared by Susie Alegre***

### **A3.1. Introduction**

#### **A3.1.1. Methodological note**

International human rights law recognises two types of rights with respect to the protection of minorities: universal protection against discrimination<sup>699</sup> and specific minority rights.<sup>700</sup> This thematic case study reviews compliance of the selected countries with international and European norms for the protection of religious minorities as assessed by the respective monitoring bodies<sup>701</sup> and enforced by judicial bodies, with a focus on Islamophobia and anti-Semitism. The review highlights the difficulty in defining both Islamophobia and anti-Semitism as strictly related to a person's religion, as both concepts include elements of discrimination based on perceived religious affiliation and elements of ethnic and racial discrimination as well as, in the case of Islamophobia, discrimination and intolerance against migrants in general. The review includes two major sources: i) the regular assessment of states' compliance conducted by monitoring bodies and ii) judgements by the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).

Assessment of a state's compliance is provided in the Concluding Observations on the state's periodic reports by the UN treaty bodies; the Opinions of the Advisory Committee on the Framework Convention for the Protection of National Minorities (ACFC), followed by resolutions of the Council of Europe Committee of Ministers; the country-by-country assessment by the European Commission against Racism and Intolerance (ECRI); the country reports of the Council of Europe Commissioner for Human Rights following his country visits; reports by the European Commission, the EU Fundamental Rights Agency and the EU network of legal experts on gender equality and non-discrimination.

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<sup>699</sup> Article 2(1) and Article 26 International Covenant on Civil and Political Rights (ICCPR); Article 2(2) International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 1(1) International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention on the Rights of the Child (CRC) (see Article 2); Convention on the Rights of Persons with Disabilities (CRPD); Article 14 European Convention on Human Rights (ECHR) and Protocol 12 ECHR; European Social Charter/Revised European Social Charter; Council Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Directive); EU Charter of Fundamental Rights; Council Framework Decision on Combatting Racism and Xenophobia.

<sup>700</sup> Article 27 ICCPR; Council of Europe Framework Convention for the Protection of National Minorities (FCNM).

<sup>701</sup> The relevant monitoring bodies at UN level are the Human Rights Committee (for the ICCPR); Committee on the Elimination of Racial Discrimination (for the ICERD); Committee on Social, Economic, and Cultural Rights (for ICESCR); Committee on the Rights of the Child (for CRC); Committee on the Elimination of Discrimination against Women (for CEDAW); and Committee on the Rights of Persons with Disabilities (for CRPD). The relevant monitoring bodies at CoE level are: Council of Europe Committee of Ministers, European Commission against Racism and Intolerance (ECRI); Council of Europe Commissioner on Human Rights, and the European Commission for Democracy through Law (Venice Commission). The relevant bodies at EU level are the European Commission, EU Fundamental Rights Agency, and the European network of legal experts in gender equality and non-discrimination.



### A3.1.2. International and regional standards to protect religious minorities

- International standards

International standards relevant to the protection of religious minorities include provisions to protect the right to freedom of religion, such as Article 18 of the International Covenant on Civil and Political Rights (ICCPR)<sup>702</sup> and provisions to combat discrimination and intolerance, such as the prohibition on hate speech in Article 20 of the ICCPR.<sup>703</sup> The Convention for the Elimination of All Forms of Racial Discrimination (CERD) also contains prohibitions on hate speech and discrimination against non-citizens.<sup>704</sup> In many cases, those most susceptible to discrimination in the form of Islamophobia are non-citizens;<sup>705</sup> therefore, protections for these groups are particularly relevant.

- Regional standards

The ECtHR has issued various rulings relating to discrimination against religious minorities, in particular structural differences in treatment between a national majority religion and minority denominations. The case law on hate speech at the ECtHR<sup>706</sup> has primarily been developed through decisions on admissibility where the complaint is about a limitation on free speech.

Hate speech is not protected under Article 10 of the European Convention on Human Rights (ECHR) because Article 17 prohibits the abuse of rights. In a series of cases relating to revisionism and Holocaust denial,<sup>707</sup> the Court has found that freedom of expression and freedom of association cannot be used to defend hate speech aimed at denying crimes against humanity and anti-Semitism. In *Norwood v UK*,<sup>708</sup> the applicant had displayed a British National Party poster representing the Twin Towers in flame accompanied by the words "Islam out of Britain – Protect the British People". As a result, he was convicted of aggravated hostility towards a religious group. The Court declared his application on the basis of his freedom of expression inadmissible because it found that such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, was incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.

The ECRI has also issued a general policy recommendation on combating intolerance and discrimination against Muslims.<sup>709</sup> This provides guidance on the requirements for preventing discrimination and ensuring that religious observance is facilitated.

<sup>702</sup> Elaborated on by the CCPR in its General Comment 22: CCPR/C/GC/22.

<sup>703</sup> CCPR/C/GC/22 para. 7 see also General Comment 11 of 1983 on propaganda for war and inciting national, racial or religious hatred CCPR/C/GC/11.

<sup>704</sup> Articles 4 and 5, CERD.

<sup>705</sup> See FRA report on Muslims in Europe that indicates a significant drop in the likelihood of suffering from Islamophobic discrimination for citizens as opposed to non-citizens: <http://fra.europa.eu/en/publication/2010/eu-midis-data-focus-report-2-muslims>.

<sup>706</sup> See Council of Europe Compilation of case law on hate speech here: [http://www.echr.coe.int/Documents/FS\\_Hate\\_speech\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf).

<sup>707</sup> See for example: European Court of Human Rights, *Garaudy v France* (no. 65831/01), Admissibility Decision of 24 June 2003.

<sup>708</sup> European Court of Human Rights, *Norwood v UK*, (Application no. 23131/03), Admissibility Decision of 16 November 2004.

<sup>709</sup> General Policy Recommendation Number 5, Adopted 16 March 2000, CRI(2000)21 [http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation\\_N5/Rec5%20en21.pdf](http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N5/Rec5%20en21.pdf).

The Venice Commission has produced a compilation<sup>710</sup> of extracts taken from opinions and reports/studies adopted by the Venice Commission on issues concerning the freedom of religion and belief. This gives an overview of the doctrine of the Venice Commission in this field on a variety of issues, including religious insult and religious hatred, education, clergy and religious leaders, and religious or belief organisations.

- The EU

Council Framework Decision 2008/913/JHA of November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (Framework Decision on Racism and Xenophobia) includes religion as one of the motivations for racist or xenophobic offences.<sup>711</sup> The preamble states: "Religion' should be understood as broadly referring to persons defined by reference to their religious convictions or beliefs." But in its opinion<sup>712</sup> on the impact of the Framework Decision on Racism and Xenophobia in 2013, the EU Fundamental Rights Agency (FRA) pointed out that, unlike many other directives in the field of harmonising criminal law, this Directive does not contain adequate provisions on victims' rights.<sup>713</sup> On 14 June 2016, the European Commission launched the High Level Group on combating Racism, Xenophobia and other forms of Intolerance to step up cooperation and coordination, to better prevent and combat hate crime and hate speech on the ground.

The FRA issued a report in 2009 looking at discrimination against Muslims.<sup>714</sup> It found the majority of Muslim respondents believed this was mainly due to their ethnic background – only 10% said they thought the discrimination was based solely on their religion.<sup>715</sup> Despite the ubiquity of contentious discourse around wearing Islamic headscarves in Europe, the report found that wearing traditional or religious clothing, like a headscarf, did not increase the likelihood of being discriminated against.<sup>716</sup> It updated its report on anti-Semitism in Europe in 2014,<sup>717</sup> which concluded:

What this update undoubtedly shows, however, is that antisemitism remains an issue of serious concern in and to the EU. Decisive and targeted policy responses are required to tackle the phenomenon. The effective implementation of such responses would not only afford Jewish communities better protection against antisemitism but also ensure that EU Member States guarantee that the fundamental rights of people living in the EU are protected and safeguarded.<sup>718</sup>

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<sup>710</sup> CDL-PI(2014)005 (revised July 2014).

<sup>711</sup> Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, Article 1.

<sup>712</sup> <http://fra.europa.eu/en/opinion/2013/fra-opinion-framework-decision-racism-and-xenophobia-special-attention-rights-victims>.

<sup>713</sup> Opinion of the European Union Agency for Fundamental Rights on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime, FRA Opinion – 02/2013, 15 October 2013, p. 7.

<sup>714</sup> <http://fra.europa.eu/en/publication/2010/eu-midis-data-focus-report-2-muslims>.

<sup>715</sup> <http://fra.europa.eu/en/publication/2010/eu-midis-data-focus-report-2-muslims>.

<sup>716</sup> <http://fra.europa.eu/en/publication/2010/eu-midis-data-focus-report-2-muslims>.

<sup>717</sup> <http://fra.europa.eu/en/publication/2014/antisemitism-summary-overview-situation-european-union-2003-2013>.

<sup>718</sup> Ibid p. 7.

For the first time this year, the CJEU has considered two cases<sup>719</sup> of alleged discrimination on the basis of religion contrary to Council Directive on Equal Treatment in Employment and Occupation.<sup>720</sup>

### A3.2. Country-specific review

**Estonia:** Estonia provided no data to the Organization for Security and Co-operation in Europe (OSCE) on hate crime reporting for 2015.<sup>721</sup> There were no notable cases relating to religious minorities from Estonia in either the ECtHR or the CJEU.

The UN's Universal Periodic Review (UPR) in 2016 identified the concerns of several UN oversight bodies about the treatment of non-nationals.<sup>722</sup> There were no observations referring directly to religious minorities in Estonia, but the majority of people belonging to religious minorities are likely to be migrants and non-nationals so the observations relating to those groups are of most relevance.

In its fourth report,<sup>723</sup> ECRI had observed that the prohibition of discrimination based on religion or other beliefs did not extend to social protection, education or to access to and supply of public goods and services and recommended that action should be taken to address this. The 2015 report notes that the Chancellor of Justice concluded that the existence of different levels of protection under the Equal Treatment Act, depending on the prohibited ground concerned, could be contrary to the state's obligation to guarantee protection against all unequal treatment in accordance with the constitution.<sup>724</sup> It appears that the social affairs ministry has started the process of amending the law in order to widen the scope of protection equally to all grounds of discrimination.

**Finland:** Finland reported 1,704 hate crimes to the OSCE in 2015, of which 171 were related to bias against Christians and members of other religions.<sup>725</sup> There were no notable cases in either the ECtHR or the CJEU relating to religious minorities in Finland. In the Finnish context, religious minority groups will often be non-nationals. In the 2017 UPR, concerns were noted from the Committee on Elimination of Racial Discrimination (CERD) and the Committee on Economic, Social and Cultural Rights (CESCR) about increasing anti-immigrant sentiment in Finland.<sup>726</sup>

The Council of Europe Commissioner for Human Rights raised concerns about **social exclusion** among the Somali population in Finland. The report noted that the ombudsman for minorities was concerned about restrictions placed on her mandate regarding working life

<sup>719</sup> European Court of Justice, *Bougnaoui and ADDH v Micropole SA*, Case C-188/15 Judgement of 14 March 2017 and *Achbita v G4S Secure Solutions*, Case C-157/15, Judgement of 14 March 2017.

<sup>720</sup> Council Directive 2000/78/EC of 27 November 2000.

<sup>721</sup> See <http://hatecrime.osce.org/estonia>.

<sup>722</sup> Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, Estonia, 23 November 2015, A/HRC/WG.6/24/EST/2, Section A.

<sup>723</sup> European Commission against Racism and Intolerance ECRI (2010), ECRI Fourth report on Estonia, CRI(2010)3.

<sup>724</sup> European Commission against Racism and Intolerance. ECRI Report on Estonia, fifth monitoring cycle, published on 13 October 2015, para. 12.

<sup>725</sup> See <http://hatecrime.osce.org/finland>.

<sup>726</sup> Compilation on Finland, Report of the Office of the United Nations High Commissioner for Human Rights, 17 February 2017, A/HRC/WG.6/27/FIN/2, para. 53, see also See CERD/C/FIN/CO/20-22, para. 16 and See E/C.12/FIN/CO/6, para. 12.

that posed a problem because ethnicity and foreign nationality, often in combination with gender, put the people concerned at a serious disadvantage in the labour market.<sup>727</sup>

**France:** France reported 1,790 cases of hate crime to the OSCE for 2015 of which 715 were related to anti-Semitism and 336 were for bias against Muslims.<sup>728</sup> Civil society reported a murder, a physical assault, 3 arson attacks, vandalism, damage to property and desecration of graves motivated by bias against Muslims. The United Nations High Commissioner for Refugees (UNHCR) reported 2 cases of damage to property against mosques.<sup>729</sup> In relation to anti-Semitism, civil society reported on murders and hostage-taking in a kosher supermarket related to acts of terrorism as well as stabbings and cases of poisoning after a synagogue's lock was covered with poison.<sup>730</sup> Jehovah's Witnesses reported physical assaults, graffiti, desecration of graves and threats, while Christians reported robberies, attempted arson, website hacking, vandalism and an attack on Christian refugees.<sup>731</sup>

France is a large country with a multicultural and diverse population, encompassing minority groups that are French nationals as well as religious minority migrant populations. There are significant observations from international oversight bodies relating **to more institutionalised forms of discrimination against religious minorities in France, including concerns about Islamophobia and anti-Semitism**. Several cases relating to the use of the Muslim veil have been decided recently by both the ECtHR and the CJEU in relation to France:

- *SAS v France*<sup>732</sup> concerned the complaint of a French national who is a practising Muslim and who was no longer allowed to wear the full-face veil in public. The ECtHR found no violation of Article 9 (freedom of religion) in conjunction with Article 14 (freedom from discrimination) in relation to a law prohibiting the concealment of one's face in public places. This was based on the justification of the French objective of promoting 'living together'.
- *Ebrahimian v France*<sup>733</sup> concerned a complaint about the decision not to renew the contract of employment of a hospital social worker because of her refusal to stop wearing the Muslim veil. The ECtHR found no violation of Article 9.
- *Bouagnaoui and ADDH v Micropole SA*<sup>734</sup> concerned a complaint about a worker who was dismissed because of her refusal to remove her Islamic headscarf when sent on assignment to customers. The CJEU found that the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine

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<sup>727</sup> Council of Europe Commissioner for Human Rights. Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe Following his visit to Finland from 11 to 13 June 2012, para. 34.

<sup>728</sup> See <http://hatecrime.osce.org/france>.

<sup>729</sup> Ibid.

<sup>730</sup> Ibid.

<sup>731</sup> Ibid.

<sup>732</sup> European Court of Human Rights, *SAS v France* (Application No. 43835/11) Judgement of 1 July 2014.

<sup>733</sup> European Court of Human Rights, *Ebrahimian v France* (Application No. 64846/11) Judgement of 26 November 2015.

<sup>734</sup> European Court of Justice, *Bouagnaoui and ADDH v Micropole SA*, Case C-188/15 Judgement of 14 March 2017 (see below for further details).

and determining occupational requirement within the provisions of the Council Directive on equal treatment<sup>735</sup> in employment and occupation.

Other cases decided by the ECtHR include these two:

- a finding<sup>736</sup> of a violation of Article 9 because of the imprecise nature of the law of taxation for Jehovah's Witnesses, and
- the dismissal of a case<sup>737</sup> brought by a comedian against his conviction for public insults of an anti-Semitic nature because the application was incompatible with the provisions of the Convention as hate speech is not protected.

The CCPR also considered the case of *Singh v France* and found a violation of Article 18 ICCPR, as the requirement for a Sikh to remove a head-covering for a passport photograph was not deemed necessary.<sup>738</sup>

The Council of Europe Commissioner for Human Rights, in his 2015 report, observed that

France has for a long time faced intolerance, particularly racism and xenophobia, expressed through hate acts and hate speech. Extremism regularly resurfaces in the country, stirred by activists, small groups and extreme right-wing parties which stoke hatred and tension. The reports published in recent years by international bodies (...) show the serious and systemic nature of this problem in France and highlight the authorities' difficulties in combating it.<sup>739</sup>

He also noted that the statistics showed an increase in acts and language of an anti-Muslim or anti-Semitic nature. He referred to a 91% increase in anti-Semitic acts recorded in early 2017 on the basis of data issued by the French interior ministry<sup>740</sup> and reports of a **significant increase in people leaving for Israel (over 7,000 in 2014 as compared with 1,900 in 2012 and around 1,000 per year in the late 1990s)**.<sup>741</sup> In relation to anti-Muslim acts, over 80% of the victims of crimes reported in 2013 were women and the Commissioner noted a particular issue of attacks on women wearing veils.<sup>742</sup>

The Commissioner welcomed the criminal law response to acts or language of a hateful or discriminatory nature alongside the administrative measures taken to prevent anti-Semitic performances or public demonstrations but recognised difficulties in effectively implementing a national policy to combat racism and anti-Semitism.<sup>743</sup> He regretted the fact that France had not yet acceded to Protocol No. 12 of the ECHR establishing a general prohibition on

<sup>735</sup> Council Directive 2000/78/EC of 27 November 2000.

<sup>736</sup> European Court of Human Rights, *Association Les Témoins de Jehovah v France* (Application No. 8916/05) 30 June 2011.

<sup>737</sup> European Court of Human Rights, *M'Bala M'Bala v France* (Application No. 25239/13), 10 November 2015.

<sup>738</sup> HRC, *Singh v France*, CCPR/C/108/D/1928/2010.

<sup>739</sup> Report by Nils Muižnieks Council of Europe Commissioner for Human Rights following his visit to France from 22 to 26 September 2014, Para. 9.

<sup>740</sup> Report by Nils Muižnieks Council of Europe Commissioner for Human Rights following his visit to France from 22 to 26 September 2014, Para. 10.

<sup>741</sup> Report by Nils Muižnieks Council of Europe Commissioner for Human Rights following his visit to France from 22 to 26 September 2014, Para. 15.

<sup>742</sup> Report by Nils Muižnieks Council of Europe Commissioner for Human Rights following his visit to France from 22 to 26 September 2014, Para. 16.

<sup>743</sup> Report by Nils Muižnieks Council of Europe Commissioner for Human Rights following his visit to France from 22 to 26 September 2014, Para. 39.

discrimination.<sup>744</sup> The Commissioner requested information about measures taken to redress violations of the ICCPR Article 18 found in three views adopted by the CCPR between 2011 and 2013 in relation to certain religious groups.<sup>745</sup>

ECRI's 2016 report reflects the **ongoing challenge of anti-Semitic and Islamophobic hate speech in France**.<sup>746</sup> It does note, however, that the French authorities have continually reminded people through ministerial directives that there are mechanisms and systems that make it possible to combat hate speech.<sup>747</sup> And, in relation to hate speech online it referred to the French authorities engaging in discussions with Twitter to ensure that details of authors of anti-Semitic tweets could be shared with the judicial authorities in criminal proceedings.<sup>748</sup>

ECRI noted the increase in racist violence and a large increase in the desecration of cemeteries and places of worship. According to information from the interior ministry, cases in which Christian places of worship were targeted rose from 527 in 2011 to 673 in 2014, and in the same period, those targeting Muslim places of worship went up from 50 to 64 and those involving attacks on Jewish places of worship from 44 to 70.<sup>749</sup> ECRI highlighted the "proliferation of anti-Semitic attacks of unprecedented ferocity". It said that the assumption in some of these attacks that "being Jews meant they had money" showed there was an urgent need to tackle the prevalence of racist prejudices and stereotypes in France.<sup>750</sup>

The **systemic problem of the integration of Muslim women** in France was raised again by ECRI. This was a particular issue in relation to women wearing the headscarf in public places and Muslim women being asked to remove their headscarves when participating in school outings as accompanying parents. ECRI recommended that the French authorities should clarify the regulations concerning the wearing of a headscarf by mothers in such circumstances and take steps to ensure that decisions taken by school authorities are not discriminatory, including by providing for sanctions where appropriate.<sup>751</sup> It highlighted the impact that regulations relating to religious clothing in application of the principle of secularity had on both access to education<sup>752</sup> and access to employment<sup>753</sup> for Muslim girls and women in France.

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<sup>744</sup> Report by Nils Muižnieks Council of Europe Commissioner for Human Rights following his visit to France from 22 to 26 September 2014, Para. 40.

<sup>745</sup> Report by Nils Muižnieks Council of Europe Commissioner for Human Rights following his visit to France from 22 to 26 September 2014, Para. 41.

<sup>746</sup> European Commission against Racism and Intolerance. ECRI Report on France, fifth monitoring cycle, published on 1 March 2016, CRI(2016)1, Paras 24-26.

<sup>747</sup> European Commission against Racism and Intolerance. ECRI Report on France, fifth monitoring cycle, published on 1 March 2016, CRI(2016)1, Para. 33.

<sup>748</sup> European Commission against Racism and Intolerance. ECRI Report on France, fifth monitoring cycle, published on 1 March 2016, CRI(2016)1, Para. 34.

<sup>749</sup> European Commission against Racism and Intolerance. ECRI Report on France, fifth monitoring cycle, published on 1 March 2016, CRI (2016)1, Para. 48.

<sup>750</sup> European Commission against Racism and Intolerance. ECRI Report on France, fifth monitoring cycle, published on 1 March 2016, CRI(2016)1, Para. 49.

<sup>751</sup> European Commission against Racism and Intolerance. ECRI Report on France, fifth monitoring cycle, published on 1 March 2016, CRI(2016)1, Paras. 69-70.

<sup>752</sup> European Commission against Racism and Intolerance. ECRI Report on France, fifth monitoring cycle, published on 1 March 2016, CRI(2016)1, Para. 72.

<sup>753</sup> European Commission against Racism and Intolerance. ECRI Report on France, fifth monitoring cycle, published on 1 March 2016, CRI(2016)1, Para. 73.

Concerns about public schools barring students from school if they were wearing conspicuous religious symbols were raised by both the UN CCPR and CRC Committee due to the potential for excluding observant Jewish, Muslim and Sikh students from attending school<sup>754</sup>. The International Labour Organization's Committee of Experts also noted the discriminatory effect on access to employment for Muslim women of the Act prohibiting concealment of the face in public areas.<sup>755</sup> The HRC also noted the continued reports of anti-Semitic violence in France.

**Greece:** In 2015, Greece reported 60 hate crimes to the OSCE, which were not broken down according to bias. Civil society reported attacks on Jewish cemeteries and a Holocaust memorial as well as Islamophobic attacks, including an arson attack on a mosque, desecration of graves, vandalism and damage to property.

There have been some cases against Greece in the ECtHR regarding the **institutional treatment of religious minorities**, in particular Jehovah's Witnesses.<sup>756</sup> In the more recent case of *Dimitras and others v Greece*,<sup>757</sup> the ECtHR found violations of Article 9 and Article 13 (right to an effective remedy) regarding the obligation to reveal non-Orthodox religious convictions when taking the oath in court in the context of criminal proceedings.<sup>758</sup>

ECRI in its 2015 report raised serious concerns about the rise of anti-immigrant and anti-Semitic discourse in Greece. It referred, in particular, to the Golden Dawn and their openly voiced hatred of immigrants and Jews. Notably, it pointed out that anti-Semitic stereotypes were not limited to far-right political parties but have permeated large parts of society as well as some parts of the Greek Orthodox Church.<sup>759</sup> In a global survey conducted by the Anti-Defamation League, **Greece had the highest index score (69%) of anti-Semitic attitudes outside the Middle East and North Africa.**<sup>760</sup> These views were manifested in acts of vandalism and desecration of synagogues and Holocaust memorials.

Xenophobic references to irregular migrants were also of concern, which could have a particular impact on Muslim migrants. As an example, the report referred to a member of parliament who called refugees "unarmed invaders, weapons in the hands of the Turks" when referring to a shipwreck that had resulted in the drowning of women and children during a

<sup>754</sup> Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, 9 November 2012, A/HRC/WG.6/15/FRA/2, para. 38, see also CCPR/C/FRA/CO/4, para. 23 and CRC/C/FRA/CO/4 and Corr.1, paras. 45 and 46.

<sup>755</sup> Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, 9 November 2012, A/HRC/WG.6/15/FRA/2, para. 39, see also ILO Committee of Experts on the Application of Conventions and Recommendations, Direct Request concerning the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), adopted 2011, published 101st ILC session (2012).

<sup>756</sup> E.g. European Court of Human Rights, *Kokkinakis v Greece*, (Application No. 14307/88) Judgement of 25 May 1993 violation of Article 9 following more than 60 arrests of the complainant for proselytising and *Thimmenos v Greece*, (Application no. 34369/97) Judgement of 6 April 2000, violation of Article 9 taken with Article 14 for refusal to appoint complainant as a chartered accountant due to conviction of insubordination for refusing to wear military uniform in accordance with his faith.

<sup>757</sup> European Court of Human Rights, *Dimitras and others v Greece*, (Application Nos. 42837/06, 3269/07, 35793/07 and 6099/08), Judgements of 8 January 2013 and 3 June 2010.

<sup>758</sup> See also European Court of Human Rights, *Alexandridis v Greece*, (Application No. 19516/06), Judgement of 21 February 2008 regarding a lawyer obliged to reveal he was not an Orthodox Christian when taking the oath of office.

<sup>759</sup> European Commission against Racism and Intolerance. *ECRI Report on Greece, fifth monitoring cycle*. Published 24 February 2015, Para. 39.

<sup>760</sup> European Commission against Racism and Intolerance. *ECRI Report on Greece, fifth monitoring cycle*. Published 24 February 2015, Para. 39.

controversial Greek coastguard operation to intercept irregular migrants.<sup>761</sup> ECRI noted that, although the Council of Europe Commissioner for Human Rights had pointed out the **lack of serious responses to hate speech in Parliament** in his 2013 report, there had not been structural measures put in place to address this problem despite some positive developments.<sup>762</sup>

ECRI pointed out that the anti-terrorism discourse in Greece often targets immigrants and refugees, as well as the Muslim community in general, with the media playing a significant role in linking criminality and terrorism with immigration, thus fuelling hate speech. It noted a **dramatic increase in Islamophobia** since the far-right press began to link Islam to terrorism.<sup>763</sup>

Reports of **serious, organised racist violence against immigrants** were of great concern to ECRI. It noted that the majority of the victims were Muslim and in many cases the perpetrators were reported to be associated with the Golden Dawn. In only 6 out of 154 incidents did the perpetrator act alone, with most attacks involving groups, armed and wearing military-style clothing, moving on motorcycle or on foot, often with aggressive dogs.<sup>764</sup> Victims reported areas of Athens that had become inaccessible to them because of fear of attack.

**A large number of racist incidents were carried out by police** and ECRI noted that, along with the fears expressed by irregular migrants in reporting incidents, many victims who reside legally in Greece have no trust in the judicial system. Measures taken to address irregular migration, including through stop and search, have resulted in racial profiling leading them to be treated with suspicion and alienated from Greek society.<sup>765</sup> Although Greece has taken steps to address the issues, like the introduction of a hotline to report racist incidents, issues such as the lack of interpreters on the hotline and the obligation to check the residence status of victims of racist violence make these measures ineffective.<sup>766</sup>

As well as issues relating to Muslim migrants, ECRI **highlighted systemic problems around the treatment of the Muslim minority of Western Thrace**. They are a recognised minority with special rights with regard to religion, language and mother-tongue education. Around 60,000 mainly ethnic Turks lost their Greek citizenship under laws that were repealed in 1998 but not with retroactive effect. ECRI raised concerns about the processing of citizenship applications for those people affected.<sup>767</sup> Other issues concerned access to education in Turkish mother tongue and the low levels of employment of this minority in the civil service.<sup>768</sup>

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<sup>761</sup> European Commission against Racism and Intolerance. *ECRI Report on Greece, fifth monitoring cycle*. Published 24 February 2015, Para. 42.

<sup>762</sup> European Commission against Racism and Intolerance. *ECRI Report on Greece, fifth monitoring cycle*. Published 24 February 2015, Para. 47.

<sup>763</sup> European Commission against Racism and Intolerance. *ECRI Report on Greece, fifth monitoring cycle*. Published 24 February 2015, Para. 51.

<sup>764</sup> European Commission against Racism and Intolerance. *ECRI Report on Greece, fifth monitoring cycle*. Published 24 February 2015, Para. 64.

<sup>765</sup> European Commission against Racism and Intolerance. *ECRI Report on Greece, fifth monitoring cycle*. Published 24 February 2015, Para. 96.

<sup>766</sup> European Commission against Racism and Intolerance. *ECRI Report on Greece, fifth monitoring cycle*. Published 24 February 2015, Para. 77.

<sup>767</sup> European Commission against Racism and Intolerance. *ECRI Report on Greece, fifth monitoring cycle*. Published 24 February 2015, Para. 117.

<sup>768</sup> European Commission against Racism and Intolerance. *ECRI Report on Greece, fifth monitoring cycle*. Published 24 February 2015, Paras 119-126.



The UPR 2016 highlighted a number of issues.<sup>769</sup> The CRC expressed concern that schools kept records on the religion of students, that religion was mentioned in leaving certificates and that requests for exemption from religious classes were not always granted.<sup>770</sup> It also commented on persistent discrimination against children of Turkish origin and children belonging to the Muslim community of Thrace.<sup>771</sup> Concerns were raised in relation to CEDAW about the social exclusion and vulnerability of women belonging to the Muslim community of Thrace<sup>772</sup> as well as the non-application of the general law of Greece regarding marriage and inheritance to that community and the persistence of polygamy and early marriage in Muslim communities.<sup>773</sup> The UN HRC recommended that Greece should review legislation to ensure that all advocacy of religious hatred was prohibited by law<sup>774</sup> and it was concerned about insufficient guarantees for the equal and effective enjoyment of culture, profession and practice of religion, and use of language by all persons including those claiming to belong to ethnic, religious or linguistic minorities.<sup>775</sup>

**Hungary:** Hungary provided no data to the OSCE on hate crimes for 2015 but 79 were reported in 2014 – they were not distinguished on bias.<sup>776</sup> Civil society reported 23 anti-Semitism-related incidents, including violent attacks, desecration of graves and graffiti.

There are two recent ECtHR cases of note against Hungary: *Magyar Kereszteny Mennonita Egyhaz and Others v Hungary*<sup>777</sup> highlights **institutional problems for religious minorities**. It concerned the entry into force of the Hungarian Church Act in 2012, with the effect that the applicant religious communities lost their status as registered churches, which had previously entitled them to certain monetary and fiscal advantages for their faith-related activities. The Court held there was a violation of Article 11 (freedom of association) read in the light of Article 9 (freedom of religion).

*Vojnity v Hungary*<sup>778</sup> concerned the total removal of a father's access rights to his child on the grounds that his religious convictions (belonging to the religious denomination 'Congregation

<sup>769</sup> Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, 7 March 2016, A/HRC/WG.6/25/GRC/2.

<sup>770</sup> Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, 7 March 2016, A/HRC/WG.6/25/GRC/2 Para. 14, see also See CRC/C/GRC/CO/2-3, paras. 34-35.

<sup>771</sup> Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, 7 March 2016, A/HRC/WG.6/25/GRC/2 Para 18, see also CRC/C/GRC/CO/2-3, para. 26.

<sup>772</sup> Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, 7 March 2016, A/HRC/WG.6/25/GRC/2 Para. 19, see also CEDAW/C/GRC/CO/7, paras. 32-33.

<sup>773</sup> Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, 7 March 2016, A/HRC/WG.6/25/GRC/2, Para. 49, see also CEDAW/C/GRC/CO/7, para. 36. See also CRC/C/GRC/CO/2-3, para. 9.

<sup>774</sup> Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, 7 March 2016, A/HRC/WG.6/25/GRC/2, Para. 15, see also CCPR/C/GRC/CO/2, para. 14.

<sup>775</sup> Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, 7 March 2016, A/HRC/WG.6/25/GRC/2, Para. 78, see also CCPR/C/GRC/CO/2, para. 43.

<sup>776</sup> See <http://hatecrime.osce.org/hungary> (checked 28.6.17).

<sup>777</sup> European Court of Human Rights, *Magyar Kereszteny Mennonita Egyhaz and Others v Hungary*, (Application no. 70945/11), Judgement of 08 April 2014 and related judgement on just satisfaction of 28 June 2016.

<sup>778</sup> European Court of Human Rights, *Vojnity v Hungary*, (Application no. 29617/07) Judgement of 12 February 2013.

of the Faith') had been detrimental to his son's upbringing. The Court held there was a violation of Article 14 (prohibition on discrimination) in conjunction with Article 8 (right to family life).

The Council of Europe Commissioner for Human Rights in his 2014 report<sup>779</sup> raised concerns about **anti-Semitism being a widespread phenomenon in Hungary**, which had been exacerbated in the context of the economic crisis. In particular, he noted the proposal from a Jobbik MP that a list of government officials with a Jewish background be compiled as a flagrant manifestation of anti-Semitism.<sup>780</sup> According to the FRA online survey on perceptions and experiences of anti-Semitism, discrimination and hate crime, of all the Jewish respondents, **90% perceived that anti-Semitism is a problem in Hungary** in comparison with the average of 66% for the other eight Member States covered by the survey.<sup>781</sup> He also noted that, although Hungarian legislation has the capacity to curb and prevent discrimination, it is not being applied effectively.<sup>782</sup>

The ECRI report of 2015 also highlights **anti-Semitism as a significant problem in the political discourse of Jobbik**, noting that research showed a marked increase in anti-Jewish sentiments in the population since 2010.<sup>783</sup> It also noted that Jews have been attacked in the streets, Jewish cemeteries and Holocaust memorials have been damaged and swastikas have been sprayed on public transport and on synagogues.

In 2013, following a sudden and large influx of asylum-seekers, migrants (many of them Muslim) also became the target of extremely xenophobic discourse invoking stereotypes of them bringing in disease and being "lazy", "uncivilised" and "criminals".<sup>784</sup>

Hungary's UPR in 2016 noted that its reporting to the CERD, CESCR and CCPR was overdue. The Special Rapporteur on racism recommended that the Hungarian government should step up efforts to prevent and eliminate all manifestations of anti-Semitism<sup>785</sup> and the UN High Commissioner for Human Rights had criticised Hungary's dealing with migrants.

**Italy:** Italy reported 555 hate crimes to the OSCE in 2015 but bias was not reported.<sup>786</sup> Civil society reported various violent incidents targeting Jewish people, including an attempted murder as well as vandalism and graffiti. A physical assault against a Muslim woman wearing a veil, arson attacks on mosques, halal butchers and an Islamic centre, along with graffiti and desecration of mosques, were also reported.

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<sup>779</sup> Report by Nils Muižnieks Council of Europe Commissioner for Human Rights following his visit to Hungary from 1 to 4 July 2014. CommDH(2014)21.

<sup>780</sup> Report by Nils Muižnieks Council of Europe Commissioner for Human Rights following his visit to Hungary from 1 to 4 July 2014. CommDH(2014)21, Para. 71.

<sup>781</sup> Noted in Report by Nils Muižnieks Council of Europe Commissioner for Human Rights following his visit to Hungary from 1 to 4 July 2014. CommDH(2014)21, Para. 72.

<sup>782</sup> Report by Nils Muižnieks Council of Europe Commissioner for Human Rights following his visit to Hungary from 1 to 4 July 2014. CommDH(2014)21 Para. 93.

<sup>783</sup> European Commission against Racism and Intolerance (ECRI). *ECRI Report on Hungary (5<sup>th</sup> Monitoring Cycle)*, published on 9 June 2015, CRI(2015)19, Para. 27.

<sup>784</sup> European Commission against Racism and Intolerance (ECRI). *ECRI Report on Hungary (5<sup>th</sup> Monitoring Cycle)*, published on 9 June 2015, CRI(2015)19, Para. 29.

<sup>785</sup> Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, Hungary, 7 March 2016, A/HRC/WG.6/25/HUN/2, fn 41, see also A/HRC/20/33/Add.1, para. 65.

<sup>786</sup> <http://hatecrime.osce.org/italy> (checked 28/06/2017).

The ECtHR found no violations of human rights in relation to the presence of crucifixes in state-school classrooms<sup>787</sup> or of a judicial authority's refusal to adjourn a hearing listed on the date of a Jewish holiday.<sup>788</sup>

In its 2016 report,<sup>789</sup> ECRI noted concerns about the **rise of political extremism in Italy with strong xenophobic and Islamophobic connotations**, which has become worse in the current migration context. It identified Casa Pound as an organisation of particular concern in this regard.<sup>790</sup>

ECRI also highlighted **systemic issues around the integration of the Muslim community**, an issue it had raised in earlier reports. It noted with approval that the Council for Italian Islam, an advisory body set up to promote dialogue between the state and the Muslim community at the national level, had resumed its meetings and was making concrete proposals for measures favouring integration.<sup>791</sup> But it also pointed to problems encountered through opposition to applications to build new mosques, which it identified as an issue for integration.<sup>792</sup>

CERD, in its 2017 report, noted concern about the immunity for members of parliament for opinions expressed in the exercise of their functions. It expressed particular concern for the prevalence of racist discourse, stigmatisation and negative stereotypes in political debates that are directed against migrants, Muslims, etc. Parliamentary immunity could undermine accountability for hate speech.<sup>793</sup>

**Romania:** Romania reported 15 hate crimes to the OSCE in 2015 but the bias was not reported. Civil society reported 3 physical assaults against Jehovah's Witnesses.<sup>794</sup>

The issues concerning religious minorities in Romania primarily relate to inter-denominational disputes, restitution of church property and to anti-Semitism. They include **institutional problems relating to the law around religious minorities and structural anti-Semitism**. The ECtHR has decided several cases against Romania in recent years:

- *Lupeni Greek Catholic Parish and Others v Romania*<sup>795</sup> concerned a request for the restitution of a place of worship that had belonged to the Greek Catholic Church and was transferred during the totalitarian regime to the ownership of the Orthodox Church. The Court found a violation of Article 6 on grounds of legal certainty and

<sup>787</sup> European Court of Human Rights, (Grand Chamber), *Lautsi v Italy*, (Application no. 30814/06), Judgement of 18 March 2011.

<sup>788</sup> European Court of Human Rights, *Sessa v Italy* (Application No. 28790/08), Judgement of 3 April 2012.

<sup>789</sup> European Commission against Racism and Intolerance (ECRI). *ECRI Report on Italy, fifth monitoring cycle*. Published on 7 June 2016.

<sup>790</sup> European Commission against Racism and Intolerance (ECRI). *ECRI Report on Italy, fifth monitoring cycle*. Published on 7 June 2016, Para. 38.

<sup>791</sup> European Commission against Racism and Intolerance (ECRI). *ECRI Report on Italy, fifth monitoring cycle*. Published on 7 June 2016, Para. 89.

<sup>792</sup> European Commission against Racism and Intolerance (ECRI). *ECRI Report on Italy, fifth monitoring cycle*. Published on 7 June 2016, Para. 90.

<sup>793</sup> Committee on the Elimination of Racial Discrimination. *Concluding observations on the combined nineteenth and twentieth periodic reports of Italy*, 17 February 2017, Para. 14.

<sup>794</sup> <http://hatecrime.osce.org/romania> (checked 23.6.2017).

<sup>795</sup> European Court of Human Rights (Grand Chamber), *Lupeni Greek Catholic Parish and Others v Romania*, (Application No. 76943/11), Judgement of 29 November 2016.

length of proceedings but no violation of Article 14 as compared with access to court of either Orthodox parishes or other Greek Catholic parishes.

- *Sindicatul Pastorul cel Bun v Romania*<sup>796</sup> concerned the refusal of the Romanian State to register a trade union of priests of the Romanian Orthodox Church. There was no violation of Article 11 as the state had simply declined to become involved in Church business, observing the duty of denominational neutrality.
- *Catholic Archdiocese of Alba Iulia v Romania*<sup>797</sup> concerned a religious community wishing to recuperate ownership of assets confiscated by the Romanian authorities during the communist period. The Court found a violation of Article 1 Protocol 1 as they had received no notification after 14 years from the preliminary procedure and the joint committee to organise transfer of property was never set up.

The ECRI report of 2014 welcomed the entry into force of the Law on Religious Freedom and the General Regime of Denominations in 2007 but it noted there were still problems in the effective application of this law.<sup>798</sup> It recommended amending the law to ease the requirement that religious associations and groups needed for formal recognition, abrogating the prohibition of religious defamation and the provisions on public offence against religious symbols, and closing legal gaps that make the application of tax breaks for religious associations discretionary.<sup>799</sup> It also commented on the disputes between the Orthodox Church and the Greek Catholic Church, which had given rise to tensions between the two confessions and recommended that the authorities should take a leading role in resolving property disputes between the Churches.<sup>800</sup>

ECRI noted that minority religious groups are frequently faced with unjustified refusals for planning permission for places of worship.<sup>801</sup> There were also reports that burials in public cemeteries of people from other denominations frequently met obstacles by the Orthodox Church. Although responsibility for burials lies with local authorities, ECRI stressed that the national authorities should maintain oversight to avoid discrimination.<sup>802</sup> It also recommended that the Romanian authorities should change the law and monitor its application to ensure that deceased persons belonging to all faiths could be buried in practice according to their own religious rite.<sup>803</sup>

Holocaust denial was raised as a significant issue in Romania by ECRI. It reiterated its calls in earlier reports for the Romanian authorities to apply the law to all those who continue to

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<sup>796</sup> European Court of Human Rights, *Sindicatul Pastorul cel Bun v Romania* (Application No. 2330/09) Judgement of 9 July 2013.

<sup>797</sup> European Court of Human Rights, *Catholic Archdiocese of Alba Iulia v Romania* (Application No. 33003/03), Judgement of 25 September 2012.

<sup>798</sup> European Commission against Racism and Intolerance (ECRI). *ECRI Report on Romania, fourth monitoring cycle, published 3 June 2014*, CRI(2014)19, Para. 11.

<sup>799</sup> European Commission against Racism and Intolerance (ECRI). *ECRI Report on Romania, fourth monitoring cycle, published 3 June 2014*, CRI(2014)19, Para. 12.

<sup>800</sup> European Commission against Racism and Intolerance (ECRI). *ECRI Report on Romania, fourth monitoring cycle, published 3 June 2014*, CRI(2014)19, Para. 25.

<sup>801</sup> European Commission against Racism and Intolerance (ECRI). *ECRI Report on Romania, fourth monitoring cycle, published 3 June 2014*, CRI(2014)19, Para. 163.

<sup>802</sup> European Commission against Racism and Intolerance (ECRI). *ECRI Report on Romania, fourth monitoring cycle, published 3 June 2014*, CRI(2014)19, Para. 164.

<sup>803</sup> European Commission against Racism and Intolerance (ECRI). *ECRI Report on Romania, fourth monitoring cycle, published 3 June 2014*, CRI(2014)19, Para. 165.

foster the cult of persons who took an active part in the Holocaust and to waive the immunity granted to those who are still alive so that they may be tried.<sup>804</sup> (There was nothing of relevance to religious minorities in the UPR.)

**Serbia:** Serbia reported 79 hate crimes to the OSCE in 2015 but the bias was not reported. Civil society reported religiously motivated graffiti and the desecration of a grave, both anti-Muslim and anti-Christian.<sup>805</sup>

There was one case of relevance decided by the ECtHR that related to **institutional failures**. *Milanovic v Serbia*<sup>806</sup> concerned a failure to effectively investigate cases of assault likely motivated by religious hatred. The Court found a violation of Article 3 (prohibition on torture, inhuman and degrading treatment) and of Article 14 (prohibition on discrimination) in conjunction with Article 3 in relation to repeated attacks on the Hare Krishna community by a far-right organisation with no perpetrators being brought to justice many years after the attacks took place.

**Slovakia:** Slovakia reported 6 cases of hate crime to the OSCE in 2015 but the bias was not reported. Civil society reported 2 physical assaults, including by a group throwing bottles and stones at a Muslim family and an incident of damage to property.<sup>807</sup> The Council of Europe Commissioner's report for 2015 noted that Slovakia should pay particular attention to the recording of hate speech and hate crime data and should ensure that law enforcement officials and legal professionals are adequately trained to recognise and effectively investigate and sanction hate crimes.<sup>808</sup> Under Slovakia's UPR in 2014 it was noted that CERD was concerned about an **increase in racially motivated attacks**, including anti-Semitic violence. There were no ECtHR or CJEU cases of relevance to religious minorities in Slovakia.

**Spain:** Spain reported 1,328 hate crimes to the OSCE in 2015 of which 9 were related to anti-Semitism, 70 related to bias against Christians and other religions.<sup>809</sup> Among them were vandalism, arson attacks, physical assaults, desecration of graves and theft. The 2015 UPR compilation raised nothing specifically related to religious minorities.

Three recent cases in the ECtHR concerned religious minorities, **including systemic issues** leading to discrimination:

- *Barik Edidi v Spain*<sup>810</sup> concerned a complaint regarding a refusal to allow the applicant lawyer to cover her head with a hijab while sitting in the lawyer's area of court. The case was ruled inadmissible as lodged out of time so domestic courts were unable to rule on the merits.

<sup>804</sup> European Commission against Racism and Intolerance (ECRI). ECRI Report on Romania, fourth monitoring cycle, published 3 June 2014, CRI(2014)19, Para. 160.

<sup>805</sup> <http://hatecrime.osce.org/serbia> (checked 23.6.2017).

<sup>806</sup> European Court of Human Rights, *Milanovic v Serbia* (Application No. 44614/07), Judgement of 14 December 2010.

<sup>807</sup> <http://hatecrime.osce.org/slovakia> (checked 23.6.2017).

<sup>808</sup> Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe following his visit to the Slovak Republic from 15 to 19 June 2015. CommDH(2015)21, Para. 57.

<sup>809</sup> <http://hatecrime.osce.org/spain> (checked 23.6.2017).

<sup>810</sup> European Court of Human Rights, *Barik Edidi v Spain* (Application No. 21780/13) Decision of 26 April 2016.

- *Fernandez Martinez v Spain*<sup>811</sup> the Court found no violation of Article 8 over the non-renewal of a contract for a married priest teaching Catholic religion who displayed an active commitment to a movement opposing Church doctrine.
- *Manzanas Martin v Spain*<sup>812</sup> concerned the difference between retirement pensions of Catholic priests and evangelical ministers. The Court concluded this amounted to discrimination and found a violation of Article 14 in conjunction with Article 1 Protocol 1.

**Sweden:** Sweden reported 4,859 hate crimes to the OSCE in 2015 of which 149 were related to anti-Semitism, 369 related to bias against Muslims and 645 bias against Christians and members of other religions. There were reports of the murder of 2 students with a sword with anti-Muslim and racist motivations along with a reported arson attack on a mosque and vandalism and desecration of mosques. There were also 2 anti-Semitic physical assaults and threats against a Jewish family reported.<sup>813</sup>

At the UN level,<sup>814</sup> CERD recommended that Sweden should amend its legislation to provide for the possibility of taking special measures to promote equal opportunities and combat **structural discrimination** faced by, among others, immigrants, foreign-born citizens and minority groups such as Afro-Swedes and Muslims.<sup>815</sup> CERD also expressed concern about increased reports of racially motivated hate speech against visible minorities, including Muslims, Afro-Swedes, Roma and Jews. It recommended that Sweden should effectively investigate, prosecute and punish all hate crimes and take effective measures to combat hate speech. The UNHCR also noted that discriminatory statements were not uncommon in political discourse around immigration and asylum.<sup>816</sup>

CERD was also concerned at the **discrepancies in access to employment** between Swedes and foreign-born persons, noting the impact on the next generation. It also questioned the stark division in the type and areas of residence on ethnic and socio-economic lines having a severe impact on foreign-born persons, in particular Afro-Swedes and Muslims.<sup>817</sup> CERD also recommended that Sweden evaluate the impact of the Terrorism Act on minorities and apply

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<sup>811</sup> European Court of Human Rights (Grand Chamber) *Fernandez Martinez v Spain* (Application No. 56030/07) Judgement of 12 June 2014.

<sup>812</sup> European Court of Human Rights, *Manzanas Martin v Spain* (Application No. 17966/10) Judgement of 3 April 2012.

<sup>813</sup> <http://hatecrime.osce.org/sweden> (checked 23.6.2017).

<sup>814</sup> Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, Sweden, 12 November 2014, A/HRC/WG.6/21/SWE/2.

<sup>815</sup> Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, Sweden, 12 November 2014, A/HRC/WG.6/21/SWE/2, Para. 13, see also CERD/C/SWE/CO/19-21, para. 8.

<sup>816</sup> Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, Sweden, 12 November 2014, A/HRC/WG.6/21/SWE/2, Para. 14, see also UNCHR submission for the UPR of Sweden, p. 2.

<sup>817</sup> Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, Sweden, 12 November 2014, A/HRC/WG.6/21/SWE/2, Para. 36, see also See also CERD/C/SWE/CO/19-21/Add.1, paras 21–23.

relevant guarantees to prevent possible police profiling and discrimination in the administration of justice.<sup>818</sup>

The CCPR requested information on measures taken to ensure the equal enjoyment of the right to freedom of religion or belief given the **reported increase in hate crimes**, some involving physical assaults against members of religious minorities (including Muslims and Jews) and attacks against their places of worship. It also asked whether Sweden intended to address the chronically negative portrayal in the media of the Muslim minority.<sup>819</sup>

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<sup>818</sup> Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, Sweden, 12 November 2014, A/HRC/WG.6/21/SWE/2, Para. 64, see also CERD/C/SWE/CO/19-21, para. 16. See also CERD/C/SWE/CO/19-21/Add.1, paras 28–34.

<sup>819</sup> Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, Sweden, 12 November 2014, A/HRC/WG.6/21/SWE/2, Para. 31, see also CCPR/C/SWE/QPR/7, para. 23. See also CERD/C/SWE/CO/19-21/Add.1, paras 15–19.

**Table A3.1 Discrimination of religious minorities – Grounds**

| Country        | Relevant Instruments                                       |                  |   |  |   | ECtHR  |
|----------------|--|------------------|---|--|---|--|
|                | UN UPR   | UN Treaty Bodies | CoE ECRI  |  | CoE Commissioner for Human Rights   |  |
| <b>Estonia</b> | Christian Orthodox (NN; NC; TCN); Muslim (TCN); Jewish (N) |                  |   |  |   |  |
| <b>Finland</b> |  | (TCN)            |   |  | Muslim (TCN – Somali)   |  |
| <b>France</b>  |  |                  | Muslim (N, NN, TCN); Jewish (N, NN, TCN)<br>Muslim (N, NN, TCN); Jewish (N, NN, TCN)<br><br>(large scale) |  | Muslim (N, NN, TCN); Jewish (N, NN, TCN)<br>Muslim (N, NN, TCN); Jewish (N, NN, TCN)<br><br>(large scale) |  |
| <b>Greece</b>  |  | Muslim (N)       | Jewish (N)<br>Muslim (TCN)<br>Muslim (N)  |  |   | Non-orthodox (N)<br>Jehovah's Witness (N)          |
| <b>Hungary</b> |  |                  | Jewish (N)<br>Muslims (TCN)   |  |   | Jewish (N)<br>Minority Christian denominations (N) |



|                 |  |   |  |  |  |  |
|-----------------|--|---|--|--|--|--|
| <b>Italy</b>    |  |   | Muslim (NN, TCN)<br>Muslim (NN, TCN)   |  | Jewish (N)<br>Jewish (N)<br>Jewish (N) |  |
| <b>Romania</b>  |  |   | Non-orthodox Christian denominations (N)<br>Jewish (N)<br>Jewish (N)<br>Jewish (N) |  |  | Non-orthodox Christian denominations (N) |
| <b>Serbia</b>   |  |   |  |  |  | Hare Krishna (N)                         |
| <b>Slovakia</b> |  | Jewish (N)  |  |  |  |  |
| <b>Spain</b>    |  |   |  |  |  | Christian denominations (N)              |
| <b>Sweden</b>   |  | Muslim (TCN);<br>Jewish (N)<br>Muslim (TCN, NN, N);<br>Jewish (N, NN, TCN). |  |  |  |  |

**Notes:** In many cases, political discourse leads to interpersonal violations and it is impossible to divide up the nature of the discrimination in this way. For example, hate speech is interpersonal but failure to prosecute or political hate speech is institutional so it is not really possible to distinguish between the two. There is not necessarily a clear distinction between nationals and non-nationals and certainly no more granular distinction about the type of migrant in many cases – it is general discrimination against the ‘other’.

Categories covered: nationals (N), third-country nationals (TCN), non-citizens (NC; for Estonia only) and naturalised nationals (NN).

**Source:** Thematic experts, 2017.

### A3.3. Key findings

#### A3.3.1. Main violations in the countries assessed

The situation regarding religious minorities in the 11 focus countries is varied according to the history, geography, political situation and religious and cultural mix of the different countries. In many countries, it is difficult to distinguish between discrimination based on race or nationality and discrimination based on religion, as both anti-Semitism and Islamophobia often include aspects of both. In some countries, issues arise out of the dominance of a majority religion and laws that have favoured that religion in the past (e.g. Romania). This can give rise to challenges about applicable tax law, burial rites and applications for building new places of worship that may discriminate against religious minorities.

#### Islamophobia

- Migrants of Muslim-majority countries and hate crime

Anti-Muslim sentiment and anti-migrant discourse are inextricably linked in many of the focal countries. In several countries, such as Hungary, Sweden, Finland, Estonia and Greece, many Muslims are also non-nationals so measures that discriminate on the basis of nationality or origin are likely to have a disproportionate impact on Muslim populations. The FRA report on discrimination against Muslims highlights that Muslims who are not citizens are much more likely to suffer discrimination than those who are citizens and that long-term residence significantly reduces the likelihood of suffering discrimination.<sup>820</sup> Negative portrayals of migrants and tendencies to link migration to crime and terrorism fuel anti-Muslim sentiments in many countries. As with anti-Semitism, many of the concerns regarding Islamophobia involve both an increase in hate crime and an increase in anti-Muslim rhetoric at the political level, which fuels the problem. At the European level, pressure could be put on Member States to respond to these issues through improved responses to hate crime but also to defuse Islamophobic political discourse, particularly as it relates to migration.

- Muslim women and religious symbols

In light of intersectional grounds of discrimination, Muslim women are particularly vulnerable to discrimination and marginalisation. Steps taken in several countries, notably France, to ban face-covering or limit the wearing of religious symbols in public spaces have often been justified as a measure to promote inclusion and the secular state but they can have significant impacts on the integration of Muslim women and their access to education, employment and public services. That said, a report by the EU Fundamental Rights Agency in 2009 indicated that wearing visible religious symbols like the Islamic headscarf did not seem to increase the likelihood of a person being discriminated against.<sup>821</sup>

The ECtHR and the CJEU have been asked to rule on legislation and practices relating to the Islamic veil in a number of recent cases. The ECtHR has consistently been reluctant to find violations of Article 9 alone or in conjunction with Article 14 for limitations on wearing the Islamic headscarf.<sup>822</sup> Earlier this year, the CJEU was asked to rule on questions relating to religious discrimination and the interpretation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and

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<sup>820</sup> <http://fra.europa.eu/en/publication/2010/eu-midis-data-focus-report-2-muslims>.

<sup>821</sup> <http://fra.europa.eu/en/publication/2010/eu-midis-data-focus-report-2-muslims>.

<sup>822</sup> See section on France for case examples.

occupation. In *Achbita v G4S Secure Solutions*<sup>823</sup> and in *Bougnaoui and ADDH v Micropole SA*<sup>824</sup> the CJEU made a complex analysis of the line between legitimate aims and discrimination against women in employment who wear the Islamic headscarf. The Courts have, in most cases, accepted arguments of secularism or religious neutrality as justification for banning religious clothing in employment and education. But the oversight bodies consistently raise issues about the integration of Muslim women in European countries. Limitations on the wearing of headscarves or face-coverings are highly emotive and there is no consensus across Europe on the issue as yet, which makes this a difficult issue to address at the European level.

- Anti-Semitism and Jewish minorities

The existence of anti-Semitic discourse in public life and incidents of anti-Semitic hate crime are a common theme in the focus countries. International bodies identified this as a particular problem in France, Greece, Hungary, Italy, Romania and Sweden. The increase in far-right political discourse has led to a sharp increase in stigmatisation and negative stereotyping of Jewish communities. Challenging this development is a matter that could be addressed at a European level given the severe impact and the existence of anti-Semitism at the political level in many countries.

#### A3.3.2. Main observations on the monitoring mechanisms

The different monitoring mechanisms have varying levels of impact. The European Court of Human Rights and the CJEU are able to issue binding judgements against states that are in breach of the relevant standards. But their impact is limited as they are reactive to the cases that come before them rather than proactive. OSCE hate-crime reporting mechanisms and support around standards for religious minorities is helpful on a technical level but lacks enforcement mechanisms.

Both ECRI and the Council of Europe Commissioner for Human Rights provide useful and detailed country reports, which highlight systemic problems. UN monitoring mechanisms are also useful but, due to the breadth of issues they cover, their monitoring is likely to be relatively superficial and will only highlight very serious problems. Perhaps the most nuanced and relevant reporting at the European level is provided by the Fundamental Rights Agency, through both opinions and analysis of data, but it is unclear how influential FRA reports and opinions are in terms of policy change and there is a need for more up-to-date reporting on Islamophobia and anti-Semitism in particular.

<sup>823</sup> Case C-157/15, Judgement of 14 March 2017.

<sup>824</sup> Case C-188/15 Judgement of 14 March 2017.





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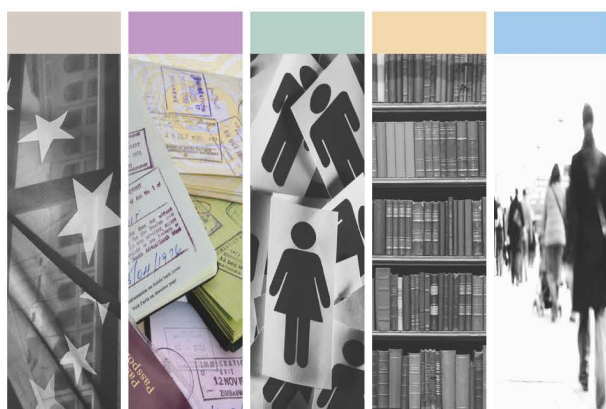
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