The Legal Status of Roma and Sinti in Europe:
National Minority and European Transnational People

Thesis Proposal

During the summer 2010, the French deportations of Roma and Sinti to Romania have re-opened the debate over the rights of Roma and Sinti in Europe. Indeed, legal instruments designed for minorities continue to be based primarily on a national-territorial perspective that either applies to social groups traditionally resident in a country (old minorities) or to migrants (new minorities).

Since a consistent proportion of Roma and Sinti remain nomadic, the existing legal instruments are inappropriate to effectively accommodate their needs because they were designed for resident people.

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

In its comparative part, this study analyzes the legal protection of Roma and Sinti in terms of cultural, linguistic, and social rights as well as in terms of political representation. The proposal for adapting indigenous peoples’ rights draws from the case of Sami in Northern Scandinavia as the only example of a European indigenous people. Finally, this study considers both theoretically and practically the protection of non-territorial minorities in Europe.

Sara Memo, PhD Candidate
School of International Studies
University of Trento
sara.memo@sis.unitn.it

14 December 2010
1. Background ........................................................................................................................................5
2. Literature Review ..........................................................................................................................6
  2.1. Minorities and non-territorial minorities ..................................................................................7
      2.1.1. Defining “minorities”: epistemological framework .....................................................7
      2.1.2. Minorities and Human Rights discourse ........................................................................8
      2.1.3. Non territorial minorities in international law .................................................................9
  2.2. Roma and Sinti .........................................................................................................................10
      2.2.1. Overview of international instruments applying to the European context ....................11
      2.2.2. Constitutional comparative view on national systems ..................................................17
3. Research Issues ................................................................................................................................19
4. A European Transnational People? ...............................................................................................20
  4.1. “Autochthonous minority” or “indigenous people”? ...............................................................21
  4.2. The Sami: a European indigenous people ..............................................................................24
  4.3. Transcending national borders and nationalistic classifications .........................................25
5. Methodology ....................................................................................................................................25
6. Potential Implications ....................................................................................................................27
References ...............................................................................................................................................27
**Terminological issues:** Roma and Sinti present a cosmos of different groups. This thesis proposal uses the term “Roma and Sinti” as the plural noun form, as well as to name the group as a whole, and “Romani” as the adjective, in line with emerging and converging uses. The term “Romanes” is used to identify the language spoke by these people. The term “Gadje” is used by the Roma and Sinti when referring to a non-Roma/Sinti. This choice of terminology is not an endorsement of approaches aimed at homogenising Roma and Sinti groups as ‘Gypsies’ or at eliminating the rich diversity within them. As a consequence of persecution in history, the term *Gypsy* and several European variants of *Tsigan* are considered by many to be pejorative.
In September 2010, EU Justice Commissioner Viviane Reding, condemned the French deportation of Roma and Sinti to Romania. Because that situation ‘gave the impression that people are being removed from a Member State of the European Union just because they belong to a certain ethnic minority’ Reding warned France that it would face an official EU "infringement procedure" if it failed to implement directive 2004/38/EC on the free movements of EU citizens and their families in two weeks. On 19 October, France met this deadline by submitting a reply to the challenge by the European Commission. Reding was satisfied with this reply, stating that ‘the European Commission will now, for the time being, not pursue the infringement procedure against France’.

While this decision temporarily resolved the affair concerning this forced deportation, at least as far as the European Commission is concerned, it certainly re-opened once again the public debate over the legal rights of Roma and Sinti in Europe. How does the public usually interpret the issue – as a problem of immigration, of public order, of linguistic minority, or of race/ethnicity?

In the realm of the “common sense” answers to this question may all have a grain of truth. As we move into the realm of the scientific debate, one quickly realizes that scholars are unable to provide adequate answers because ‘we still miss the bridges between Romani studies and general culture’. These “bridges” are even more tenuous when entering the legal field and trying to identify legal categories to address these peoples’ needs. ‘At every legal level the [Romani] image diffused a

---


3 Viviane Reding, supra note 1.


7 A. SIMONI, Stato di diritto e identità rom 9 (L’Harmattan Italia. 2005).
century ago has not been revisited. Therefore there is no reason to believe that perceptions of lawyers are different from non-lawyers.\(^8\)

These shortcomings have driven the public opinion and the scientific debate to consider the Roma and the Sinti as minority groups vis-à-vis the majority population of national States. Yet, while looking at their numerical presence in Europe as a whole – the Roma and Sinti number is estimated around 10-12 million people\(^9\) – one can question whether their treatment as “minority group” is appropriate considering that the number is in the range of a medium size European country.\(^10\) In this light, the problem on how to address the legal status of these individuals becomes more topical than ever.

1. Background

Linguistics have demonstrated that Roma\(^11\) and Sinti\(^12\) share common roots descending from North Indian castes that arrived in Europe between 500 and 1000 A.D.\(^13\) The origins and the migrations of this social group, have been mostly reconstructed both through their language and through the names used by Gadje (the “non-Roma”) to identify this social group.\(^14\)

Over the centuries, the original group has split into different subgroups which have been increasingly influenced by the cultures and languages of the countries where they have temporarily resided.\(^15\) It is appears almost impossible to accurately reconstruct the migration pattern of these people within Europe. A general, though not entirely satisfactory, macro-categorization of these

---

\(^8\) Ibidem.


\(^10\) Such as Greece (11.260.402 inhabitants), Belgium (10.750.000 inhabitants), Portugal (10.627.250) and Czech Republic (10.467.542).

\(^11\) In Romanes “Roma” means “man”. According to Calabrò the etymology of the term can either derive from the Indian group of musicians and tumblers called “Doms” or from the Sanskrit word “Dom” which means “to sound, to echo”. Calabrò interestingly highlights the fact that the self-definition of Roma people as “men” can be attributed to the primitive usage which is common to tribal groups as native American defining themselves as “the people of the men”. A.R. CALABRÒ, Zingari. Storia di un'emergenza annunciata (Liguori Editore. 2008).

\(^12\) “Sinti” describes an ethnic group which mainly leave in Germany, Austria, France and Northern Italy. “Sinti” means “relatives”. E. TAUBER, Sinti Estraixaria children at school, or, how to preserve 'the Sinti way of thinking', 5 Romani Studies (2003).


\(^14\) According to Piasere, the term “Gypsy”, which has for long time negatively connoted this social group, should have derived from the term “Egyptian” identifying the color of the skin and of the clothes attributed to the people living in that country. Another way to define Roma, which can be found in almost every European language, is through the name ‘tsiganes, gitanos, cigani, zingari’, deriving from the Greek word “adsincani”, often used interchangeably in the past with “althiganoi” to recognize the members of a sect convinced of using magic arts in Turkey during the XI century A.D. L. PIASERE, I Rom d'Europa. Una storia moderna 31 (Laterza. 2004).

\(^15\) Firstly settled in Turkey in the XI century, Roma and Sinta have progressively started to move to the Balkans and, by the beginning of the XV century, to Germany, Belgium and Sweden. Soon after, England and Scandinavia as well became “host-countries” of their peregrinations. J. AND GHEORGE LIEGEIOS, N., Roma/Gypsies: A European Minority (Minority Rights Group International ed. 1995).
groups can be drawn on the basis of the language which – to a certain extent – allows to make general distinctions among the diverse macro-ethnic categories.

Considering the peculiar nomadic life-style that has characterized this social group for centuries, one can find a high degree of heterogeneity inside every linguistic group, presenting very different cultural values as well as linguistic and religious diversity.\textsuperscript{16} Although most of them have found permanent settlement within diverse European countries, there still persists a \textit{fil rouge} linking these people in a polythetic perspective.\textsuperscript{17} This \textit{fil rouge} is mostly represented by a common culture and a common language\textsuperscript{18} and, what is most important, by common traditions.\textsuperscript{19}

Despite centuries of presence in Europe, the history of Roma and Sinti has always been marked by different degrees of stigmatization and socio-economical segregation. In the 1993 report, Josephine Verspaget, a Rapporteur for the Council of Europe, compared the condition of Roma in Europe as:

\begin{quote}
…. the third world: little education, bad housing, bad hygienic situation, high birth rate, high infant mortality, no knowledge or means to improve the situation, low life expectancy … If nothing is done the situation for most Gypsies will only worsen in the next generation.\textsuperscript{20}
\end{quote}

Yet, what can be done for these people? How their needs can be addressed? In order to provide answers to these questions, this issue needs to be analyzed in its bigger framework.

2. Literature Review

As anticipated in the introduction, a serious debate about Roma and Sinti in Europe has not been developed so far in the legal field.\textsuperscript{21} To fill this “cognitive gap” one could certainly consider a multidisciplinary overview on the literature developed in other scientific fields, especially in

\begin{footnotes}
\item[16] O'NIONS, 4.
\item[17] According to anthropologists this kind of category describes a group that cannot be defined on the basis of every single character but on a combination of characters. Piasere clarifies this concept through the following example: ‘two brothers can look similar because of their dark hair and can look different from a third brother that has blonde hair. The latter looks similar to the first because of his nose (aquiline) that is different from the second brother. The second brother in turn, resembles to the third because they are both green eyed while the first brother is dark eyed’ PIASERE, 3.
\item[18] Although nowadays different Roma groups speak “heterogenous cluster of varieties” of \textit{romanes} they share a homogenous core (which can be found in a common morphology and a common lexicon) traditionally spoken by Roman citizens in all European countries which allows to recognize Romani as a language. As Halwachs has demonstrated in his lecture “Can we think about Roma and Sinti as belonging to a common linguistic minority?” presented at the International Conference “The legal status of Roma and Sinti in Italy” Università di Milano-Bicocca, June, 16\textsuperscript{th}-18\textsuperscript{th}.
\item[19] According to Calabro common traditions which rely on common memories (i.e. memories of a shared past) represent one of the most important foundations on which the collective identity of an ethnic group is built since they constitute the social cement differentiating the \textit{insiders} from the \textit{outsiders}. CALABRO, 88.
\item[21] See SIMONI, 9.
\end{footnotes}
sociology. Yet, due to the lack of specialized legal literature, it is useful to briefly analyze the current legal tools protecting minorities in general that can be used in Europe to provide protection to Roma and Sinti.

2.1. Minorities and non-territorial minorities

Before examining the legal instruments for the protection of minorities, it is necessary to define “minorities” in order to clarify the conceptual framework of the following analysis.

2.1.1. Defining “minorities”: epistemological framework

Defining “minority” in general terms is not an easy task, since it necessarily implies sociological considerations which vary according to the continuous social changes. Broadly speaking, a minority can be considered as a group of people that can be identified vis-à-vis the rest of the population living within a State in reason of one or more distinctive features.

However, infinite might be the number of its distinctive elements: people can belong to a minority because of their gender, of their religion, of their age, etc. Being so difficult to crystallize, the definition of this concept has always been avoided whenever possible even by some specific international instruments.

Notwithstanding the lack of a general and shared binding definition, some widely accepted proposals focus on the elements of “numerical inferiority”, “non-dominant position” or on “discrimination” vis-à-vis the majority of the population.

23 E. PALICI DI SUNI, Intorno alle minoranze 5 (Giappichelli 1999).
26 In 1976 Capotorti, the Special Rapporteur of the UN SubCommission on the Prevention of Discrimination and Protection of Minorities, proposed the following definition though to be explanatory on Art. 27 of the International Covenant on Civil and Political Rights (ICCPR): “A group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directing towards preserving their culture, traditions, religion or language”. F. CAPOTORTI, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities. at 96 para.568 (UN Publications 1979). The phrase “in a non-dominant position” was included in order to ensure that non dominant minorities – such as the white minority
Besides these “objective” elements, the proposals for a definition have concentrated on the “subjective dimension” i.e. how minority groups perceive themselves within the population of a State and ‘are concerned to preserve their special features’. 28

According to Tsekos, the lack of an international shared definition is not just mere political disagreement about semantics: discrimination against some ethnic groups – such as the Roma – cannot be effectively eliminated without a serious reflection on the role that minorities play in the system of international relations. 29

2.1.2. Minorities and Human Rights discourse

Since the end of the Second World War international protection of minorities was included in the human rights discourse. 30 Among the international human rights instruments that have been developed during the years, the International Covenant on Civil and Political Rights (ICCPR) is

under the former apartheid system in South Africa – could not avail or an abuse the concept of minority rights. See F. AND BOWRING DEIRDRE, B., Minority and Group Rights in the New Millenium 91 (Martinus Nijhoff Publishers 1999). In 1985, Deschênes “updated” Capotorti’s definition by proposing the following: ‘A group of citizens of a state, constituting a numerical minority and in a non-dominant position in the state, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law’. J. DESCHÊNES, Proposal concerning a definition of the term ‘minority’ U.N. Doc. No. E/CN.4/Sub.2/1985/31 (1985).

Wirth an American sociologist, provided another renowned attempt of definition ‘As a group of people who, because of their physical or cultural characteristics, are singled out from others in the society in which they live for differential and unequal treatment, and who therefore regard themselves as objects of collective discrimination. The existence of a minority in a society implies the existence of a corresponding dominant group with higher social status and greater privileges. Minority status carries with it the exclusion from full participation in the life of the society’. L. WIRTH, The Problem of Minority Groups, in The Science of Man in the World Crisis 347, (R. Linton ed. 1945).

G. CHALIAND, Minority Peoples in the Age of Nation States 89 (Pluto Press. 1989). Wagly and Harris further develop this idea in a more comprehensive view: ‘1) Minorities are subordinate segments of complex state societies; 2) minorities have special or cultural traits which are held in low esteem by the dominant segment of the society; 3) minorities are self-conscious units bound together by the special traits which their members share and by their special disabilities which these bring; 4) membership in a minority is transmitted by a rule of descent which is capable of affiliating succeeding generations even in the absence of readily apparent special cultural or physical traits; 5) minority people, by choice or necessity, tend to marry within the group’. C. AND HARRIS WAGLY, M., in The Minority Report: An Introduction to Racial, Ethnic, and Gender Relations. 5, (G. and Dworkin Dworkin, R. ed. 1976).

States are often reluctant to grant rights to minority groups because they view such an act as a relinquishment of sovereignty. Thus, states often struggle to define minorities in ways that do not undermine their sovereignty. Some argue that minority group rights are unnecessary in a system that affords international protection to individuals. Individual rights, however, are not sufficient to protect a minority group's culture, language, and religious beliefs’. M. E. TSEKOS, Minority Rights: The Failure of International Law to Protect the Roma, 9 Human Rights Brief, 26 (2002).

Indeed, international human rights law can be considered as the macro-category comprehending the more specific set of rights designed for the protection of minorities. Compared to the classic approach to human rights, minority rights are characterized by some specificities tailored to the special needs of minorities. For this reason minority rights should be understood as a more specific set of general human rights because they address the groups’ claims of diversity.
certainly the most important for the international protection of minorities. In particular, Art.27 can be considered as the key provision specifically dealing with the rights of minorities.31

This article finds particular enforcement through the process of consideration of State reports by the Human Rights Committee. In respect to Roma’s condition there can be found two-pronged effects of the Art.27. On the one hand, the Committee is concerned with the condition of Roma as a collectivity, on the other, it adopts individualistic wording when criticizing the absence of measures to prevent discrimination.32

Among the other international human rights instruments which enshrine the protection of the rights of minorities, it is worth mentioning the 1989 Convention on the Rights of the Child (CRC)33 and the international instruments produced in the realm of UNESCO for the protection of cultural rights.34 Additionally, minorities have received particular attention (especially the Roma group in Romania) also by the ILO Commission of Inquiry which has examined the status of discrimination in labor places, on the basis of the 1958 Convention No.111 on Discrimination (Employment and Occupation).

2.1.3. Non territorial minorities in international law

Historically, international law distinguishes two macro-categories of minorities: the so-called ‘historical, traditional, autochthonous minorities’ and the ‘new minority groups stemming from migration’.35 These categories explain the concept of minority in terms of State’s sovereignty over one territory and one people. While the first category refers to communities that became minorities as a consequence of a re-drawing of international borders, the second category refers to groups and individuals that leave their original homeland to emigrate to another country.

31 ‘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 member of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language’.
32 O’NIONS, 200.
33 Art. 30 of CRC affirms: ‘In those States in which ethnic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language’.
34 Among the most important provisions that UNESCO has produced over the years, it can be recalled the Declaration of International Cultural Co-operation affirming that every people have the right and the duty to develop their own culture. In UNESCO Records of the General Conference, 14th Session 1966. UNESCO has recognized as well the importance for education and development of minority culture and identity. A third interesting effort of recognition of minority’s culture can be found at Art.5 c) of the Convention on Discrimination in Education which states: ‘It is essential to recognize the rights of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of the State, the use or teaching of their own language. For a discussion over the importance of UNESCO’s action in promoting the rights of minorities see H. HANNUM, Autonomy, Sovereignty, and Self-Determination: The Adjudication of Conflicting Rights (Pennsylvania Press. 1990).
However, these categories cannot be thought as comprehensively embracing the whole spectrum of minority groups. Indeed, there are some groups, such as Jews, which are a historical and traditional minority within several States, but they do not have a territory of reference. These classifications refer to a concept of State and sovereignty that derive from the Westphalian model which regards national States as ‘superiorem non reconoscentes’ i.e. as the only agents legitimized to intervene within their domestic jurisdiction. Yet, facing the current complexity of cross-border relations, one needs to shift toward a new paradigm and a new definition.

Nowadays, a (more) useful classification of minorities may be drawn with reference to their relations to territory: territorially concentrated minorities and non-territorial minorities. The first category refers to ethnic, religious, national, or linguistic groups that are resident in a defined territory, while the second category refers to distinct groups lacking such a defined territory of residence. To the latter groups, the Westphalian model cannot be easily applied, because the current legal definitions and their related instruments are tailored on the needs of territorial groups (territorial autonomy, for instance) and on those of the States adopting territorial governance.

Hence, there is a need to re-define the current categorization of minorities in order to effectively address the claims of non-territorial groups as well. One possible solution has been conceptualized by Karl Renner, who proposes to move from territorial autonomy to personal autonomy in order to allow the coexistence of multiple and diverse nationalities within the same state. This model can be particularly ‘suited for minorities that demand significant autonomy but for a variety of reasons cannot have separate States’.

2.2. Roma and Sinti

The situation of Roma and Sinti in Europe has been described as ‘non-territorial minorities living dispersed in more than one country’. Within Romani communities coexist people with different

---

36. Renner proposed a system or dual federalism, in which power would be devolved from the centre on both territorial and non-territorial lines. On the one hand, the historic crown lands or provinces (Länder) that had long constituted the basic building blocks of the monarchy would be recognized as central elements in a system of territorial federalism. On the other, power would also be devolved to the nations that made up the Austrian population. This would take the form of devolution of responsibility for such areas as education, culture, the arts, sciences and museums to a national council (Nationalrat) for each nation. This council would consist of elected representatives of all parts of the “nation,” regardless of the province (Land) in which they were located. Renner's project was based on the administrative units into which each province was divided: each uninational county (Kreis) would return three deputies to the appropriate national council, while binational counties would return two deputies to the national council of the local majority and one to that of the local minority. The jurisdiction or each national council would be non-territorial: it would extend to all persons in uninational counties or the nation in question and to persons registered as belonging to that nation in binational counties. J. COAKLEY, Approaches to Resolution of Ethnic Conflict: The Strategy of Non-Territorial Autonomy 300 § 15 (1994).


status regarding citizenship: European, non-European, stateless people and even unregistered people who are completely invisible to law. This variation in legal status even co-exists within the same family.\(^{39}\)

### 2.2.1. Overview of international instruments applying to the European context

In the European territory human rights’ protection is implemented in three “geo-legal spheres”:\(^{40}\) (a) the European Union (EU) as the most inner level, (b) the Council of Europe (CoE) as the intermediate level, and (c) the Organization for Security and Cooperation in Europe (OSCE) as the most external one.\(^{41}\) These geo-legal dimensions have produced – especially in the realm of the rights of minorities – an increasing osmotic process between international law and domestic constitutional laws mutually reinforcing the guarantees belonging to each single dimension.\(^{42}\) Yet, this increasing intensification of minority rights has not yet resulted in a redefinition of legal categories identifying minorities groups in Europe. Hence, Roma and Sinti can only partially benefit from stronger guarantees deriving from this process because of their peculiar non-territorial feature.

(a) In EU law, there are very few specific instruments dealing with the protection of the rights of minorities.\(^{43}\) For Roma and Sinti, the most comprehensive legal instrument is certainly the Racial Equality Directive (2000/43/EC), which requires all Member States to forbid discrimination on grounds of racial or ethnic origin in employment, education, healthcare, social protection, housing

---

\(^{39}\) G. PERIN, L'applicazione ai Rom e ai Sinti non cittadini delle norme sull'apolidia, sulla protezione internazionale e sulla condizione degli stranieri comunitari ed extracomunitari. (2010).
\(^{41}\) ‘Supranational Law, International Law and soft law correspond to every of these geo-legal sphere. Each one characterized by the formation of an “European Constitutional Law” ‘. Id. at 23.
\(^{42}\) The combined effect of the increasing ‘internationalization’ of minorities’ standards and the parallel conditionality of these standards vis-à-vis domestic norms has produced the so-called “internationalization of constitutional law”. Constitutional laws, seem to be more and more influenced both in the contents and in the procedures by international law, also when these are not immediately binding. At the same time, international law seems to start adopting more and more some features that so far have been recognized as a prerogative of domestic constitutions such as normativity and jurisdictional (or para-jurisdictional) control. F. PALERMO, Internazionalizzazione del diritto costituzionale e costituzionalizzazione del diritto internazionale delle differenze European Diversity and Autonomy Papers.
\(^{43}\) Interesting enough, if on one hand, minority’s respect and protection is one of the criteria for the new adherent countries to accede EU (Copenhagen European Council, 21-22 June 1993, SN 180/93), on the other, until the entry into force of the Treaty of Lisbon on the 1\(^{st}\) December 2009, there was no communitarian provision among the primary sources entailing the respect and the protection of minority groups. The Treaty of Lisbon includes for the first time the word “minority” at Art. 1a establishing the general principles on which the Union is founded: ‘[…] respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’
and access to goods and services. However, according to De Schutter, the mere prohibition of direct and indirect discrimination does not suffice to effectively integrate Roma and Sinti.44

Further EU instruments can provide some other forms of protection to Roma and Sinti that can even be more difficult to apply than Directive 2000/43/EC because the legislator tailored them to the needs of other categories: the Employment Framework Directive (2000/78/EC), 45 the Council Directive on Family Reunification (2000/86/EC) and the Long-Term Resident Directive (2003/109/EC).46

Besides these EU Directives, which can be applied also to minorities, there is an important institutional mechanism of redress for individuals and communities: the European Court of Justice (ECJ). However, individuals can bring action before the Court only whenever governments may violate EC law (for instance discriminatory treatment in the employment field). Thus, if governments do not engage at all in positive actions even with regard to the most excluded and discriminated groups, judicial action is impossible. Indeed, the EU has left the problem of the inclusion and integration of marginalized groups to the discretion of Member States. As a consequence, governments are free to adopt programs and policies for Roma and Sinti’s inclusion but there is no legal means to enforce them to do so.

In this regard, Kostadinova suggests that ‘the EU should allow a broader scope (i.e. a higher ceiling) for Member States to adopt positive action measures for ethnic minorities, who suffer from widespread marginalization’ in order for this judicial remedy to be really effective for the rights of Roma and Sinti.47

---

44 Positive action is needed, and this is allowed and not obliged by the Directive (Article 5). Second, the material scope of application of the Racial Equality Directive is too limited for the needs of Roma. The Directive does not prohibit discrimination in the issuing of administrative documents.... A third insufficiency may be added, which concerns the exclusion of discrimination on the basis of nationality from the scope of the Directive. Roma ..., belong to the category of non-nationals in many states. Although this does not exclude them from the benefit of the Racial Equality Directive, the fact that the Directive is without prejudice to differences of treatment based on nationality means that it is doubtful whether such differences in treatment, even if they appear to create an indirect discrimination on the grounds of race or ethnic origin, could be challenged under the Directive. O. AND VERSTICHEL DE SCHUTTER, A., The Role of the Union in Integrating the Roma: Present and Possible Future European Diversity and Autonomy Papers.

45 Which forbids discrimination in the field of employment and vocational training, but on a wider range ground: religion or belief, age, disability and sexual orientation.

46 Especially these two last directives have been specifically designed for migrants.

The European Parliament perceived the need to improve the living conditions of Roma and Sinti and did so, by adopting a Resolution on the situation of Roma and Sinti of Europe on 28 April 2005.48

(b) In the geo-legal sphere of the CoE one can find a rich catalogue of legal instruments specifically tailored to protect the rights of minorities. From the 1990s, in fact, the CoE created new legal instruments focused on minorities in order to better address the ethnic claims that emerged after the dissolution of the Federalist Socialist Republic of Yugoslavia.

The first instrument is represented by the 1992 Language Charter, the first European multilateral Treaty dealing with linguistic diversity and, albeit indirectly, with the protection of minorities. This instrument has entailed important innovation for the rights of Roma and Sinti, since it recognizes Romanes as a minority language. This recognition is extraordinary: according to traditional international law, the realm of application for a minority language has generally been limited by the requirement of citizenship. For this reason, most languages recognized in this Charter have been those traditionally spoken in Europe, thus belonging to autochthonous minorities.49 Yet, in the cases of Yiddish and Romanes there has been a recognition of the non-territorial character of the language. However, the Charter’s main goal relates to the promotion of minority languages and linguistic diversity, without guaranteeing, from a more holistic perspective, general minority rights of the speakers of these languages.50

In 1995, the CoE adopted another instrument the Framework Convention on the Rights of Persons Belonging to National Minorities. This Convention represents a more comprehensive instrument than the 1992 Charter, since it considers the whole spectrum of minority rights.51 As in the case of the ICCPR the protection of minorities is conceived on an individual rights basis as it is

49 Thus completely excluding dialects and migrants languages.
50 The recognition of the element of non-territoriality belonging to a national language is among most interesting European developments as far as the protection of minority rights is concerned. See, inter alia, J.M. WOEHERLING, The European Charter for National or Minorities Languages. A Critical Commentary 131 (The Council of Europe Publishing, 2005). Nonetheless, this linguistic recognition is still partial because Romani is not included in Part III of the Charter which requires State to adopt specific measures to promote the use of minority languages in public life (with regard to education or judicial authorities for instance). Therefore the recognition of non-territorial languages remain a step backward the recognition of territorial ones. See GARO, 163.
51 From a general overview, the content of the Framework Convention can be thought as being articulated on three levels. The first one relates to the principle of free choice to belong to a national minority (Art. 3 also defined as right to non-association); the second enshrines the prohibition of discrimination for people belonging to minorities (Art.4); while the third enshrines some specific measures on minority protection (Art.5) in F. PALERMO & J. WOELK, Diritto Costituzionale Comparato dei Gruppi e delle Minoranze 90 (Cedam, 2008).
clear from the wording of the first article ‘persons belonging to minorities’. Nevertheless some provisions can apply to collectivities, despite wording in individual terms. A clear example is represented by Art.5 allowing for special measures to ensure de facto equality.  

The domestic implementation of the Convention’s provisions is supervised by a monitoring mechanism based on periodical reports that States Parties have to transmit to the Secretary General of the Committee of Ministers (Arts. 24-26). Although the work of the Committee certainly is a strong factor conditioning the national adherence to the standards of the Framework Convention, there still persist some shortcomings undermining the whole validity of the Convention.

The current mechanism of implementation which does not foresee any possibility of adjudicating individual or group complaints is, according to Tsekos, ineffective for the protection of Roma and Sinti’s rights because it ignores the fact that states can easily refuse to acknowledge or confer minority status on certain groups … as has been demonstrated in the case of the Roma in Germany. Furthermore, the implementation mechanism fails to provide redress if the reporting state has refused to acknowledge that discrimination in fact exists.

According to the author, it is important for minorities to have the legal means to challenge an international judicial organ not only for the breaches regarding acts of discrimination against their individual members but also regarding effective redress for the group as a whole.

Especially in the last years, more specific international instruments have been adopted in the realm of the CoE specifically focused on Roma and Sinti. Yet, if they have contributed to focusing

---

52 O’NIONS, 214.
53 The programmatic formulation of the Framework Convention, the limited scope of the special measures called for in order to eliminate discrimination and to achieve dignity and equal rights, weak wording and frequent qualifications in the text, the absence of group rights, a monitoring instance relying only on the examination of State reports, political control over monitoring body, and the apparent opening for States to arbitrarily identify minorities which are entitled to protection under the Framework Convention, thus implying the rejection of other groups’. G. ALFREDSSON, A Frame an incomplete painting: a comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures, 7 International Journal of Minority and Group Rights, 292 (2000).
54 TSEKOS, 28.
55 The Committee of Ministers of the Council of Europe has adopted a number of important recommendations that are relevant to national minorities, such as Recommendation Rec(2006)10 on better access to health care for Roma and Travellers in Europe, Recommendation Rec(2001)17 on the economic and employment situation of Roma/Gypsy and Travellers in Europe, Recommendation No. R (2000) 4 on the education of Roma/Gypsy children in Europe, Recommendation No. R (97) 21 on the media and the promotion of a culture of tolerance and Recommendation No. R (1997) 20 on “hate speech”. The Parliamentary Assembly of the Council of Europe has also issued a number of recommendations, such as Recommendation 1766 (2006) on ratification of the Framework Convention for the Protection of National Minorities by the member states of the Council of Europe, Recommendation 1623 (2003) on the rights of national Minorities, Recommendation 1203 (1993) on Gypsies in Europe and Recommendation 1201 (1993) on the additional protocol on the rights of minorities to the European Convention on Human Rights. The Congress of Local and Regional Authorities of the Council of Europe has also paid attention in its work to minority-related issues and adopted pertinent texts, such as Resolution 16 (1995) 1 on “towards a tolerant Europe: the contribution of Roma (Gypsies)”.

14
the international attention on the issue, their soft-law nature as recommendations does not allow an immediate and effective enforcement of these general principles.

Additionally, the CoE created an advisory body on constitutional matters the Venice Commission\(^\text{56}\), whose legal advices has been used, \textit{inter alia}, by NGOs to support their concerns and address their recommendations to improve Roma and Sinti’s rights in the UN realm.\(^\text{57}\)

Finally, inside the CoE geo-legal sphere, it should be emphasized the principal jurisdictional body that individuals have at their disposal to redress violations of human rights: the European Court of Human Rights (ECHR) established by the 1950 European Convention on Human Rights (ECHR). Although there are no substantive provisions dealing with minorities,\(^\text{58}\) the ECHR has certainly played a vital role in protecting the respect for minority rights.

Recent jurisprudence concerning Romani rights has mostly concentrated on cases of police abuse\(^\text{59}\) and on discrimination in education.\(^\text{60}\) European lawyers are increasingly using litigation as a

\(^{56}\) Established in 1990, the commission has played a leading role in the adoption of constitutions that conform to the standards of Europe's constitutional heritage. Initially conceived as a tool for emergency constitutional engineering, the commission has become an internationally recognized independent legal think-tank. It contributes to the dissemination of the European constitutional heritage, based on the continent's fundamental legal values while continuing to provide “constitutional first-aid” to individual states. The Venice Commission also plays a unique and unrivalled role in crisis management and conflict prevention through constitution building and advice. See http://www.venice.coe.int

\(^{57}\) Written Comments of the European Roma Rights Centre (ERRC) and the Centre for Roma Initiatives ("CRI") concerning Montenegro for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at its 74th Session., pt. 1-17 (2009).

\(^{58}\) The only provision mentioning minorities can be found at Art.14 of ECHR which prohibits discrimination, \textit{inter alia}, on the ground of association with a national minority.

\(^{59}\) The trigger case in the realm of police abuse has been \textit{Assenov v. Bulgaria} (1994) where the Court holds: ‘Where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within their jurisdiction the rights and freedoms in [the] Convention,” requires by implication that there should be an effective official investigation. This obligation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible’ para 177. Because of the importance of the rights at stake which are considered as absolute or quasi-absolute in view of their limited scope ‘the question arises to what extent the state has positive state obligations to prevent infringements of the right to life at the hand of private parties or in other words how wide the indirect horizontal applicability of human rights reaches’. C. HENRARD, \textit{The European Convention on Human Rights and the Protection of the Roma as a Controversial Case of Cultural Diversity}, 5 European Diversity and Autonomy Papers, 7 (2004). For this reason whenever absolute human rights are at stake, the ECHR applies the rational of the “reverse burden of proof” i.e. it is up to the perpetrator (in this case the State), not to the victim to provide evidence that it has undertaken every and each measure to prevent the commission of the criminal action. See J. RINGELHEIM, \textit{Minority Rights in a Time of Multiculturalism: The Evolving Scope of the Framework Convention on the Protection of National Minorities}, 10 Human Rights Law Review, 63 (2010).

\(^{60}\) Whereas in the field of discrimination in education \textit{D.H. v. Czech Republic} (2007) the Court expressly endorsed the principle of indirect discrimination by affirming that once the applicant has shown a difference in treatment, the burden of proof shifts, and it is then for the government to “show that it was justified” by providing “a satisfactory and convincing explanation J.A. GOLDSTON, Roma Rights Litigation: What Has Been Achieved and How (Draft Version) 6 (Università Bicocca www.rom.asgi.it 2010). Within the jurisprudence of the ECtHR, the principle of non-discrimination has enjoyed further improvement since the adoption of Protocol XII in 2000.
strategic tool to ‘bring about changes in areas where legislators are unwilling or unable to act or where legislation does not adequately address social issues’.\(^\text{61}\)

Notwithstanding these judicial improvements, domestic courts remain pivotal in monitoring and implementing human rights since, as a general rule, international remedies remain blocked until domestic remedies are fully exhausted.\(^\text{62}\) Moreover, the judgments of the ECtHR are not immediately executive \textit{vis-à-vis} States Parties.\(^\text{63}\)

(c)The third geo-legal sphere of the OSCE is mostly characterized by \textit{soft-law} instruments. Although its legal instruments are not binding, this organization has undertaken several steps in setting international standards focused for minorities.\(^\text{64}\) This organization from its origins, as Conference on Security and Cooperation in Europe (CSCE), emphasized the “human dimension” from the Helsinki Final Act of 1975.

The 1990 Copenhagen Document on Human Dimension, which is a ‘veritable European charter on democracy’ for Eastern Europe in the post-Communism transition, specifically dealt with the protection of minorities in its Part IV.\(^\text{65}\) At point 40, it recognizes the ‘particular problems of Roma (gypsies)’.\(^\text{66}\) The international attention regarding the situation of Roma and Sinti in Europe has been further recalled by the OSCE in a series of international meetings.\(^\text{67}\) Some of them have been of key importance in enlarging the range of international tools specifically focused on the situation of minorities. The 1994 Concluding Document of Budapest ‘Towards a Genuine Partnership in a New Era’ establishing a contact point for Roma and Sinti (Gypsies) issues within the Office for Democratic Institutions and Human Rights (ODIHR);\(^\text{68}\) the 2003 Maastricht Ministerial Council,

\(^{61}\) G.J. GARLAND, \textit{The Use of Strategic Litigation as a Tool for Social Change: A Roma Rights Perspective,} in Stato di Diritto e Identità Rom 125, (A. Simoni ed. 2005). The author further observes ‘The situation of the Romani population in Europe has frequently been compared to that of American black in the fifties and sixties. Whether or not this comparisons are fair to make, the strategic value of carefully selected litigation in addressing what are often political issues and political failures to provide fair treatment is readily apparent’ GARLAND, 127.

\(^{62}\) MEDDA-WINDISCHER, 36.

\(^{63}\) For a discussion over the non immediate execution of the judgments of ECtHR in the case of Roma and Sinti see K. KANEW, \textit{Non Execution of European Court Judgments Involving Romani Victims in Bulgaria} Roma Rights Quarterly.


\(^{66}\) Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 1990, point 40.

\(^{67}\) Paragraph VI of the Report of the CSCE Meeting of Experts on National Minorities, Geneva, 1991 reaffirm the recognition of Roma and Sinti’s problems and encourage Member States to undertake research and studies over their living conditions. Point 35 of CSCE Helsinki Document 1992 ‘The Challenges of Change’ reaffirms the need to develop appropriate programs addressing problems of people belonging to ‘Roma and other groups traditionally identified as Gypsies and to create conditions for them to have equal opportunities to participate fully in the life of society’. Point 20 of the Istanbul Document, 1999 renamed ‘Charter for European Security’ stresses once again the necessity to eradicate discrimination against Roma and Sinti.

\(^{68}\) Point 23 of this document explains the tasks of the Contact Point: ‘act as a clearing-house for the exchange of information on Roma and Sinti (Gypsies) issues, including information on the implementation of commitments
adopting an Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area;⁶⁹ the 3rd Summit of Heads of State and Government⁷⁰ encouraging the cooperation among the Council of Europe, the European Union and the OSCE in the field of Roma and Sinti’s rights and highlighting the paramount importance of the European Roma and Travelers Forum (ERTF).⁷¹

In addition, the OSCE High Commissioner on National Minorities (HCNM), established in 1992, provides early warning and takes appropriate early action to prevent ethnic tensions from developing into conflict. The HCNM’s mandate describes the Office as ‘an instrument of conflict prevention at the earliest possible stage’.⁷² The Commissioner uses “quiet diplomacy” by providing “early warning” and, as appropriate, ‘early action in regard to tensions involving national minority.⁷³

Besides monitoring the situation of minorities within the OSCE States parties the HCNM can also decide to submit informal or formal recommendations to a government if retained necessary to enforce human and minority rights standards. More in general, the HCNM has developed specific sets of thematic recommendations and guidelines as well.⁷⁴ In 2000, a report on the situation of Roma and Sinti in the OSCE area was published to highlight once again the situation of discrimination and racial violence against this social group.⁷⁵

2.2.2. Constitutional comparative view on national systems

As international and European levels, also national systems have difficulties in adapting the existing legal categories addressing to minorities to the needs of Roma and Sinti. “Linguistic belonging” is also an issue: some of them speak Romanes, others speak the language of the State where they live.⁷⁶

---

⁶⁹ Fostering in particular the action of High Commissioner on National Minorities. Decision No. 3/03: Action plan on Improving the Situation of Roma and Sinti within the OSCE Area.
⁷⁰ Warsaw, 16-17 May 2005.
⁷¹ The European Roma and Travellers Forum (ERTF) was born as an informal exploratory group composed of Roma leaders and personalities. By 2004 the Forum started privileged relations with the CoE through a Partnership Agreement. By virtue of this agreement, the Forum receives assistance in terms of financial and human resources, and has a privileged access to the various bodies and organs of the Council of Europe which deal with matters concerning Roma and Travellers. In February 2005, the Forum opened its Secretariat in Strasbourg within the Council of Europe’s premises. Among their principal objectives there are: the establishment of fair and democratic representation of Roma in Europe; the achievement a fair and equal participation of Roma at all levels of policy-making at national and international level; the achievement of official recognition of the Roma as a European people and of Romanes as a European language. More information are available at http://www.ertf.org/
⁷² OSCE, High Commissioner on National Minorities FactSheet.
⁷³ Ib.
⁷⁴ The Hague Recommendations regarding the Education Rights of National Minorities (1996); the Oslo Recommendations regarding the Linguistic Rights of National Minorities (1998); the Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999); and the Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations & Explanatory Note (2 October 2008)
Thus the category of “linguistic minority” is also not appropriate to comprehensively embrace this heterogeneous group.

Constitutional approaches to diversity in society have been classified according in four main ideal typical models: repressive – national systems; liberal agnostic systems indifferent to differences; promotional systems; multinational equal systems.\(^{76}\) Whereas the first model ideologically emphasizes national unity and homogeneity among the population leading to repression (and in the worst cases to human annihilation by the means of ethnic cleansing for instance), the second model is liberally inspired, but agnostic in the acknowledgement of difference, and it is characterized by the respect for individual rights and by the a complete indifference for collective ones. In the third model, which characterizes promotional systems, minorities are recognized and respected as constitutional elements and they are fully entitled to take active part in the public sphere. In respect to the fourth model, promotional systems can present some multinational features, although institutionally limited in scope.\(^{77}\) Indeed, within multinational models the whole constitutional system is designed to integrate diversity. For this reason, this model also defined as an ethnic “consociative democracy”\(^{78}\) where the governmental structure is necessarily based on the division and sharing of powers.\(^{79}\)

This general classification is particular useful to analyze Roma and Sinti’s recognition as a minority group within European countries from a comparative perspective. This first general overview has been conducted through the magnifier of the European Framework Convention.\(^{80}\)

A first group of countries belongs to the first ideal-typical categorization, in a milder way: they do not openly discriminate Romani groups, but they emphasize homogeneity of national systems by excluding these people from the protection of the Framework Convention.\(^{81}\) There are countries, such as Italy and Slovenia, that either do not consider Roma and Sinti as a national minority, or


\(^{77}\) To this regard, this model has been characterized by two main versions: the Ottoman Millet system (see G.M. QUER, Pluralismo e diritti delle minoranze. Il sistema del "millet" 18 Quaderni di diritto e politica ecclesiastica (2010).) and the Dutch system of parallel integration (see PALERMO & WOEKL, Diritto Costituzionale Comparato dei Gruppi e delle Minoranze.).


\(^{79}\) Further in PALERMO & WOEKL, Diritto Costituzionale Comparato dei Gruppi e delle Minoranze.


\(^{81}\) Different motivations have been presented in order to justify this choice: Belgium and Portugal present the argument that Roma and Sinti do not satisfy the territorial criteria. Denmark that they are perfectly integrated within the Danish society. In Cyprus they are considered as belonging to Turkish group. Id. at 5.
consider them as a different type of national minority with a lower degree of protection, as are the cases of Albany and Macedonia. Another group of countries which can be defined as “carefully promotional” include those, such as Switzerland, Estonia, Austria and Romania that limit recognition only to the holders of national citizenship.\footnote{While Finland limit their recognition only to citizens, on the practical level there are no concrete differences among citizens and non-citizens. Spain, instead is another interesting case recognizing as national minority just Roma and Sinti by excluding every other social group.} Only a fourth, restricted group of countries, can be defined as “fully promotional” recognizing legal protection of Roma and Sinti living within their territories, independently from the criteria of citizenship. These are United Kingdom, Ireland and Sweden.\footnote{The last two groups of countries can be thought as pertaining to the third ideal-type “Promotional systems” in a more or less accentuated shade. So far, no country can be described as fully pertaining to the fourth ideal-type “multinational systems” according to the Framework Convention’s categorization.}

### 3. Research Issues

This research aims to investigate the (possible) protection of non-territorial minorities in Europe, in particular the case of Roma and Sinti. At present international human rights law lacks ad hoc guarantees for non-territorial minorities. Conceptually, as a non-territorial minority, Roma and Sinti escape the boundaries of the classical categorization,\footnote{Traditionally, people belonging to ‘historical, traditional, autochthonous minorities’ could find recognition of their diversity through a special set of rights mostly tailored on the dimensions of religious, linguistic and cultural rights. Whereas people belonging to ‘new minorities stemming from migration’ can generally find recognition mostly of economic, social rights and, in certain cases, to representation on public life. Especially in countries where there are consistent social groups of migrants of second and third generation ‘it is still debated whether the scope of application of international treaties pertaining to minorities that are usually applied to historical, old minorities can be extended to new minorities groups stemming from migration’. \textsc{Medda-Windsicher}, 42. This “extensive application” of international tools designed for “old minorities” to “new minorities” would be particularly useful in the case of Roma and Sinti. Indeed, the international tools designed for migrants could offer a more comprehensive degree of protection since they address to non-citizens and stateless people as well (which is the especially the case of the nomadic component). Yet, the viability of this application still relies on the ‘margin of appreciation’ of national states, therefore it should be remembered that the mere application of legal tools designed for migrants can not offer an adequate protection to Roma and Sinti. As Hannikaines emphasizes: ‘there is a fundamental difference between the protection afforded by human rights conventions to migrant workers and to minorities: the conventions on migrant workers try only weakly to protect the ethnic identity of migrant workers [in fact] the emphasis is on equal rights and decent}

because on the one hand they can be considered a “traditional minority’ since they have been historically living in Europe, while, on the other, they can be considered “migrants” since a persistent proportion of them remain nomadic.

In order to overcome the limitations of conceptualizing Roma and Sinti as ‘national minority’ this study proposes to adopt a complementary approach, that conceives Roma and Sinti in terms of “transnational people” because of their dispersed but significant presence throughout Europe. By using a holistic approach Roma and Sinti can benefit from a more specific set of rights which can potentially meet their need for stronger recognition at the level of collective rights.\footnote{\'Historical, traditional, autochthonous minorities’ and/or by using the legal tools shaped for ‘new minority groups stemming from migration’ according to Medda Windsicher’s categorization. Id at. 40-41.}
To achieve this goal, this study will investigate whether it is possible to identify a minimum common European set of rights specifically designed for this social group: by using a legal comparative approach which combines the general human rights standards set at the international level with the best “legal practices” developed by European countries this research focuses on three specific issues:

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

4. A European Transnational People?
So far, a general excursus on the protection of non–territorial minorities in Europe has presented at various legal levels, the perspective of “old governance” which has regarded minorities “within Europe [States]”, rather than minorities “of Europe” [i.e. in their transnational, continental dimension]. Yet, especially for Roma and Sinti, a shift towards a perspective of “new governance” which considers them as a ‘transnational minority of Europe’ seems to be more urgent than ever, given the incapability of effectively addressing their needs through the traditional perspective.

Given their diffuse and historical presence which corresponds to that of the population of a European middle-size country, the idea of considering Roma and Sinti from the perspective of ‘European transnational people’ has been recently proposed. Nonetheless, the seeds for approaching these people through this new paradigm have already been rooted some centuries ago.

This “holistic perspective” in addressing Roma and Sinti has found recognition at the international level a couple of decades ago. This perspective departs from the old idea of national minority and considers these people as belonging to a special group in need of ad hoc protection. At the United Nations, the Commission on Human Rights accepted in 1992 the Sub-Commission’s economic, social and labour conditions of migrant workers and their families’. L. HANNIKANINEN, The Status of Minorities, Indigenous People and Immigrant and Refugee Group in Four Nordic States 65 Nordic Journal of International Law (1996).

86 On the idea of “old and new governance” see T. AHMED, A Critical Appraisal of EU Governance for the Protection of Minority Rights, 17 International Journal of Minority and Group Rights (2010 ). Although this article takes into consideration this shift of paradigm especially as far as the protection of minorities in EU is concerned, general assumptions underlying the protection of minorities in Europe *latu sensu* are worthy to be considered.

87 This idea has liberally taken from the article of G. TOGGENBURG, Minorities ( . . . ) the European Union: Is the Missing Link an "Of" or a "Within"?, 25 European Integration (2003).

resolution 65/1992 ‘on the protection of Roma and Gypsies’. The following year, the Economic and Social Council of the United Nations (ECOSOC) upgraded the status of the International Romani Union to Category II Observer Status.

More recently, at the EU level, there have been some cautious steps going in the direction of recognizing Roma and Sinti as a ‘pan-European minority’. This idea is progressively involving the CoE and the OSCE, as it emerges from the ‘Statement on Roma and Sinti’ presented at the Working Sessions 6 and 7 of the Annual Human Dimension Implementation Meeting of the OSCE-ODIHR in September 2007.

A shift toward this new paradigm of Roma and Sinti as a ‘European transnational people’ is thus already taking place. Yet, the international discussion over the potential of this new approach has concentrated more on possible definitions and new legal classifications rather than on its legal content. In my opinion, this new approach shall not be intended as a substitute, rather as a complementary tool for integrating the traditional approach of minority-protection. Indeed, it can fill the “old legal gaps” in a subsidiary way especially with special regard to the protection of collective rights.

### 4.1. “Autochthonous minority” or “indigenous people”?

The development of a new conceptual approach for analyzing an existing situation does not necessarily imply the adoption of new legal tools for regulating it. Theoretically, autochthonous minorities and indigenous peoples are not mutually excluding concepts. Indeed, they are linked by a
“subtle continuum”. Practically, this “subtle continuum” implies the opportunity for the lawyers to use existing tools for protecting indigenous peoples and adapt them for accommodating the claims of autochthonous minorities. Therefore, it is necessary to identify the common features of autochthonous minorities and indigenous peoples in order to foster a viable adaption of the model(s) so far applied to autochthonous minorities.

According to Geschiere, the concept of “autochthonous” groups has shaped the “minority debate” only recently. In fact, whenever referring to human beings, the debate over the natives or historical inhabitants of a certain area, has been characterized for decades by the word “indigenous” without making any formal distinction between “people” and “minority”.

Compared to other continents, Europe has become concerned about indigenous issues within its territory only recently. While the term “indigenous peoples” in the Western common sense usually refers to those ethnic groups living in former colonial territories whose survival can only be guaranteed by means of a special protection, “autochthonous” refers to some important “élites” belonging to Western societies. However, these linguistic distinctions appear more distant on the ideological level than on the epistemological one, as their very close “etymological kinship” demonstrates.

The proximity between the two concepts can also be found in the number of common descriptors identifying “minorities” and “indigenous peoples”. This has allowed the “flexible

---

94 MEDDA-WINDISCHER, 40.
96 After the foundation of the United Nations Working Group on Indigenous Populations in 1982, the notion of “indigenous people” has acquired new vitality by reaching global dimensions. Conversely, the notion of “autochthony” has remained more circumscribed in some African regions (inspiring violent attempts aim to exclude the “foreigners” particularly in the francophone areas) and in some European countries such as the Flemish part of Belgium and the Netherlands especially with regard to some political debates over multiculturalism and migration issues. Id at 4.
97 Etymologically “autochthonous” and “indigenous” are notions deriving from the Greek tradition and implying similar status. Although the meaning of the concepts cannot be intended as completely overlapping, the distinction between the two terms nowadays can mostly be drawn on the linguistic rather than on the substantial level. “Autochthonous” is composed by two particles (autos+chthon) “auto-” in the sense of “of or by yourself” and “chthon” in the sense of “soil, land”. In the classical Greek period, a quite positive implication was attributed to this term: by using it the Athenians could claim their superiority over all the other Greeks by emphasizing the fact that they were the only “autochthonous people” over the Greek area. Furthermore, the feature of “autochthony” explained their natural inclination towards democracy. GESCHIERE, 6. By the other hand, the word “indigenous” literally means “born within” with the connotation of “born within the house” of the classical Greece.
98 As Thornberry argues the proximity of the two concepts can be easily foreseen at Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe which defines national minorities as a group of persons in a State who: a) reside on the territory of that State and are citizens thereof; b) maintain longstanding firm and lasting ties with that State; c) display distinctive ethnic, cultural, religious or linguistic characteristics; d) are sufficiently representative, although smaller in number than the rest of the population of that State or of region of that State; e) are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion and their language. P. THORNBERRY, Indigenous People and Human Rights 53 (Manchester University Press. 2002).
usage” of the 1995 European Framework Convention for the Protection of National Minorities to accommodate the needs of European indigenous people as well.99

Some commentators have argued that the peculiar feature distinguishing “indigenous peoples” from “minorities” relates to their historical tie with the land.100 Yet, both the international legal instruments focusing on indigenous peoples and the doctrine have clarified that this territorial tie can be interpreted in a more dynamic way, since it does not necessarily imply the permanent presence of indigenous groups within a certain territory. Art. 1 of ILO Convention 107 (1957) identifies, inter alia, indigenous people as members of tribal or semi-tribal populations.101 International law recognizes that tribal or semi-tribal people can have nomadic features.102 Thornberry further specifies that

it is notable that the Convention 107 (1957) accepts the tribal category as dominant – postulating that, while all indigenous populations are tribal, not all tribal populations are indigenous. Some ‘tribal or semi-tribal’ populations are tribal in independent countries are regarded as being at ‘a less advanced stage than the stage reached by other sections of the national community’ with the status regulated by own customs or special laws; others are regarded as indigenous on account of their descent from the population which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization’ and which ‘irrespective of their legal status’ live more in conformity with the institutions at that earlier time. The rights in the Convention apply equally to those regarded as indigenous people and those not regarded.103

Moreover, the subsequent ILO Convention 169 (1989) recently intervening on the same topic, specifies that ancestors of indigenous people may have existed in countries which did not experience conquest or colonization.104

---

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

100 This territorial tie has been understood as having a compound nature based on the following elements: (1) precedent habitation; (2) historical continuity; (3) attachment to land. In THORNBERRY, 45.

101 This Convention applies to: (a) Members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) Members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong.


103 THORNBERRY, 43.

104 The applicable scope of this Convention appears in fact broader than the previous one, as it can been seen in the travaux préparatoires where Canada proposed to replace the reference to colonization reference with the reference to
4.2. The Sami: a European indigenous people

After having discussed the possible application of legal tools designed for indigenous peoples to address the claims of autochthonous minorities, it remains to be clarified to what extent the protection of Roma and Sinti can benefit from this “innovative application” within the European context.

There is only one indigenous people in Europe: the Sami in Northern Scandinavia.\(^{105}\) As Roma and Sinti the Sami are a semi-nomadic heterogeneous and trans-national group. They currently reside in four Baltic states namely: Sweden, Norway, Finland, and Russia.\(^{106}\) ‘Both groups’ self-understanding reflects the historical uniqueness of the special features of their culture as well as a long history of injustices inflicted on them.’\(^{107}\) They both have been in an economically and socially inferior position as a non-dominant minority in the national societies where they live. Yet, compared to Roma and Sinti, Sami have recently been able to gain some degree of internal self-determination or autonomy, in particular by establishing Sami Parliaments, consultative bodies with advisory functions.\(^{108}\)

A crucial argument in the Sami’s attempts to redress past wrongs has been centered on their ‘pre-existing rights to the lands and waters’ on the basis of their primordial settlements within the Baltic area.\(^{109}\) Roma and Sinti, besides lacking a homeland, do not make any territorial claim although their historical tie with the European territory is strong enough to argue that they have a ‘transnational identity as a stateless European nation whose members form a community of memory based on a shared history, culture and language’.\(^{110}\)

\(^{105}\) The term “Sámi” is substituted for the commonly known and used word “Lappish”. Sámi is the genitive and accusative case of “Sápmi”, the general concrete and abstract concept referring to the Sámi people, land and spirit – in the Sámi language. S. ÁNDDE, Regional Characteristics of Sapmi and the Sami People (Ándde (Anders) Sara ed., Sámi Instituhtta Nordisk Samisk Institutt 2002).

\(^{106}\) Today, Sápmi embraces in its entirety a territory inhabited by at least seven ethnic groups: Samis (also called Lapps), Kvens, Norwegians, Finns, Swedes, Komis and Russians. Id. at. I.


\(^{108}\) In 1989 the “Sametinget” was opened in Norway, in 1993 in Sweden and in 1996 in Finland. In 2001 the parliaments have been united through the Sámi Parliamentary Conference. See ÁNDDE.


\(^{110}\) L.H. MEYER, Transnational Autonomy: Responding to Historical Injustice in the Case of the Saami and Roma Peoples 8see id. at 297.
4.3. Transcending national borders and nationalistic classifications

Therefore although Roma and Sinti cannot build their redress of past (and current) wrongs on the ‘historic sovereignty argument’ as Sami have done, the similarities in the factual situation make the comparison and the idea of a transfer these legal instruments possible.

Additionally, considering the fact that their presence in Europe is dated long before the emergence of modern national States, their historical territorial tie with the European territory is certainly deep-rooted and constant in time (although of a semi-nomadic nature). Further, considering that Roma and Sinti maintain transnational relations with peoples belonging to the same social group dispersed in other countries, the use of legal tools designed for indigenous people does not only appear viable but also promising. Indeed, this can provide an additional legal basis to better address their aspirations ‘to gain the status of transnational minority whose rights are protected both internationally and in each country Roma reside’.\(^{111}\)

5. Methodology

International, European and national legal instruments guaranteeing the rights of minorities are increasingly interdependent. Since this process of ‘internationalization of constitutional law and constitutionalization of international law’\(^{112}\) is already taking place, the effort of building a common European minimum framework of guarantees for Roma and Sinti necessarily implies the departure from a comparative perspective.\(^{113}\)

A comparative analysis is chosen as a methodological tool precisely with the aim of combining existing (though fragmentary) guarantees at different levels in a more systematic way.

\(^{111}\) Id. at 297.

\(^{112}\) PALERMO, Internazionalizzazione del diritto costituzionale e costituzionalizzazione del diritto internazionale delle differenze.

\(^{113}\) As Smits further clarifies, if one’s empirical question is on ‘not what the law says but what it should say’, it should consequently focus on an external legal approach that conceives law as a ‘science of competing arguments’ whereby ‘the conflict of norms is the essence of normatively-based scholarship.’ In this light, existing jurisdictions can also be regarded as ‘empirical material’ of how conflicting normative positions are being reconciled. Specifically, this empirical material can be used ‘to test whether some idea or argument was already used elsewhere and how it was received in that other jurisdiction.’ To these purposes, the most appropriate method of research for the evaluation arguments is the comparative one: ‘comparison with other jurisdictions and even with other normative systems … can unveil whether solutions adopted elsewhere function or not. Other jurisdictions should in this respect be seen as … “experimenting laboratories”.’ J.M. SMITS, Redefining Normative Legal Science: Towards an Argumentative Discipline, in Methods of Human Rights Research 46-48, (F. Coomans, and Grünfeld, F., and Kamminga, M.T. ed. 2010). Yet, the comparative methods have been characterized for long time as a congérie of observations, sometimes correct, but fragmentary, often conflicting and incoherent, nevertheless always incomplete SMITS, (L.J. COSTANTINESCO, Il metodo comparativo (In general, it can be described as a set of acts and phases, rationally arranged, that lead legal thought to unveil the relationships of resemblance and divergence existing among diverse elements that belong to different legal systems. The goal of comparison is to identify an ideal solution to actual problems, starting from the solutions already provided by different legal systems. L.J. COSTANTINESCO, Il metodo comparativo (Giappichelli 2000).10.
This research will be developed on two parallel tracks:

A) As for the perspective of **Roma and Sinti as a national minority**, the analysis will compare domestic guarantees of different systems at various legal levels (Constitution, ordinary laws and subordinated legal sources at national, regional, local levels of government). This analysis will mostly be conducted by considering:
- At international level: the country reports presented to the Human Rights Committee and to the Human Rights Council concerning alleged violations of human rights for Roma and Sinti;
- At European level: periodical reports presented under the 1995 Framework Convention; the case law of ECtHR; the thematic and national recommendations of the HCNM;
- At national level: the analysis will firstly take into account a restricted number of promotional States that will be identified by crossing the data that will emerge from the analysis of the international and the European levels.\textsuperscript{114} It will therefore consider other countries belonging to less promotional models which can nevertheless present some guarantees for Roma and Sinti on a more tenuous level or only for specific legal areas (socio-economic, cultural or political rights for instance).

B) As for the perspective of **Roma and Sinti as a European transnational people**, the analysis will be conducted through a comparison with the Sami people. It will take examine the best practices developed by the four countries where Sami reside (Sweden, Norway, Finland, and Russia). This will be done by considering research and reports developed by international organizations (both governmental and non–governmental).

C) In the end, the **results of both comparative tracks will be merged** for an analysis of the following dimensions:
- (National) legal definition of Roma and Sinti;\textsuperscript{115}
- Linguistic rights;
- Cultural rights;
- Political Representation;
- Economic and social rights;

\textsuperscript{114} For the time being, by considering only the reports presented under the 1995 Framework Convention the most promotional countries that have been identified are: United Kingdom, Ireland and Sweden (as it has been shown at section 2.2.2.). Yet, by considering the other reports and case-law deriving from a more in-depth analysis of the International and the European levels, this catalogue may be probably enlarged.

\textsuperscript{115} This dimension takes into account the way through which Roma and Sinti are legally defined in order to understand how the related legal tools address their needs and claims: are they considered in terms of national, linguistic or ethnic minority? Do national laws recognize just their citizens as belonging to the minority of Roma and Sinti or do they recognize every person living within their territory in spite of their legal status? Do national law identify Roma and Sinti through nomadic/sedentary features?
- Individual vs. Collective perspective on the rights of Roma and Sinti;
- Protection vs. Promotion of rights of Roma and Sinti;

Nevertheless, since this research belongs to the human rights field it also needs to be developed through a multidisciplinary approach.\textsuperscript{116} Therefore, comparative legal enquiry will draw from some studies on Roma and Sinti in other disciplines, such as anthropology, sociology, politics, history and statistics.\textsuperscript{117}

The following research periods are planned: research and strengthen on the general theoretical legal framework at the office of the OSCE Commissioner on National Minorities; development of the perspective of Roma and Sinti as a national minority at the European Roma Rights Center in Budapest; development of the perspective of Roma and Sinti as a European transnational people at the Centre for Sami Studies-University of Tromsø.

6. Potential Implications
The aim of this study is to identify a minimum set of rights by using traditional minority rights in combination with those for indigenous peoples. The findings may be applicable to different social groups in diverse geo-political contexts.

\textsuperscript{116} Human rights is by nature an interdisciplin ary subject and the study of it can entail numerous approaches to comprehensively address it’ in D.P. FORSYTHE, Human Rights Studies: On the Dangers of Legalistic Assumptions in Methods of Human Rights Research (F. Coomans, and Grünfeld, F., and Kamminga, M.T. ed. 2010).

\textsuperscript{117} J. BRYCE, Studies in History and Jurisprudence (Adamant Media. 2002).
References


A. FRASER, Gypsies: From India to the Mediterranean (CRDP Midi-Pyrenees InterfaceCollection Toulouse 1994).


A. PHILIP, Recueil des cours, Collected Courses, § 160 II (Martinus Nijhoff 1979).

A. SIMONI, Stato di diritto e identità rom (L'Harmattan Italia. 2005).


E. PALICI DI SUNI, Intorno alle minoranze (Giappichelli 1999).

E. TAUBER, *Sinti Estraixaria children at school, or, how to preserve 'the Sinti way of thinking'*, 5 Romani Studies (2003).


F. PALERMO, Internazionalizzazione del diritto costituzionale e costituzionalizzazione del diritto internazionale delle differenze European Diversity and Autonomy Papers.


G. CHALAND, Minority Peoples in the Age of Nation States (Pluto Press. 1989).


G. PERIN, L'applicazione ai Rom e ai Sinti non cittadini delle norme sull'apolidia, sulla protezione internazionale e sulla condizione degli stranieri comunitari ed extracomunitari.(2010).

G. TOGGENBURG, Minorities ( . . . ) the European Union: Is the Missing Link an "Of" or a "Within"?, 25 European Integration (2003).


G.M. QUER, Pluralismo e diritti delle minoranze. Il sistema del "millet" 18 Quaderni di diritto e politica ecclesiastica (2010).


H. O'NIONS, Minority Rights Protection in International Law. The Roma People in Europe(Ashgate. 2007).


J. DESCHÊNES, Proposal concerning a definition of the term 'minority' (1985).


J. Michon-Agueff, Tsiganes, sédentaires, migrants…chemins de voyage. CEFI Brèves.


J.G. Cívico, Haciendo desigualdad de la diferencia: Meritocracia y derecho a la identica cultural. A propósito de la posición socioeconómica del pueblo gitano Cuadernos Electrónicos de Filosofía del Derecho.


K. Kanew, Non Execution of European Court Judgment Involving Romani Victims in Bulgaria Roma Rights Quarterly.


L.J. Costantinesco, Il metodo comparativo (Giappichelli 2000).


M. GARO, La langue rromani au coeur du processus d’affirmation de la nation rrom, 105Hérodote (2002).


OSCE, High Commissioner on National Minorities FactSheet.


P. THORNBERRY, Indigenous People and Human Rights (Manchester University Press. 2002).


R. MEDDA-WINDISCHER, Old and New Minorities: Reconciling Diversity and Cohesion (EURAC Research. 2009).


Recent Migration of Roma in Europe. (2008).


Written Comments of the European Roma Rights Centre (ERRC) and the Centre for Roma Initiatives ("CRI") concerning Montenegro for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at its 74th Session., pt. 1-17 (2009).