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Lawmaking in Traditional Romani Communities and International Human Rights Law and Norms: Case Study of the Real and Potential Role of the Romani Kris

I. Introduction

The study that follows examines the legal structure and community role of the Romani Kris, an autonomous legal system prevalent in some particular Romani communities. It explores possibilities to recognize Romani legal systems under the normative state law system, particularly in continental Europe, as well as human rights dilemmas arising from possible recognition. In so doing, the study hopes to make contributions to the study of minority rights in Europe, as well as to the examination of the interface between human rights law and issues arising as a result of parallel or plural legal systems.

The study is structured as follows: the first substantive section—Section II—provides an account of Roma in European societies—focussing in particular on those aspects of Romani community organization of relevance to the research, namely the significance of Romanian Romani communities in the wider European and global Romani diaspora. Section III offers a cursory description of the Romani Kris tribunal system, based on a 1947 account provided by Jan Yoors, as well as on the author's own research in one Romani community in Romania. Section IV examines possible sources for recognition of Romani law within the mainstream normative system. Section V discusses two primary objections to possible recognition, one human rights absolutist, and the other based on challenges from women's rights. The study concludes with the view that there is scope for the recognition of Romani law within mainstream systems, with the caveat that particular safeguards would be needed, particularly to ensure gender equality requirements.

Space limitations require limiting the study to a focus on Romani law in Europe, and in particular in relation to continental legal systems.

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It has unfortunately not been possible to render orthographic usage in this essay fully internally consistent. For example, in different parts of this essay, the words "Kalderash" and "Căldăraş" appear, although no difference in meaning or pronunciation is intended. Romani has no universally recognized or authoritative orthography. As a result, in this essay, several different approaches have been taken, as follows: (1) Romani words have generally been rendered using spelling which an English speaker could recognize phonetically, hence "Romani Kris" and "Kalderash". However, (2) in the several passages quoted from Jan Yoors, the spelling he used has been left in the original, not least because it indicates the pronunciation and dialectical features of the Belgian Lowara group he knew; (3) In Section III.D, which deals exclusively with matters in Romania, spelling is rendered using Romanian orthography, consistent with the way in which the Romanian Romani group at issue would generally render their own words. Thus, these sections use "Ghiambaş" to spell the name of a Romani group which might be rendered approximately "Dzhambash" using English spelling. The system developed by Marcel Courthiade and advocated in Romania by Gheorghe Sarău is not used, not least because, at key points, it offers the uninitiated no guidance as to pronunciation. Finally, (4) words rendered from the Ghiambaş dialect of Romani and presented *in italics* in Section III.4 follow the rule above in (1), and are thus rendered in such a way that an English speaker would recognize, at least approximately, their pronunciation.

II. Roma in Europe

The Romani and related ethnic groups are a diverse set of peoples and communities living in Europe, the Americas and parts of Africa, related to similar groups in the Middle East and Central Asia, called "Lom" and "Dom". Roma are believed to be descended from groups of people who left India approximately 1000 years ago and arrived in Europe in successive waves beginning in or around the 14th century. A lack of written community records makes Romani history an extremely difficult field, intensely reliant on, among other things, sources such as the historical imprint left on the various Romani dialects. The Romani language is closely related to modern Urdu, Punjabi and Hindi, but a number of its grammatical features link it to South Eastern Europe, and Romani as currently spoken most likely took shape under the Byzantine and Ottoman empires. Romani has (1) an Indic core of only several hundred works, (2) an inner band of unchanging loan words from a number of Middle Eastern and European languages—most notably Greek (probably as a result of the dominance of Byzantine Greek on Middle Eastern trade routes), and (3) a very large outer band of

loan words that change according to the particular dialect of Romani.[1] The Indian origins of the Romani people were (re)discovered at the end of the 18th century, as a result of linguistic evidence. Prior to that, the standard account involved Egyptian origins, and an ideology of Egyptian origins has proven tenacious in the Balkans and elsewhere to the present day.[2] Among scholars, a dispute exists as to the reasons and character of the original exit from India.[3]

The profile of Romani communities in today's Europe, the Americas[4] and parts of Africa[5] is almost entirely country-specific and generalizations are very difficult to make. However, nearly all countries of Europe and much of the Americas have more than one Romani community subgroup, and these are frequently determined by the time of arrival. Often one group will be more closely affiliated with the national culture of the country at issue than others, reflecting earlier arrival of the group concerned.

The history of Roma in Europe is not a happy one. Soon after their arrival in Europe, Roma were excluded in Western Europe and periodically subjected to raw persecution.[6] In the Ottoman Empire, Roma occupied a low status, even when part of the privileged Muslim community.[7] Roma were enslaved in the Romanian princi-

1 See especially Yaron Matras, *Romani: A Linguistic Introduction* (Cambridge University Press, Cambridge, 2002).

2 See Elena Marushiakova and Vesselin Popov, *Studii Romani,* Vol. I (Club '90 Publishers, Sofia, 1994), 44–45; Elena Marushiakova and Vesselin Popov, *Studii Romani,* Vol. II (Club '90 Publishers, Sofia, 1995), 36–45.

3 Yaron Matras, a leading scholar of Romani linguistics directly involved in this debate, has described the dispute as follows: "Most mainstream researchers in Romani linguistics and Romani ethnography hold the view that the exodus of the Rom(a) from India is part of the historical phenomenon of outwards migration from India of castes, specializing in certain trades. These groups will have originated in different areas within India, and spoken different (albeit related) Indian languages, and probably left the subcontinent at different times, taking different routes. However, many of them share ethnonyms that go back to similar caste names: the Rom of Europe, the Lom of the Caucasus and Anatolia, the Dom of the Middle East, are an example, all descending, it is assumed, from the Indian caste of the Dom. The latter is a cover-term for itinerant service-providing castes. This origin hypothesis allows to reconcile the linguistic and geographical diversity of minorities of Indian origin living outside of India, with the similarities between them in occupation profile, social status, name, and origin. However, in recent years political activists and Romani intellectuals have begun to reject this hypothesis, searching instead for a historical narrative that would connect their ancestors with 'high status' groups in Indian society, rather than with the low-status Dom." (Yaron Matras, e-mail exchange on Romano Liloro list, "Wikipedia and Roma", 24 June 2007).

4 The UN Committee on the Elimination of Racial Discrimination (CERD) has commented on human rights issues concerning Roma in countries including Brazil and Ecuador. Canada and the United States have extensive Romani communities, as do a number of other American countries.

5 Romani communities exist in South Africa and possibly elsewhere, and related groups exist throughout North Africa.

6 See Sir Angus Fraser, *The Gypsies* (Blackwell, Oxford, 1992).

7 See Elena Marushiakova and Vesselin Popov, *The Gypsies in the Ottoman Empire* (University of Hertfordshire Press, Hatfield, 2001).

palities.[8] From the beginning of the modern state, significant efforts were periodically undertaken—with mixed success—to assimilate Roma forcibly.[9] Roma were targeted for genocide during World War II.[10] The period since 1989 has seen a renewal of active anti-Romani antipathy throughout the continent. Tens of thousands of Roma were ethnically cleansed from Kosovo from 1999 to the present.[11] Outbreaks of anti-Romani racism have plagued every European society without exception.

III. Romani Law in Kris and Divano Systems and Its Relation to Mainstream Law

A. Romani Groups Practicing the Kris

Roma were enslaved in Romania until the mid-19th century.[12] Following emancipation, successive waves of Romanian-associated Roma periodically left Romania. The picturesque arrival of Romanian Roma has been commented upon by major news media since the late 19th century. Today, many countries of Europe and the Americas[13] have major distinct Romani communities with evident Romanian pasts, judging by both dialect and cultural practice. Some countries—for example Sweden and the United States—have major Romani communities with evidently Romanian pasts, which have in periods between the time of their exit from Romania and their arrival in the current home, have spent extensive periods in third countries. Thus, for example, the Machvaya group—a major segment of the US Romani community—is a group the dialect of which links it to Romania. However, its name is derived from the town it identifies as its origin: Mačva, Serbia. Similarly, the very large Kalderash community of Sweden asserts a community history of Russian origins, although the dialect has evidently Romanian influences. Sweden also has a large Lovara community, also evidently Romanian in the past 200 years, but with an intermediary stop of several generations in Czechoslovakia.[14] Meanwhile, in today's Romania, the Romani community

8 See Achim Viorel, *The Roma in Romanian History* (Central European University Press, Budapest, 2004), 27–132.

9 See David Crowe and John Kolsti (eds.), *The Gypsies of Eastern Europe* (M.E. Sharp Inc., Arnok, NY, 1991).

10 See *inter alia* Michael Zimmermann, *Verfolgt, Vertrieben, Vernichtet: Die Nationalsozialistiche Vernichtungspolitik gegen Sinti und Roma* (Klartext, Essen, 1989); Donald Kenrick and Grattan Puxon, *Gypsies under the Swastika* (University of Hertfordshire Press, Hertfordshire, 1995).

11 See Cahn, Claude, "Birth of a Nation: Kosovo and the Persecution of Pariah Minorities" 8(1) *German Law Journal* (2007), 81–94.

12 On the slavery of Roma in Romania, see Viorel, *op.cit.* note 8, 27–132.

13 Including but not limited to Hungary, Russia, Serbia, Macedonia, Bulgaria, Greece, Turkey, Sweden, Germany, Norway, Austria, the Czech Republic, Slovakia, Ukraine, Poland and elsewhere.

14 The groups of Roma with an evident Romanian past have been termed by (predominantly non-Romani) anthropologists "Vlach Roma", but this term is confusing for a number of reasons including (1) it is rarely used by Roma as an autochthonous term of description, (2)

is both among the largest anywhere, as well as extremely diverse, with a high number of subcommunities or "tribes".

The fact that Romanian-descended Romani communities make up a major component of the Romani communities of many other Euro-Atlantic countries is important for the purposes of this study, because it is precisely these communities—as well as the traditional, non-assimilated Romani communities of Romania today—that maintain the institution of the Kris. This fact has led to the theory that the Kris is an institution that developed under the particular conditions of slavery, at least in part to regulate the relationship between slave and slaveholder, as well as to preserve community autonomy in the context of slavery.[15]

Marushiakova and Popov have recently taken issue with this theory, rejecting the link between slavery and Kris-making. Marushiakova and Popov contend instead that Kris-making communities fulfill the following conditions: (1) are "service nomads" or have a recent history of service nomadism and (2) are Romani speaking, particularly within a certain set of dialect groups.[16] However, it is unclear whether the Giambaş, the group primarily studied in the current research, has any recent history of service nomadism.

Criticizing a preoccupation with the Kris by anthropologists and other observers, Acton has held that it is possible to classify three types of community authority structure in the Romani communities: "The typology I am proposing is […] a kind of triangle with the feud, the *kris* and the *baro shero* being near the three extremities each prioritizing a different value, that is personal responsibility, consensus and tradition, and each society having a different authority figure."[17] Thus, according to Acton, one segment of the communities not practicing the Kris tribunal system might be those characterized by having one dominant, authoritarian leader/authority, such as the "Polska Roma" group. The third broad category would be those having an apparently anarchic community structure, in which blood feuds regulate inter-personal—and especially inter-family—conflict.[18] Examples include one or more groups in Macedonia, as well as the Romanichals of England. This paper examines solely the law of Kris-maintaining communities.

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it is not widely used in Romania, (3) it is occasionally used to describe Beash, "Kashtale", Karavlach, and other archaic Romanian speakers in the Balkans and elsewhere—i.e., groups different from Romani groups speaking Romanian Romani dialects as a native language.

15 Author discussion with Thomas Acton, June 2001.

16 Elena Marushiakova and Vesselin Popov, "The Gypsy Court in Eastern Europe", 17 *Romani Studies* (2007), 71–72.

17 Thomas Acton, "A Three-Cornered Choice: Structural Consequences of Value-Priorities in Gypsy Law as a Model for More General Understanding of Variations in the Administration of Justice", paper presented to the conference of the Gypsy Lore Society at the University of Florence in Italy, 2003, at 11.

18 On blood feuds, see especially, Martti Grönfors, *Blood Feuding Among Finnish Gypsies* (University of Helsinki Department of Sociology Tutkimuksia Research Reports No. 213, Helsinki, 1977).

B. Romani Law in Kris-Making Communities

Discussions of Romani law entered mainstream discussions of law in 1993, when Walter O. Weyrauch and Maureen Ann Bell published "Autonomous Lawmaking: The Case of the 'Gypsies'" in the *Yale Law Journal*. The essay aimed to contribute to a better understanding of "private lawmaking and its relationship to state law". In the process, Weyrauch and Bell heightened somewhat the profile of the study of Roma, which for the better part of two centuries has struggled to be taken seriously. Relying on secondary literature from a number of sources, they offered a description of Romani law based heavily on anthropological sources, as well as those found in the *Journal of the Gypsy Lore Society* (*JLGS*).[19] The Weyrauch and Bell description suffered from the anthropological bias of the secondary sources on which they relied, placing undue weight on ritual purity issues, "sexual taboos", "contamination by women" and "hygienic matters" to the detriment of examining more-normative legal elements of Romani law.[20] Nevertheless, they provoked a decade-long debate among Romani activists and academics. This debate included the criticism brought by Acton, noted above, that the Kris is the legal system of only one segment of the diverse Romani communities. In 2001, major contributions to the debate were published in book form.[21]

It is one contention of this study that Weyrauch and Bell's description of Romani law—centred on ritual purity and defilement, sexual taboos, etc.—although not inaccurate in anthropological terms, neglected key elements of Romani law, and particularly those elements based on honour, damage to honour and the restoration of honour. A description of Romani law with honour as its centrepiece would have placed Romani law much closer to mainstream law. An honour-based description of Romani law would enable us to see more clearly where Romani law is congruent and harmonious with mainstream, state-made law and where it may diverge. Although this brief essay cannot hope to provide a full description of Romani law, it is one ambition of this essay to supplement the sex and ritual purity-based description of Romani Kris law offered by Weyrauch and Bell, with a legal description aiming to illuminate more clearly the relationship between Romani Kris legal concepts and those underpinning state-made law.

C. The 1947 Yoors Description

Ambivalence among many Roma about sharing the details of Romani community practices has meant that good descriptions of Romani tribunal systems are rare.[22] Among the most systematic first-hand descriptions of Romani law, as practiced by individual traditional Kris-making groups, is Jan Yoors's "Lowari Law and Jurisdiction", which

19 A useful summary of the history of the JLGS is included in Angus Fraser, "The Present and Future of the Gypsy Past", 13(2) *Cambridge Review for International Affairs* (2000).

20 Walter O. Weyrauch and Maureen Ann Bell, "Autonomous Lawmaking: The Case of the 'Gypsies'", as reprinted in Walter O. Weyrauch, *Gypsy Law: Romani Legal Traditions and Culture* (University of California Press, Berkeley, 2001), at 11.

21 *Ibid*.

22 A good recent overview is provided in Marushiakova and Popov, *op.cit.* note 16.

appeared in the *Journal of the Gypsy Lore Society* (*JLGS*) in 1947.[23] Yoors was adopted by a group of Belgian Lowara, with whom he spent sporadic but lengthy periods of time for a number of years during his youth. He wrote a number of articles and books based on his experiences. Yoors's "Lowari Law and Jurisdiction" has provided an initial sounding-board for the research for this study. Yoors's 1947 description of Kris law as practiced by the Lowara group into which he had been adopted is usefully systematic. It also includes some potentially questionable contentions. Beginning with a summary of Yoors's description of Romani law in his Lowara community seems a fitting way to both pay suitable tribute to the contribution of an earlier useful classification of Kris law, as well as a useful starting point for providing supplementary comment on the system as it exists today. Yoors divides the types of cases ruled on under the Lowara system as follows:

> The cases to be judged (masc. sing. *bayo)*[24] fall into different classes. There is the case which is only concerned with material loss, such as theft at the expense of a *Rom*, assaults and injury, kidnapping of a young girl, and irregularity in the partition of booty; *kurvišago* (adultery), in so far as it means material loss, comes under this category. Then there is the type of case relating to matters of honour, such as refusal to keep a marriage agreement (*kurvišago)*, which morally prejudices the honour of the husband. In this class also are included the cases which concern the spreading of false rumours, biased news, abusive language, prejudice caused to the honour of a person, his family or tribe *(xoxamno hiro)*, and insults directed against his ancestors *(mulengo kušimo)*. There are also the cases concerned with moral or religious matters, such as the practice of black magic to the injury of a human being *(kerrinio)*, maledictions uttered secretly which have their source in jealousy *(armai čorane)*, the false oath *(bangi solax)* and the non-observance of a taboo connected with 'pure and impure' *(marhime).* Any action made with evil intent and liable to bring disease or ill-luck to a *Rom* such as obscene talk, disrespectful language when speaking of a deceased person, blasphemy, swearing or alluding to words which are taboo; all come under this same category.[25]

Yoors summarizes matters of standing as follows:

> In many lawsuits the whole tribe is the plaintiff, as for instance when the fate or the happiness of the community as a whole is threatened because of the behaviour of a single member, or as a result of the doings of one or a group of persons, such as actions, let us say, as repeated theft *(paguba)* or plunder carried out in an unskillful manner at the expense of a *gajo*[26] and liable to bring reprisals (expulsion, for

23 Jan Yoors, "Lowari Law and Jurisdiction", 26(1–2) *Journal of the Gypsy Lore Society* (January–April 1947), 1–18.

24 The terminology used by Yoors's Belgian Lowara group is not universal; other groups use different terminology for many of the terms here.

25 Yoors, *op.cit.*, note 23, 3.

26 *Gajo* or *gadjo* is Romani for 'non-Romani person'. The feminine is *gadji*; the plural is *gadje*.

> instance) to all members of the tribe; the robbing of people regarded by the Kris as 'friends'; the non-observance of religious rites by a *Rom* or his allowing a member of his family to neglect them and thus bring down ill-luck *(prikaza bibaxt)* on the community; or *kurvišago* (adultery) which a member of the clan has refrained from bringing to the notice of the Kris. […] The fact of tolerating adultery is considered as bringing *lajavo* (shame) on all members of the tribe.

In all cases which prejudice the community the tribe takes action. If a member is afflicted by scabies *(gər)* and does not inform the community of the fact and takes no measures to avoid contagion, he will be punished for it. A person, in such a case, suffering from any contagious disease may be banished temporarily from the tribe after judgment has been passed on him by the Kris.[27]

No counsels for defence or plaintiff are employed; "it is a point of honour for a *Rom* to defend his own reputation."[28] Husbands represent wives, however, and minors are represented by the nearest male relative of the age of majority. Witnesses are called before a Kris if they have a demonstrated interest in the case.

In Yoors's description, the entire tribe (*Kumpanii*) will have a right to be informed about the case and to be present at the hearing. At the hearing, the plaintiff and defendant present their versions of the facts of the case. Independent witnesses also report, providing information also on any statements the relevant parties may have made regarding the case. The Kris poses questions to the parties to clarify matters of fact. Following an interrogation as to the facts, the witnesses, plaintiff(s) and defendant may be cross-examined. Up to this point, a friendly settlement between the parties is still possible, with the parties required only to pay the costs of the Kris.[29]

The Kris at this point moves to its second, interpretive phase, in which the Kris will endeavour to derive the proper legal interpretation of the facts (*paraskodiv o bayo*). Public opinion is weighed at this point, as non-parties are provided with the opportunity to express their opinion of the case. Extensive discussion follows, as various minds voice opinion on the proper outcome. Next, an impartial elder (*Rom P'uro*) is called upon to act as devil's advocate by shedding light on the weak points of the cases of the various parties. Finally, both parties are invited to plead their case, briefly and clearly.[30]

Following final pleadings, the judges (*Krisatora*) enter into council. Most decisions come swiftly, but Yoors reports that he has witnessed cases in which judges took over three weeks to reach a decision.[31] Verdicts are declared publicly to all assembled. If no decision can be reached then the Kris may resort to the swearing of oaths (*solax*), in which the accused would be required to answer questions following the swearing of

27 Yoors, *op.cit.* note 23, 3–4.

28 *Ibid.*, 4.

29 *Ibid.*, 11–14.

30 *Ibid.*, 14–16.

31 *Ibid.*, 16–17.

an oath on a holy figure as well as on a key deceased person. Thereafter the Kris would render decision.[32]

Sanctions, as described by Yoors, may be of various kinds, most frequently monetary compensation for damages. Yoors holds that, in the Belgian Lowara Kris of the 1930s and 40s, there were three different types of fines which might be awarded: (1) damages for material loss (*kevečigo*); (2) payment for moral damages (*počinav o lajav*); and (3) compelling the man who loses the case to pay the costs of convening the tribunal (*boldav kecigo*).[33]

D. Case Study: Kris Law Today in Timiş County, Romania

Meetings of Romani activists and traditional Romani leaders today in Europe are frequently characterized by an undercurrent of anxiety that Romani traditions are being lost or are otherwise under threat. Concerns are expressed for the waning, weakening or corruption of the Romani language, the loss of community structure and the steady dissolution of traditions, among them the Kris. One interlocutor for this essay expressed the view that, after 1989, enough persons of previously high standing have become involved in dishonourable activities such as facilitating prostitution that it is now more difficult to call a Kris than it previously was; on this view, the count of genuine persons of moral and legal authority is dwindling. This view notwithstanding, the Kris appears to be a thriving institution in Timiş County, Romania.

Timiş County falls in the broader geographical area called "Banat", today shared by Romania, Serbia and Hungary. Falling within areas included in medieval Hungary—and today claimed as part of Greater Hungary by Hungarian nationalists—the area was within the Ottoman Empire until shortly after its defeat at the Battle of Vienna in 1683. Thereafter, successive Habsburg emperors offered land to farmers from throughout the Habsburg Empire to settle in the newly vanquished area, an offer taken up by Swabians (Germans), Slovaks, Czechs, Ruthenians and new groups of Hungarians. The empire also absorbed Bulgarians, Serbs and other Christians fleeing the Ottoman Empire after unsuccessful peasant revolts following 1683. Waves of colonization continued through the late 19th century. Thus, until World War II, Romanian Banat was a patchwork of Bulgarian, Czech, Slovak, Romanian, Ruthene, German, Hungarian and Serbian villages with significant Jewish and Romani communities living throughout. The capital, Timişoara, was 'multicultural', although in a traditional context and by no means in the modern or postmodern sense in which the term is used today. The majority of Banat's Jews did not survive World War II, and many Roma were also killed as a result of the massive deportations by the Romanian authorities to Transnistria. Following World War II, many Banat Germans were deported to the Soviet Union and died there. During later Communism, many surviving Jews and Germans left for Israel and Germany respectively, under policies in which ethnic kin states bought liberation for their own. Following 1989, Germans and Jews continued to leave, while new communities of Ukrainian immigrants formed. Many people from Banat of all communities have gone temporarily or permanently to Western Europe and elsewhere

32 *Ibid.*, 17–18.

33 *Ibid.*, 7–9.

in search of work, and there are large networks and communities of people from Banat in Italy, France and Spain (where Romanian speakers go because of the proximity of the language), Germany, Hungary, the United Kingdom, Ireland and elsewhere.

A number of Romani groups in Timiş County are active Kris-making communities today: the Căldăraş (including subgroups Pițuleşti/Pițularea and Balbare), the Giambaş and to some extent also the Gaborea are all Kris-making. The Pițularea and Balbare are apparently Căldăraş groups by traditional practice and dialect but are now distinct groups by self-identification. The Giambaş are traditionally horse traders—similar to the Lovara—but do not regard themselves as a Lovara group. The Gaborea form among the most highly visible components of the Timiş County groups. The women wear highly distinctive types of skirts, and the men frequently wear leather boots and wide-brimmed hats and sport distinctive moustaches and sideburns. The Gaborea pursue fierce independence from other groups and in recent years have seen a wave of Pentecostalism.[34] Gaborea also are Kris-making, although Gabor Kris-making may be significantly different from the Kris law described here, and according to one account, Gaborea do not accept judges from any other group and will not participate in the Kris of other groups, preferring state-made law in cases of intergroup conflict.[35] Members of other groups, such as the group referred to as the "Machorea", which may possibly not have an autochthonous subgroup name, might come before a Kris as accused but would likely not be regarded as being of sufficiently high standing to become judges (*krisinarea, krisinitori*).[36]

In December 2007 and January 2008, the author conducted first-hand research among persons aware of or affiliated with the Giambaş Kris in Timiş County, interviewing a number of persons including judges (*krisinarea*). Research was conducted primarily in the Deta area, where there is only one active Giambaş judge—Judge "Brîndză" Petrovici.[37] However, for a major Kris, other judges might come from Timişoara or from farther away.

According to his own account, Judge Petrovici first attended Romani tribunals from the age of seven. Because he was gaining a reputation as a potential *krisinari,* when he was 19, a group of Roma came to ask his opinion about a case. There was ultimately a Kris in this case, and the Kris reached a decision that coincided with his opinion in the case. From then, he began to be sought as a judge *(krisinari).*

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34 Timiş County Gaborea are predominantly Pentecostal, although elsewhere in Romania, and especially in Mureş County, Gabor communities are for the most part Seventh Day Adventist.

35 On the Gabor Kris, see Gabriel Sala, "Percepția şi desfăşurarea judecății țigăneşti la neamul romilor gabori", in *Revista Agero Stuttgart, Revista pe internet a Asociatiei Germano-Romane*, at <http://www.agero-stuttgart.de/REVISTA-AGERO/ISTORIE/Perceptia%20si%20desfasurarea%20judecatii%20tiganesti%20de%20Gabriel%20Sala.htm> (accessed 20 January 2008).

36 The terms differ from those used by Yoors because of differences in Romani dialect. *Krisinarea* is used by the Giambaş group examined here; *krisinitori* is used by other Romani groups in Romania.

37 Two other Giambaş judges in the Deta area have been barred from practice as a result of handing down corrupt or invalid decisions.

As described by Petrovici, a *krisinari* must have the following qualities: the people must know him to be an upright, correct person. What family he comes from is important. His children have to be well raised, because "how you treat your family shows how you are in society." A *krisinari* must have the capacity to judge and be skilled at sorting through complex matters of detail to arrive at decision. The community chooses *krisinaria*. Also, if a person "is well-known and respected among non-Roma, a person may rise to be a *krisinari*." Some characterized the role of *krisinari* as "passed on from father to son". Famous *krisinarea* are often known broadly. A *krisinari* from Timişoara called Krumpli was named as a particularly gifted judge, before he died several years ago.

Petrovici was unaware of any occasion in which a woman had become a *krisinari* and thought that, in present conditions, such a scenario was more or less out of the question. Women do not have the right to speak at a Kris, although paradoxically, in practice some examples were cited in which women—particularly older women—had spoken at a Kris. The rule appeared to be that there is no right, but there are tolerated exceptions.

Losing status as a *krisinari* is relatively easy. A person associated once with a corrupt or otherwise illegitimate decision (*bangi kris*) would lose status as a *krisinari*; a formal ban on ruling might be imposed for a distinct term. One recent case involving a ban of five years was noted during the research. A judge losing status for a fixed term would have to decline taking cases during that term. He might never be called on to rule again, because his reputation would be permanently harmed by the fact of having held a *bangi kris*.

In 2007, there were reportedly three cases of sufficient gravity to merit a Kris in the Deta area. This number is small, which was accounted for by the fact that so many Giambaş Roma from Timiş County are now in Western Europe or going there regularly that it has become increasingly difficult to gather a sufficient quorum of judges and the parties themselves to actually hold a Kris, although the fact of a Kris, once it has been decided that one will be held, can inspire extensive international travel by numbers of persons.

Some cases decided by Romani courts in the Deta area in recent years include the following. In one case, D.L., a Romani man from Deta, was transporting Ms L.P., the wife of a close relative—Mr M.P.—and some other people to Italy, because he regularly assists Roma from the area in traveling to Italy. During the trip, for some period, M.P. could not reach L.P. on her mobile telephone. Several days later, upon his return to Romania, D.L. was in the company of M.P. and he made a remark including sexual innuendo, while he was eating a frankfurter with mustard. M.P. concluded from the remark that, during the period when he could not reach his wife by mobile phone, she and D.L. must have been having sexual relations, and he demanded that D.L. swear an oath *(tsolakhal)* on the life of his daughter that this was not the case. D.L. consented to swear an oath, but not on his daughter, but rather on his own life; D.L.'s younger daughter had previously died of leukaemia, so the life of his one remaining daughter was a particularly sensitive subject. In any case, the persons concerned were his close relatives and sexual relations with L.P. were therefore impermissible. As a result of D.L.'s refusal to swear the requested oath, a conflict ensued; M.P.'s family loosened the lug nuts on D.L.'s car, an act which was potentially life-threatening to D.L. and

anyone riding with him in the car. D.L. discovered the problem before anyone was hurt however. D.L. then convened a Kris. The Kris found M.P. guilty and ordered him to pay D.L. damages. The court examined solely the potential threat of loosening D.L.'s car's lug nuts and awarded damages for that act. D.L. had requested damages of 10,000 EUR but the court ordered M.P. to pay D.L. only 2500 EUR, on grounds that no one had been hurt in the case. The court refused to consider arguments concerning harm to D.L.'s honour over the matter of the oath because D.L. had never in fact sworn an oath for M.P. when requested. D.L. initially rejected the Kris as *bangi* on grounds that the damages were humiliatingly low, but D.L.'s father publicly accepted the damages in his son's name and in the interests of peace, banned him from challenging the decision of the Kris.

The swearing or nonswearing of oaths can be a key matter for the Kris, particularly in cases involving honour and reputation. For example, in a 2005 case in Italy, involving a Giambaş Kris from Romania, the burden of proof hinged upon the refusal of the accusers to swear an oath. The case involved gossip that close family members were involved in sexual relations. The gossipers were called before a Kris by the father of one of the persons about whom the gossip was spread (the girl). At the Kris, they refused to swear an oath that the rumour was true. Had they sworn an oath, the *krisinarea* would have been compelled to submit the girl for gynaecological examination. The refusal by the accusers to swear an oath shifted the burden to them to explain why they had spread the rumour, and they were ultimately found in the wrong by the Kris.

Another recent case from Timiş County involved very significant violence, including broken arms and legs, and in which the victims had to be hospitalized. They had also reported the case to the police. After some discussion, several *krisinari* persuaded the parties to resolve the issue before a Romani tribunal. The case was heard in Timişoara before four *krisinarea*. The court imposed a 10,000 EUR fine on the guilty party, and it was agreed that the parties would withdraw any complaints before the police and otherwise urge that the state criminal law proceedings be ended. One of the *krisinarea* was charged with going to the police and explaining that the matter had been resolved. The guilty party was also obliged to pay the hospital bills of the victims.

The foregoing case indicates the contours of *de facto* informal recognition of Romani justice by mainstream normative law in Timiş County. When there is a conflict among Roma in Timiş County, frequently, if it can be resolved among Roma, including via Romani tribunals, then the state will not assert jurisdiction, if a *krisinari* intervenes with the police.

Indeed, the formal authority in Timiş County habitually seeks out Romani authority to resolve disputes and clarify crime. One occasion was recounted in which a police officer attended a Kris and told the persons assembled there that Romanian state law would only assert itself in cases in which someone had been killed. Otherwise, the police regarded Romani law as autonomous.

In one case recounted by Judge Petrovici, a conflict arose among Roma; one man had told persons that he could make false passports and bring them to Italy, but he instead simply stole their money. The conflict became serious enough that the wronged party had apparently paid criminals to kill the other party. In that case, Petrovici

went to the police, requested—and was granted—jurisdiction over the case. The case was resolved by forcing an outcome whereby all money was paid back to the harmed party.

The *de facto*—non-formal—recognition of Romani law in Timiş County has a number of troubling aspects from the point of view of human rights law. For example, several persons told the author that the police had been persuaded to turn a blind eye to cases of selling children, trafficking for prostitution (including trafficking children for prostitution) and other extreme harms, on the reasoning that these were "internal Romani community issues". Police in Romania are not the only authorities implicated in customary deference to Romani authority with very worrying human rights implications.[38]

There were mixed views as to whether a non-Romani person might have standing to petition a Kris. In the standard account, a non-Romani person is by definition devoid of honour and so cannot be a party before a Kris. However, on some accounts, in recent years, non-Roma have been more actively seeking the Kris—and traditional Romani authorities in general—in particular in cases involving business disputes with Roma, on the view that a Kris may provide financial remedy if sufficient deference is paid to the community authorities. This fact reflects among other things the deep scepticism in Romania about the ability of the mainstream justice system to provide remedy with any level of efficiency or adequacy.

Proceedings described were broadly similar to those documented by Yoors. Each party chooses its own *krisinarea,* so the standard number of judges in a case is two. However, large cases may involve three or four judges, and smaller, simpler ones only one judge. The *konsilo* is all *krisinarea* in a case. Some cases also have a *komitet*—students whose opinions are heard in the case. The *komitet* are generally family members of the *krisinarea.* A *krisinari* can refuse to take on a case, and often will, if upon review of the facts, he believes he cannot arrive at decision. The Kris may also invite the opinion of persons who would otherwise not have any formal standing before it, such as older women.

Most *krisinarea* swear an oath (*tsolakh*) at the beginning of proceedings that they will be fair to both sides. Some regarded this however as blasphemy and did not *tsolakhal* (the act of swearing an oath) at the beginning of the Kris. Witnesses have to swear an oath if there is a clear conflict in facts between two parties. The Kris will give more value to person who swears an oath before the Kris. The swearing of oaths is a key component of the Kris, because as a matter of practice, in the heat of the high stakes

38 One case reported on in the Romanian media in 2006 took place in Caraş Severin County, Romania. Ms. M.S., a 10-year-old Romani girl, was sold by her parents to the parents of D.M., a 17-year-old youth. The contract for the arrangement specified that M.S. would bear at least two children. Romanian authorities may have provided a modicum legal recognition for the arrangement by agreeing to the adoption of M.S. by the parents of D.M. Apparently no adequate investigation of the circumstances of the "adoption" was undertaken by Romanian child protection authorities. At the age of 12, M.S. gave birth by cesarean section to a child but was told by doctors not to have any more children. At this point, the parents of D.M. attempted to reclaim the dowry from the parents of M.S., citing default of contract. This conflict came to violence between the two families, and the Romanian authorities were alerted for a second time.

of a Kris, deceiving the court is a very significant threat. The high regard for an oath is so compelling that extensive verbal pyrotechnics can be employed to avoid swearing an oath, challenge the request to swear an oath, avoid a real oath, or otherwise avoid the immense weight imposed by a genuine oath.

In marked distinction to Yoors's description of the Kris of the Belgian Lowara, the idea that the Kris would cite precedent while reaching a decision was treated with scorn. The primary work of the Giambaş Kris—and in particular the *krisinarea*—involves arriving at a decision that is both fair and seen to be fair and, above all, that avoids the suspicion or accusation that the Kris was *bangi*—that it had arrived at its decision as a result of corruption or bribery or poor reasoning. A very high value is placed on a decision that will resolve the given conflict.

If a fine is ordered by a Kris, there is a deadline for payment. There are cases in Timiş County in which *krisinarea* have ordered a person to sell their house to pay a fine (although in the case at issue, the decision was ultimately overturned and the first Kris declared *bangi*). The highest fine anyone had heard of imposed by a Kris was 100,000 EUR. Cases involving 10,000 EUR fines are not uncommon. Smaller cases involve 1000 EUR or thereabouts.

The relative wealth of the parties may be taken into account in assessing fines. In one case, a fine was reduced from 7000 to 3500 EUR as a result of the poverty of the person compelled to pay. The explanation of the reason for the lowered fine (the poverty of the person concerned) was part of the decision presented to the parties. However, this can give rise to complex considerations for the judges: if the parties in the named case had appealed and the appeal had been successful, the judge would have been forced to pay the difference of the 3500 EUR plus the fees of the new *krisnarea.*

If *krisinarea* deem that a person has a good faith intention to pay but cannot pay now, the court may give an extension. They may give up to three deadlines. Failure to pay a fine would result in the harmed party being within their rights to take the matter into their own hands, including by violent means. In its conflict resolution role, the Kris would go to great lengths to avoid such an outcome.

As is evident from the foregoing, there can be conflicts after the Kris, in particular if one party does not accept the decision. The parties can appeal by calling other *krisinarea* to rule again on the case. As a rule, if one party seeks to appeal, they must say at the time of the decision that they are unhappy with the decision and want to appeal. In such a case, the judges in the first decision go to the second Kris to defend their decision before other *krisinarea.* If the first Kris is found to be *bangi,* then the first-instance *krisinarea* have to pay fines. Otherwise the guilty parties have to pay all fees. In general, there is a high degree of respect for the decisions of the Kris, a fact which has been key in sustaining the system.

How much to pay a *krisinari* depends on the case—what kinds of facts are at issue and what range of sums of money are involved. To fix the price of the *krisinari,* the judges first hear about the case and how difficult it is, also how much money is involved, and the relative wealth of the parties. In the 7000 EUR case named above, the judge's fee was 500 EUR.

E. Summary: Reflecting on Contrasts Between the Yoors Description and the Kris in Timiş County Today

One immediately striking difference between the Kris as practiced in Timiş County today and that of Yoors's Belgian Lowara is that of context: Yoors described a law-making and law-applying institution among a group of people not settled anywhere, nor welcome (for very long), anywhere. The pre-World War II Belgian Lowara were nomadic, and this was reflected in the concerns addressed by the Kris; as Yoors notes, one issue that might give rise to community action against an individual was if the behaviour of that person might be giving rise to a threat of expulsion for the group. By contrast, the Kris as practiced today in Timiş County is an institution practiced by non-nomadic persons with a stable—if troubled—relationship with neighbouring non-Romani communities.[39] In addition, the Kris—and traditional Romani authorities generally—have been deeply influenced by accommodations to state powers, accommodations that were apparently particularly powerfully shaped during the Ceauşescu era.[40] Traditional Romani authorities are regular formal and informal participants in mainstream law, particularly criminal law. In times of inter-communal stability, peaceful relations between Roma and non-Roma are frequently maintained by active cooperation between traditional Romani authorities and the police.

Of perhaps even greater significance is the fact that Yoors focuses nearly all of his attention on occasions on which the community takes legal action against an individual. In Timiş County today, the community may take action against an individual, but such an event would most likely take the form of a "Divano"—a convocation of

39 Romania has had extreme anti-Romani sentiment in the post-1989 period. During 1990 to 1993, this resulted in around 30 episodes of mass community violence, including a number of instances in which entire Romani communities were burned to the ground, often with the assistance with the public authority, and a number of pogrom killings of Roma by non-Romani mobs (see Jennifer Tanaka, "Discrepancies in the Damages Incurred and the Charges Depending on the Ethnicity of the Accused", unpublished, on file with the author, which details 35 major crimes taking place during the period 1990–1997; see also European Roma Rights Centre, *State of Impunity: Human Rights Abuse of Roma in Romania* [Budapest, 2001]). The European Court of Human Rights has thus far ruled on three major early 1990s Romanian pogroms, issuing decisions including, most comprehensively, two separate decisions on the 1993 pogrom at Hădăreni, Mureş County, in which three Romani men were killed by a mob, and 14 Romani houses burned to the ground (See ECtHR, *Moldovan and Others v. Romania*, judgments of 5 July 2005 and 12 July 2005).

40 Some traditional Romani authorities labor under the whispered accusation that they collaborated actively with the Ceauşescu-era secret police, the Securitate. A frequent litmus test of the corruption of a traditional leader is their purported role in the confiscation of gold from Roma by Ceauşescu-era authorities. Beginning in the 1970s, the Ceausescu state began actively seizing gold from traditional Roma. The extent of perceived collaboration in reporting on Roma with gold is in many places one gauge of community standing of any given traditional leader after 1989. On Ceausescu-era policies of seizing gold from Roma, see Franz Remmel, *Die Roma Rumäniens* (Picus Verlag, Vienna, 1993).

elders consulting with parties and then ruling on matters related to the community.[41] One example of the kind of case in which a Divano might rule is for example in an extreme domestic violence case in which the person at issue should be expelled from the community. The Kris, on the other hand, would be primarily an action triggered as a result of one individual seeking remedy for monetary or honour harms purportedly inflicted by another individual.

Seen in this light, the Kris and the Divano would seem to mirror the forms of civil and criminal law. The Kris comprises a highly advanced and formalistic type of civil law, in which the most frequent form of remedy—damages calculated in monetary terms—is highly similar to that existing in state-made law. The Divano shows greater divergence from state-made law in that it lacks one of the major defining features of contemporary criminal law: the power to deprive a person of her liberty. In its punitive features, the Divano has limited sanctioning powers and these are confined primarily to expulsion from the community—expulsion may be either banishment from the community as a formal matter or a formal ban combined with a requirement to remove oneself physically from the physical space of the village—an extreme form of punishment.

Although some may take issue with this rendering of Kris law and Divano law as analogous to civil and criminal law,[42] the distinction is useful insofar as it can help to demystify Romani law to some extent and to provide a context in which to examine possibilities for its recognition within the state system.

Indeed, in 2007 and 2008, apparently for the first time (and notwithstanding very old links between Romani and mainstream authorities at local level), a discussion developed in national media in Romania as to what the nature of Romani law is and how it might be afforded broader official recognition. Following a meeting between traditional Romani judges and a number of national authorities in Romania, including Ministry of Justice officials, a number of articles appeared in respected Romanian media examining the issue. For example, an article in *Jurnalul national*[43] provided examples of cases in which prominent Roma have held that the Kris should give way to national law (and perpetrators should be imprisoned). Ghiță Radulean, a Romani authority from Craiova, was cited as holding the view that the Kris should not apply in extreme crime cases. He explained one case in Craiova in which a family refused

41 Yoors's Lowara group appears not to have had a Divano, and they regarded it as an inferior form, attributable to the Kalderash: "The Kalderaša too are fond of litigation, but the Lowara claim, justly I think, that the latter never reach a conclusion. They engage in interminable quarrels and discussions 'after women's fashion' (*sar Romia*). This they call *Devano*." (Yoors, *op.cit.* note 23, 3).

42 One expert reader of this document took issue with this characterization and thought instead that, "[…] a Divano is an informal consultation carried out to avoid the expense of a Kris—you only have a Kris if the Divano fails. I disagree that you can call the Kris a civil court. It is deals with civil disputes, but in so far as it construes wrongdoing as always an offence against the honour and tranquility of the whole community, as well as against the claimant/victim, then there is a criminal element always to its proceedings."

43 See Petru Zoltan, "Justiția Staborului - Dreptatea lui Sută", *Jurnalul National Online* (29 June 2007), at <http://www.jurnalul.ro/articole/96107/justitia-staborului-dreptatea-lui-suta-96107.html> (accessed 20 January 2008).

bride arrangement with another family because the second family was not considered of high enough status. Afterward, the 12-year-old girl was kidnapped and raped by the second family. As described, a lawsuit was brought before a Kris in Craiova on grounds that the bride was no longer a virgin and therefore that a bridal dowry would be impossible to secure from anyone else. The first family was therefore deemed to have incurred material damages. Mr Radulean states that the Kris held that the family that abducted the girl had to keep the stolen bride and pay the family of the parents compensation. In Mr Radulean's opinion, this is a bad decision and mainstream criminal law should prevail instead.

IV. Normative Basis for Possible Recognition of Romani Law

Recent decades have seen a number of efforts to mediate absolutist conceptions of the state–individual dichotomy, with us since at least Hegel.[44] Among the more powerful include so-called communitarian critiques of pure liberal theory, such as those of Alisdair Macintyre.[45] Taylor, for example, has noted:

> Political society is not neutral between those who value remaining true to the culture of our ancestors and those who might want to cut loose in the name of some individual goal of self-development. It might be argued that one could after all capture a goal like survivance for a proceduralist liberal society. One could consider the French language, for instance, as a collective resource that individuals might want to make use of, and act for its preservation, just as one does for clean air or green spaces. But this can't capture the full thrust of policies designed for cultural survival. It is not just a matter of having the French language for those who might choose it. This might be seen as the goal of some of the measures of federal bilingualism over the last twenty years. But it also involves making sure that there is a community of people here in the future that will want to avail itself of the opportunity to use the French language. Policies aimed at survival actively seek to create members of the community, for instance, in their assuring that future generations continue to identify as French-speakers. There is no way that these policies could be seen as just providing a facility to already existing people.[46]

Reflecting on Taylor, Habermas explores the link between the considerations probed by Taylor on the one hand and the demands of equality—an established international human rights law norm—on the other:

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44 "[…] dass es der Mensch ist (und nicht, wie in Griechenland, Rom, u.s.f., nur einige menschen) welcher als person anerkannt ist und gesetzlich gilt." (from G.W.F Hegel, *Encyclopedia of the Philosophical Sciences,* Vol. 3, para. 432, cited in Hermann Glockner, *Hegel Lexikon*, vol. 10, (Frommann Verlag, Stuttgart, 1935), 284.

45 See, for example, Alisdair MacIntyre, *Whose Justice? Which Rationality?* (University of Notre Dame Press, Notre Dame, IN, 1988).

46 Charles Taylor, "The Politics of Recognition", in Amy Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press, Princeton, 1994), at 58–59

> The question that concerns us here is whether the demand for respect for one's cultural traditions follows from the principle of equal respect for each individual, or whether, at least in some cases, these two demands will necessarily come into conflict with one another.[47]

Habermas offers the insight that these matters are both intrinsically bound up with massive systemic discrimination and also raise a kind of mirror inverse, potentially implicating other forms of law:

> The demand for respect is aimed not so much at equalizing living conditions as it is at protecting the integrity of the traditions and forms of life in which members of groups that have been discriminated against can recognize themselves. Normally, of course, the failure of cultural recognition is connected with gross social discrimination, and the two reinforce each other.[48]

Consideration of the meaning of diversity in society has also found its way into discussions of constitutional theory.[49]

These philosophical preoccupations have played out in tandem with—and mutually influenced by—the development of legal norms at the regional and international level that would lend strength to minority and indigenous rights claims. The passages that follow explore in summary fashion several possible international law and related bases for the potential recognition of Romani law under the normative state system. It also attempts to examine the relative strength of these bases. Explored below are the relevance for the potential recognition of Romani law of (1) indigenous rights, (2) minority rights, (3) "temporary special measures" within the anti-discrimination law paradigm, (4) recognition as remedy for systemic past abuse with contemporary effects and (5) intrinsic core human rights reasons.

A. The Rights of Indigenous Peoples

The rights of indigenous peoples have a history at international level. Early efforts date at least to the now-criticized (and closed for new ratifications) 1957 ILO Convention 107 Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries, as well as the vastly improved 1989 ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, which replaced Convention 107. There are also a range of UN mechanisms and fora, including the Working Group on Indigenous Populations, the Permanent Forum on Indigenous Issues, and two mechanisms reporting to the UN Human Rights Council: the Special Rapporteur on the situation of human rights and funda-

47 Jurgen Habermas, "Struggles for Recognition in the Democratic States", in Ciaran P. Cronin and Pablo De Greiff (eds.), *The Inclusion of the Other: Studies in Political Theory* (MIT Press, Cambridge, MA, 1998), 206.

48 *Ibid*., 205–206.

49 See, for example, James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, Cambridge, 1995).

mental freedoms of indigenous peoples and the Expert Mechanism on the Rights of Indigenous Peoples.

Indigenous rights have received a significant boost through the adoption by the UN General Assembly in September 2007 of the Declaration on the Rights of Indigenous Peoples,[50] a document that, although lacking formally legally binding effect, lends powerful new legitimacy to indigenous rights globally. The Declaration was several decades in the works and the focus of extensive efforts by a number of states, indigenous groups and other elements of civil society. It also encountered mobilized opposition from a number of states, particularly those such as Canada, in which the claims of indigenous groups are far-reaching.[51]

Significantly for the purposes of this study, the Declaration includes rights of self-determination (Article 4); rights to maintain and strengthen their distinct political, *legal*, (emphasis added) economic, social and cultural institutions (Article 5); elaborated rights to protection against forced assimilation or efforts to deprive the indigenous of their integrity as distinct peoples (Article 8); rights to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned (Article 9); rights to "practice and revitalize" indigenous cultures and traditions (Article 11); rights to participate in decision making in matters that would affect indigenous rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions (Article 18). Article 34 of the Declaration provides:

> Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 38 of the Declaration sets out that "States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration".

Although several Nordic countries have recognized indigenous peoples—particularly the Sami—indigenous rights are generally underdeveloped in Europe. In general, in Europe, Roma would at present have difficulty establishing a claim to be "indigenous" in the sense of having arrived before the majority population.[52] Outside

50 United Nations Declaration on the Rights of Indigenous Peoples, resolution adopted by the General Assembly 61/295. See <http://www.un.org/esa/socdev/unpfii/en/declaration.html>.

51 Indigenous groups in Canada have laid claim to rights over major parts of Toronto's suburbs, for example.

52 On definitions of indigenous persons, which as noted above and below would not necessarily mean first or prior arrival, see Patrick Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, Oxford, 1991), 331–382, in particular 335–336 and 339–343.

of Europe, tribunals have recognized as "indigenous" groups that did not arrive first.[53] For example, in the Moiwana Village case, the Inter-American Court listed under "proven facts", the following:

> During the European colonization of present-day Suriname in the 17th Century, Africans were forcibly taken to the region and used as slaves on the plantations. Many of these Africans, however, managed to escape to the rainforest areas in the eastern part of Suriname's present national territory, where they established new and autonomous communities; these individuals came to be known as Bush Negroes or Maroons. Eventually, six distinct groups of Maroons emerged: the N'djuka, the Matawai, the Saramaka, the Kwinti, the Paamaka, and the Boni or Aluku.[54]

In assessing the existence of the N'djuka People of the Moiwana Village as an indigenous group, the Court relied *inter alia* on testimony concerning the existence of communal institutions and demonstrated community autonomy and cohesion, rather than seeking evidence of occupation of land previous to European arrival.[55]

As of December 2007, only four European states—Denmark, Netherlands, Norway, and Spain—had ratified ILO Convention 169, the primary international law instrument securing the rights of indigenous peoples. At least one European state—Switzerland—has grounded its reluctance to date to ratify ILO Convention 169 in concerns that Roma ("Travellers") or their advocates might argue claims under the instrument, providing recognition in the breach of the potential relevance of ILO 169 for Roma rights.[56]

Indeed, ILO Convention 169 would appear to have considerable relevance for the matters in this essay. For example, Article 8(1) of the Convention sets out that, "In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws", whereas Article 8(2) states:

> These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

Article 9 of ILO Convention 169 holds explicitly that "1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences com-

53 See for example Inter-American Court of Human Rights, *Case of Moiwana Village v. Suriname,* judgment of 15 June 2005, available at <http://www.forestpeoples.org/documents/law_hr/suriname_iachr_moiwana_judg_jun05_eng.pdf>.

54 *Ibid*., para. 86(1).

55 *Ibid.,* paras. 86(2)–86(4).

56 See Council of Europe, Second Report Submitted by Switzerland Pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities (received 31 January 2007), ACFC/SR/II(2007)002, para. 35.

mitted by their members shall be respected" and "2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases."

In domestic jurisdictions in which indigenous rights have been extensively litigated, confusion has prevailed as to the source of aboriginal title. However, components of recognition of aboriginal title derive from recognition of autochthonous communal law. Thus, McNeil summarizes jurisprudence in Canada as follows: "The approach that the courts have taken to the issue of the source of Aboriginal title […] reveals a logical inconsistency which has not been resolved. If Aboriginal title is based simply on occupation of lands by an organized society at the time the Crown asserted sovereignty, how could it be a pre-existing right? For it to exist as a legal right before the Crown acquired sovereignty, it would need to be based on some system of law, which would have to be Aboriginal, as no other law existed in North America prior to European colonization. But if Aboriginal title originates in Aboriginal systems of law, why is proof of those systems of law not necessary to establish the title? The courts seem to be vacillating between two possible sources of aboriginal title—Aboriginal occupation and Aboriginal laws—without pronouncing clearly in favour of one or the other."[57]

A Romani indigenous rights claim, based on the continuous existence of an autonomous legal system, would in principle be available, but work would be needed to develop such a claim. Certain aspects of the indigenous rights *acquis*—in particular the respect inherent in an indigenous rights approach for autochthonous legal systems—recommend deriving a recognition of Romani law at least in part from a recognition of the rights of indigenous peoples.

B. Minority Rights

The primary international law source for minority rights is Article 27 of the International Covenant on Civil and Political Rights, worded to delimit the rights of minorities to individuals.[58] These rights have been to some extent elaborated in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities Adopted by the UN General Assembly in 1992.[59] The Council of Europe system has included, since 1995, the Framework Convention for the Protection of National Minorities (FCNM).[60] However, a number of states have used the ratification

57 Kent McNeil, "The Meaning of Aboriginal Title", in Michael Asch (ed.), *Aboriginal and Treaty Rights in Canada* (UBC Press, Vancouver, 1997), 137.

58 "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."

59 General Assembly resolution 47/135 of 18 December 1992.

60 Framework Convention for the Protection of National Minorities, Council of Europe, Strasbourg, 1 February 1995, ETS no. 157. The Framework Convention entered into force on 1 February 1998.

process to articulate a restrictive version of minority recognition.[61] Many Council of Europe Member States have not ratified the Convention at all. The Council of Europe system also includes a Charter for Regional and Minority Languages,[62] designed less as a rights system than as a menu of policy choices.

The Council of Europe's premier human rights instrument, the European Convention on Human Rights, includes no explicit minority rights provision. However, the European Court of Human Rights—the regional arbiter of the Convention and without rival the world's most powerful international human rights tribunal has on two occasions held

> that there could be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.[63]

This recognition has emerged in cases concerning Roma, linked in one case to the Convention's Article 8 right to private and family life,[64] and in the other case to the Article 2 of Protocol 1 guarantee of the right to education, linked to the Article 14 ban on discrimination.[65] In the same two cases, as well as in two other cases,[66] the Court has held that "The vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases".[67] As a result, there is, in the view of the Court, "a positive obligation imposed on the Contracting States […] to facilitate the gypsy way of life".[68] On two of the four occasions, the Court found the state concerned in violation of the Convention.[69] Thus,

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61 For example, Germany's ratification of the Framework Convention limits the applicability of the treaty to "the Danes of German citizenship and the members of the Sorbian people with German citizenship" as well as "to members of the ethnic groups traditionally resident in Germany, the Frisians of German citizenship and the Sinti and Roma of German citizenship".

62 European Charter for Regional or Minority Languages, Strasbourg, 5 November 1992, ETS. No 148.

63 As articulated in the Court's Grand Chamber decision in *D.H. and Others v. the Czech Republic*, judgment of 13 November 2007.

64 ECtHR, *Chapman and Others v. United Kingdom,* judgment of 18 January 2001.

65 ECtHR, *D.H. and Others v. the Czech Republic, op.cit.* note 63.

66 ECtHR, *Connors v. United Kingdom*, judgment of 27 May 2004; and ECtHR, *Buckley v. United Kingdom, Chamber*, judgment of 26 August 1996.

67 ECtHR, *Connors v. United Kingdom*, *op.cit.* note 66, para. 84.

68 *Ibid.*

69 ECtHR, *D.H. and Others v. the Czech Republic*, *op.cit.* note 63. concerning racially segregated education, and ECtHR, *Connors v. United Kingdom*, *op.cit.* note 66. concerning arbitrary forced eviction from minority-specific housing accommodation.

the most powerful recognition of minority rights at regional level in Europe is linked directly to Roma.

In addition, in a series of rulings concerning freedom of conscience and religion, the Court has increasingly rejected state classification of officially recognized groups, if such designations would trigger infringements of Convention rights. In these cases, the Court has effectively conferred recognition on pariah, minority or other disfavoured groups.[70]

The foregoing to some extent reflects the convergence of several developments: (1) the recognition of Roma as an ethnic group;[71] (2) the strengthening of minority rights in Europe; (3) the enrichment of conceptions of minority rights, increasingly divorced from original considerations involving, especially, ethnic kin-states.[72] As of the date of this writing, all three of these areas are poised for further development.

Certain key elements are, at present, missing. Most notably, although the European Union has required explicit respect for minority rights for candidate countries via the so-called "Copenhagen Criteria", the incorporation of minority rights in the *acquis communautaire*, the corpus of European Union law, has been, to date, thin to nonexistent.

Nevertheless, minority rights law at present constitutes among the most powerful sources for a potential formal recognition of Romani law.

C. Special Measures (within the Anti-Discrimination Paradigm)

The most powerful legal basis for any possible future recognition of Romani law would be the anti-discrimination *acquis,* particularly if it can be shown that (1) such recognition would constitute a special measure[73] and (2) that special measures are indeed an essential component of the corpus of anti-discrimination law.

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70 See for example ECtHR, *Religionsgemeinschaft der Zeugen Jehovas v. Austria*, judgment of 31 March 2008; as well as summary of the former ruling in ECtHR, *Löffelmann v. Austria,* judgment of 12 March 2009.

71 One indicator of how recently Roma have emerged as a recognized group is provided by the following detail: according to the 1948 *Slavonic Dictionary*, a compendium of information about Slavic-speaking countries, the censuses of only two of the Slavic-speaking countries (Bulgaria and Yugoslavia) documented the existence of Roma as of that date.

72 See for example the International Court of Justice cases brought by Austria against Italy concerning South Tyrol during the period 1957–1969, ultimately resolved in 1992.

73 As noted by the UN Committee on the Elimination of Racial Discrimination, "'Special measures' is a term used in the Convention on the Elimination of Racial Discrimination for all such measures that Governments may put in place to promote certain disadvantaged racial or ethnic groups within their countries, including indigenous peoples, for instance by giving a preference to such groups in access to education or by specifically promoting their participation in government. Such measures are otherwise also frequently referred to as 'affirmative action' or sometimes as 'positive discrimination'." (see Committee on the Elimination of Racial Discrimination Thematic Discussion on "special measures / affirmative action", 4–5 August 2008, at <http://www2.ohchr.org/english/bodies/cerd/index.htm>, accessed 28 July 2008)

Discrimination is banned under both international Covenants, as well as under every other major international human rights law treaty. Racial discrimination—seen as a source of major scourges of the modern era including World War II (and in particular the Holocaust), colonialism and Apartheid—is of such compelling international concern that a specific treaty—the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)—is devoted to its eradication. Many experts regard the ban on racial discrimination as customary international law—or as *ius cogens*.[74] In Europe, the European Court of Human Rights has repeatedly called racial discrimination a "particularly invidious" form of discrimination.[75] Since the Treaty of Amsterdam, the European Union has enjoyed powers to enact laws banning racial discrimination.[76] In 2000, the Union used these powers to adopt two directives[77] in this area—effectively detailed instructions to EU Member States to adopt laws banning racial and related discrimination.[78]

74 See for example Michael Banton, "Eliminating Racial Discrimination" 3(4) *Anthropology Today* (August 1987).

75 See for example ECtHR, *Timishev v. Russia*, judgment of 13 December 2005, para. 56. It should be noted, however, that the Court's record on addressing racial discrimination has been slow to develop and is inherently fragile. The Court did not manage to find a violation of the Convention's Article 14 discrimination ban, in a case involving racial discrimination, until 2004. In addition, the Court allows "objective and reasonable" justifications for different treatment in *prima facie* direct discrimination cases, a feature that distinguishes the Court's law from the law of the European Union, which allows no such exceptions. As of the date of writing, the latter issue weighs heavily over the matter of *Oršuš and Others v. Croatia*, pending before the Grand Chamber as of 9 May 2009. In the Chamber ruling, the Court allowed the Croatian's government's segregation of Romani children in schools in several towns, after it accepted the pleadings of the Croatian government that these were for reasons of language weakness, not ethnicity. Thus, unless the Grand Chamber overturns to Chamber ruling in *Oršuš,* possibilities for pretextual racial discrimination will appear to have been reinvigorated.

76 Following amendments introduced as a result of the Treaty of Nice, Article 13(1), of the Consolidated Treaty Establishing the European Community read, "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

77 Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Directive 78/2000/EC establishing a general framework for equal treatment in employment and occupation, adopted pursuant to the revised Article 13 of the Treaty Establishing the European Community (TEC) after its Treaty of Amsterdam amendments.

78 The year 2000 also saw the adoption of Protocol No. 12 to the European Convention on Human Rights, which provides a comprehensive ban on discrimination in the realization of any right secured by law. The existing Article 14 European Convention ban on discrimination covered only discrimination in the realization of rights set out in the Convention itself. The European Commission overviews of current EU law in relevant areas pertain-

The extent to which special measures—also referred to as "affirmative action" or, particularly in Europe, "positive action"[79]—is required or even allowed under the anti-discrimination *acquis* is disputed, as is the nature of the measures allowed, where allowed. The source and justification for such measures is also a matter of dispute. Major tribunals such as the US Supreme Court (ruling repeatedly on affirmative action measures for minorities) and the European Court of Justice (the final arbiter of European Union law, which has ruled repeatedly on such measures for women) have held that special measures/positive action allowed, but have struck down particular measures adopted, especially where these have been seen to be overly rigid, formalistic, or mechanical; quotas and rigid tie-breaker rules are increasingly regarded as problematic.[80] Under many conceptions, special measures are temporary and intended to end once their purpose of ensuring equality in practice has been secured.[81]

Whether or not special measures are required is another matter. One United Nations study commenting on the issue, dating from 2001, equivocates on this question,[82] despite the fact that ICERD Article 2(2) specifies that states "shall, when the circumstances so warrant" take such measures, suggesting that they may in fact be required under international law. The UN Committee on the Elimination of Racial Discrimination was, as of the date of this writing, continuing to examine its approach, with a day of general discussion taking place in August 2008. The UN Committee on the Elimination of Discrimination Against Women has held that temporary special measures are required for women under the CEDAW Convention, where conditions

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ing to discrimination, including gender discrimination, are available at <http://ec.europa.eu/employment_social/fundamental_rights/legis/legln_en.htm>.

79 On terminology in this area, among the clearest statements to date emerges in the UN Committee on the Elimination of Discrimination Against Women's General Recommendation 25 on "Temporary Special Measures": "States parties often equate 'special measures' in its corrective, compensatory and promotional sense with the terms 'affirmative action', 'positive action', 'positive measures', 'reverse discrimination', and 'positive discrimination'. These terms emerge from the discussions and varied practices found in different national contexts. In the present general recommendation, and in accordance with its practice in the consideration of reports of States parties, the Committee uses solely the term 'temporary special measures', as called for in article 4, paragraph 1."

80 For an overview of European Court of Justice jurisprudence on positive action in the field of gender discrimination, see European Roma Rights Centre/Interights/Migration Policy Group, *Implementing European Anti-Discrimination Law: Strategic Litigation of Race Discrimination in Europe: From Principles to Practice* (Budapest, 2004), Annex V: Relevant Cases, 155–178.

81 The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) Articles 1(4) and 2(2) emphasize that any positive or affirmative action measures undertaken by states shall be temporary.

82 See United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-third session, Prevention of Discrimination and Protection of Indigenous Peoples and Minorities, "The Concept and Practice of Affirmative Action", Progress report submitted by Mr Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5, E/CN.4/Sub.2/2001/15, 26 June 2001.

merit their adoption,[83] and the UN Committee on Economic, Social and Cultural Rights has followed this approach.[84]

Developments in Europe pertaining in particular to Roma have arguably leant new force to the idea that, indeed, special measures for Roma are in fact required in Europe. One source for this view is the European Court of Human rights jurisprudence cited above.[85] The idea that the "positive obligation imposed on the Contracting States […] to facilitate the gypsy way of life" is in fact a positive action requirement rather than a minority rights requirement is newly affirmed by the Court's ruling in *D.H and Others v. Czech Republic,* which involved a finding of a violation of the Convention's Article 14 non-discrimination provisions. The clearest language in this area has been provided by the European Committee of Social Rights, the body adjudicating collective complaints claims under the Revised European Social Charter, another Council of Europe mechanism. Ruling in 2006 in a complaint against Bulgaria, the Committee held, "for the integration of an ethnic minority as Roma into mainstream society measures of positive action are needed".[86]

Whether or not recognition of Romani law could be seen as positive action or special measures is open to debate. The vast majority of positive action measures undertaken to date concern securing equality at the workplace, school or in the field of housing, as well as in areas such as policing. Nevertheless, ICERD Article 2(2) leaves open the possibility, by specifying that positive action measures are those undertaken "in the social, economic, cultural and other fields […] to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms".

D. Recognition as Remedy

Another source for possible recognition is the need to remedy a legacy of historic persecution, either as a remedy for past abuse, or because such abuses generate contemporary burdens of inequality, or both. Probably as a result of US experience, the idea of remedy for historical wrongs on the one hand and positive action measures on the other have been frequently seen as intrinsically bound, although there is little

83 See UN Committee on the Elimination of Discrimination Against Women, "General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures", para. 24.

84 See general comment 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights, E/C.12/2005/4, 11 August 2005, para. 15

85 On possible positive action requirements deriving from the Court's jurisprudence in this area, see Claude Cahn, "Towards Realising a Right to Positive Action for Roma in Europe: Connors v. UK" 1 *Roma Rights* (2005), at <http://www.errc.org/cikk.php?cikk=2160>.

86 See European Committee of Social Rights, *European Roma Rights Centre v. Bulgaria*, Complaint No. 31/2005, Report to the Committee of Ministers, Strasbourg, 30 November 2006, at
<http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp>.

apparent reason why remedy for past harm might not take other remedial forms. In the United States, remedying historic injustice for African Americans played a central role in both the US Supreme Court's activism in court-ordered and managed school desegregation following the landmark 1954 *Brown v. Board of Education* ruling, as well as in shaping US affirmative action policies from the 1960s onwards. By analogy, one might recognize Romani community structures—including Romani law—as a mode of rectifying previous determined efforts to eliminate the Romani community and with it the Romani people.[87]

Dworkin has argued, with reference to the proceedings in the so-called "Michigan cases" in which affirmative action policies were (again) challenged before the US Supreme Court, that a public consensus in the United States on the legitimacy of reasons of remedying past injustice as a source for policy and law has eroded significantly, and may be gone.[88] He claims that, in the United States, a previously existing recognition of the need to remedy historic discrimination against African Americans has been supplanted by a public consensus on the need for policy measures to secure and preserve diversity—a distinctly ahistoric mandate. On this account, having listened for a generation to public policy reasons derived from the burdens imposed by past injustice, (white, or majority) US Americans have lost patience with "reasons of guilt", but apparently are nevertheless comfortable with affirmative action policies, provided they are grounded in reasons not related to righting historical wrongs.

Here, differing periodicity between Europe and the United States may be key. Insofar as Europe has only begun to grapple with issues related to the systemic persecution of Roma in Europe,[89] a basis for creating such recognition may be now emerging, rather than waning.

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87 Elements of a history of persecution of Roma in Europe include but are not necessarily limited to (1) the collective expulsion of Roma from medieval Spain; (2) episodes of intense persecution of Roma in medieval Western Europe, including collective banishment enforced by measures including killings; (3) wholesale efforts beginning with the advent of the modern state to forcibly assimilate Roma in a number of countries of Europe; (4) with the development of modern policing, systemic race-based police monitoring; (5) the Holocaust; (6) practices such as systemic coercive sterilization in communist Czechoslovakia and its post-communist successor states; (7) other practices. On persecution as a component of Romani history in Europe, see Fraser, *op.cit.* note 6. On the Romani holocaust, see Donald Kenrick and Grattan Puxon, *Gypsies under the Swastika* (University of Hertfordshire Press, Hertfordshire, 1995).

88 On the recent—and intensively scrutinized—rulings by the US Supreme Court in the so-called 'Michigan cases', see Ronald Dworkin, "The Court and the University", 50(8) *New York Review of Books* (15 May 2003).

89 Germany only recognized the Romani Holocaust in 1981; the European Court of Human Rights first found that Roma had ever suffered any form of racial discrimination in any case ever brought to its attention only in 2004; the first major study of the situation of Roma in Europe ever undertaken by the European Commission was published in the same year. The first national policies aiming at ameliorating the situation of Roma date only from 1989 (Spain) and 1996 (Greece); most are less than a decade old, and a number of EU Member States have no such policies at all.

E. Other Human Rights Reasons for Recognition: The View from Pragmatism

Above and beyond the legal bases derived from the international human rights law *acquis*, there are potential reasons arising from possibilities for taking a pragmatic approach to the implementation of international human rights law, in particular with respect to human rights issues arising within the Romani community. A cursory examination of the issue of child marriage[90] in the traditional Romani community can be useful in examining this matter.

Although the issue is not very well explored in human rights literature, a number of traditional Romani communities practice arranged traditional marriage between girls and boys. A recent study carried out in Banloc, Timiş County, Romania, a village of circa 900 families approximately seven kilometres from Deta, one of the towns noted in the foregoing description of Romani law, attempted an assessment of marriages in the Romani community and documented a number of issues, including the age of the bride.[91] The study found that, among the circa 245-person Romani community of Banloc, from 1986 to the present, there were 37 traditional or customary weddings. These included two weddings involving brides aged 12; 14 weddings involved brides aged 13; eight weddings involving brides aged 14; nine brides aged 15; and three brides aged 16. The only other bride from the village was the author herself, who was married at the age of 28. She was also the only person from the community to marry a non-Romani person. Three Romani girls/women had not married during the period and had remained unwed into their 20s/30s. Grooms in the Banloc study tended to be slightly older: ten were aged 14; nine were 15 years old; thirteen were married at 16; four were married at 17; and two were married at the age of 18.

Romanian domestic law provides that boys may marry at 18 and girls at 16—and in exceptional circumstances 15. Thus, even if all of the girls married at 15 received the special dispensation allowing them to marry at 15 (and none in fact did), around two out of every three traditional marriages carried out in Banloc during the 20 years surveyed involved brides too young to marry by law. When the 15-year-olds are discounted, only four girls married at a legal age. The legality of the age of the groom was even less pronounced: only two boys had reached the legal age of marriage at the time they were wed.

According to a report by the Open Society Institute, Romani women throughout Romania marry at very young ages.[92] Anecdotal evidence indicates that, throughout

90 Among other international law provisions, the Convention on the Elimination of All Forms of Discrimination against Women states, at Article 16(2): "The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory."

91 Cosmina Novacovici, "Child Marriage in the Roma Community before and after 1989 in Romania", 20 April 2007, unpublished, on file with the author.

92 Open Society Foundation Romania, "Roma Access to Social Services: 2005 Facts and Trends", Bucharest 2006. The study does not differentiate between Romani women from traditional communities and other Romani women.

Romania, the minimum age of the bride in the traditional Romani marriage, may be dropping, with marriage contracts sometimes performed shortly after birth, and in some reported cases wedding ceremonies carried out when the bride is aged five, eight, or 10 years old.

The human rights issues arising from the above are many. In the first place, although this point is sometimes disputed by community members, parents arranging marriage for their children are arguably not acting in their children's best interests, one of the central requirements of the Convention on the Rights of the Child (CRC). Where authorities fail to intervene to stop child marriage, a state's compliance with the Convention may be in question.[93] Article 23(3) of the International Covenant on Civil and Political Rights states, "No marriage shall be entered into without the free and full consent of the intending spouses", and since children lack full agency, the consent provided by a child cannot be regarded as "free and full".

In addition, although not immediately apparent from the act itself, in practice, marriage frequently results in the child bride being withdrawn from school, matters that engage the Convention on the Elimination of All Forms of Discrimination Against Women, as generations of girls are systematically severely under-educated and thereby effectively rendered subordinate to their husbands. Where sexual union is consummated with minors, the matter may arguably fall within the ban on torture,[94] as well as engage a number of other elements of international human rights law.[95] Many states, Romania included, maintain a domestic criminal law ban on sex with an underage girl.

In addition to the foregoing, child marriage can pose health threats to girls, because girls who give birth at an early age may, depending on the quality of available health care services, suffer threats in childbirth.[96] Child marriage and early motherhood are also linked to depression.[97] Additionally, there is evidence of links between practices of early marriage and domestic violence.[98]

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93 Article 19(1) of the CRC states: "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."

94 See "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak", A/HRC/7/3, 15 January 2008, including at 25–33, "Introduction: towards a gender-sensitive interpretation of torture".

95 For example, in the case of ECtHR, *X. and Y. v. Netherlands*, judgment of 27 February 1985, the European Court of Human Rights found that sexual intercourse with a minor engaged the Convention Article 8 guarantee or privacy, the home and family life, and found the Netherlands in violation, among other things, for failing to have an adequate criminal law ban under domestic law.

96 At <http://www.kaisernetwork.org/Daily_reports/rep_index.cfm?DR_ID=24108>.

97 Nawal M. Nour, "Health Consequences of Child Marriage in Africa" 12(11) *Emerging Infectious Diseases* (2006), at <http://www.cdc.gov/ncidod/EID/vol12no11/06-0510.htm>.

98 International Center for Research on Women, "Too Young to Wed: Education and Action Toward Ending Child Marriage", at <http://www.icrw.org/docs/2006_cmtoolkit/cm_all.pdf>.

Indeed, the Romanian government has on a number of occasions been put under international pressure as a result of continuing practices of child marriage in traditional Romani communities. The most high-profile case took place in October 2003 when Member of the European Parliament Baroness Nicholson mobilized international media and other means after the wedding of Ana-Maria Cioabă, the daughter of Sibiu-based Florin Cioabă, a prominent Romanian Romani personality who has taken the title of Romani King, was widely broadcast in the Romanian media. Ms Cioabă, whose age was reported variously in the media as 12 or 14, was married by arrangement to Mihai Biriță, who was at the time reportedly 15. As a result of extensive media coverage throughout Europe, Romanian authorities intervened and forcibly separated the bride and groom. Following the case, it has become a more frequent occurrence that Romanian officials check to determine whether sexual acts between minors are taking place in the context of high-profile Romani celebrations. Police tend to intervene in instances in which the media becomes involved. Involvement of public officials can mean medical examinations to determine virginity, as well as in some cases remand of the children at issue into state care.

Nevertheless, it seems apparent, on the strength of the fact that child marriage is very much alive and well in the traditional Romani communities of Romania, that new police attention to cases of traditional marriage in the Romani community has by no means put an end to the practice. Indeed, it seems unlikely that punitive measures, the seizure of children by state authorities and/or invasive and mandatory modes of determining the virginity of the bride can have the effect of ending practices that many regard as a central feature of the Romani identity.[99] If history is any guide, episodes in which the public authority has endeavoured by force to end Romani traditions have if anything resulted in reinforcement of community efforts by the community to defend practices.[100] This fact would seem to endorse the observation by Habermas, cited above.

It is not immediately apparent why overriding the traditional authority should result in more vigorous human rights compliance than working with the traditional authority to ensure that its decision making comply with international human rights norms. That is, human rights goals may be better served through the inclusion of the traditional authority within the archipelago of institutions responsible for the implementation of international human rights law, rather than the exclusion of the traditional authority from such responsibilities, and its construction instead as an

99 One prominent Romani activist from a traditional community told me, "I cannot think of a more Romani act than two fathers getting together and saying, 'I have a daughter; you have a son. Let us join our families together!'."

100 The history of Roma in Europe is replete with failed efforts to force Roma to abandon cultural practices. From the mid-18th century forward, Habsburg authorities attempted to force Roma to stop speaking Romani through measures, including seizing their children. There is little evidence that these had any influence on the extent of Romani usage in the Habsburg lands. Paradoxically, these measures failed, but the vast majority Roma ceased speaking Romani in Hungary in the 20th century, after such policies had ended. Similarly, the Kale of Wales, the group on which one of the best existing Romani dictionaries is based, ceased speaking Romani in the first half of the 20th century, under the influence of no particularly stringent policy.

implacable enemy of human rights. In some jurisdictions, the state has attempted to craft law to ensure that recognized traditional authorities comply with human rights norms, or to force or guide traditional authorities in that direction.[101] Elsewhere, traditional authorities incorporated into state arrangements take the lead in human rights defence functions.[102] Canada's recognition of the role of traditional authorities in various aspects of criminal proceedings has been derived explicitly from pragmatic arguments concerning the failure of the Canadian criminal justice system where native peoples are concerned.[103]

International monitoring bodies charged with assessing compliance by states with international human rights law have to date provided at best confused and in some cases conflicting guidance to states as regards the proper approach to traditional legal systems and other traditional authorities, particularly in matters related to troubling internal community issues. Thus, on the one hand, in *Lovelace v. Canada*, the United Nations Human Rights Committee (HRC) held that Canada had gender equality obligations (1) derived explicitly from the Article 27 ICCPR minority right to the enjoyment of their own culture, to profess and practice their own religion, or to use their own language and (2) overriding mixed views on the matter of gender equality among traditional native authorities.[104] In so doing, the Committee acknowledged the legitimacy of the native authority—in particular as a result of the Canadian state's treaty system with aboriginal authorities, as well as because of the Canadian Indian Act—but held that there were positive obligations flowing to the Canadian authori-

101 See Yüksel Sezgin, "A New Theory of Legal Pluralism: The Case of Israeli Religious Courts", paper presented at Association for Israel Studies, 19th Annual Meeting, 27-29 April 2003, San Diego, CA, USA.

102 For example, in the Philippines, the figure of the Barangai Captain, a local communal authority, has in recent years acted as advocate for communities under threat of forced eviction in Manila and elsewhere (Centre on Housing Rights and Evictions, field research, September 2007, unpublished).

103 See for example Justice Canada, "The Aboriginal Justice Strategy", which includes, among four objectives: "To contribute to decreasing rates of crime and victimization in Aboriginal communities operating AJS programs"; and "To assist Aboriginal communities to take greater responsibility for the local administration of justice" (see Justice Canada, "The Aboriginal Justice Strategy", available on the Internet at <http://www.justice.gc.ca/eng/pi/ajs-sja/>). Key activities of the Aboriginal Justice Strategy are, as described by Justice Canada, the following: "Diversion or alternative measures; Community sentencing circles and peacemaking; Mediation and arbitration in family and civil cases; and Court/community Justice Program".

104 Sandra Lovelace, an ethnic Maliseet Indian, lost her status as a "Maliseet Indian" under Canada's Indian Act when she married a non-Indian. Following her subsequent divorce, she attempted to move back to the Maliseet Tobique Reserve and was barred from doing so. In addition, she lost a number of other very tangible benefits flowing to persons with official "Indian" status under the Indian Act. In its findings in the case, the Human Rights Committee held that Sandra Lovelace had been denied the right guaranteed by ICCPR Article 27 to persons belonging to minorities to enjoy their own culture and to use their own language in community with other members of their group as a result of being barred from residing on the Tobique Reserve (CCPR/C/13/D/24/1977, 30 July 1981)

ties to amend the Indian Act to ensure human rights compliance (in this case with the gender equality norm).

By contrast, the United Nations Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) has provided conflicting advice to states, on some occasions recommending direct amendment of customary laws,[105] and on other occasions advising outright abolition.[106] This ill-harmonized guidance points toward deep ambivalence in the heart of women's rights over the character of the traditional authority, derived primarily from a preponderance of evidence indicating the frequency of the traditional authority's actions or complicity in the oppression of women. Opposition to recognition of traditional law, based on the international law of women's rights, will be explored in greater detail in the next chapter.

F. Conclusion

A number of legal bases exist on which to found formal recognition of Romani legal systems. The relative normative force of these legal bases varies. The force of the obligation would appear to be stronger were such recognition conceived as a remedy for present or past discrimination harms. That would be similarly true if recognition were conceived as positive action within the ban on discrimination. On the other hand, if recognition proceeded on such a basis, it would be of necessity temporary. Were recognition to proceed on the basis of the rights of indigenous peoples, on the other hand, although the normative force would (as of the date of this writing) be weaker, the content of the norm applicable is significantly richer. Persons or groups pursuing recognition of Romani legal systems as a right of indigenous peoples would however need to address the problem that Roma are generally seen as an ethnic minority—and are recognized as such in many European states. A shift to press for recognition as an indigenous people or peoples would require the dismantling of several decades of work toward minority recognition of Roma in Europe.

Recent theoretical literature has moved in the direction of blending recognition claims with justice claims, and finding a plural basis for recognition. For example, building on Nancy Fraser's work, and examining in particular the very different placement of Orthodox Jewish and Palestinian Arab minorities in Israel, Stopler argues:

105 For example, the CEDAW Committee told Tanzania to take "immediate action to modify customary and religious laws to comply with the Constitution and the Convention (CEDAW)" (CEDAW/C/1998/II/L.1/Add.5).

106 According to Merry, in its review of Fiji's compliance with the International Convention on the Elimination of All Forms of Discrimination Against Women, the CEDAW Committee requested to know whether the customary practice of *bulubulu,* a traditional justice form involving ritual apology and compensation, had been abolished in its entirety (according to the Fiji State Party Report at issue, as a result of the interference of traditional authorities and with reference to the *bulubulu,* prosecutors to drop rape charges and magistrates to mitigate sentences) (see Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* [University of Chicago Press, Chicago, 2006], 118).

> [S]imilarly to any other rights claims, multicultural claims should be analyzed in the political, social and economic context in which they are made and should not be given precedence over other dimensions of justice. Culture and cultural differences are not ontologically prior to other dimensions of justice such as redistribution and political participation and should not be treated as such. These three dimensions of justice over-determine each other and are simultaneous and interrelated.[107]

These issues are taken up below, in discussion of the approach to date by the European Court of Human Rights to the issue of parallel legal systems.

V. Challenges and Questions

As the foregoing suggests, there are a number of objections to the formal recognition of the traditional authority. The next section of this study will explore several of these challenges.

A. The International Human Rights Law System and Legal Pluralism

International legal systems display an inherent suspicion of plural legal orders. Dilemmas have arisen, for example, as to how a federal system can uphold international law obligations, where states in the federal system enjoy significant autonomy.[108] Other dilemmas have taken place where a *de facto* parallel system emerges.[109] An underlying preference for non-plural systems derives at least in part from perceived inefficiency; because of its ambition to be of sufficient power to secure domestic implementation, international law tends to see the spectre of rivals in complex domestic systems. Thus, international law—and in particular international human rights law, which has very large ambitions for domestic implementation—includes inherent absolutist tendencies.

One obstacle to the recognition of Romani law under domestic jurisdictions in Europe derives from the European human rights legal order itself. The European Court of Human Rights has been pressed to address matters related to the limits of minority expression and minority autonomy in a number of cases related to matters such as the rights of Jews to undertake Kosher slaughter,[110] the rights of minority religions to proselytize,[111] rights of conscientious objection arising from religious convic-

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107 Gila Stopler, "Contextualizing Multiculturalism: A Three Dimensional Examination of Multicultural Claims", in 1(1) *Law and Ethics of Human Rights* (2007), Article 10, 42.

108 See J.H.H. Weiler, "The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle", in *id.*, *The Constitution of Europe: "Do the New Clothes Have an Emperor" and Other Essays on European Integration* (Cambridge University Press, Cambridge, 1999), 130–187.

109 See for example OSCE Mission in Kosovo, Department of Human Rights, Decentralization and Communities, "Parallel Structures in Kosovo", January 2007.

110 ECtHR, *Cha'are Shalom ve Tsedek v. France*, judgment of 27 June 2000.

111 ECtHR, *Kokkinakis v. Greece*, judgment of 25 May 1993.

tion,[112] the relative weight of national law versus rights to wear religious head-covering, the relative weights of minority protection and environmental protection[113] and other matters.[114] On the whole, these cases have generated some very contentious jurisprudence, with the Court occasionally offering highly questionable pronouncements.[115] It has also been plausibly accused of showing bias toward Christianity, or at least showing a predilection to thinking of Europe as an inevitably Christian entity. Indeed, in the case described in detail below, it took the liberty of pronouncing Shari'a law as incompatible with democracy.[116]

Among the most contentious issues the Court has had to face in this area have been a number of petitions concerning the legitimacy of measures by the Turkish state in taking action against perceived rising Islamic fundamentalism in Turkey, and in particular in shutting down political parties advocating political Islam. This was the context of the series of petitions which ultimately became the Grand Chamber ruling in *Refah Partisi (The Welfare Party) and Others v. Turkey*.[117]

The Refah Partisi case concerned the forced closure of the Welfare Party on a number of grounds not clearly distinguished from each other, including that the party and high-ranking members of the party called into question the secular nature of the Turkish state; that it regarded democracy as merely a means to achieve the political end of a Muslim state, possibly to be ceased once that end was achieved; that it advocated or seemed to advocate violence; and—crucially for the purposes of this study—that it advocated a plurality of legal systems.[118]

The case was noteworthy for a number of reasons, not least because the Court was called on to rule on the limits of permissible action by a state that it had elsewhere found implicated in extra-judicial killings, torture in custody and other extreme acts of repression. The question of the legitimacy of legal pluralism became bound up with a contest in which—in caricatured form—a repressive state defending the legal order itself is pitted against a growing popular movement seeming to challenge democracy and the rule of law. For a Court, the founding context of which was the aftermath of World War II and the excesses of the Nazi regime, which seized power via threatened

112 ECtHR, *Thlimmenos v. Greece*, judgment of 6 April 2000.

113 ECtHR, *Chapman and Others v. United Kingdom*, judgment of 18 January 2001.

114 ECtHR, *Leyla Sahin v. Turkey*, judgment of 10 November 2005.

115 For example, in its judgement in the case of *Kokkinakis v. Greece*, the world's most prestigious human rights tribunal arrived, apparently uncompelled, at the following arbitrary assertion of fact: "First of all, a distinction has to be made between bearing Christian witness and improper proselytism. The former corresponds to true evangelism, which a report drawn up in 1956 under the auspices of the World Council of Churches describes as an essential mission and a responsibility of every Christian and every Church. The latter represents a corruption or deformation of it." (ECtHR, *Kokkinakis v. Greece*, *op.cit*., note 111, para. 48).

116 ECtHR, *Refah Partisi (The Welfare Party) and Others v. Turkey,* judgment of 13 February 2003, para. 123.

117 *Ibid*.

118 *Ibid*, paras. 28 and 29.

democratic procedures, this was no ordinary case. The Court explicitly commented on the stakes in the case in the decision by the Grand Chamber.[119]

Following exhaustion of domestic remedies against the forced closure of the party, a number of entities, including key members of the closed party, petitioned the European Court, arguing that a number of their European Convention rights had been violated. The Court dismissed a number of the claims at the stage of admissibility. In its judgment on the merits, on 31 July 2001, the Chamber ruled by four votes to three that there had been no violation of Article 11 (freedom of assembly and association) of the Convention and unanimously that it was not necessary to examine separately the complaints under any of the many other argued grounds for the case. Following a request by the applicants, the case was referred to the Court's Grand Chamber.

The Grand Chamber chose to follow broadly the approach of the Chamber in assessing the matter as an Article 11 freedom of assembly issue, although its reasoning ranged also to a number of the other rights raised. The Court decided that

> among the arguments for dissolution pleaded by Principal State Counsel at the Court of Cassation those cited by the Constitutional Court as grounds for its finding that Refah had become a centre of anti-constitutional activities can be classified into three main groups: (i) arguments that Refah intended to set up a plurality of legal systems, leading to discrimination based on religious beliefs; (ii) arguments that Refah intended to apply Shari'a to the internal or external relations of the Muslim community within the context of this plurality of legal systems; and (iii) arguments based on the references made by Refah members to the possibility of recourse to force as a political method.[120]

The Grand Chamber's assessment on the first matter—advocacy of legal pluralism—follows here:

> [T]he Court considers that Refah's proposal that there should be a plurality of legal systems […] would categorise everyone according to his religious beliefs and would allow him rights and freedoms not as an individual but according to his allegiance to a religious movement.
>
> The Court takes the view that such a societal model cannot be considered compatible with the Convention system, for two reasons.
>
> Firstly, it would do away with the State's role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of the various beliefs and religions in a democratic society, since it would oblige individuals to obey, not rules laid down by the State in the exercise of its above-mentioned functions, but static rules of law imposed by the religion concerned. But the State has a positive obligation to ensure that everyone within its jurisdiction enjoys in full, and without being able to waive them, the rights and freedoms guaranteed by the Convention […].

119 *Ibid*, paras. 96–101.

120 *Ibid.*, para. 116.

> Secondly, such a system would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy. A difference in treatment between individuals in all fields of public and private law according to their religion or beliefs manifestly cannot be justified under the Convention, and more particularly Article 14 thereof, which prohibits discrimination. Such a difference in treatment cannot maintain a fair balance between, on the one hand, the claims of certain religious groups who wish to be governed by their own rules and on the other the interest of society as a whole, which must be based on peace and on tolerance between the various religions and beliefs […].[121]

After an assessment that also included finding Shari'a law incompatible with the European legal order,[122] the Grand Chamber dismissed the Article 11 claim and held that it did not need to assess the other claims raised.

Many of the contentions brought by the Court, such as the claim that the Refah program "would categorise everyone according to his religious beliefs and would allow him rights and freedoms not as an individual but according to his allegiance to a religious movement" seem, at minimum, debatable. However, this essay is not the place to discuss the quality of the Court's decision in the Welfare Party case. The Court's decision in the Welfare Party case merits discussion because it is not quite relevant for the matters at issue in the recognition of Romani law, as well as because it suggests the contours of a number of matters which perhaps should be.

Several issues distinguish the Welfare Party case from matters concerning the recognition of Romani law. The Court itself holds not that a plurality of legal systems is incompatible with the Convention system, but rather that "a plurality of legal systems, as proposed by Refah" cannot be considered compatible. The Court thus recognizes, notwithstanding its blunt language, that the particular nature of any given scenario needs to be examined. As noted above, the Court evidently takes a very dim view of the nature of Shari'a law, which it recapitulates in its assessment, positing the purported "static rules of law imposed by the religion concerned" as not capable of being harmonized with the "State's role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of the various beliefs and religions in a democratic society".

Whatever one's opinion of the Court's characterization of Islamic law, it is apparent that the nature of the system proposed by Refah involves not a minority rights or other adjunct separate system, sheltered under the protection of an otherwise neutral state, but rather a situation in which the state itself—the entity bound by international law—proceeds to bind itself to a form of law that the Court evidently considers both a rival and an incompatible one to the Convention. The distinction between the scenario at issue in the Welfare Party decision on the one hand and a minority law regime on the other is well illustrated in Sezgin's and Stopler's separate discussions of Israel's approach to religion-based plural legal systems, in particular Shari'a courts on the one

121 *Ibid*, para. 119.

122 *Ibid,* para. 123.

hand and Orthodox Jewish law on the other.[123] In both examinations, comparatively different positions of power and influence over the state and in society are the basis for fundamentally different assessments of entitlements of the community authority.

The Court's assessment does however hint at a number of the questions that would need to be addressed in the course of recognizing Romani law in a Council of Europe Member State. These include—but are not limited to—questions of (1) to whom would Romani law apply; (2) how to ensure possibilities to opt out; and (3) how to ensure that no form of discrimination flows from either a decision to or a decision not to be bound by Romani justice: effectively the core elements of the Court's concerns over legal pluralism in the Welfare Party case. Human rights furnishes a ready—if possibly overly facile—answer to the first: Romani law would apply to those persons, and only to those persons, who would provide informed consent to be bound by such law. Evidently, such an approach leaves many issues (children, etc.) unaddressed, but it at least furnishes a principled point from which to begin an assessment. The latter issue—how to ensure that no discrimination flows from a decision to be bound by, or not to be bound by, Romani law—is a wholly more complex matter. It is to these and related issues that the next section turns, in a discussion of gender discrimination and women's rights issues.

B. Objections from Women's Rights

At first glance, a preference for seeking the protection of the state legal order against abuses by the traditional authority would seem to be primarily derived from the nature of the international human rights legal order itself. As the primary responsibilities bearer under a formalistic reading of human rights law, the state would appear to be the first line of recourse against abuses within the family, within the community, or within any other sphere narrower than the state itself. Recent theoretical attention to the human rights responsibilities of non-state actors[124] does not significantly change this preoccupation with the state as guarantor. This is perhaps also because of a pre-human rights law view of the state as the entity with a monopoly on legitimate violence (see famously Max Weber) as well as a core preoccupation among feminists, from the early suffragists forward, on effective citizenship.

Among the most nuanced explorations of matters concerning the safeguard of women's rights in a context of pressure to recognize community law mechanisms has arisen in the work of Ayelet Shachar. Shachar's subject is

123 Sezgin, *op.cit.* note 101; Stopler, *op.cit.* note 107.

124 These have been derived particularly from the Preamble of the Universal Declaration on Human Rights, which includes the following: "Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, *to the end that every individual and every organ of society* [emphasis added], keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."

> the surprising lacuna that lies at the heart of multicultural theory: the manner in which we should deal with demands for respecting diversity, which are not raised as calls for fair and just *inclusion* in the public sphere—the latter vividly captured by Iris Young's image of a 'heterogeneous public, in which persons stand forth with their differences acknowledged and respected'.[125]

The specific context of Shachar's exploration of these issues was an absolute ban by the Canadian government on all religious community family law tribunals, after particularly vigorous claims for autonomy raised by one Muslim group.

Shachar notes that, "The traditional legal approach is to turn a blind eye"[126] to genuine conflicts faced by individuals in a communal setting "in line with the idealized public/private divide", a particularly salient truth in the context of Roma in Europe. In a well-seen passage, Shachar notes:

> For a complex set of reasons, women and the family often serve a crucial symbolic role in constructing group solidarity vis-a-vis society at large. Under such conditions, women's indispensable contribution in transmitting and manifesting a group's collective identity is coded as both an instrument and symbol of group integrity. As a result, idealized and gendered images of women as mothers, caregivers, educators, and moral guardians of the home come to represent the ultimate and inviolable repository of "authentic" group identity. These carefully crafted, gendered images […] then become cultural markers that help erase internal diversity and disagreement, while at the same time allowing both minority and majority leaders to politicize selective and often invented boundaries between the 'self' and the 'other'.[127]

Shachar notes, "Ignoring this multiplicity of affiliations may be compatible with an abstract public/private divide, but it misses the mark for these embedded individuals."[128]

Shachar distinguishes what she calls "privatized diversity" approaches from "state-accommodationist legal structures […] in countries like Israel, Kenya, or India, which publicly and officially recognize and facilitate a degree of diversity in the regulation of the family." Shachar dismisses "privatized diversity":

> The main claim raised by advocates of privatized diversity is that what respect for religious freedom or cultural integrity requires is not inclusion in the public sphere, but exclusion from it. This leads to a demand that the state adopt a hands-off, non-interventionist approach, placing civil and family disputes with a religious or cultural aspect fully *outside* the official realm of equal citizenship.[129]

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125 Ayelet Shachar, "Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law" 9(2) *Thoeretical Inquiries in Law: Legal Pluralism, Privatization of Law and Multiculturalism* (2008), Article 11, 580–581.

126 *Ibid*., 593.

127 *Ibid*., 591–592.

128 *Ibid*., 577.

129 *Ibid*.

Shachar also dismisses the preoccupation for securing possibilities of "exit" for minority women, as an appropriate mode of addressing these pressures, "precisely because the group member may *wish to remain within the group*" (emphasis in the original).[130]

Shachar proposes instead, "*regulated interaction* between religious and secular sources of law, so long as the baseline of citizenship guaranteed rights remains firmly in place."[131] Exploring a series of rulings by Canadian courts in a case concerning divorce in the Orthodox Jewish community, she proposes a model involving (1) entry into a secular agreement (with a religious aspect) combined with (2) stringent *ex ante* regulatory review and control by the public authority. *Ex ante* or "police patrol" regulation is distinguished in this model from *ex post* judicial review, or "fire alarm" regulation. The latter relies on individual action to challenge bad decision-making. Shachar argues successfully that *ex post* judicial review is inappropriate in this context for a number of reasons, most notably the gendered concerns described above: "the idea of placing the burden of initiating the process of ex post review on the more vulnerable parties, which may have been semi-coerced in the first place into consenting to the tribunal's authority, is implausible."[132] Finally, Shachar's model envisions (3) voluntary agreement by faith-based tribunals to comply with statutory restrictions ("self-restraint"). The latter element would require community-based tribunals

> themselves to determine, through their actions and deeds, whether to enjoy the benefits of binding arbitration—including the boon of public enforcement of their awards—if they *voluntarily* agreed to comply with statutory thresholds and default rules defined in general family legislation. These safeguards typically establish a "floor" of protection, above which significant room for variation is permitted. […] Under this 'self-restraint' scenario […] if a resolution by a religious tribunal falls within the margin of discretion that any secular family-law judge or arbitrator would have been permitted to employ, there is no reason to discriminate against that tribunal solely for the reason that the decision-maker used a different tradition to a reach a permissible resolution.[133]

Shachar holds that

> permitting community members to turn to a faith-based tribunal may, perhaps paradoxically, provide the conditions for promoting a moderate interpretation of the tradition, as authorized by religious arbitrators themselves. The prospect for such 'change from within'—or what I have elsewhere labeled *transformative accommodation*—in this context may translate into a recognition by the tribunal's arbitrators themselves that if they wish to issue final and binding decisions (which permit parties to turn to the state for enforcement where needed), they cannot breach the basic protections to which each woman is entitled by virtue of her equal citizenship status.

130 *Ibid.*, 592.

131 *Ibid.*, 575.

132 *Ibid.*, 599.

133 *Ibid.*, 600.

> To ignore these entitlements is to lose the ability to provide relevant legal services to members of the community. Counter-intuitively, the qualified recognition of the religious tribunal by the secular state may ultimately offer an effective, non-coercive encouragement of egalitarian and reformist change from within the religious tradition itself. The state system, too, is transformed from strict separation to regulated interaction. In this way, the 'multilayered' or intersectionist identity of the individuals involved may be fostered.[134]

According to Shachar, "This approach […] discourages an underworld of unregulated religious tribunals and offers a path to transcend the either/or choice between culture and rights, family and state, citizenship and islands of 'privatized diversity'."[135]

Although the analogy between religious tribunal and ethnic tribunal may not be seamless, it is difficult to avoid the conclusion that ways forward in the recognition of Romani systems will be through a similarly close examination of the possibilities for close intersection between the communal authority and the public authority, similarly drained of its highly charged political context. It will also involve both the stringent *ex ante* regulatory review as well as the "self-restraint" envisioned by Shachar.

VI. Conclusion

Tribunals outside Europe have grappled with the challenges posed by the abrasion of human rights norms on the one hand and customary law on the other, with apparently greater success than those in Europe to date. Thus, for example, in one recent series of rulings assessing gender equality issues in the context of customary law, on 4 June 2008, the Constitutional Court of South Africa handed down the decision in the case of *Shilubana and Others v Nwamitwa* (Case CCT 3/07), upholding the right of a woman—the eldest daughter of a deceased chieftain—to succeed to the throne of the Valoyi community in Limpopo, and thus ending, or at least interrupting, male primogeniture. The case arose out of a dispute over the throne, in which a primary claim of the challenger was, relying on customary law, to dispute that a woman could be chief of the tribe. Ms Shilubana had been invested as successor to the throne during the reign of her father Hosi Richard. The Constitutional Court held *inter alia* that the value of recognizing the development by a traditional community of its own law, in accordance with the constitutional right to equality, was not in this case outweighed by the protection of rights. The case affirmed both the requirement to protect and promote customary law, as well as the requirement to implement gender equality.[136]

At present, it is difficult to imagine a European court managing to arrive at a similarly complex decision. Dominant throughout the continent at present is an absolutist version of lawmaking perpetuating the systematic denial of certain autonomous communities, and the existence of their cultures. In light of the extreme exclusion

134 *Ibid.*

135 *Ibid.*, 602.

136 See case summary by the Equal Rights Trust at <http://www.equalrightstrust.org/ert-documentbank/Shilubana%20and%20Others%20v%20Nwamitwa%20Case%20CCT%203%20case%20summary.pdf>.

of Romani communities in Europe—exclusion driven by centuries of systemic racial discrimination, punctuated by periods of extreme persecution—the recognition of Romani law can form an ideal basis for a broader effort at general legal reform.

Indeed, the most powerful obstacles to such a recognition appear to be precisely the most powerful reasons why such recognition might be valuable: a widespread contempt for Roma, a suspicion that they are not a minority in the "genuine" sense, a deeply internalized oppression among Roma that has rendered claims for justice and equality to date weak and fragmented. Romani and non-Romani Europeans alike have an interest in the further exploration of possibilities for the recognition of Romani law. As long as the system remains outside the normative framework, it will continue to labour under the suspicion that it is not human rights compliant, and/or that it is a component of community norms oppressive of minorities—particularly women, children and sexual minorities—inside the communities. Recognition can foster compliance with human rights law in addition to providing much-needed strength to the community and its institutions. It is difficult to see who or what would lose in such a scenario.